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State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

January 6, 2015

Navarro W. Gray, Esq.
Hunt, Hamlin & Ridley
Military Park Building
60 Park Place, 16th Floor
Newark, NJ 07102

Louis Bucceri, Esq.
Bucceri & Pincus
300 Broadacres Drive, Suite 210
Bloomfield, NJ 07003-3153

Dear Counsel:

IN THE MATTER OF THE TENURE HEARING OF AMY LEUTH, SCHOOL DISTRICT OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY, AGENCY DKT. NO. 294-10/14

I have reviewed the tenure charges filed in the above-captioned matter on October 2, 2014, and respondent's answer filed on October 17, 2014. Respondent's answer asserts that the tenure charges are procedurally defective in that respondent was not given 15 days from receipt of the charges to submit a response for consideration by the Board prior to its vote on certification of the charges, in violation of *N.J.A.C.* 6A:3-5.1(b)(3); further, respondent asserts that neither she nor her representative was given notice of the Board's vote to certify the charges within 3 business days, in violation of *N.J.A.C.* 6A:3-5.1(b)(5). The Board has now requested that it be permitted to withdraw the charges, without prejudice, because of possible procedural deficiencies.

Under the circumstances, I approve the withdrawal pursuant to *N.J.A.C.* 6A:3-5.6. The matter is hereby dismissed without prejudice.

Sincerely,

David C. Hespe
Commissioner

DCH/MKD/ch/ngray&lbucceri

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Under the circumstances, I approve the withdrawal pursuant to *N.J.A.C.* 6A:3-5.6. The matter is hereby dismissed without prejudice.

Sincerely,

David C. Hespe
Commissioner

DCH/MKD/ch/ngray&lbucceri

IN THE MATTER OF THE TENURE	:	
HEARING OF FEDERICO CRUZ,	:	COMMISSIONER OF EDUCATION
CAMDEN STATE-OPERATED SCHOOL	:	DECISION
DISTRICT, CAMDEN COUNTY.	:	
	:	

SYNOPSIS

Petitioning Board filed tenure charges of chronic and excessive absenteeism and conduct unbecoming, and inefficiency against respondent, a tenured teacher, and sought to terminate his employment with the district. Neither respondent nor any attorney acting on his behalf filed an answer to the petition following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.4(h), the allegations – which respondent has chosen not to deny – may be deemed admitted and are sufficient to warrant termination of the respondent from his tenured position. Accordingly, the Commissioner granted summary decision to the petitioner, dismissed the respondent from his tenured position in petitioner's school district, and forwarded a copy of this decision to the State Board of Examiners for review and action as that body deems appropriate.

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

January 6, 2015

AGENCY DKT. NO. 343-11/14

IN THE MATTER OF THE TENURE HEARING OF FEDERICO CRUZ, CAMDEN STATE-OPERATED SCHOOL DISTRICT, CAMDEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

For the Petitioner, Louis R. Lessig, Esq.
No pleading by or on behalf of Respondent.

This matter was opened before the Commissioner of Education on November 24, 2014, through certification by the State Superintendent of the Camden school district (petitioner) of tenure charges of chronic and excessive absenteeism, unbecoming conduct and inefficiency against Federico Cruz (respondent), a tenured teacher in petitioner's employ. Following his review of the charges as filed, together with the supporting evidence,[1] the State Superintendent certified the charges to the Commissioner on November 21st and provided respondent with written notice of the certified charges on the same date.

On November 26, 2014 the Department directed respondent – via both certified and regular mail – to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "shall have 15 days from the date such charges are filed with the Commissioner to file a written response to the charges with the Commissioner." It further advised that failure to answer within the prescribed period would – absent the granting of an extension for good cause shown – result in the charges being deemed admitted. Neither the copy

[1] Respondent apparently did not appear before the Board to contest the charges.

of the Department's notice which was sent by regular mail nor the certified copy has been returned to the Commissioner as undeliverable. To date, no answer to the tenure charges has been received from or on behalf of respondent.

The charges and statement of supporting evidence filed by petitioner indicate that in recent years respondent has received unsatisfactory ratings in meeting curriculum objectives, managing classes, implementing instructional techniques, creating and submitting lesson plans, and responding to the guidance and support of his supervisors. Respondent's absences have also been excessive. Deeming these allegations to be admitted – due to respondent's failure to respond to same – the Commissioner finds that petitioner's charges have been proven, and that they warrant respondent's dismissal from tenured employment.

Accordingly, summary decision is hereby granted to petitioner, and respondent is dismissed from his tenured teaching staff position as of the filing date of this decision. A copy of this decision shall be forwarded to the State Board of Examiners for review and action as it deems appropriate.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 1/06/15
Date of Mailing: 1/07/15

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

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In the Matter of Tenure Charges filed by
The School District of the Borough of
New Milford, Bergen County, New Jersey
Against Lawrence Henchey

----------X

Agency Docket No. 322-11/14

SUMMARY DECISION &
CASE MANAGEMENT ORDER

Issued: January 3, 2015

ARBITRATOR
Joseph Licata, Esq.

APPEARANCES

FOR THE PETITIONER
Vittorio S. LaPira, Esq.
Fogarty & Hara

FOR THE RESPONDENT
Sheldon H. Pincus, Esq.
Bucceri & Pincus

NATURE OF DISPUTE

In accordance with N.J.S.A. 18A:6-10 et. seq. and N.J.A.C. 6A:3-5.1(b), on November 7, 2014, the New Milford Board of Education ("Board") filed with the New Jersey Department of Education, Bureau of Controversies & Disputes tenure charges against Lawrence Henchey ("Henchey") seeking to dismiss him from employment as a certificated Language Arts teacher based on five (5) Charges:

Charge No. 1 alleges that Henchey has consistently demonstrated inefficiencies and ineffectiveness in his teaching skills throughout the 2011-2012, 2012-2013 and 2013-14 school years and as a result of the significant negative impact that his poor teaching performance has upon the quality of education that his students receive, Henchey must be dismissed from his position.

Charge No. 2 alleges that Henchey has consistently demonstrated inefficiencies and ineffectiveness in his teaching skills throughout the 2011-2012, 2012-2013 and 2013-2014 school years despite intensive and comprehensive assistance that has been continuously offered to him by the District Administration and his colleagues, and through multiple corrective action plans designed to address and improve his teaching deficiencies, which demonstrates either an inability or an unwillingness to improve, and which inability or unwillingness to improve constitutes inefficiency warranting dismissal from his position.

Charge No. 3 alleges that as a result of Henchey's consistent failure to, among other things, implement District initiatives; implement a more interactive method of instruction; integrate core content in lesson plans and classroom instructional practices;

use effective teaching strategies; implement consistent grading practices; and meet the professional expectancies set forth in the New Jersey Professional Standards for Teachers, Board Policies and his job description, Henchey's increments were withheld by the Board for the 2013-2014 and 2014-2015 school years, and which ongoing inefficiencies and ineffectiveness warrant dismissal from his position.

Charge No. 4 alleges that in addition to Henchey's consistent failure to demonstrate effective and efficient teaching performance during the 2011-2012, 2012-2013 and 2013-2014 school years, Henchey has failed, since 2002, to remediate certain deficiencies and demonstrate improvement in areas of specific concern, including but not limited to, the use of varied instructional techniques/student-centered activities and the provision of adequate lesson closure, and which inability or unwillingness to improve, and the resulting impact on the education received by his students, constitutes inefficiency warranting dismissal.

Charge No. 5 alleges that, in addition to Henchey's consistent failure to implement effective and efficient teaching strategies, and in addition to his unwillingness or inability to improve upon the same, Henchey has also demonstrated a lack of professionalism throughout the 2011-2012, 2012-2013 and 2013-2014 school years which has included a lack of respect for the Administration and a complete disregard for the high professional standards placed upon him, and which unprofessionalism constitutes incapacity and conduct warranting dismissal.

On November 21, 2014, within the applicable 15-day timeline (N.J.A.C. 6A:3-5.3(a)), Henchey filed with the New Jersey Department of Education, Bureau of

Controversies & Disputes, an Answer and Affirmative Defenses to the Tenure Charges. However, Henchey did not file a Motion to Dismiss in lieu of an Answer within the same applicable 15-day timeline. See, N.J.A.C. 6A:3-5.3(a)1.

On December 1, 2014, Kathleen Duncan, Director, Bureau of Controversies and Disputes notified the parties' respective representatives (1) that the Tenure Charges have been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary and (2) that the dispute was referred to the undersigned Arbitrator for resolution in accordance with N.J.S.A. 18A:6-16. On December 8, 2014, during a telephone conference, Counsel for Mr. Henchey notified Board Counsel and the undersigned of his intent to file a "Motion to Dismiss" the tenure charges. Ground rules governing the motion and hearing dates were discussed and set. The undersigned memorialized the results of the telephone conference in writing on the same day:

> In addition, Mr. Pincus has notified Mr. LaPira and I of his intent to file a motion to dismiss the certified tenure charges. Since an Answer has been filed, I regard the motion as one for summary judgment and I agree, in an exercise of discretion only, to decide that portion of the motion that is not subject to a genuine dispute of material fact. The motion schedule is as follows: December 10 (motion papers due via email and in MS Word format); December 19 (opposition papers due via email and in MS Word format); and December 26, 2014 (reply papers, if any, due via email and in MS Word format). The motion will be decided in advance of the first day of hearing. I have set down five days of hearing as follows: January 8, 12, 13, 14 & 15, 2015. All hearing days shall begin at 9:30 a.m. and conclude by 5:00 p.m. The hearing will be held at the administrative offices of the New Milford Board of Education. Testimony should be very limited with respect to past incidents, events, etc. that are a matter of record and that were not contemporaneously contested. Finally, the hearing will be governed by the Labor Arbitration Rules of the American Arbitration Association pursuant to N.J.S.A. 18A:6-17.1c.

The parties' representatives complied with the briefing schedule. In addition, the undersigned asked the parties to address, by no later than January 2, 2015, Arbitrator Walt De Treaux's Opinion and Award in State Operated School District of the City of Camden and Leon Mashore, et. al. Agency Docket Nos. 303-10/14; 290-9/14; 300-10/14; and 291-9/14. The parties' representatives each submitted a written position statement in response.

THE POSITION OF LAWRENCE HENCHEY

Henchey first posits that Charges Nos. 1-4 must be dismissed due to non-compliance with Section 25 of the Act. Section 25 mandates the filing of an inefficiency charge by the Superintendent in instances where a teacher is "rated ineffective or partially ineffective in an annual summative evaluation" for at least two years. N.J.S.A. 18A:6-17.3(1) and (2). It is not disputed that the first two years of the TEACHNJ evaluation process under Section 25 encompass 2013-14 and 2014-15. Henchey observes that N.J.S.A. 18A:6-123(e) provides that "[b]eginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric for all educators in all elementary, middle, and high schools in the district. Results of evaluations shall be used to identify and provide professional development to teaching staff members. Results of evaluations shall be provided to the commissioner, as requested on a regular basis."

Henchey further submits that the State Board of Education adopted and made effective comprehensive evaluation regulations entitled "Components of Teacher Evaluation" effective October 7, 2013 (45 N.J.R. 2211 (a)). These regulations required

that teaching staff members be observed at least three times per school year but not less than once a semester; with at least one of the observations being announced, including a pre-observation conference; with the remaining two observations announced or unannounced. N.J.A.C. 6A:10-4.4. Moreover, teaching staff members with corrective action plans, like Henchey, must receive a fourth observation in addition to the observations required by N.J.A.C. 6A:10-4.4 (See, N.J.A.C. 6A:10-2.5(j)(1), as well as a mid-year evaluation by the School Improvement Panel, N.J.A.C. 6A:10-3.1).

According to Henchey, the Board did not comply with the 2013-14 legal requirements. More specifically, in the 2013-14 school year, the District completed three of the four observations required by the regulations then in effect, and it did not perform a mid-year evaluation required from and by the School Improvement Panel ("SIP") (Charge No. 1, ¶¶19, 21, 23). Only a year-end evaluation was afforded Henchey (Charge No. 1 ¶26). Henchey points out, in response to Interrogatory No. 24, the Board admits that it did not conduct and/or provide him with a mid-year evaluation in 2013-2014 (Certification of Sheldon H. Pincus ¶6). While the Board counters that the Building Principal met weekly with Henchey to address progress on his corrective action plan, Henchey retorts that the Building Principal does not constitute the SIP contemplated and required to perform the mid-year evaluation. Pursuant to N.J.A.C. 6A:10-3.1(a), the SIP consists not only of the Building Principal, but a Vice-Principal, and a teacher who is chosen in accordance with N.J.A.C. 6A:10-3.1(b) in consultation with the majority representative. Henchey maintains that because of these omissions, both legal and

procedural, it is clear that the Tenure Charges should be dismissed as a matter of law with respect to Henchey's 2013-2014 evaluations and observations.

Henchey further argues that the Charges must be dismissed with respect to the Board's reliance on Henchey's 2012-2013 (and prior) observations and summative evaluations. According to Henchey, because the full implementation of TEACHNJ did not go into effect until the beginning of the 2013-2014 school year, the Board's reliance on the evaluations that it conducted in 2012-2013 (and prior) are expressly prohibited and premature: "The regulations implementing TEACHNJ, N.J.A.C. 6A:10-1.1 et. seq.; the provisions governing the content of evaluation and components, N.J.A.C. 6A:10-4.1; the procedures and components on rubric approval by the Commissioner, N.J.A.C. 6A:5.1; the procedures concerning the timing, form, and nature of teacher evaluations, observations, and corrective action plans, N.J.A.C. 6A:10-4.4 and N.J.A.C. 6A:10-2.5; as well as other components of the subchapter sections demand the conclusion that neither the Legislature in enacting TEACHNJ in August 2012 nor the Commissioner in establishing the regulatory scheme adopted in October 2013 intended that the Act be implemented or that teachers become subject to evaluation before the commencement of the 2013-2014 school year." (Henchey's Brief, at page 10).

Further, Henchey acknowledges that TEACHNJ allowed for the adoption of evaluation rubrics by December 31, 2012, however, it is clear that those rubrics which the Board used that year were different from those used in 2013-2014 and had not been approved by the Commissioner of Education. Even if they were the same (which they were not), the utilization of any preliminary evaluation rubrics (by no later than January

31, 2013) were seen by Legislature to be no more than a "pilot program" to test and refine those rubrics. They were not to be used to fully implement the Act. Indeed that is why N.J.S.A. 18A:6-123(e) provides that the implementation does not occur until the 2013-2014 school year. It thus states that "[b]eginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric for all educators in all elementary, middle, and high schools in the district."

Henchey further observes that the District did not have a SIP in place until the 2013-2014 school year:

> Conspicuously absent from the minutia filled 46 pages of tenure charges is any reference to the SIP being in place for 2012-2013. The undisputed fact is that the District did not have a SIP in place until September 2013 (Certification of Sheldon H. Pincus ¶8, Exhibit C). Inasmuch as both N.J.S.A. 18A:6-120 and N.J.A.C. 6A:10-3.1 both require that each school within a district establish a SIP that conducts evaluations and oversees the mentoring program, the establishment of the SIP sometime in 2013-2014 precludes it from being seen or determined to be functioning during 2012-2013.

According to Henchey, the clear intent of the newly enacted evaluation and observation statutory scheme was to afford teachers and administrators/evaluators to become familiar with and, through trial and error, practice the new system and its requirements during the 2012-2013 school year with formal implementation commencing the beginning of the 2013-2014 school year. The purpose was to train certified teaching staff members and evaluators on the evaluation instruments and procedures and for the Department of Education to prepare and finalize its regulation, which later became known as ACHIEVENJ and which did not become effective until October 2013.

In further support of Henchey's position, Henchey relies upon NJDOE regulatory guidance for tenure charge cases implicating the 2013-2014 school year (Certification of Sheldon H. Pincus ¶10, Exhibit E). Thus, on page 4 of that guidance, it was specifically asked:

> Q. Will summative ratings "count" this year (2012-2013) toward tenure decisions?
>
> A. No – the only item "on the clock" is the mentorship year for new teachers. No evaluation outcomes in the 2012-2013 school year will impact tenure decisions. 2013-2014 is the first year where the statewide system will be in place, and the first year when the summative rating "clock" (i.e. teachers needing to be rated at least effective for two of three years) will start.

Since Henchey's 2012-2013 annual summative evaluation (if not also those occurring in prior school years) is precluded from consideration by the Commissioner or an arbitrator, according to Henchey, the Board lacks the required two consecutive deficient performance evaluations necessary to bring tenure charges pursuant to N.J.S.A. 18A:6-17.3, as non-compliance bars consideration of the charges. Indeed, N.J.S.A. 18A:6-17.3(c) states:

> [n]otwithstanding the provisions of N.J.S.A. 18A:6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a. of this section, the commissioner shall examine the charge. The individual against whom the charges are filed shall have 10 days to submit a written response to the charges to the commissioner. The commissioner shall, within five days immediately following the period provided for a written response to the charges, refer the case to an arbitrator and appoint an arbitrator to hear

> the case, unless he determines that the evaluation process has not been followed. (Emphasis supplied).

Under the above-quoted language, either the Commissioner or the Arbitrator must dismiss tenure charges alleging inefficiency if it is determined that a school district did not comply with these uniform observation and evaluation procedures, guidelines and processes.

In support of Henchey's statutory and regulatory analysis, Henchey directs the Arbitrator's attention to analogous TEACHNJ arbitrations. In IMO the Tenure Charge Hearing of Inefficiency of Sandra Cheatham and the School District of the City of Newark, Docket No. 226-8/14, Arbitrator Stephen M. Bluth dismissed procedurally defective charges of inefficiency and ordered the respondent reinstated with full back pay and benefits. He held that "[s]imply put, the passage of TEACHNJ superseded any evaluation procedures that had been in place prior to its enactment. Thus, in my view, the "clock" began with the 2013-2014 school year." See, http://www.state.nj.us/education/ legal/teachnj/2014/oct/420-14.pdf (slip op at 11) (Certification of Sheldon H. Pincus ¶11, Exhibit F). Arbitrator Bluth further opined that the Department of Education's guides (cited above), make it clear that the no evaluation in the 2012-2013 school year would impact tenure decisions (slip op at 13). Finally, according to Henchey, Arbitrator Bluth rejected the contention that, if a teacher is exonerated under Section 25 of the Act, a district may advance a Section 8 claim of inefficiency by which a teacher may be dismissed under the conditions that are delineated under that section.

Mr. Henchey further relies upon In the Matter of the Tenure Charge of Inefficiency against Neil Thomas and the School District of Newark, (Agency Dkt. No. 244-9/14). Arbitrator Robert Simmelkjaer there held: (a) as designee of the Commissioner pursuant to N.J.A.C. 6A:3-5.1(c)(5), he could "examine the charge" to determine whether the procedural requirements necessary to file an inefficiency charge under Section 25 of the TEACHNJ Act had been met (slip op. at 33); (b) given that TEACHNJ and its implementing NJDOE regulations had not been enacted when the district conducted its pilot program, the district could not rely on its 2012-2013 evaluations to charge the teacher with inefficiency absent adherence to each of the substantive evaluation standards of TEACHNJ, N.J.S.A. 18A:6-17.3 (slip op. at 40); (c) having filed tenure charges pursuant to Section 25 of TEACHNJ, ostensibly based upon two consecutive years of "partially effective" ratings, the district was obligated to use only those evaluations conducted in accordance with a rubric adopted by the board and approved by the Commissioner pursuant to P.L. 2012, c. 26.(slip op at 44); and (d) that the district could not proceed under Section 8 of TEACHNJ (slip op at 46).

Based on the foregoing statutory and regulatory interpretations, Henchey asks the Arbitrator in this case to dismiss Charges Nos. 1-4 for the District's non-compliance with Section 25 and implementing regulations.

Lastly, Henchey seeks dismissal of Charge No. 5 based on principles of double jeopardy. Charge No. 5 alleges that in addition to being inefficient, Henchey has demonstrated a lack of professionalism throughout the 2011-2012, 2012-2013 and 2013-2014 school year, which has included a complete lack of respect for the Administration

and a complete disregard for the high professional standards placed upon him. Incorporated by reference from Charges Nos. 1-4 are the facts that Henchey's salary and adjustment increments were withheld by the Board upon the recommendation of the Superintendent of Schools for the school years 2012-2013 and 2013-2014. (See, e.g., Charge No. 1 ¶¶ 16 and 28. See, Board Doc. No. 56 (h) – Letter and Board Resolution from Board Secretary Michael Sawicz to Henchey dated July 16, 2013; Board Doc. No.57 (p) – Letter from Superintendent Polizzi to Henchey dated June 5, 2014; and, Board Doc. No. 57 (r) – Letter and Board Resolution from Board Secretary Michael Sawicz to Henchey dated June 24, 2014).

According to Henchey, any reasonable and rational reading of those letters, the statement of reasons given in support of the withholdings, and these tenure charges make it evident that the allegations of Charge No. 5 are subsumed in, and made part of, the reasons underlying the withholdings. It is also clear that, in exercising its discretion to withhold the salary and adjustment increments, the Board at no time reserved any rights or gave any indication that tenure charges might follow for the same conduct. As such, the Board made a conscious and deliberate determination that that was the penalty it had elected to exact from Henchey for the conduct alleged. It gave no notice, required by its own policies, that the conduct might further give rise to the filing of tenure charges. (Certification of Sheldon H. Pincus ¶12, Exhibit G).

In support of this last argument, Henchey relies upon longstanding arbitral decisions in the private sector (citations omitted), the application of double jeopardy in public sector disciplinary proceedings and, moreover, the application the principle of

double jeopardy by TEACHNJ arbitrators, including the undersigned. See, e.g., In the Matter of Ricky Porter (MSB, decided March 16, 2007) (considering reprimand letter previously issued to be penalty and rejecting attempt to impose further punishment); In the Matter of Victor Onwuzuruike (MSB, decided August 9, 2006) (reversing the removal of an employee, finding he had previously been disciplined for the incidents at issue, via official written reprimands that were placed in his personnel file by his supervisor; the Board, thus, rejected appointing authority's attempt to impose double punishment for the same offense and its attempt to revive a stale charge to impose a greater penalty); and I/M/O Jill Buglovsky (Decided December 21, 2012).

Based on the foregoing, Henchey argues: "It necessarily follows that these double jeopardy principles find particular applicability to the facts of this case. The doctrine must be considered not only in determining whether the Board stated a cause of action on which charges could be predicated (See, Answer to Tenure Charges, First Affirmative Defense), but further in considering whether any increased penalty may be imposed should it be determined that the Board could have legitimately proceeded" (Henchey Brief at page 20).

THE BOARD'S OPPOSITION

The Board does not necessarily deny the foregoing Section 25 deficits. Rather, the Board notes that it could not have complied with Section 25 prior to the conclusion of the 2015-16 school year. The Board reasons that it filed tenure charges against Mr. Henchey pursuant to N.J.S.A. 18A:6-10-16 (Section 8) and that it complied with the procedural prerequisites to dismissing Henchey that apply to a Section 8 dismissal. The Board refers

to Section 25 as a "streamlined process", noting the comparatively more expeditious timeframes (up to 45 days in the aggregate) and the elimination of the need for a Board of Education to file a comprehensive Statement of Evidence (See, pages 5 and 6 of Board's Opposition Brief). The Board argues that Section 25 was never intended to negate (nor did it negate) the authority of a board of education to file tenure charges for, *inter alia*, inefficiency under Section 8.

In addition to the distinction of timelines for inefficiency charges filed under Section 25 and Section 8, the Board observes that the statutory language of TEACHNJ leaves no doubt that there are two distinct means by which tenure charges alleging inefficiency may be filed:

- N.J.S.A. 18A:6-17.2 set forth considerations for the arbitrator when considering inefficiency charges pursuant to N.J.S.A. 18A:6-17.3 and addresses whether the matter "...before the arbitrator pursuant to Section 22 of this act is employee inefficiency pursuant to Section 25 of this act..." (emphasis added). This language leaves no doubt that Section 25 is one way of pursuing inefficiency charges, otherwise there would be no reason to include the qualifying phrase "pursuant to Section 25 of this act."

- N.J.S.A. 18A:6-17.3(a) states, "Notwithstanding the provisions of N.J.S.A. 18A:6-11 or any other section of law..." (emphasis added). Clearly, N.J.S.A. 18A:6-17.3 contemplates inefficiency charges brought under N.J.S.A. 18A:6-10 et. seq.; if it did not, those quoted provisions would have no meaning.

- N.J.S.A. 18A:6-17.3(c) also recognizes the provisions of filing inefficiency charges under N.J.S.A. 18A:6-16 in its phrase, "[n]otwithstanding the provisions of N.J.S.A. 18A:6-16 or any other section of law..."

- N.J.S.A. 18A:6-17.3(d) states that only rubric evaluations may be used to determine inefficiency charges "for purposes of this Section." If rubric evaluations were the only means by which inefficiency charges could

go forth, there would have been no Legislative purpose in stating, "for purposes of this Section."

- Finally, N.J.A.C. 6A:3-5.1(b) sets forth the timelines for filing charges "for reasons of inefficiency pursuant to N.J.S.A. 18A:6-17.3." By specifying that this section applies only to inefficiency charges filed under Section 25, the Commissioner is acknowledging that inefficiency charges may indeed be filed through alternate statutory provisions.

According to the Board, all of the phrases cited above would be meaningless if boards of education could only file tenure charges that included claims of inefficiency under Section 25. The Board relies upon the well-recognized rule of statutory construction that an interpretation that would render any part of a statute inoperative, superfluous or meaningless is to be avoided. See, e.g., Hoffman v. Hock, 8. N.J. 397, 406-07 (1952). As such, there is no basis for Henchey's claim that tenure charges for inefficiency can only be brought pursuant to Section 25. The Board submits that Henchey's position must be rejected as contrary to the intent of the legislature: the concept that inefficiency tenure charges can only be brought at the conclusion of the 2014-15 school year, meaning that a district would have to suffer through at least a third year of inefficiency for any teacher deemed inefficient in the prior two years, is an absurd result that could not have been intended by the Legislature. See, Schwartz v. Dover Public Schools, 180 N.J. Super. 210, 226-27 (App. Div. 1981)("Reason is said to be the 'soul of the law' and the sense of a statute should control over its literal terms. Interpretations which lead to absurd or unreasonable results should be avoided").

The Board, most notably, asserts that it did not plead Section 25 as the basis for the tenure charges. Cf. State Operated School District for the City of Newark [Brady,

Thomas and Cheatham cases]. Accordingly, the Board contends that the core rationale for dismissal of the tenure charges in the aforementioned Newark line of cases does not support Henchey's position. On the contrary, the arbitrators in the Newark matters did not ring Section 8's death knell, but rather, acknowledged the existence of Section 8 as a means of filing tenure charges for inefficiency that was unfortunately bypassed in the District's pleadings. The Board insists that there is not one shred of evidence that the instant charges were filed under Section 25 (as alleged by Henchey). Although the Board acknowledges that Henchey did not have two years' worth of ineffective or partially effective evaluations under an approved rubric when it filed the charges in October 2014, which is why the charges were filed under Section 8, nonetheless, the grounds for dismissing Henchey pursuant to Section 8 are abundant in nature.[1]

The Board further observes that other arbitrators have upheld tenure dismissals under Section 8 in closely analogous circumstances. The Board refers to In the Matter of the Tenure Hearing of Jose Martinez and the School District of the Township of Mahwah, Bergen County, Agency Dkt. No. 167-7/14 (De Treux)(reviewing observations commencing with the 2007-08 school year and continuing through 2013-14, including the withholding of salary increments for the latter three consecutive years of Martinez's career); In the Matter of the Tenure Hearing of Dr. Audrey Cuff and Cumberland

[1] The Board notes that Henchey has accumulated *at least* two years' worth of poor evaluations, as evidenced by not only his 2012-13 and 2013-14 evaluations, but also the Corrective Action Plans in place for 2012-13 and 2013-14 (each pertaining to concerns about to his teaching performance for the prior school year), and the withholding of his employment and adjustment salary increments, for reasons relating to his teaching performance, for the 2013-14 school year. Moreover, the Board asks the Arbitrator to observe that the McRel evaluation rubric, which the Board adopted on December 17, 2012, has been specifically approved by the Department of Education as complying with the law's requirements. *See* http://www.state.nj.us/education/AchieveNJ/teacher/approvedlist.pdf.

Regional School District Board of Education, Agency Dkt. No. 71-3/14 (Gerber)(sustaining charges of, among other things, inefficiency based on charges filed in March of 2014, notwithstanding non-compliance with Section 25); In the Matter of the Tenure Hearing of Edgar Chavez, State Operated School District of the City of Newark, Essex County, Agency Dkt. No. 269-9/12 (Brown)(dismissal of Chavez upheld on inefficiency grounds pursuant to Section 8); and In the Matter of the Tenure Hearing of Felicia Pugliese, State Operated School District of the City of Newark, Essex County, Agency Dkt. No. 272-9/12 (Brent)(dismissal of Pugliese on inefficiency grounds after two years of unacceptable ratings and argument that tenure charges were premature was rejected – no compelling evidence to support Henchey's arguments that TEACHNJ's passage created a state-wide hiatus of at least two years in preferring tenure charges for inefficiency).

The Board further asserts that it would have been impossible to file Section 25 tenure charges under the existing set of facts, as the tenure charges also allege unbecoming conduct as well as Henchey's inability or unwillingness to improve his teaching performance (i.e., incapacity or insubordination constituting other just cause). Here, reasons the Board, the tenure charges against Henchey are factually quite similar to those in Martinez and Cuff, where the arbitrators found that those teachers' inefficient teaching continued regardless of the assistance offered by the school districts. According to the Board, those are essentially tenure charges for gross incompetency, or incapacity, reasons that have led to dismissal of teachers in the past. In the present matter, the Board specifically charged that Henchey has either an "...*inability* or an unwillingness to

improve..." his teaching in various places,[2] and that theme is consistent throughout the tenure charges (emphasis added). The Board maintains that Henchey is not charged with inefficiency alone, but with incompetency and incapacity: "There can be no question, then, that the Charges 1 through 4 are not limited *solely* to inefficiency, but include incompetency as well. For that reason, the Board submits that it properly proceeded under Section 8 (Boards' Opposition Brief at page 18). The Board emphatically states that the legislature could not have intended to require a school district to file two separate tenure charge proceedings – one for inefficiency pursuant to the streamlined Section 25 process and one for all other grounds pursuant to the ordinary Section 8 procedures.

Based on the foregoing, the Board urges the Arbitrator to reject Henchey's Motion for Summary Decision regarding Charge Nos. 1-4.

Lastly, the Board insists that the concept of double jeopardy does not properly apply to a tenure dismissal proceeding or, alternatively, even if it does, the Board's action of salary increment withholding followed by the certification of tenure dismissal charges does not constitute double punishment. The Board first reasons that double jeopardy is a doctrine applicable solely in the context of a criminal proceeding. See, e.g., In the Matter of the Tenure Hearing of Richard Graffanino, Agency Dkt. No. 223-9/13 (January 31, 2014); In the Matter of the Tenure Hearing of Desly Getty, OAL Dkt. No. EDU-08750-08 (June 4, 2009)(Comm. Ed. July 17, 2009); see also Martinez, *supra* (school district withheld Martinez's increment and successfully pursued tenure charges resulting in his

[2] *See, e.g.*, Charge 2, Heading, ¶¶ 20, 21, 29 and 33; Charge 4, Heading, ¶¶ 2 and 28; Charge 5, Heading and generally throughout the charge.

dismissal). In Getty, a tenured teacher alleged that since she had already been reprimanded for the conduct that was the subject of the tenure charges, double jeopardy should attach and the charges should be dismissed. Id. The ALJ rejected the argument, stating that "tenure hearings are not quasi-criminal in nature and are not primarily directed at imposing punishment upon teachers, but are instead vehicles to determine a teacher's fitness to teach and to set examples for impressionable students." Id., citing In the Matter of the Tenure Hearing of R. Scott McIntyre, 96 *N.J.A.R.*2d (EDU) 726 (App. Div. 1996).

Similarly, in McIntyre, a teacher that was arrested for possession of marijuana and had the complaint subsequently dismissed due to an illegal search unsuccessfully sought to have his dismissal from his teaching position, based on that conduct, overturned under the theory of double jeopardy. 96 *N.J.A.R.*2d at 726-27. The Appellate Division declined to overturn the tenure dismissal, since tenure charges are not instituted with the purpose of punishing a teacher. Id. at 727. Rather, tenure charges embrace a teacher's "fitness for school teaching and example setting for impressionable students who are entrusted by society to the teaching profession." Id.

Finally, in Graffanino,[3] the arbitrator directly and succinctly disposed of the very same arguments being made here:

> Although the District's tactic in withholding the salary increment and filing tenure charges is uncommon, I find that it does not constitute "double

[3] The Board notes that Henchey's failure to cite to the Graffanino decision unfortunately reflects a lack of candor towards this tribunal, as the arbitrator there specifically rejected the *very same arguments* made here, and Henchey cannot claim ignorance of this matter, because his attorney was the same attorney who represented Graffanino, made the very same argument, and lost. This matter should be treated no differently.

> jeopardy." Double jeopardy, of course, **applies only in criminal cases**; but Respondent is arguing duplicative punishments, two separate disciplinary actions for the same offenses. The District's approach was not an attempt to duplicate punishment; but rather, it was an attempt to fill a gap caused by the timing of the tenure charges. In the interval before tenure charges were filed and again before an arbitration decision would issue, **the District wanted to ensure that Graffanino's salary was not increased.** It may have been an unnecessary move because the gaps in time were so limited, but it was not inflicting a double penalty on Respondent.
> [*Id.* at 26 (emphasis added).]

According to the Board, this matter is distinguishable from In the Matter of the Certified Tenure Charges Between the Randolph Board of Education and Jill S. Buglovsky, Docket No. 265-9/12 (December 21, 2012), where this arbitrator found that Randolph "cannot now retry Ms. Buglovsky based on conduct transpiring *over three years ago*, which *did not involve harm* or realistic potential harm to students, and was resolved at that time by an official reprimand." Buglovsky, Slip Op. at 54 (emphasis added).[4] In other words, it was an attempt to mete out duplicative punishment for the same conduct. The Board reasons that in this case, it was necessary to withhold Henchey's increment due to the timing of the tenure charges. Even more compelling than Graffanino, where the gap in time was relatively brief, the Board argues that the Superintendent did not serve the tenure charges until October 2014,[5] and the Board did not consider them until November 2014. The Board reasons that if it declined to certify the tenure charges, that would have meant that Henchey would effectively have received

[4] Also, in *Buglovsky*, reasons the Board, the teacher there was generally lauded as a good teacher with favorable evaluations, which mitigated the penalty of dismissal to a suspension and increment withholding. That is a stark difference from the facts in the instant matter, where Henchey has multiple years of poor evaluations, and no basis to conclude that the latest increment withholding will do anything to change his behavior, since he failed to fulfill his prior two corrective action plans (one of which came after his increments were withheld).

[5] Henchey was suspended before the beginning of the school year, and when the parties were unable to amicably resolve their issues, the Superintendent filed the instant tenure charges.

a raise—*and thus no consequences*—despite his substandard teaching performance in the 2013-14 school year. In sum, the Board maintains that it was acting prudently to ensure that Henchey did not receive a pay raise for his performance and conduct while the tenure charges were being finalized, and pending a decision on the tenure charges the Board, and ultimately, by an arbitrator. That is wholly permissible, and supported by the applicable case law and arbitration decisions (Board Opposition Brief at page 19).

For all these reasons, the Board asks the Arbitrator to reject dismissal of the Charges based on Henchey's double jeopardy argument.

HENCHEY'S REPLY

Here, Henchey maintains that Section 8, as amended, does not mention or include the term "inefficiency." According to Henchey, even more telling, N.J.S.A. 18A:16-11, as amended, deleted all reference to inefficiency charges and eliminated the 90-day notice and opportunity to correct allegations of inefficiency, which was a prerequisite to the certification of charges of inefficiency that had existed under the old legislation.

Henchey buttresses his contention with Arbitrator Simmelkjaer's conclusion in Thomas, To Wit: "In the absence of statutory language permitting the alternate and/or simultaneous filing of inefficiency charges under Section 8 and Section 25, the District, given the deficiencies found in its Section 25 filing, can file either Section 25 commencing with the 2013-2014 school year or Section 8 inefficiency charges based on one year." Henchey reasons that Arbitrator Simmelkjaer was referring to the 2011-2012 school year only.

In light of the foregoing, Henchey insists that Section 8's scope or useful lifespan is limited to those performance evaluations predating the 2013-14 school year. That is, Section 8, as a vehicle for facilitating tenure charges based on inefficiency, came to an end after the conclusion of the last group of inefficiency cases pending before the passage of TEACHNJ on August 6, 2012; citing, State Operated School District of the City of Newark and Darrin Hawthorne, Agency Docket No. 266-9/12 (charges filed in July of 2012); State Operated School District of the City of Newark and Edgar Chavez, Agency Docket No. 269-9/12 (charges filed March 26, 2012); and State Operated School District of the City of Newark and Felicia Pugliese, Agency Docket No. 272-9/12 (filing of charges preceded the 2012-13 school year).

Henchey specifically observes that, in Chavez, Arbitrator Brown reasoned – based on a March 26, 2012 filing date – that Section 18 of the Act afforded him jurisdiction to determine the case under the law "as read prior to the effective date of" the Act. Most importantly, Henchey points out that Arbitrator Brown further reasoned: "Importantly, the legislative did not similarly provide for such application of the old law for post-enactment charges of inefficiency that do not meet the prerequisite for consideration under Section 23" (Henchey Reply at page 3).

In application to the present matter, Henchey reasons that the Charges were filed on October 17, 2014 (over two years after August 6, 2012). As such, reasons Henchey, the "Board does not have the ability or the option to rely on Section 8 and the Arbitrator does not have jurisdiction to determine charges of inefficiency except under Section 25 of the Act" (Henchey Reply at page 4). Henchey characterizes the Board's Section 8

position as running "against the entire intent of the legislation... The legislative plan was designed to establish only one system for filing and deciding inefficiency cases, the Section 25 proceedings... No employer would proceed under Section 25 if it could avoid its requirements and still proceed with inefficiency cases" (Henchey Reply at pages 5-6).

Finally, Henchey asks the Arbitrator to note additional support for its double jeopardy argument and for dismissal of Charge 5 by way of reference to In the Matter of Arbitration of John Carlomango, School District of the Township of Hillside, Agency Dkt. No. 450-13 (Melissa Biren).[6]

DISCUSSION AND OPINION

Jurisdiction

Initially, I have decided to address the motion in an exercise of discretion under TEACHNJ, N.J.S.A. 18A:6-117, et. seq., effective August 6, 2012 (P.L.2012, Ch. 26). The instant motion is treated as one for summary decision because an Answer, as opposed to a Motion to Dismiss, was filed by Henchey and because evidence has been introduced in the form of the Certification of Sheldon H. Pincus with attached Exhibits. Compare, N.J.A.C. 6A:3-5.3(a) and 5.3(a)1. Additionally, N.J.S.A. 18A:6-16 allows for a motion for summary decision – filed with the Commissioner -- to be transmitted to an arbitrator or to be decided by the Commissioner. In this matter, Henchey did not meet the prerequisite filing with the Commissioner, but instead filed the motion after

[6] In addition, the undersigned asked the parties to address, by no later than January 2, 2015, Arbitrator Walt De Treaux's Opinion and Award in State Operated School District of the City of Camden and Leon Mashore, et. al. Agency Docket Nos. 303-10/14; 290-9/14; 300-10/14; and 291-9/14. The parties' representatives each submitted a written position statement in response. I have carefully considered the Mashore position statements and incorporate both into my decision.

transmittal of the case to the undersigned. Thus, the Labor Arbitration Rules of the American Arbitration Association, which otherwise governs this dispute, do not provide a party to an arbitration with the right to file a dispositive motion. Lastly, in light of the relatively stringent restrictions imposed on arbitrators under N.J.S.A. 18A:6-17.1 b., it is evident that an arbitrator must cautiously exercise discretion in deciding whether to address any motion filed after transmittal of the case from the Commissioner of Education to the arbitrator. In this case, I have elected to exercise discretion in favor of deciding the motion given the importance and relative novelty of the legal principles involved.

Summary Decision Standard

Summary decision may be granted if the pleadings, discovery and affidavits show "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.S.A. 1:1-12.5. Contini v. Bd. of Educ., 286 N.J. Super. 106 (App. Div. 1995). In ruling on summary-decision motions, administrative agencies follow substantially the same standard as the standard governing motions for summary judgment in civil litigation. The essence of the inquiry is whether the evidence presents a sufficient disagreement to require submission to the trier-of-fact or whether it is so one-sided that one party must prevail. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 536 (1995). I have carefully considered Henchey's moving papers, the opposition filed by the Board, Henchey's reply letter brief and both parties' position statements in response to my request following Arbitrator Walt De Treux's

decision in Mashore. Because the parties' respective positions do not raise a genuine issue of material fact, I am satisfied that summary decision is appropriate.

Synopsis

The failure of the District to comply with the uniform evaluation rules in place under TEACHNJ for 2013-2014 must be deemed fatal to the sufficiency of Tenure Charges Nos. 1-4 (and 5, in part) with respect to the 2013-2014 school year. I am not convinced, however, that there was a moratorium on filing a Section 8 tenure charge alleging inefficiency insofar as the 2012-2013 school year is concerned. However, since the Board has clearly addressed Henchey's 2012-2013 shortcomings by way of an increment withholding action under N.J.S.A. 18A:29-14 unrelated to the filing of tenure charges shortly thereafter, I must dismiss the Board's Charges with respect to Henchey's teaching performance during the 2012-2013 school year based on the principles elaborated upon in IMO Randolph Board of Education and Jill S. Buglovsky, Docket No. 265-9/12 (December 21, 2012), confirmed, Buglovsky v. The Randolph Township Board of Education, Morris County, Docket No.: C13-13 (P.J. Ch. Stephan C. Hansbury)[7]; see, also, In the Matter of Arbitration of John Carlomango, School District of the Township of Hillside, Agency Dkt. No. 450-13 (Melissa Biren). With respect to Henchey's 2011-2012 performance, this record contains no indicia that the Board sought to contemporaneously discipline Henchey for his teaching performance during that year. To the contrary, Henchey received an acceptable year end evaluation and was placed on a

[7] A copy of the Order and Opinion confirming the undersigned's Opinion and Award in Buglovsky is attached hereto and made a part hereof.

non-disciplinary Corrective Action Plan. Thus, I will dismiss the Board's tenure charges with respect to Henchey's teaching performance during the 2011-2012 school year. Finally, this matter will proceed to a hearing based solely on Charge No. 5, on a limited basis, as more fully discussed herein.

Dismissal of Charges Nos. 1-4 (2011-12, 12-13 and 13-14 School Years)

In its most basic sense, the TEACHNJ Act represents the byproduct of two years of bipartisanship legislative efforts. The interests of school boards and teachers in bringing about meaningful tenure reform leaps from the pages of the legislation and legislative history. In the recent case of IMO State Operated School District for the City of Newark and Elena Brady, Agency Docket No. 270-9/14, Arbitrator Joyce Klein cogently described the legislative covenant that was embodied by the final legislation on August 6, 2012:

> TEACHNJ adopted new performance requirements for teaching staff and streamlined the process for revoking tenure from those teachers who do not meet the new performance requirements. In exchange for these requirements, the legislature adopted requirements for teachers receiving ineffective and partially effective summative ratings including required corrective action plans pursuant to N.J.S.A. 18A:6-128(b) and School Improvement Panels pursuant to N.J.S.A. 18A:6-120 (slip op. at 19-20).

Arbitrator Klein's analysis is firmly grounded in the Legislature's declaration of purpose at N.J.S.A. 18A:6-118:

> The Legislature finds and declares that:
>
> a. The goal of this legislation is to raise student achievement by improving instruction through the adoption of evaluations that provide specific feedback to educators, inform the provision of aligned professional development, and inform personnel decisions;

> b. The New Jersey Supreme Court has found that a multitude of factors play a vital role in the quality of a child's education, including effectiveness in teaching methods and evaluations. Changing the current evaluation system to focus on improved student outcomes, including objective measures of student growth, is critical to improving teacher effectiveness, raising student achievement, and meeting the objectives of the federal "No Child Left Behind Act of 2001".

In State Operated School District of the City of Camden And Leon Mashore, et. al. Agency Docket Nos. 303-10/14; 290-9/14; 300-10/14; and 291-9/14, Arbitrator Walt De Treaux recently stated that TEACHNJ "dramatically revised teacher evaluations in a way that the new criteria allowed for more effective removal of ineffective teachers." The trade off, of course, is that a school district must afford teachers with the tools necessary to improve upon their performance, commencing with the 2013-2014 school year and that teachers will not be dismissed for inefficiency if they meet the new standards.

As to the substantive law that must be applied in a tenure revocation case, N.J.S.A. 18A:6-17.5, entitled, "Governing law for tenure charge determination" provides:

> Any tenure charge transmitted to the Office of Administrative Law pursuant to N.J.S.18A:6-16 prior to the effective date of P.L.2012, c. 26 (C.18A:6-117 et al.) shall be determined in accordance with the provisions of subarticle B of Article 2 of chapter 6 of Title 18A of the New Jersey Statutes, N.J.S.18A:6-10 et seq., as the same read prior to the effective date of P.L.2012, c. 26 (C.18A:6-117 et al.).

The instant charges were filed on November 7, 2014 – well after the passage of the Act on August 6, 2012. The applicable statutory provisions serving as vehicles for processing tenure charges post August 6, 2012 include N.J.S.A. 18A:6-16 (Section 8) and N.J.S.A. 18A:6-17.3 (Section 25).

Importantly, N.J.S.A. 18A:6-10 remained unaffected by the TEACHNJ Act. The recognized causes of action for bringing tenure charges against a certificated teacher continue to be inefficiency, incapacity, unbecoming conduct or other just cause. N.J.S.A. 18A:6-11, encompassed by Section 8, states:

> 18A:6-11. Written charges; written statement of evidence; filing; statement of position by employee; certification of determination; notice
>
> Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. The board of education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address. In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner for a hearing pursuant to N.J.S. 18A:6-16, together with a certificate of such determination. The consideration and actions of the board as to any charge shall not take place at a public meeting.

Of note, the following language was removed from N.J.S.A. 18A:6-11 by way of the new legislation: **[Provided, however, that if the charge is inefficiency, prior to making its determination as to certification, the board shall provide the employee with written notice of the alleged inefficiency, specifying the nature thereto, and**

allow at least 90 days in which to correct and overcome the inefficiency].[8]

N.J.S.A. 18A:6-16 "Proceedings before commissioner; hearing" (Section 8) was amended to make relatively minor changes in the preexisting timelines and, most significantly, to supplant the Office of Administrative Law with a panel of arbitrators:

> Upon receipt of such a charge and certification (referring to N.J.S.A. 18A:6-11), or of a charge lawfully made to the commissioner, the commissioner or the person appointed to act in the commissioner's behalf in the proceedings shall examine the charges and certification. The individual against whom the charges are certified shall have 15 days to submit a written response to the charges to the commissioner. Upon a showing of good cause, the commissioner may grant an extension of time. The commissioner shall render a determination on the sufficiency of charges as set forth below within 10 days immediately following the period provided for a written response to the charges.
>
> If, following receipt of the written response to the charges, the commissioner is of the opinion that they are not sufficient to warrant dismissal or reduction in salary of the person charged, he shall dismiss the same and notify said person accordingly. If, however, he shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section 22 of P.L.2012, c. 26 (C.18A:6-17.1) for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for purposes of deciding the motion.

In contrast to the removal of the old inefficiency language from Section 8, Section 25 specifically addresses the subject of inefficiency charges under the new law. Section 25 mandates the filing of an inefficiency charge by the Superintendent in instances where a teacher is "rated ineffective or partially ineffective in an annual summative evaluation"

[8] N.J.S.A.18A:6-13 was similarly modified (pertaining to the dismissal of a tenure charge in the case where a board of education does not act on the submission of a tenure charge by school administration).

for at least two years. N.J.S.A. 18A:6-17.3(1) and (2). N.J.S.A. 18A:17.3 (Section 25) provides in full:

> a. Notwithstanding the provisions of N.J.S.18A:6-11 or any other section of law to the contrary, in the case of a teacher, principal, assistant principal, and vice-principal:
>
> (1) the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency whenever the employee is rated ineffective or partially effective in an annual summative evaluation and the following year is rated ineffective in the annual summative evaluation;
>
> (2) if the employee is rated partially effective in two consecutive annual summative evaluations or is rated ineffective in an annual summative evaluation and the following year is rated partially effective in the annual summative evaluation, the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency, except that the superintendent upon a written finding of exceptional circumstances may defer the filing of tenure charges until after the next annual summative evaluation. If the employee is not rated effective or highly effective on this annual summative evaluation, the superintendent shall promptly file a charge of inefficiency.
>
> b. Within 30 days of the filing, the board of education shall forward a written charge to the commissioner, unless the board determines that the evaluation process has not been followed.
>
> c. Notwithstanding the provisions of N.J.S.18A:6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a. of this section, the commissioner shall examine the charge. The individual against whom the charges are filed shall have 10 days to submit a written response to the charges to the commissioner. The commissioner shall, within five days immediately following the period provided for a written response to the charges, refer the case to an arbitrator and appoint an arbitrator to hear the case, unless he determines that the evaluation process has not been followed.
>
> d. The only evaluations which may be used for purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L.2012, c. 26 (C.18A:6-117 et al.).

As noted in Henchey's moving papers, the substantive evaluation standards are set forth under N.J.S.A. 18A:6-117, et. seq. and under the regulations implementing the new law, N.J.A.C. 6A:10-2.1, et. seq.

In response to the foregoing, I observe that both parties made reasonable arguments in support of their competing positions. Henchey reads the above language as reflecting a legislative shift in the processing of all charges of inefficiency from Section 8 to Section 25 and imposing, by implication, a moratorium on discipline for inefficiency until after the completion of the 2014-15 school year and then only pursuant to Section 25. The Board, on the other hand, reasonably argues that no such moratorium was expressed and Section 8 remains a viable procedure with its own requirements for prosecuting a charge of inefficiency:

- N.J.S.A. 18A:6-17.2 set forth considerations for the arbitrator when considering inefficiency charges pursuant to N.J.S.A. 18A:6-17.3 and addresses whether the matter "...before the arbitrator pursuant to Section 22 of this act is employee inefficiency pursuant to Section 25 of this act..." (emphasis added). This language leaves no doubt that Section 25 is one way of pursuing inefficiency charges, otherwise there would be no reason to include the qualifying phrase "pursuant to Section 25 of this act."

- N.J.S.A. 18A:6-17.3(a) states, "Notwithstanding the provisions of N.J.S.A. 18A:6-11 or any other section of law..." (emphasis added). Clearly, N.J.S.A. 18A:6-17.3 contemplates inefficiency charges brought under N.J.S.A. 18A:6-10 et. seq.; if it did not, those quoted provisions would have no meaning.

- N.J.S.A. 18A:6-17.3(c) also recognizes the provisions of filing inefficiency charges under N.J.S.A. 18A:6-16 in its phrase, "[n]otwithstanding the provisions of N.J.S.A. 18A:6-16 or any other section of law..."

- N.J.S.A. 18A:6-17.3(d) states that only rubric evaluations may be used to determine inefficiency charges "for purposes of this Section." If

rubric evaluations were the only means by which inefficiency charges could go forth, there would have been no Legislative purpose in stating, "for purposes of this Section."

- Finally, N.J.A.C. 6A:3-5.1(b) sets forth the timelines for filing charges "for reasons of inefficiency pursuant to N.J.S.A. 18A:6-17.3." By specifying that this section applies only to inefficiency charges filed under Section 25, the Commissioner is acknowledging that inefficiency charges may indeed be filed through alternate statutory provisions.

Since the plain language of TEACHNJ can be reasonably debated with respect to the viability of a Section 8 tenure proceeding for inefficiency, I did evaluate the legislative history as contained in the New Jersey State Law Library with an eye toward ascertaining the intent of the legislation. I can conclude with confidence that the legislature obviously sought to overhaul evaluation criteria, to train teachers on the new criteria and to make it easier to remove teachers who, despite the required training, cannot meet the expected standards in two consecutive years. It also can be detected that the legislature was disturbed by the inordinate time and costs associated with bringing all tenure charges to conclusion under Section 8, and that they were particularly disturbed by the ninety (90) day window of correction that a school district was obligated to provide to a teacher charged with inefficiency before tenure charges could be firmly prosecuted.[9] Having said this, however, since both Sections 8 and 25 matters are now both relatively expedited and less costly as compared to the *status quo ante,* I am not convinced either

[9] See, e.g., IMO State Operated School District and Wesley Gilmer, 2011 WL 5868027 (noting under footnote 1 a 138-day improvement period and under footnote 2 that 23 days of hearing took place).

that the legislature would be shocked if an inefficiency case was prosecuted pursuant to Section 8 where Section 25 was not applicable.[10]

More importantly, even if Section 8 has some life left in it for processing a tenure charge based on inefficiency, I am convinced that Section 25 was intended to supersede Section 8 in the case of a conflict. For example, if a teacher meets the TEACHNJ evaluation criteria and, thus, cannot be removed from his or her position under Section 25, it would seem anomalous to conclude that he or she may be removed from employment pursuant to Section 8. By the same token, if a teacher fails to meet the new substantive evaluation criteria, then he or she may, or shall be, brought up on tenure charges for inefficiency under Section 25 and, in that scenario, Section 8 is of no import. Elevating substance over procedure, I find that all teachers were entitled to the 2013-2014 and 2014-2015 school years to see if they could pass muster under Section 25. As such, I agree with Henchey's analysis that allowing a Section 8 proceeding for inefficiency to encompass 2013-2014 would defeat the purpose underlying Section 25. Thus, because I believe that a Section 8 tenure proceeding for inefficiency cannot interfere with the more specific tenets of Section 25 concerning TEACHNJ evaluations commencing with the 2013-14 school year, I conclude that any Section 8 proceeding necessarily must be limited to school years 2012-2013 and prior.

In light of the foregoing, I find that, to the extent that Section 8 remains a potential procedural vehicle to bring tenure charges alleging inefficiency after August 6, 2012, it

[10] The preference for arbitrators in lieu of administrative law judges came about in a Senate Committee Substitute for Senate No. 1455 on June 18, 2012 (more than four (4) months after introduction by Senator Ruiz and less than two (2) months before Governor Christie's signing of the Bill).

does so only for the 2012-2013 school year. Here, I agree with Arbitrator Simmelkjaer's conclusion in Thomas: "In the absence of statutory language permitting the alternate and/or simultaneous filing of inefficiency charges under Section 8 and Section 25, the District, given the deficiencies found in its current Section 25 filing, can file either Section 25 commencing with the 2013-14 school year or Section 8 inefficiency charges based on one year" (referring to 2012-2013) (slip op at 47). Thus, whereas Section 8 may be available for tenure charges predicated on evaluations not encompassed by TEACHNJ (or where both efficiency and conduct charges are alleged after the 2014-15 school year), most importantly, Section 8 is not available as a means to address evaluation deficiencies encompassing the 2013-2014 school year. At the very least, even if Section 8 is still intact, certainly, a Section 8 proceeding cannot be based on a legally flawed 2013-2014 school year evaluation.

In further support of this conclusion, I observe that the DOE adopted and made effective comprehensive evaluation regulations entitled: "Components of Teacher Evaluation" effective October 7, 2013 (45 N.J.R. 2211 (a)). These regulations required that teaching staff members be observed at least three times per school year but not less than once a semester; with at least one of the observations being announced, including a pre-observation conference; with the remaining two observations announced or unannounced. N.J.A.C. 6A:10-4.4. Moreover, teaching staff members with corrective action plans, like Henchey, must receive a fourth observation in addition to the observations required by N.J.A.C. 6A:10-4.4 (See, N.J.A.C. 6A:10-2.5(j)(1), as well as a

mid-year evaluation by the School Improvement Panel, N.J.A.C. 6A:10-3.1). All of these requirements were effective during the 2013-14 school year.

In review of the record before me, I agree with Henchey that the Board did not comply with the 2013-2014 legal requirements and, thus, cannot use Section 8 as a basis to bring tenure charges. More specifically, in the 2013-2014 school year, the District completed three of the four observations required by the regulations then in effect, and it did not perform a mid-year evaluation required from and by the School Improvement Panel ("SIP") (Charge No. 1, ¶¶19, 21, 23). Only a year-end evaluation was afforded Henchey (Charge No. 1 ¶26). Henchey points out, in response to Interrogatory No. 24, the Board admits that it did not conduct and/or provide him with a mid-year evaluation in 2013-2014 (Certification of Sheldon H. Pincus ¶6). While the Board counters that the Building Principal met weekly with Henchey to address progress on his corrective action plan, I credit Henchey's retort that the Building Principal does not constitute the SIP contemplated and required to perform the mid-year evaluation. Pursuant to N.J.A.C. 6A:10-3.1(a), the SIP consists not only of the Building Principal, but a Vice-Principal, and a teacher who is chosen in accordance with N.J.A.C. 6A:10-3.1(b) in consultation with the majority representative. Although I recognize that a Section 25 proceeding was not yet ripe, once again, the substantive law governing mandatory evaluation criteria was in effect and the Board was obliged to follow it with respect to all of its teaching personnel, Section 8 notwithstanding.

Indeed, as of July 1, 2013, it was illegal for a school board and education association to agree upon an evaluation system that differed from the Act. See, N.J.S.A.

18A:6-126. By the same token, a school board would have no license to unilaterally implement an evaluation system than did not meet the letter of the substantive evaluation requirements of the new law. Therefore, the Board, in my opinion, cannot seek dismissal of Henchey for inefficiency during the 2013-2014 school year because the Board itself has failed to adhere to the mandatory evaluation procedures that were uniformly in place under TEACHNJ for that year.[11]

Based on the foregoing, I find that the Board cannot rely upon Henchey's 2013-2014 summative evaluation/teaching performance as a basis for Charges Nos. 1-4 (and Charge No. 5, to the extent the Board seeks a finding of incapacity or conduct unbecoming based solely on Henchey's teaching performance during the 2013-2014 school year).

Next, while I also dismiss Charges Nos. 1-4 with respect to the 2012-13 and 2011-12 school years, I do so for different reasons. On the one hand, I agree with the notion that 2012-2013 was a pilot year for the purpose of Section 25. School administrators were charged with implementing a rubric approved by the Commissioner of Education by December 31, 2012, to "test and refine the evaluation rubric" by January 31, 2013, N.J.S.A. 18A:6-123(d), to train teachers and administrators on the approved rubric, to set up a SIP, to comply with the requisite observations and evaluations, to establish corrective action plans, etc. IMO State Operated School District for the City of Newark

[11] Perhaps recognizing its flaw, the Board may have invoked Section 8 in order to avoid resetting the two year clock under Section 25 to the 2014-2015 and 2015-2016 school years. While the Board's growing dissatisfaction with Henchey's performance after the passage of TEACHNJ may be understandable, the Board could have removed Henchey from employment after the 2014-2015 school year under Section 25 if it had simply complied with TEACHNJ's mandatory evaluation criteria during the 2013-14 school year.

and Elena Brady, Agency Docket No. 270-9/14(Klein)("Thus, both the statute and rules suggest that the 2012-2013 school year, which was the first year that TEACHNJ was in effect, was to be a developmental year for preparing to fully implement the newly adopted requirements for evaluation rubrics to be used for both the acquisition of tenure and the revocation of tenure for inefficiency beginning in the 2013-2014 school year", slip op at 13); and, see also, N.J.S.A. 18A:6-123(e)("beginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric for all educators in all elementary, middle, and high schools in the district.").

Having said this, however, TEACHNJ evaluation criteria were not in place during 2012-13. In addition, the legislation does not reflect an express recognition that teaching personnel were immunized from disciplinary consequences flowing from poor teaching performance or misconduct pending the first year of TEACHNJ evaluations. cf. N.J.S.A. 18A:7A-45(c)("notwithstanding any other provision of "law and contract" while the State district superintendent could file tenure charges against a principal or vice principal for incapacity or unbecoming conduct at any time after the state takeover, he or she could not do so for inefficiency reasons or other just cause until "after the completion of an assessment cycle of not less than 12 months"). Consistent with Arbitrator Simmelkjaer's finding in SOSD City of Newark and Neil Thomas, and in light of my dismissal of the 2013-14 Charges, I am satisfied that the Board could otherwise proceed under Section 8 with respect to Henchey's evaluation relative to the 2012-2013 school year. Having said this, however, I must ultimately dismiss, *sua sponte*, Charges Nos. 1-4 with respect to the

2012-13 school year based on the doctrine of double jeopardy or double punishment.

Here, I fully incorporate by reference my rationale set forth in IMO Randolph Board of Education and Jill S. Buglovsky, Docket No. 265-9/12 (December 21, 2012), confirmed, Buglovsky v. The Randolph Township Board of Education, Morris County, Docket No.: C13-13 (P.J. Ch. Stephan C. Hansbury); see, also, In the Matter of Arbitration of John Carlomango, School District of the Township of Hillside, Agency Dkt. No. 450-13 (Melissa Biren). In rejecting the rationale opposing the doctrine's applicability to the education context, I direct the parties to both my Opinion in Buglovsky and the Opinion of Judge Hansbury confirming that Award. I add that arbitrators addressing whether there is just cause for discipline or discharge have for years incorporated constitutional-like protections into the analysis -- fully aware that they were not proceeding over a "criminal case" -- for example, "disparate treatment" (or equal protection under the law); double jeopardy (borrowed from the Fifth Amendment); the right to cross-examination (borrowed from the confrontation clause of the Sixth Amendment); and the right of the grievant not to testify in a disciplinary hearing (borrowed from the Fifth Amendment), etc. See, *Elkouri and Elkouri*, How Arbitration Works, 6th Edition, Chapter 15, Section F ("Factors in Evaluating Disciplinary Penalties"), pages 964-1000. Thus, no mistake has been made concerning the applicability of the concept of double jeopardy to the arbitration context.

Additionally, as an arbitrator empowered to exclusively determine tenured teacher dismissal cases under Section 22 of the Act, I note that we may accept or reject prior decisions in the education context just as we may accept or reject the decisions and

rationales of other arbitrators. Here, I find no reason to depart from the traditional arbitral approach to determining just cause, notwithstanding the ALJ's rationale in Getty that was fully addressed and reconciled appropriately by Judge Hansbury in confirming Buglovsky. Suffice it to say that the provisions of Title 18A addressing reprimands, increment withholdings and tenure dismissal are disciplinary actions, with the exception of those increment withholdings not deemed levied predominantly for disciplinary purposes. See, N.J.S.A. 34:13A-26; Randolph Tp. Bd. of Educ. v. Randolph Educ. Ass'n, 306 N.J. Super. 207 (App. Div. 1997), certif. den. 153 N.J. 214 (1998). As such, since N.J.S.A. 18A:6-10 expressly refers to the "just cause" standard in all tenure dismissal cases seeking a reduction in compensation or dismissal, I see no reason to depart from the traditional arbitration approach in deciding the instant dismissal case under a just cause standard.

In the present case, since the Board has clearly addressed Henchey's 2012-2013 shortcomings by way of an increment withholding for 2013-14 -- not leading to the filing of tenure charges shortly thereafter (See, Statement of Evidence, Tab 56 (g)), I will dismiss the Board's tenure charges with respect to Henchey's teaching performance during the 2012-2013 school year. With respect to 2011-2012, this record contains no indicia that the Board sought to contemporaneously discipline Henchey for his teaching performance during that year. To the contrary, Henchey received an acceptable year end evaluation and was placed on a non-disciplinary, Corrective Action Plan. Thus, I will dismiss the Charges with respect to Henchey's teaching performance during the 2011-2012 school year as well.

Based on the foregoing, I grant Henchey's motion for summary decision with respect to Charges Nos. 1-4 in their entirety.

Limitations of Charge No. 5 (Incapacity and Conduct Unbecoming)

Charge No. 5 alleges that, in addition to Henchey's consistent failure to implement effective and efficient teaching strategies, and in addition to his unwillingness or inability to improve upon the same, Henchey has also demonstrated a lack of professionalism throughout the 2011-2012, 2012-2013 and 2013-2014 school years which has included a lack of respect for the Administration and a complete disregard for the high professional standards placed upon him, and which unprofessionalism constitutes incapacity and conduct warranting dismissal.

Here, although I do not see a significant difference between "double jeopardy" as that terminology has been commonly understood by arbitrators in discharge and discipline cases under a just cause analysis for more than a century and "double punishment", I concur with the underscored portion of Arbitrator De Treaux's rationale in IMO River Dell Regional School District and Richard Graffanino, Agency Dkt. No. 223-9/13, distinguishing the doctrine based on the timing of events in the case of an increment withholding followed by the issuance of tenure charges:

> Although the District's tactic in withholding the salary increment and filing tenure charges is uncommon, I find that it does not constitute "double jeopardy." Double jeopardy, of course, applies only in criminal cases; but Respondent is arguing duplicative punishments, two separate disciplinary actions for the same offenses. **The District's approach was not an attempt to duplicate punishment; but rather, it was an attempt to fill a gap caused by the timing of the tenure charges. In the interval before tenure charges were filed and again before an arbitration decision would issue, the District wanted to ensure that Graffanino's salary was**

not increased. It may have been an unnecessary move because the gaps in time were so limited, but it was not inflicting a double penalty on Respondent. [Id. at 26 (emphasis added).][12]

As such, the Board may present evidence demonstrating Henchey's alleged continued "incapacity" and "conduct unbecoming" during the 2013-14 school year while all prior years must be deemed satisfied or *res judicata* by virtue of the Board's July 16, 2013 increment withholding and any other prior discipline that exists in the record. Thus, this means that Mr. Henchey enters the hearing process with a major disciplinary record in the form of an increment withholding under Title 18A for incapacity and related conduct unbecoming. The allegations set forth under Charge No. 5 that antecede the 2013-14 school year will not be re-litigated or recycled. Instead, the focus of the hearing will now shift to whether Henchey should be dismissed from his teaching position based on his alleged continued incapacity and related conduct unbecoming, as specifically set forth by Charge No. 5, pars. 12-19.[13]

Case Management Order

Lastly, in order to expeditiously manage this matter scheduled to commence on January 8, 2015, I direct the parties as follows.

1. The hearing is now limited to the following issue: Did the Board have just cause to dismiss Lawrence Henchey from his teaching position based

[12] Indeed, the failure to withhold an increment may be cited by a teacher as evidence that the ensuing tenure charges were not justified based on the implicit recognition that increments are not withheld in the case of satisfactory teaching performance in a given school year.

[13] As to the distinction between inefficiency and incapacity and related misconduct, the latter offenses involve, among other things, a teacher's chronic failure to meet professional expectations, and unprofessional and hostile reactions to supervision by district personnel. See, IMO School District of the Borough of Butler, Morris County, 2010 WL 5624390; Board of Education of the Township of Parsippany-Troy Hills v. Greg Molinaro, 96 N.J.A.R. (EDU) 268, 1995 WL 863033 (1995); Bd. of Ed. Lawrence Twp. v. Lester Helmus, 2 N.J.A.R. 334 (1980).

on his alleged continued incapacity and related conduct unbecoming as specifically set forth by Charge No. 5, pars. 12-19?;

2. All documents relevant to the charges of incapacity and conduct unbecoming (including rebuttal letters, if any) prior to the 2013-2014 school year shall be admitted without testimony;

3. The parties may simply refer to the Statement of Evidence identifying markers without the need to separately introduce the same documents as exhibits; documents obtained in discovery that are not contained in the Statement of Evidence must be introduced in exhibit format; and

4. Testimony shall be limited to the events of the 2013-14 school year, although the "decision-maker" may testify in summary fashion as to how, if at all, he or she factored in Henchey's overall work record (as reflected in the Statement of Evidence) in connection with the charges of incapacity and conduct unbecoming and the recommendation for dismissal. Mr. Henchey, of course, may refer to those portions of his prior work record that he deems supportive of his continued employment in the District.

CONCLUSION

For the reasons more fully set forth herein, I grant Mr. Hencheys's Motion for Summary Decision with respect to Charges Nos. 1-4 of the November 7, 2014 Tenure Charges. I deny the motion with respect to Charge No. 5, pars. 12-19. Lastly, I direct the parties to observe the case management order set forth on pages 40 and 41.

Respectfully submitted,

Joseph Ficata

Dated: January 5, 2015

FILED

JUL 16 2013

STEPHAN C. HANSBURY
PRESIDING JUDGE
CHANCERY DIVISION

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JULL S. BUGLOVSKY, Plaintiff, -v- THE RANDOLPH TOWNSHIP BOARD OF EDUCATION, Defendant.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: MORRIS COUNTY Docket No.: C13-13 Civil Action ORDER OF JUDGMENT

This matter being opened to the Court by Order to Show Cause, by Sanford R. Oxfeld, Oxfeld Cohen, P.C., attorney for Plaintiff, Jill S. Buglvosky, for an Order of Judgment confirming and enforcing the Arbitrator's Opinion and Award in State of New Jersey Department of Education Docket No.: 265-9/12, and the Court having heard and considered the submissions and the arguments of counsel, and for good cause shown;

IT IS on this 16th day of July, 2013;

ORDERED that the Opinion and Award of Arbitrator Joseph Licata, Esq., issued on December 21, 2012 in State of New Jersey, Department of Education Docket No.: 265-9/12, be and is hereby confirmed and enforced; including the immediate

reinstatement of Ms. Buglovsky to her teaching position, with full back-pay and benefits retroactive to the date she should have been reinstated; and

IT IS FURTHER ORDERED, that a copy of this Order of Judgment be served on Defendant within 7 days hereof, through Lawyers Service.

STEPHAN C. HANSBURY, JUDGE
SUPERIOR COURT OF NEW JERSEY

See attached statement of reasons

BUGLOVSKY v. THE RANDOLPH TOWNSHIP BOARD OF EDUCATION c/w RANDOLPH TOWNSHIP BOARD OF EDUCATION v. BUGLOVSKY
Docket No. MRS-C-13-13

STATEMENT OF REASONS

Plaintiff, Jill S. Buglovsky ("Ms. Buglovsky"), applied for an order to show cause as to why the Court should not confirm the arbitration award issued by Arbitrator Joseph Licata ("Mr. Licata"). Defendant, the Randolph Township Board of Education (the "Board") subsequently applied for an order to show cause as to why the Court should not vacate the same award. This Court ordered consolidation of the Board's case into Ms. Buglovsky's case on May 6, 2013.

Ms. Buglovsky has been a Health and Physical Education Teacher for grades K-5 in Randolph Township since 2002 and has consistently received positive performance evaluations. However, during the 2008-2009 school year, Ms. Buglovsky used her school email account[1] to correspond with another person known as "J.C." Many of the roughly 2,000 e-mail messages between Ms. Buglovsky and J.C. contained graphic sexual language, and at least one thread of correspondence discussed drug use.[2] One e-mail reads as though Ms. Buglovsky invited J.C. to her office for a sexual liaison.[3] In April 2009, the Board reprimanded Ms. Buglovksy and warned her that she would be dismissed if she did not cease this conduct. After this, Ms. Buglovsky continued to correspond with J.C. via e-mail on the school network, but used her personal e-mail accounts and communicated using discrete language. The Board alleges, however, that Ms. Buglovsky attempted to thwart the Board's monitoring of her conduct by sending these subsequent communications from a colleague's computer and by using her own personal e-mail accounts rather than her school account. During the 2011-2012 school year Ms. Buglovsky evidently continued to use the District computer network for personal use[4] during the school day, including during times when she was scheduled to be teaching.

Ultimately, the Board, under new administration, filed tenure charges against Ms. Buglovsky and sought to remove her from her teaching position. Pursuant to N.J.S.A. 18A:6-16, the Commission of Education reviewed the charges and concluded that, if proven, the charges would be sufficient to warrant dismissal or reduction of salary. Pursuant to N.J.S.A. 18A:6-17.1, Joseph Licata was chosen as the arbitrator from the list maintained by the Commissioner. Mr. Licata reviewed the charges, as well as evidence submitted on behalf of both parties, and issued a 69-page decision wherein he sustained several of the charges, but opined that termination was an excessive remedy. Mr. Licata disposed of the charges as follows:

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[1] Mr. Licata found that a number of these e-mails were sent from Ms. Buglovsky's home computer while she was on maternity leave.

[2] Ms. Buglovsky alleges that there is no evidence that she actually used drugs during her employment as a teacher, and that she cannot drink or use drugs due to her bipolar disorder.

[3] A subsequent investigation revealed that J.C. was in Virginia when the e-mail was sent and that Ms. Buglovsky was aware of his location. Accordingly, the e-mail can be read to have been based in fantasy.

[4] This alleged personal use was not of a sexual nature.

- Charge One, pertaining to the sexually explicit e-mails, was dismissed as attenuated due to the passage of time, and because Ms. Buglovsky had already been formally reprimanded for the conduct and had subsequently ceased to engage in the conduct;

- Charge Two, pertaining to more discrete e-mails sent in 2009-2010 was sustained with respect to a few implicitly sexual communications, but was dismissed as to non-sexual personal e-mails because Ms. Buglovsky was not disciplined previously for that type of e-mail and received a positive performance evaluation for the year;

- Charge Three, alleging that Ms. Buglovsky used a co-worker's computer and log-in as an "alias" to communicate with J.C. via personal e-mail between September 2009 and November 2009 was sustained in part and dismissed in part. The dismissal resulted from Mr. Licata's finding that the charge was attenuated due to the passage of time and Ms. Buglovsky's subsequent similar communications using her own identity;

- Charge Four, alleging non-sexual use of personal e-mail on the school network during the 2010-2011 school year, was dismissed because Ms. Buglovsky was not disciplined previously for that type of e-mail and received a positive performance evaluation for the year;

- Charge Five, alleging one personal, non-sexual communication with J.C. during the 2011-2012 school year was dismissed for the reasons stated with respect to charges Two and Four, and because it exemplified her significantly improved behavior;

- Charge Six, alleging Internet browsing during instructional time was sustained;

- Charge Seven was dismissed as setting forth no new or additional factual allegations;

- Charge Eight regarded a picture of Ms. Buglovsky using her iPod, allegedly during instructional time, which was sent via e-mail from another individual to Ms. Buglovsky with a caption stating "My Baby at Work." Ms. Buglovsky apparently replied to the e-mail and said, "I was drawing you at that time!" This was apparently the incident that influenced the Board to file the tenure charges, but the Board withdrew the charge at the arbitration hearing;

- Charge Nine, alleging a pattern of misconduct, was dismissed because no disciplinary action was taken for the same behavior following the 2009-2010 and 2010-2011 school years, and as a result of Ms. Buglovsky's history of improving her behavior after being reprimanded.

Instead, Mr. Licata determined that a 120-day unpaid suspension and loss of a salary increment were an appropriate consequence for Ms. Buglovsky's conduct. Pursuant to Mr. Licata's decision, the Board was supposed to reinstate Ms. Buglovsky following the end of the December holiday break. However, the Board did not and has not yet reinstated Ms. Buglovsky. The instant orders to show cause address Ms. Buglovsky's application to confirm Mr. Licata's award and the Board's application to vacate same.

This Court grants Ms. Buglovsky's application to confirm the arbitration award and denies the Board's application to vacate the award.

Pursuant to N.J.S.A. § 18A:6-16, when tenure charges are filed with the Commissioner of Education ("Commissioner"), and the Commissioner determines that the charges warrant either dismissal or a reduction in salary, the Commissioner must refer the dispute to an arbitrator pursuant to N.J.S.A. § 18A:6-17.1. See N.J.S.A. § 18A:6-16. As set forth in N.J.S.A. § 18A:17.1(e), "the arbitrator's determination shall be final and binding . . . [and] the determination shall be subject to judicial review and enforcement as provided pursuant to [N.J.S.A. §] 2A:24-7 through [N.J.S.A. §] 2A:24-10." N.J.S.A. § 18A:17.1(e). N.J.S.A. § 2A:24-8 provides that the Court "shall vacate an arbitration award in any of the following cases:

> a. Where the award was procured by corruption, fraud or undue means; b. Where there was either evident partiality or corruption in the arbitrators, or any thereof; c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party; d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.

[N.J.S.A. § 2A:24-8.] The New Jersey Supreme Court has interpreted "undue means" (a) to encompass decisions that are contrary to applicable law or public policy. See Grover v. Universal Underwriters Ins. Co., 80 N.J. 221, 230-31 (1979).

In interpreting N.J.S.A. § 2A:24-8 and the rest of the Arbitration Act, New Jersey Courts have afforded a presumption of validity to decisions issued by arbitrators. See Township of Wyckoff v. PBA Local 261, 409 N.J. Super. 344, 354 (App. Div. 2009). This reflects the underlying policy of promoting a sense of finality. See Linden Bd. of Ed. v. Linden Ed. Ass'n. ex rel Mizichko, 202 N.J. 268, 266 (2010). In keeping with this policy, courts must confirm an arbitrator's award "so long as it is reasonably debatable" and "a reviewing court may not substitute its own judgment for that of the arbitrator, regardless of the court's view of the correctness of the arbitrator's interpretation." Id. at 276-277 (internal citations omitted). Accordingly, it is the burden of the party challenging the award to rebut the presumption of validity and establish that the award must be vacated.

I. Whether Mr. Licata's Decision Misapplied or Is Contrary to the Law

New Jersey's Tenure Employees Hearing Law mandates that no tenured public employee shall be dismissed from his or her position, or shall be subject to a reduction in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause . . ." following a hearing by the commissioner or a person appointed by the commissioner. See N.J.S.A. § 18A:6-10. Where parties do not define "just cause" for termination in an agreement between them, the Appellate Division has upheld an arbitrator's endeavor to define "just cause" based on the

totality of the circumstances. See Linden Bd. of Ed., supra, at 277-278; see also In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967). In Linden Bd. of Ed., the Court also upheld the arbitrator's consideration of "progressive/corrective discipline" as part of the "just cause" concept, and recognized the arbitrator's authority to fashion an appropriate remedy where the arbitrator found that there was not "just cause" to support terminating the employee. Id. at 277.[5]

The New Jersey Courts' definition of "unbecoming conduct" originated in the context of law enforcement, but was cited in the education context in In re Donahue, No. A-1636-06T1, 2008 N.J. Super. Unpub. LEXIS 1429 (App. Div. Mar. 3, 2008). There, the Court noted, "the phrase 'unbecoming conduct' has been described as 'elastic' and 'defined as any conduct which adversely affects the morale or efficiency' of the public entity or 'which has a tendency to destroy public respect for [public] employees and confidence in the operation of [public] services.'" Id. at *21. (internal quotations omitted). "[A] finding of misconduct need not 'be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.'" Id. at *22 (internal citations omitted). "Unfitness to remain as a teacher may be demonstrated by a single incident if it is sufficiently flagrant, although in less serious matters progressive disciplinary measures may be more appropriate." In the Matter of the Tenure Hearing of Desly Getty, OAL 08750-08S, 2009 N.J. Agen. LEXIS 319 (June 4, 2009) (citing In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967)). "The determination of what constitutes conduct unbecoming a public employee is primarily a question of law." Donahue, supra at *21 (internal citation omitted).

a. Double Jeopardy

The Office of Administrative Law (OAL) has stated that the Constitutional protection of "double jeopardy" which generally protects criminal or quasi-criminal defendants from being punished more than once for the same crime, does not apply in the context of a tenure hearing. See Getty, supra, at 34-35. This is because tenure hearings "are not primarily directed at imposing punishment upon teachers, but are instead vehicles to determine a teacher's fitness to teach and to set examples for impressionable students." Id. However, in Getty, the OAL ultimately recognized that "reason and fairness must play a role in determining the sanction to which one who fails in one instance should be exposed" and reached the conclusion that "while Ms. Getty's actions do warrant some additional response, neither the students nor the general public will be best served by removing Ms. Getty's tenure." Id.

In the instant case, it is clear that Mr. Licata looked to the totality of the circumstances to evaluate whether Ms. Buglovsky had engaged in conduct unbecoming a teacher, and whether the Board had "just cause" to terminate her from her teaching position. In so doing, Mr. Licata recognized that Ms. Buglovsky had been disciplined for sending the sexually explicit e-mails in April 2009, and that she generally ceased that conduct, but for a few discrete and far less offensive exceptions, following the April 2009 discipline. Accordingly, Mr. Licata decided that the sexually explicit e-mails could not support a finding of "just cause" to terminate Ms. Buglovsky. The Court finds that this was not an impermissible application of the constitutional

[5] Although Linden Bd. of Ed. involved a janitor, rather than a teacher, the case is relevant to the extent it addressed an arbitrator's evaluation of "just cause" where the phrase was not otherwise defined.

protection of "double jeopardy" which is afforded only in criminal, or quasi-criminal proceedings, but a proper application of the principles of reason and fairness that the OAL applied in Getty, or a proper consideration of progressive/corrective discipline that the Appellate Division held to be within the authority of the arbitrator in Linden Bd. of Ed, supra. She was disciplined at that time in the manner the Board felt was appropriate and corrected her behavior.

Although these principles may borrow from the "double jeopardy" protection, Mr. Licata never acted as though he was bound to apply such a protection. To the contrary, he recognized that the protection itself did not apply, but that its underlying principles were relevant. See Opinion & Award at pg. 54. Accordingly, this Court finds that Mr. Licata's dismissal of Charge One, reflecting a finding that Ms. Buglovsky had already been adequately disciplined for sending the sexually explicit e-mails and had corrected her behavior, was not a misapplication of the Constitutional protection of double jeopardy, but a determination as to reasonableness and fairness and a consideration of progressive or corrective discipline, made properly, within Mr. Licata's discretion as an arbitrator and based on the totality of the circumstances before him. See Opinion & Award at pg. 57.[6]

b. Laches

"Laches is 'an equitable defense that may be interposed in the absence of the statute of limitations,' and has been defined as an 'inexcusable delay in asserting a right.'" Northwest Covenant Med. Ctr. V. Fishman, 167 N.J. 123, 140 (2001) (internal citations omitted). "'[L]aches involves more than mere delay, mere lapse of time. There must be delay for a length of time which, unexplained and unexcused, is unreasonable under the circumstances and has been prejudicial to the other party.'" Id. (internal citations omitted). "Factors considered in determining whether to apply laches include '[t]he length of delay, reasons for delay, and changing conditions of either or both parties during the delay.'" Id. (internal citations omitted).

The Board asserts that the doctrine of laches cannot apply in the context of a tenure hearing, but the precedent the Board cites on this issue does not stand for the proposition asserted. Specifically, the ALJ in I/M/O Tenure Hearing of David Clark did not decline to apply the doctrine of laches. See I/M/O Tenure Hearing of David Clark, 95 N.J.A.R. 2d (EDU) 164, *133-134 (N.J. Admin. 1995). Rather, the ALJ noted that it was unnecessary to reach the issue of whether laches barred the charges because it was appropriate to dismiss the charges on the merits.[7] Similarly, in I/M/O Tenure Hearing of Morton, the ALJ declined to apply laches to bar charges, based on a finding that the two year delay in filing the charges did not prejudice the employee. See I/M/O Tenure Hearing of Morton, 96 N.J.A.R. 2d (EDU) 236, *32 (N.J. Admin. 1995). This reflects an understanding that laches may apply in the context of a tenure hearing under appropriate circumstances, rather than a precedent that laches is inapplicable to tenure

[6] Notably, Mr. Licata properly qualified the dismissal of Charge One by stating that the reprimand issued in 2009 could still be used as "prior discipline" for purposes of determining a disciplinary penalty and to evaluate the credibility of Ms. Buglovsky's stated understanding that she was verbally warned not to use the district network to access her private e-mail to read or send sexually explicit messages. See Opinion & Award at pg. 58.

[7] There is significant discussion in I/M/O Tenure Hearing of David Clark of whether the doctrine of laches applies in the context of a tenure hearing, but this discussion appears in the section of the opinion that simply summarizes the position of the parties. It is clear from a full reading of the opinion that the ALJ did not decide this issue.

hearings as a matter of law. It should be noted that laches might actually be an appropriate doctrine to apply in this context, as there is no statute of limitations. See Fishman, supra.

In the instant case, Mr. Licata did not expressly apply the doctrine of laches, but did dismiss certain allegations as "stale" due to the passage of time and to Ms. Buglovsky's subsequent good behavior. See Opinion & Award at pg. 61. The Board presents no law to suggest that this decision exceeded Mr. Licata's authority.

c. Application of Civil Service Precedent and Failure to Apply Prior Education Law Decisions

The Board alleges that Mr. Licata reached an impermissible conclusion by applying cases regarding civil service employees as opposed to cases regarding educators. However, the Board fails to articulate a distinction between civil service law and education law that is sufficient to demonstrate that reliance on civil service precedent led to an improper conclusion. Notably, decisions in the context of tenured educators have borrowed from civil service decisions in defining "unbecoming conduct" and otherwise. See Donahue, supra.

Moreover, the primary education law cases cited by the Board wherein dismissal was held to be an appropriate remedy are factually distinct from the instant case. For example, in In re Voza, the educator referenced students in his explicit e-mails. See In re the Revocation of Richard Voza, 2011 N.J. Agen. LEXIS 545 (N.J. Admin. 2011). Ms. Buglovsky's e-mails are completely devoid of references to students. In In re Howarth and In re Donahue, the educators used school equipment to search and view pornography. See In re Revocation of Certificates of Dean Howarth, 2009 N.J. Agen. LEXIS 506 (N.J. Admin. 2010); see also In re Revocation of Certificates of Darlene Donahue, 2006 N.J. Agen. LEXIS 658 (N.J. Admin. 2006). The conduct of viewing and searching for pornography on a school computer goes a step further than sending explicit e-mail communications to one individual, and presents a greater risk that students might see the explicit materials.

It is clear from Mr. Licata's decision that he looked to the totality of the circumstances in evaluating whether students would be better served by the retention or removal of Ms. Buglovsky. In so doing, he considered not only her inappropriate conduct, but her response to prior discipline, the decreasingly offensive nature of the alleged conduct, her display of remorse and participation in therapy, and her consistently positive performance evaluations. It follows that this Court finds that Mr. Licata's decision not to order dismissal was reasonable and not inconsistent with established education law.

II. Whether Mr. Licata's Decision Is Contrary to Public Policy

Under rare circumstances, a court may vacate an arbitration award that violates public policy, but the policy must be a "clear mandate" and must be embodied in "statute, regulation, or legal precedent." See New Jersey Turnpike Authority v. Local 196, 190 N.J. 283, 287-288 (2006). Importantly, the inquiry is whether the award itself, as opposed to the conduct giving rise to the award, violated the policy. Id.

In the instant case, the Board cites precedent to establish a public policy that teachers are held to a higher moral standard. However, such precedent is insufficiently "clear" to establish that suspending rather than dismissing a teacher who engages in unbecoming conduct contravenes this policy. The Board cites no other relevant precedent, statute, or regulation on this issue. Accordingly, this Court finds that Mr. Licata's decision did not contradict public policy and cannot, therefore, be vacated on that ground.

III. Whether Mr. Licata Gave Sufficient Weight to the Evidence Presented

In advocating for the vacation of Mr. Licata's award, the Board also asserts that Mr. Licata failed to give appropriate weight to certain evidence including a USB drive containing explicit communications, Ms. Buglovky's use of a colleague's online log-in information to access Ms. Buglovsky's personal e-mail, and Ms. Buglovsky's browsing of the Internet during instructional time.

The Board alleges that since Mr. Licata did not explicitly mention the USB drive containing 22,000 screen shots of Ms. Buglovsky's Internet communications (Ex. J4), he must not have properly considered that evidence. However, it is clear from Mr. Licata's decision that he adequately considered both the content and volume of Ms. Buglovsky's inappropriate Internet activities and reached a reasonable decision that suspension was an appropriate consequence. Considering the totality of the circumstances and Mr. Licata's ultimate conclusion, there is nothing in the record to suggest that Mr. Licata failed to give sufficient weight to this evidence.

The Board also raises the issue that from September 2009 through November 2009, Ms. Buglovsky sometimes used a colleague's computer, under this colleague's log-in in violation of Board policy, to access her own personal e-mail. The Board asserts that this evidence suggests that Ms. Buglovsky intentionally attempted to evade monitoring by using her own school-issued computer and log-in to send work-related communications via school e-mail, but switching immediately thereafter to her colleague's computer and log-in to access her personal e-mail for personal reasons. It is undisputed that the e-mails sent during this time period were not explicitly sexual in nature. Mr. Licata reviewed this evidence and found that "to the extent there is any attempt to 'cover her tracks,' I find that such activity is limited to the period September through November of 2009, almost three years prior to the filing of tenure charges." See Opinion & Award, at pg. 42. Mr. Licata further found that Ms. Buglovsky used her own log-in to access her personal e-mail for the remainder of the 2009-2010 school year, and made no sexually explicit communications during that time. Accordingly, Mr. Licata found, "the record does not sufficiently evidence intent on the part of Ms. Buglovsky to evade review of her e-mail communications after December of 2009." See Opinion & Award, at pg. 43.

Mr. Licata cited several reasons in support of his decision that Ms. Buglovsky's 2009-2010 computer usage did not warrant dismissal. First, Mr. Licata credited Ms. Buglovsky's testimony that accessing of personal e-mail is prevalent among staff members during non-instructional time and that she genuinely believed that she was not prohibited from sending non-sexual personal e-mails. See id. at pg. 43-44. Mr. Licata further found that "Ms. Buglovsky's network usage was under individualized scrutiny" as a result of the explicitly sexual Spring 2009 communications. Id. at pg. 44. Importantly, Mr. Licata noted that no disciplinary action was

taken against Ms. Buglovsky and that Ms. Buglovsky received a positive evaluation for the 2009-2010 school year. Id. at pg. 44. Mr. Licata ultimately noted that the only improper conduct in 2009-2010 was Ms. Buglovsky's use of Mr. Patrick's log-in, but that this violation, which ceased in November 2009 and was never addressed by the Board, was attenuated due to the passage of time.

With respect to the 2010-2011 school year, Mr. Licata found that Ms. Buglovsky only exchanged a handful of e-mails with J.C. See id. at pg. 44-45. However, Mr. Licata also found that within a seven-week period, Ms. Buglovsky accessed the Internet for personal reasons on five occasions when she was supposed to be teaching. See id. at pg. 49. Ultimately, Mr. Licata found that this was "conduct unbecoming a teacher," warranting disciplinary action but not dismissal. In support of his finding that suspension and an increment loss were more appropriate remedies than dismissal, Mr. Licata cited the fact that at least one of the incidents occurred on "Take Your Child to Work Day" and the access of a "My Little Pony" website during instructional time indicated that it was Ms. Buglovsky's daughter who had been using the computer while Ms. Buglovsky was teaching. See Opinion & Award, at pg. 50. Additionally, Mr. Licata found that, again, Ms. Buglovsky had not been disciplined and had received a positive evaluation for the 2010-2011 school year. See id. at pg. 58. Mr. Licata inferred that Ms. Buglovsky's improved behavior following her 2009 reprimand indicated that Ms. Buglovsky would likely have ceased sending personal e-mails and using the Internet during instructional time if the violations were brought to her attention. Mr. Licata therefore concluded that it would be "fundamentally unfair" to dismiss Ms. Buglovsky for this conduct. Id. Mr. Licata also declined to find that the web-browsing was part of a pattern of unbecoming conduct, as a consequence of the prior improvements in Ms. Buglovsky's behavior. Id. at pg. 64.

It follows that this Court finds that Mr. Licata gave sufficient weight to all of the evidence presented. Mr. Licata's divergence with the Board's position can be attributed to his decision to give substantial weight to Ms. Buglovsky's improved behavior and positive performance evaluations. The Court finds that Mr. Licata acted within his discretion in considering the totality of the circumstances and weighing the evidence as he did.

Whether Mr. Licata Properly Interpreted the Board's Policies

Mr. Licata's Arbitration Opinion and Award outlines the bases for his conclusions with respect to the charges asserted by the Board against Ms. Buglovsky. Mr. Licata based his decision on the assertion that a lesser punishment would address Ms. Buglovsky's conduct more effectively than dismissal would, given the circumstances surrounding her initial punishment, her subsequent interactions with the Board including positive performance evaluations, her improved conduct, and her understanding of what was expected of her thereafter.

Although the Board's policies prohibit certain behavior in which Ms. Buglovsky undisputedly engaged, the Board's policies do not mandate dismissal as a consequence. Additionally, the Court finds that Mr. Licata properly credited Ms. Buglovsky's testimony that she did not understand the Board's policy to mean that she was prohibited from sending personal e-mails of an appropriate nature, and that she understood that other teachers frequently used the computers for personal reasons during non-instructional time. In considering whether Ms.

Buglovsky had proper notice regarding the impropriety of her conduct, Mr. Licata also found that the Board's policy was worded in a manner that incorporates both legal and non-legal jargon, making it "unduly complex." Mr. Licata also referenced the April 2009 letter of reprimand, which referenced e-mails of a sexual nature.

This Court finds that this was not an attempt on the part of Mr. Licata to "re-write" the Board's policy. Instead, this Court finds that Mr. Licata properly interpreted Ms. Buglovsky's understanding of the Board's computer usage policy in the context of other communications and circumstances that may have influenced Ms. Buglovksy's perception of the Board's expectations for her conduct. Thus, this Court finds that Mr. Licata did not misinterpret or fail to give sufficient weight to the Board's policy. It should also be noted that the Policy does not carry the weight of a collective bargaining agreement, so reference to public service precedent that binds an arbitrator to give deference to a collective bargaining agreement does not apply here.

STEPHAN C. HANSBURY, P.J. Ch.

FILED

JUL 16 2013

STEPHAN C. HANSBURY
PRESIDING JUDGE
CHANCERY DIVISION

SCHENCK, PRICE, SMITH & KING, LLP
220 Park Avenue
Florham Park, New Jersey 07932
(973) 539-1000
Attorneys for Plaintiff
Randolph Board of Education

RANDOLPH TOWNSHIP BOARD OF EDUCATION, Morris County, Plaintiff, v. JILL BUGLOVSKY, Defendant.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: MORRIS COUNTY DOCKET NO: C16-13 CIVIL ACTION **ORDER**

THIS MATTER having opened to the court by Schenck, Price, Smith & King, L.L.P., attorneys for the Randolph Township Board of Education (hereinafter "Plaintiff"), upon the filing of a Verified Complaint and Order to Show Cause against Defendant, Jill Buglovsky ("Defendant"), to vacate the decision of Arbitrator Joseph Licata in the matter docketed as Commissioner of Education Agency Docket No. 265-9/12, and the Court having reviewed the papers and for good cause shown:

IT IS on this 16th day of July, 20___

ORDERED as follows:

1. The December 21, 2012 award of Arbitrator Joseph Licata in the arbitration entitled In the Matter of the Arbitration of Certified Tenure Charges Between the Randolph Township Board of Education and Jill S. Buglovsky, docketed as Agency Docket No. 265-9/12, is hereby vacated; and
2. Ms. Jill Buglovsky is hereby ordered dismissed from her tenured position as a teacher in the Randolph Township School District; and

2. Defendant shall pay to Plaintiff ~~reasonable~~ attorney's fees and costs of suit in an amount to ~~be~~ determined; and denied

3. Counsel for Plaintiff shall serve a copy of this order upon all interested parties and attorneys of record within seven (7) days from the receipt hereof.

P.J.Ch.
STEPHAN C. HANSBURY, JUDGE
SUPERIOR COURT OF NEW JERSEY

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

----------X

In the Matter of Tenure Charges filed by
The School District of the Borough of
New Milford, Bergen County, New Jersey
Against Lawrence Henchey

Agency Docket No. 322-11/14

SUMMARY DECISION &
CASE MANAGEMENT ORDER
(On Reconsideration)

Issued: January 6, 2015

----------X

ARBITRATOR
Joseph Licata, Esq.

APPEARANCES

FOR THE PETITIONER
Vittorio S. LaPira, Esq.
Fogarty & Hara

FOR THE RESPONDENT
Sheldon H. Pincus, Esq.
Bucceri & Pincus

NATURE OF DISPUTE

On January 3, 2015, I filed with the New Jersey Department of Education, Bureau of Controversies and Disputes Summary Decision and Case Management Order. In summation, I granted Mr. Henchey's Motion for Summary Decision with respect to Charges Nos. 1-4 of the November 7, 2014 Tenure Charges. I denied the motion with respect to Charge No. 5, pars. 12-19. Lastly, I directed the parties to observe the following case management order set forth on pages 40 and 41 in anticipation of the hearing set to commence on Thursday, January 8, 2015:

> 1. The hearing is now limited to the following issue: Did the Board have just cause to dismiss Lawrence Henchey from his teaching position based on his alleged continued incapacity and related conduct unbecoming as specifically set forth by Charge No. 5, pars. 12-19?;
>
> 2. All documents relevant to the charges of incapacity and conduct unbecoming (including rebuttal letters, if any) prior to the 2013-2014 school year shall be admitted without testimony;
>
> 3. The parties may simply refer to the Statement of Evidence identifying markers without the need to separately introduce the same documents as exhibits; documents obtained in discovery that are not contained in the Statement of Evidence must be introduced in exhibit format; and
>
> 4. Testimony shall be limited to the events of the 2013-14 school year, although the "decision-maker" may testify in summary fashion as to how, if at all, he or she factored in Henchey's overall work record (as reflected in the Statement of Evidence) in connection with the charges of incapacity and conduct unbecoming and the recommendation for dismissal. Mr. Henchey, of course, may refer to those portions of his prior work record that he deems supportive of his continued employment in the District.

On Sunday, January 4, 2015, the Board filed a letter brief/motion for reconsideration. The Board takes issue with that portion of my Summary Decision

holding that the Board failed to comply with the mandatory evaluation procedures of TEACHNJ for the 2013-14 school year, because it did not conduct a mid-year evaluation of Mr. Henchey. Perhaps correctly, the Board observes that the new law does not require a mid-year evaluation unless a teacher has been rated partially effective in his most recent annual summative evaluation – which could not take place under Section 25 until after the 2013-14 school year. The Board requests that it be permitted to utilize the 2013-14 evaluation in the instant tenure charge proceedings to demonstrate inefficiency, incapacity, and conduct unbecoming.

On January 5, 2014, Mr. Henchey filed a letter in opposition to the Board's request for reconsideration. Henchey accuses the Board of backpedaling from its previous admission that it did not comply with Section 25. Apart from the mid-year evaluation issue, Henchey observes that the Board failed to submit in discovery any proof that its evaluation rubric (McRel) was submitted to or approved by the Commissioner. Mr. Henchey opines: "In this case the Board shot its gun prematurely and the lack of a mid-year evaluation is but one of the errors it committed in seeking to bring inefficiency charges against Henchey." Mr. Henchey urges the Arbitrator to decline reconsideration for trial reasons as well: "To allow the Board to use those observations to demonstrate inefficiency, incapacity and conduct unbecoming would simply open a Pandora's box, because inevitably each party would then feel compelled to refer to prior observations/evaluation to refute and/or allow for consideration of the totality of the circumstances."

After reviewing the Board's motion, I must deny same. The undersigned's twofold rationale for rejecting the Board's Section 8 position with respect to the 2013-2014 school year was articulated in the alternative. The primary thrust of the rationale, as set forth at pages 32 to 33, is that the legislature intended teachers to have the 2013-2014 and 2014-2015 school years to see "if they could pass muster under Section 25." Thus, I agreed with Henchey's argument that a Section 8 proceeding for inefficiency cannot be advanced with respect to the 2013-14 school year. As such, I concluded "that any Section 8 proceeding necessarily must be limited to school years 2012-2013 and prior." In the alternative, I reasoned: "At the very least, even if Section 8 is still intact, certainly, a Section 8 proceeding cannot be based on a legally flawed 2013-2014 school year evaluation." I then analyzed the Board's evaluation of Henchey during the 2013-2014 school year under Section 25 and held that the Board failed to comply with the new law by omitting a mid-year evaluation performed by the School Improvement Panel (pages 33-35).

In considering the Board's argument on reconsideration, I must reaffirm my grant of Summary Decision with respect to Charges Nos. 1-4 regarding the 2013-14 school year based on the first of two alternative rationales set forth above, i.e., the inapplicability of Section 8 to interfere with the first two operative years of Section 25 (2013-14 and 2014-15). While I realize that Arbitrator De Treaux allowed such Section 8 evidence of inefficiency in Martinez, as Henchey aptly notes, the issue was not raised by Mr. Martinez who, for some reason, represented himself and, thus, "had a fool for a client." To the extent that Arbitrator Gerber reached a contrary conclusion in Audrey Cuff, I note

the support for the undersigned's conclusion based on the several arbitration decisions noted by Henchey in his reply brief dated December 23, 2014.

I add that what is clear is that the future of tenure disputes involving efficiency was intended to lie within Section 25 and not Section 8; the first year the Section 25 clock began running was 2013-14; and all teachers, as part of the comprehensive legislative covenant reached, were provided with an opportunity to prove their efficiency during the 2013-14 and 2014-15 school year based on a rubric approved by the Commissioner of Education. While this may have resulted in some teachers avoiding "justice" for their poor performance in years leading up to the 2013-14 school year, I observe, boards of education still had the ability to take action prior to the commencement of the 2013-14 school year for inefficiency under Section 8 and Section 25 did not preempt Section 8 cases involving incapacity, conduct unbecoming and other just cause. I leave off with the thought that the new legislation – which addressed a plethora of tenure-related matters – understandably may not have been perfectly drawn with respect to each and every contingency subsequently arising. Thus, for all these reasons, even if I retract my alternative rationale for granting Summary Decision, i.e., the Board's failure to conduct a mid-year evaluation, such action would not change the outcome of my January 3, 2015 Summary Decision, but only eliminate the second of two alternative rationales in support of my ultimate finding and order. In so concluding, I comment that, unless this matter is remanded, I need not address Mr. Henchey's point that the Board failed to comply with other aspects of TEACHNJ, e.g., failure to demonstrate that it timely secured the approval of the McRel rubric by the Commissioner

of Education and, thus, could not rely on the 2013-14 evaluation, even if the lack of a mid-year evaluation in 2013-14 was appropriate.

In light of the foregoing, and for the reasons contained in my January 3, 2015 Summary Decision, I reiterate, the heart of the dispute remaining is whether the Board had just cause to dismiss Mr. Henchey for continued incapacity and conduct unbecoming based on the 2013-14 allegations set forth at Charge No. 5, pars. 12-19. As to the distinction between inefficiency and incapacity, the latter offenses involve, among other things, a teacher's chronic failure to meet professional expectations, and unprofessional and hostile reactions to supervision by district personnel. See, IMO School District of the Borough of Butler, Morris County, 2010 WL 5624390; Board of Education of the Township of Parsippany-Troy Hills v. Greg Molinaro, 96 N.J.A.R. (EDU) 268, 1995 WL 863033 (1995); Bd. of Ed. Lawrence Twp. v. Lester Helmus, 2 N.J.A.R. 334 (1980). The Board may introduce any and all evidence originating during the 2013-14 school year in support of Charge No. 5, pars. 12-19 to prove Henchey's alleged incapacity and conduct unbecoming. Such evidence may include evidence of the assistance and/or constructive criticism provided to (or reiterated to) Mr. Henchey during the 2013-14 school year, no matter what the form – not to demonstrate inefficiency – but to serve as a predicate for the allegation that Henchey's incapacity and conduct unbecoming continued as demonstrated by the manner of his responses, or lack thereof, to such assistance and/or constructive criticisms.

Finally, both parties may refer to Mr. Henchey's overall work record (as contained in the Statement of Evidence) culminating with the 2012-2013 school year increment

withholding in support of their respective positions concerning the appropriate disciplinary penalty, if proof of continuing incapacity and conduct unbecoming is demonstrated based on Henchey's actions and/or or inactions during the 2013-14 school year.

CONCLUSION

Based on the foregoing, I must deny the Board's request for reconsideration, but I issue this decision for clarification and guidance given the fast-approaching commencement of the hearing. The parties are referred to the Case Management Order set forth above and within my original Decision.

Respectfully submitted,

Joseph Licata

Dated: January 6, 2015

State of New Jersey
Government Records Request
Receipt

Requestor Information

David Foster
The Trentonian
600 Perry Street
Trenton, NJ 08618

dfoster@trentonian.com
609-349-7437

Request Date: January 5, 2015
Maximum Authorized Cost: $100.00
Email

Request Number: W93149
Request Status: In Progress
Ready Date:

Custodian Contact Information
Chief of Staff
Records Custodian
100 Riverview Plaza
P.O. Box 500
Trenton, NJ 08625-0500
OPRA.CUSTODIAN@doe.state.nj.us
609-943-4599
By

Status of Your Request

Your request for government records (# W93149) from the Chief of Staff has been reviewed and is In Progress. Detailed information as to the availability of the documents you requested appear below and on following pages as necessary.

The cost and any balance due for this request is shown to the right. Any balance due must be paid in full prior to the release / mailing of the documents.

If you have any questions related to the disposition of this request please contact the Custodian of Records for the Chief of Staff. The contact information is in the column to the right. Please reference your request number in any contact or correspondence.

Cost Information

Total Cost:	$0.00
Deposit:	$0.00
Total Amount Paid:	$0.00
Balance Due:	$0.00

Document Detail

Div	Doc #	Doc Name	Redaction Req	Pages	Legal Size	Electronic Media	Other Cost

---------- No Document Detail ----------

1/5/2015: Received.

Your request for government records (# W93149) is as follows:

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
TRENTON, NEW JERSEY

IN THE MATTER OF THE TENURE CHARGE OF INEFFICIENCY - against - URSULA WHITEHURST Respondent - filed by - STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, District/Petitioner AGENCY DOCKET NO. 282-9/14	OPINION AND DECISION ON MOTION TO DISMISS AND STAY PROCEEDINGS

Before: Prof. Robert T. Simmelkjaer, Esq.
Arbitrator

APPEARANCES

FOR THE SCHOOL DISTRICT

Ramon E. Rivera, Esq., Scarinci, Hollenbeck, LLC, Of Counsel and On the brief
Christina M. Michelson, Esq., On the brief
Laura M. Miller, Esq., On the brief

FOR THE RESPONDENT

Jason E. Sokolowski, Esq.,
Zazzali, Fagella, Nowak, Kleinbaum & Friedman, P.C.

BACKGROUND

On or about August 27, 2014, tenure charges of Inefficiency were filed against Ursula Whitehurst, Respondent, by John B. Weinstein, Principal of Bard High School Early College pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1. By letter dated September 25, 2014, this matter was subsequently transmitted to David C. Hespe, Acting Commissioner of Education at the New Jersey Department of Education, in accordance with N.J.S.A. 18A:6-17.3(c) to an arbitrator for a hearing.

The tenure charge of inefficiency was filed by the State District Superintendent , Ms. Cami Anderson ("District") pursuant to Section 25 of the Teachers Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), N.J.S.A. 18A:6-17.3. This section provides for the filing of such charges based upon ratings of ineffective or partially ineffective during two consecutive annual summative evaluations. In the case of Ms. Whitehurst, the District's Statement of Evidence includes evaluations from the 2012-2013 and 2013-2014 school years "as well as numerous memoranda, emails and correspondence regarding the Respondent's performance as a tenured teacher." In the Respondent's Annual Evaluation Summary Form dated June 20, 2013, she received an "Ineffective" rating for 2012-2013. In the Respondent's Annual Evaluation Summary Form dated May 23, 2014, she received a "Partially Effective" rating.

The District maintains that it "complied with all requirements set forth in the 'Tenure Employees Hearing Law' N.J.S.A. 18A:6-10 et seq. when it served

the Respondent with the tenure charge. Pursuant to N.J.S.A. 18A:6-10, "a tenured teacher shall not be dismissed from his or her position or reduced in compensation 'except for inefficiency, incapacity, unbecoming conduct or other just cause.'"

The District maintains that "the tenure charges against the Respondent in this matter are based on inefficiency under both N.J.S.A. 18A:6-10 and TEACHNJ. The District properly adhered to statutory requirements in place in the 2012-2013 school year and the subsequent regulations promulgated in the 2013-2014 school year. Thus, Respondent's 2012-2013 evaluations satisfied the requirements in effect in 2012-2013. Respondent was rated ineffective/partially effective in two consecutive years and therefore, her dismissal is warranted."

By letter dated October 3, 2014, the law firm of Zazzali, Fagella, Nowak, Kleinbaum & Friedman, P.C., on behalf of the Respondent, filed a Notice of Motion to Dismiss and Stay Proceedings.

The Respondent referred to "the authority of the Commissioner to decide this Motion as set forth in Section 25 of TEACHNJ, N.J.S.A. 18A:6-17.3" (and the implementing regulations), which provide, in relevant part, as follows:

> [u]pon receipt of a charge . . . the commissioner shall examine the charge. The individual against whom the charges are filed shall have 10 days to submit a written response to the charges to the commissioner. The commissioner shall, within five days immediately following the period provided for a written response to the charges, refer the case to an arbitrator and appoint an arbitrator to hear the case, *unless he determines that the evaluation process has not been followed.* (Emphasis added).

Since the law requires that the Commissioner not refer this matter to an arbitrator in the event the evaluation process was not followed by the District, the

Respondent notes that "the charges are based upon Ms. Whitehurst's evaluations for the 2012-13 and 2013-14 school years" and "as a matter of law, the 2012-13 evaluations cannot be used as one of the school years for measuring Ms. Whitehurst's performance under TEACHNJ."

Accordingly, the Respondent moved to dismiss the charges pursuant to N.J.A.C. 6A:3-5.3 and requested that "the Commissioner hold the charge in abeyance pending a determination on this application by the Commissioner under N.J.A.C. 6A:3-5.5." The regulation cited reads, in pertinent part, as follows:

> Except as specified in N.J.A.C. 6A:3-5.1(c), within 10 days of receipt of the charged party's answer or expiration of the time for its filing, the Commissioner shall determine whether such charge(s) are sufficient, if true, to warrant dismissal or reduction in salary. *If the charges are determined insufficient, they shall be dismissed and the parties shall be notified accordingly*... (Emphasis added).

By letter dated September 25, 2014, the law firm of Scarinci Hollenbeck, LLC, on behalf of Ms. Cami Anderson, State District Superintendent, transmitted the Notice of Inefficiency charges against Ms. Ursula Whitehurst, Respondent, to David C. Hespe, Acting Commissioner of Education. By letter dated October 3, 2014, the law firm of Zazzali, Fagella, Nowak, Kleinbaum & Friedman, P.C. filed a Motion to Dismiss the Inefficiency charge on behalf of the Respondent. On November 7, 2014, the District/Petitioner submitted its Opposition to Respondent's Motion to Dismiss and Stay of the Proceedings. On November 20, 2014, the Respondent submitted a Reply Brief to the Opposition Brief filed by the Newark Public Schools ("District") as well as to its October 31, 2014 correspondence regarding Respondent's Motion to Dismiss the Tenure Charge

alleging inefficiency, specifically correspondence sent to Ms. Charlotte Hitchcock, General Counsel of the District from Mr. Peter Shulman, Assistant Commissioner of the NJDOE. On December 5, 2014, the District submitted a sur-reply to the Respondent's Reply Brief. On December 16, 2014, the Respondent submitted a sur-sur. reply brief

By letter dated October 14, 2014, the undersigned was appointed as the arbitrator in the instant case by M. Kathleen Duncan, Director, Bureau of Controversies and Disputes, Department of Education, State of New Jersey pursuant to P.L. 2012, C. 26 signed into by law by Governor Christie on August 6, 2012. The letter reads as follows:

> Please be advised that, following receipt of respondent's answer on October 6, 2014, the above-captioned tenure charges have been reviewed pursuant to N.J.S.A. 18A:6-17.3e; upon review the Commissioner is unable to determine that the evaluation process has not been followed, and accordingly, on this date, the case is being referred to Arbitrator Robert T. Simmelkjaer as required by the statute.

STATEMENT OF FACTS

Ms. Ursula Whitehurst ("Whitehurst") is a tenured teacher and has been employed by the State-Operated School District of the City of Newark for over twenty-four (24) years.

The tenure charge of inefficiency filed against the Respondent is based upon the annual summative evaluation ratings she received for the 2012-2013 and 2013-2014 school year pursuant to N.J.S.A. 18A:6-17.3 or Section 25 of TEACHNJ, N.J.S.A. Section 25 mandates the filing of an inefficiency charge by the Superintendent in instances where a teacher is "rated ineffective or partially

ineffective in an annual summative evaluation" for at least two years. N.J.S.A. 18A:6-17.3(1) and (2). Section 25 further precludes any discretion in the matter by mandating that an inefficiency charge be filed. Section 25 further provides, however, that "[t]he only evaluations that may be used for the purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L. 2012, c. 26 (C.18A:6-117 et al.)." See N.J.S.A. 18A:6-17.3(d).

During the 2012-2013 school year, the Statement of Evidence indicates that Respondent received the following evaluations from her administrators:

- Formal Observation Form dated February 21, 2013;
- Formal Observation Form, dated June 13, 2013;
- Annual Evaluation Summary Form dated June 20, 2013 (Respondent received an Ineffective rating).

Neither of the formal observations was announced or involved a pre-observation conference.

During the 2013-2014 school year, the Statement of Evidence indicates that the Respondent received the following evaluations:

- Corrective Action Plan dated October 15, 2013;
- Long Observation Summary Form dated December 23, 2013;
- Annual Evaluation Summary Form dated May 23, 2014 (Respondent received a partially Effective rating);
- Long Observation Summary Form, dated May 23, 2014;
- Short Observation Summary Form dated May 28, 2014.

CONTENTIONS OF THE PARTIES

Respondent Position

The crux of the Respondent's position is that "Ms. Whitehurst's Annual Summative Evaluation pertaining to the 2012-13 school year may not be considered in connection with tenure charges brought pursuant to N.J.S.A. 18A:6-17.3." According to the Respondent, since the applicable regulations establishing guidelines and procedures for the timing and conduct of teacher evaluations pursuant to both TEACHNJ and Achieve NJ did not go into effect until the beginning of the 2013-14 school year, specifically in October 2013, "the District has not alleged viable tenure charges under N.J.S.A. 18A:6-17.3.

"Those regulations include, but are not limited to, provisions governing the content of evaluation rubrics and components, N.J.A.C. 6A:10-4.1, procedures on rubric approval by the Commissioner, N.J.A.C. 6A:10-5.1, and procedures concerning the timing, form, nature and number of Teacher evaluations and observations, N.J.A.C. 6A:10-4.4." (Resp. brief @ 4).

The law, according to the Respondent, "clearly provides that the utilization of the preliminary evaluation rubrics by no later than January 31, 2013 was merely a 'pilot program' to test and refine those evaluation rubrics, not the full implementation of them." See N.J.S.A. 18A:6-123. It states:

> "[b]eginning no later than January 31, 2013, a board of education shall implement a pilot program to *test and refine* the evaluation rubric. (Emphasis added)."

Furthermore, Respondent asserts, in reference to N.J.S.A. 18A:6-123(e), that the actual implementation of the approved rubrics following the pilot program was not scheduled to commence until the 2013-14 school year.

> "[b]eginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric for all educators in all elementary, middle, and high schools in the district."

In addition to the fact that the teacher evaluation and observation guidelines were not established by the Commissioner until October 2013, after the commencement of the 2013-14 school year, Respondent notes that "contrary to the applicable regulatory and statutory requirements, the District did not have a School Improvement Panel ('Panel') in place at Respondent's school during the 2012-13 school year." Both N.J.S.A. 18A:6-120 and N.J.A.C. 6A:10-3.1 require that each school within a District establish a Panel to conduct evaluations and oversee the mentoring program as follows:

> *[t]he panel shall oversee the mentoring of teachers and conduct evaluations of teachers*, including an annual summative evaluation, provided that the teacher on the school improvement panel shall not be included in the evaluation process, except in those instances in which the majority representative has agreed to the contrary. (Emphasis added). (N.J.S.A. 18A:6-120

Given the foregoing statutory and regulatory requirements, the Respondent contends that "the District's failure and/or inability to meet the standards of the regulatory scheme during the 2012-13 school year renders formal judgment on teacher's performance for that year through tenure removal proceedings inappropriate and unlawful."

Alluding to the Department of Education's own guidance entitled "Summary of Legal Requirements for Evaluation and Tenure cases," the Respondent cites the following excerpt:

> The TEACHNJ Act outlines a new process for filing inefficiency charges under the new evaluation system (AchieveNJ). This guide outlines *the actions required in law before bringing an inefficiency tenure charge* based on the new tenure revocation process. (Emphasis added).

"Among the 'actions required in law' required to comply with the regulatory scheme established by the Commissioner – and not adopted until October 2013 – are minimum observation requirements for tenured teachers, a mandatory summative evaluation process, minimum Corrective Action Plan requirements and the existence of a School Improvement Panel." Since these mandatory requirements were not satisfied by the District in 2012-13 and the NJDOE's own statutory and regulatory guidance for tenure cases precludes consideration of evaluations conducted prior to full implementation of both TEACHNJ and AchieveNJ, which occurred in the 2013-14 school year, not the 2012-13 school year, the Respondent argues that the charges are legally and procedurally defective.

As further evidence that the 2012-13 summative evaluation cannot be considered, the Respondent cites the regulatory guidance published by NJDOE providing that the 2012-13 evaluations conducted as part of a pilot program cannot be considered in conjunction with inefficiency charges. The particular FAQ addressing this issue reads:

> Q: <u>Will summative ratings "count" this year (2012-13) toward tenure decisions?</u>

> A: No – the only item "on the clock" is the mentorship year for new teachers. No evaluation outcomes in the 2012-13 school year will impact tenure decisions. 2013-14 is the first year where the statewide system will be in place, and the first year when summative rating "clock" (i.e.: teachers needing to be rated at least effective for two of three years) will start.

In accord with the FAQ is the Evaluation Committee Final Report prepared by the Commissioner, in which the 2012-13 year is described as a "capacity building year" in anticipation of TEACHNJ and AchieveNJ scheduled to be implemented in 2013-14.

After reviewing Paterson Police PBA Local 1 v. City of Paterson, 433 N.J. Super 416 (App. Div. 2013), wherein the agency guidance was given substantial deference, the Respondent concludes that "the tenure charges filed against the Respondent conflict with the regulatory guidance issued by the Department of Education." Since 2012-13 "does not count," the District's Tenure Charge based on only one (1) year (2013-14) is "facially insufficient to sustain an inefficiency charge," which under N.J.S.A. requires two years of deficient performance.

The Respondent further maintains that dismissal of the charge is warranted because the District failed to provide Ms. Whitehurst with the observations mandated by N.J.A.C. 6A:10-4.4. Referring to N.J.S.A. 18A:6-17.3(c), specifically, "[t]he Commissioner shall examine the charge...and appoint an arbitrator to hear the case unless he determines that the evaluation process has not been followed," the Respondent argues that "the Commissioner is statutorily prohibited from forwarding (these) tenure charges to an arbitrator for resolution, and must dismiss the charges instead...Mere referral of this motion

for arbitral consideration would create an undue risk of inconsistent legal rulings which would ultimately cast doubt on the validity of any resulting rulings on an application to vacate an arbitration award and/or a subsequent appeal to the Appellate Division. As such, a stay of this proceeding and consideration of this application by the Commissioner, pursuant to N.J.A.C. 6A:3-5.5, is warranted."

To the extent the District argues that it was not bound by the regulatory requirements for observations and evaluation rubrics that were not in place in 2012-13, the Respondent responds that the applicable law and its implementing regulations were part of a comprehensive statutory scheme, including the provision of "well-defined, transparent and uniform observation and evaluation guidelines and procedures," in exchange for more the expeditious removal of deficient teachers, with more limited defenses available to them. As such, the Respondent contends that the District should not be allowed to benefit from some statutory requirements while omitting or circumventing others.

District Position

The District, in "Petitioner's Brief in Opposition to Respondent's Motion to Dismiss and Stay of the Proceedings," initially states that "the Commissioner of Education has sole authority to determine if the 'evaluation process' was followed properly by the District when it served its tenure charges" pursuant to N.J.S.A. 18A:6-17.3 and once the matter is referred to the arbitrator, the arbitrator is obligated to review the case on the merits and determine whether or not:

> (1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;

(2) there is a mistake of fact in the evaluation;

(3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or

(4) the district's actions were arbitrary and capricious. N.J.S.A. 18A:6-17.3.

In the absence of a finding validating any of the foregoing deficiencies in the evaluation, the District maintains that the Respondent's Motion to Dismiss must be denied.

After reviewing the undisputed facts, including the requirements of TEACHNJ that all public school districts develop "evaluation rubrics" to assess the performance of their teachers, and to obtain approval for their "rubrics" from NJDOE by December 31, 2012, N.J.S.A. 18A:6-123(c), the District notes that it "adopted an evaluation rubric as part of the evaluation system known as the Newark Public Schools Framework for Effective Teaching ('Framework') to be implemented in the 2012-13 school year. The Framework described, inter alia, the new levels of performance for teachers, namely, "highly effective, effective, partially effective, and ineffective."

The District further notes that in October 2012, the District and the Newark Teachers Union ("NTU") entered into a Memorandum of Agreement ("MOA") for a successor CBA wherein a new evaluation process was incorporated into contract language. Specifically, the MOA states:

> **NPS will implement a new evaluation system beginning SY 2012-13.** In accordance with the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), N.J.S.A. 18A:6-117 *et seq.*, teachers will receive an annual

> summative evaluation rating that designates them as highly effective, effective, partially effective or ineffective. [Emphasis added.]

Moreover, Section II of the MOA, which pertains to compensation and benefits, stated that "NPS shall implement a new educator evaluation system with four rating criteria beginning in school year 2012-2013. The agreed-upon compensation system would be based on teacher performance as measured by the new evaluation framework."

Prior to the negotiated settlement of the MOA, seven (7) schools in the District in 2011-2012 had participated in a "pilot" of a new teacher evaluation system. The NJDOE approved the District's participation in the Pilot and "allowed the District to begin using a new framework" and the four prong rating system in the 2011-2012 school year. This framework and rating system was continued during the 2012-13 school year "following the passage of the MOA and TEACHNJ."

With respect to clarifying the NJDOE's intent set forth in its "Guide to the TEACHNJ Act" as well as the status of the District's evaluation rubric during the 2012-13 school year, on October 24, 2014, Assistant Commissioner Shulman, on behalf of the NJDOE, provided the following "clarification" of the agency's intent:

> [S]ince August 2012, the Department has published many resources meant to support school districts in the implementation of the Act. One such document was a response to questions regarding TEACHNJ's new requirement that teachers must demonstrate four years of teaching within a school district, with a rating of effective or highly effective in two annual summative evaluations within the first three year of employment . . . [many non-tenured teachers requested] the District to clarify how the law applied to their tenure acquisition and the Department responded accordingly:

> *No evaluation outcomes in the 2012-13 school year will impact tenure decisions. 2013-14 is the first year where [sic] the statewide system will be in place, and the first year when summative rating "clock" . . . will start.*
>
> [S]uch clarifications did not indicate a prohibition on school districts to use 2012-2013 evaluation data to make personnel decisions, such as the decision to renew or non-renew a nontenured teacher or the decision to bring a tenure charge of inefficiency against a tenured teacher . . . In fact, the Department issued multiple publications notifying pilot school districts that any personnel consequences connected with evaluations were a matter of local decision and applicable State law . . . The Department did not perceive any limitations to the use of evaluation rubrics in the 2012-2013 school year for personnel decisions as no such limitation is mentioned in the TEACHNJ Act . . . (Id.) (Emphasis added).

Pursuant to its legal argument that the District's evaluation of the Respondent for the 2012-2013 school year is valid as TEACHNJ was in effect and in full force in the 2012-2013 school year, the District acknowledges that TEACHNJ was enacted by the New Jersey Legislature ("Legislature") on August 6, 2012 and each statute thereafter established the procedure for adjudicating tenure charges, N.J.S.A. 18A:6-17.5 From this chronology of statutory enactments, the District concludes that "there is no question that the evaluations in the 2012-2013 school year were to be used toward determining if tenure charges were warranted."

The District, in addressing the Respondent's reliance on the NJDOE web page entitled "Educator Frequently Asked Questions," argues that "by its terms, this statement is irrelevant to any tenure charge, because it refers to only the acquisition of tenure by non-tenured teachers rather than the evaluation or dismissal of tenured teachers as follows:

Q. Will summative ratings "count" this year (2012-13) toward tenure decisions?

A. No – only the item "on the clock" is the mentorship year for new teachers. No evaluation outcomes in the 2012-13 school year will impact tenure decisions. 2013-14 is the first year where the statewide system will be in place, and the first year when summative rating "clock" (*i.e.*: teachers needing to be rated at least effective for two of three years) will start.

From the "clarification" of the FAQ it received from Assistant Commissioner Shulman, the District asserts that "it has been unequivocally established that the term 'tenure decisions' does not refer to the determination to file tenure charges, rather it refers to the decision of whether to retain a teaching staff member past the date on which he or she will acquire tenure."

The District further argues that "even if the Department had intended its FAQ to serve as guidance on whether 2012-2013 evaluations should "count" for purposes of inefficiency charges against tenured teachers, such guidance would have no regulatory force. In that case, the FAQ would constitute invalid *de facto* rulemaking. Where an agency issues guidance without utilizing formal rulemaking procedures, the guidance may be disregarded as invalid '*de facto* rulemaking' if it meets the test set forth in Metro Media, Inc. v. Director, Division of Taxation, 97 N.J. 313 (1984)." The District cites the Appellate Division decision in Besler & Co., Inc. v. Bradley, 361 N.J. Super @ 171, where the Metromedia six factors are weighed to determine whether the APA rulemaking process should have been utilized.

Reviewing the chronology of requirements set forth in TEACHNJ, among which were that school districts "institute pilot programs to test their new

evaluation rubrics by, January 31, 2013 at the latest, implement their evaluation rubrics by the beginning of the 2013-14 school year at the latest, and '[b]eginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved adopted evaluation rubric...' (emphasis added), the District discerns nothing in TEACHNJ or its regulations that evaluations performed in 2012-2013 in accordance with an adopted, approved rubric are to be treated differently from those performed in 2013-2014 for the purpose of triggering tenure charges under N.J.S.A. 18A:6-17.3.

In its second point, the District argues that the District followed the evaluation process in accordance with N.J.S.A. 18A:6-17.3 because the Commissioner, who is solely authorized to determine if the District properly followed the evaluation process, referred the matter to the undersigned Arbitrator for further proceeding. N.J.S.A. 18A:6-17.3(c) provides the following:

> c. Notwithstanding the provisions of N.J.S.A. 18A:6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a. of this section, the commissioner shall examine the charge. The individual against whom the charges are filed shall have 10 days to submit a written response to the charges to the commissioner. The commissioner shall, within five days immediately following the period provided for a written response to the charges, refer the case to an arbitrator and appoint an arbitrator to hear the case, unless he determines that the evaluation process has not been followed. (Emphasis added).

Since N.J.S.A. 18A:6-16 similarly provides that the Commissioner has the authority to determine the sufficiency of a tenure charge "to warrant dismissal or reduction in the salary of the person charged" and is "only prohibited from referring a matter to an arbitrator 'when a motion for a summary decision has been made prior to that time,' the Commissioner may retain the matter for

purposes of deciding the motion." The Commissioner's transmission of the inefficiency charge to the arbitrator is deemed evidence of its procedural validity.

As illustrative of the process, the District cites I/M/O the Tenure Hearing of Edgard Chavez, State-Operated School District of the City of Newark, DKT, No. 269-9/12 (February 6, 2013) where ("An arbitrator recognized the Commissioner statutory authority and provided that '[b]ecause the charges have been deemed sufficient by the Commissioner, I find I need not determine whether or not the District complied with claimed controlling procedures and process, or whether the District was required to comply with a tiered evaluation system or other issue...'"). In the Chavez case, the Commissioner exercised his authority pursuant to N.J.S.A. 18A:6-17.3(c) when he issued his October 8, 2014 correspondence to the parties and Arbitrator Joyce M. Klein as follows:

> Please be advised that following receipt of respondent's answer on October 1, 2014, the above-captioned tenure charges have been reviewed pursuant to N.J.S.A. 18A:6-17.3c; upon review the Commissioner is unable to determine that the evaluation process has not been followed, and accordingly, on this date, the case is being referred to Arbitrator Joyce M. Klein as required by the Statute. (Emphasis added).

By denying the Respondent's Motion to Dismiss and transmitting the matter to an arbitrator, the District argues that the Commissioner issued his Final Administrative Decision, necessitating that the matter proceed to a hearing on the merits. After reviewing the standard for a Motion to Dismiss before the Commissioner set forth in N.J.A.C. 6A:3-1.10, the Commissioner's decision to refer the charges to the undersigned Arbitrator as opposed to dismissing the pleadings is deemed tantamount to establishing that the Respondent failed to

prove that the "District's tenure charge fails to advance a cause of action, lack jurisdiction, failure to prosecute or other good reason."

The District argues that "the Arbitrator has jurisdiction to decide this matter for inefficiency under either N.J.S.A. 18A:6-16 or N.J.S.A. 18A:6-17.3 of the TEACHNJ Act." The Arbitrator refers to the decision of the Arbitrator in Chavez supra, as follows:

> TEACHNJ provides more broad authority for arbitrator review of tenure charges than that narrowly provided in Section 23 [Now N.J.S.A. 18A:6-16]. Section 22 of the Act [Now N.J.S.A. 18A:6-17.1] provides, among other things, for the establishment of an arbitrator panel, rules for exchange of information by the parties, timelines for arbitration, use of the American Arbitration Association labor arbitration rules, and, importantly the issue of authority granted arbitrators by the statute, that; 'The Commissioner of Education shall maintain a panel of 25 permanent arbitrators *to hear matters pursuant to N.J.S. 18A:6-16*.' The plain meaning of such language supports a conclusion that the Act grants authority to arbitrators to consider all types of tenure charges, including efficiency charges beyond merely those governed by Section 23."

The District cites I/M/O Tenure Hearing of Dr. Andrew Cuff, Cumberland Regional School District, DKT. No. 71-3/14 (June 26, 2014) for its finding that inefficiency charges initiated before the new procedures of TEACHNJ had been fully implemented "must be decided upon the old standard."

The District maintains that the instant inefficiency charges have been plead under both sections pursuant to N.J.S.A. 18A:6-17.3, which provides for mandatory charges brought on the basis of two consecutive annual ratings of ineffective or partially effective, and N.J.S.A. 18A:6-16, which provides for the adjudication of inefficiency charges on other non-mandatory grounds such as

insubordination. "This matter was plead under both sections." (See Miller Cert. Exhibit A).

The District distinguishes the decision of Arbitrator Bluth, I/M/O the Tenure Hearing of Sandra Cheatham, State-Operated School District of the City of Newark, Essex County, Dkt. No. 420-14 (October 16, 2014). "There the Arbitrator over-stepped his authority in making a decision as to the appropriateness of the District's evaluation process, a matter expressly left to the Commissioner pursuant to N.J.S.A. 18A:6-10 and 17.3." Finally, the District argues as follows:

> Accordingly, even if the arbitrator here concludes, notwithstanding the facts and argument presented herein, that the requirements for inefficiency tenure charges under N.J.S.A. 18A:6-17.3 have not been met, the charge against Respondent should not be dismissed. Instead, the charge must be evaluated under N.J.S.A. 18A:6-16, and, thus, the case should proceed to hearing.

Respondent's Reply to the District's Opposition to the Motion to Dismiss

The Respondent, in her Reply, asserts that the District has "turn[ed] a blind eye to the clear mandate of the law and the recent decision on the exact same issues presented herein rendered by Arbitrator Bluth in I/M/O Cheatham and the Newark Public Schools," supra.

Notwithstanding the Shulman letter, Respondent contends "the law is clear that the 2012-13 school year was deemed by law, regulation, and the Department of Education's own advisory committees, and the Department of Education itself to be a 'pilot' year. An arbitrator, in considering this precise issue has so ruled recently, and did so persuasively, as discussed in detail *infra*." (Resp. Reply brief @ 3).

Insofar as the District's reliance on its MOA with the NTU is concerned, the Respondent notes that tenure is a statutory right unaffected by any reference to the new evaluation rating system scheduled to begin in 2012-13 in the parties' MOA and therefore any claim that the parties and Respondent were "bound to the implementation of a law that did not even exist in 2012-13 must be rejected."

The Respondent further notes: "In the first place, the MOA does not mention tenure at all. Second, in order to waive a statutory right, a waiver must be clear and explicit. Third, the TEACH NJ Act has a preemptive effect, and that statutory mandate cannot be waived." Fourth, the Respondent takes issue with the District's contention that transmittal of the charges and the motion to dismiss to the arbitrator was tantamount to a Commissioner "determination that the District complied with the many strict standards imposed by the evaluation process pursuant to N.J.S.A. 18A:6-17.3 because the Commissioner expressly directed the Arbitrator to decide the motion."

The Respondent further rejects the District's assertion that the Arbitrator can "transform the charges brought under one specific section of the law into a different type of charge altogether." Moreover, it dismisses the District's reliance on inefficiency charges brought prior to the effective date of TEACHNJ "in support of the general proposition that it cannot be foreclosed from proceeding against Respondent..."

The Respondent argues that the District's attempt to rely on evaluations it conducted in 2012-13 because it conducted its own pilot program in 2011-12 "completely ignores the TEACHNJ Act, its implementing regulations, the

voluminous Department of Education issued guidance, as well fundamental principles governing waiver of statutory rights, and the Department's multiple and consistent statements explaining how TEACH NJ was to be implemented."

The Respondent notes that the District's attempt to buttress its position that because the law was adopted in August 2012, in the 2012-13 school year, "it automatically applied during the 2012-13 school year. Since the 2012-13 school year represents a date that precedes the full effective implementation date of the revised Tenure Act...the charge of inefficiency brought against Respondent based on evaluations issued in 2012-13 and 2013-14 are fatally flawed and are ripe for dismissal under the statute."

The Respondent considers the Cheatham decision to be "sound and consistent with the TEACHNJ Act" and entitled to "substantially greater weight than the District's recent attempts at including a document obtained on an ex parte basis as a result of its dissatisfaction with Mr. Bluth's decision."

Referring to N.J.S.A. 18A:6-123(d) and (e), the Respondent notes that although the Act was adopted on August 6, 2012, "it provides for different implementation dates – a common practice." In the Respondent's view, the effect of the implementation dates was to convey the intent that the 2012-13 school year "was to serve as a test run year for purposes of all tenure related issues – not only criteria for attaining tenure, but also for completing evaluations and observations under the new evaluation procedures and rubrics, and revocation of tenure." The Respondent deems "inconsequential" the fact that the District "opted into a pilot program in the prior year (2011-12)." Whereas

"N.J.S.A. 18A:123 provides that a District will implement a pilot program to 'test and refine the evaluation rubric' by no later than January 2013 – approximately 5 months into the 2012-13 school year -- [i]t was not until the start of the 2013-14 school year that implementation of the evaluation rubrics was mandated...This begs the question how the District could comply in 2012-13 with regulations that did not exist until 3/4 of the way through the 2012-13 school year and not implemented until 2013-14?"

Notwithstanding the Shulman letter, the Respondent alludes to voluminous publications issued by NJDOE, as well as various Committee Reports issued in anticipation of the Act, "including an FAQ published by the Department, which cites in multiple parts, that 2013-14 was the first 'live' year for purposes of making tenure decisions of all kinds." With respect to the Shulman letter, Respondent writes:

> Respectfully, Mr. Shulman's letter represents little more than an admission that the District possesses absolutely no legal support for its claim that evaluation outcomes from the "pilot" 2012-13 school year count for purposes of tenure decisions, including tenure revocation. The letter, which entirely ignores all other references to the intent of the legislature, and communications from the Department of Education, claims that the FAQ that speaks to the "pilot year" was not intended to address tenure revocation timing, but, rather, timing for tenure acquisition. After posting the FAQ to the public for approximately two (2) years, and to now try to clarify that which is already clear to most everyone but the District, and just days after the Cheatham decision was issued, is circumspect at best. And for this reason alone, the letter should not be considered.

In its review of the sequence of events which culminated in the Shulman letter, the timing of which the Respondent deems "telling and suspicious to put it mildly," specifically its issuance a week after the Cheatham decision dated

October 16, 2014, the Respondent asserts that the District "coordinated with the Commissioner's office a belated attempt at a desperate get-out-of-jail free card concerning the meaning of the FAQ in question." Prior to the Shulman letter "that section of the FAQ in question makes no reference to acquisition or revocation but rather to tenure decisions..." That the Commissioner's office, having determined that the tenure charges should be decided by an arbitrator, would provide any comment in this matter, and then revise one section of a 15-page comprehensive document, including the FAQ that had been available to the public for at least the past two years, is considered problematic.

"Additionally, Mr. Shulman ignores the remainder of the very same comprehensive and authoritative FAQ, which unequivocally supports Respondent's position, on multiple pages, that 2012-13 was a capacity building year of development and that the teacher evaluation system would be implemented in 2013-14 and no sooner. Thus, not only is the letter not appropriate for consideration, the contrast between it and all of the prior communications from the Commissioner's office requires the conclusion that it is bogus." (Resp. brief @ 15).

Further evidence that 2013-14 was the first year in which the new evaluation system would count is provided in a memo dated January 7, 2014 to all Chief School Administrators et al. by NJDOE Assistant Commissioner and Chief Performance Officer Shulman as follows:

> "<u>As districts implement AchieveNJ for the first time in 2013-2014</u>, NJ SMART is preparing for a modified data collection to capture the multiple measures of educator practice and student growth that are aligned to AchieveNJ. In July 2014, we will conduct a separate

> Staff Evaluation Submission through NJ SMART and subsequently will sunset the evaluation data elements that are part of other NJ SMART submissions. In the first year of this collection, coordination will be necessary between each district's data management, personnel and administrators in charge of evaluation. Today, we are sharing information about the submission to provide districts with ample time to prepare to submit in July."

Until the Shulman letter, the Respondent contends that "Shulman himself" had announced to all Chief School Administrators, including Ms. Cami Anderson, that 2013-14 would be the first year for full implementation of the new teacher evaluation section as follows: "We have designated 2012-13 as a planning and capacity-building year. During this time, districts must engage in one of two options: participate in a second cohort of our pilot program, or build capacity through a defined series of steps for implementing the new system in 2013-14."

Also in his July 30, 2012 Memorandum, Shulman announced:

> "[a]s we prepare for statewide rollout of an improve educator evaluation system in 2013-14, all districts will conduct capacity-building activities detailed in previous memos and explained in our FAQs. The first of these requirements is to form a District Evaluation Advisory Committee (DEAC) to ensure stakeholder engagement in evaluation reform. We strongly advise these committees be formed as soon as possible, as they will help to drive decision making for all other parts of the process. To that end, we have provided an overview of the required membership of the DEAC (Appendix B) and a sample communications plan that DEACs may use to guide their initial meetings and plans for the 2012-13 school year (Appendix C). We will continue to provide information and resources for next year's capacity building activities as they become available." (Emphasis added).

The Respondent further argues that "[i]n the now infamous FAQ issued by the Department of Education, entitled '*Excellent Educators for New Jersey*" (See

Certification of Counsel dated November 20, 2014, Exhibit 4*), the Department explicitly sets forth the 2011-12 pilots in which the District participated, the 2012-13 statewide pilots and the then anticipated implementation of both TEACH NJ and its implementing regulations for the 2013-14 school year."

In summation, the Respondent maintains that "[t]hese FAQs, guidelines, summaries and reports are entitled to and must be given due diligence" as per Paterson, supra.

The Respondent disputes the District's contention that if it failed to comply with N.J.S.A. 18A:6-17.3, it may nonetheless proceed under the inefficiency alternative set forth in N.J.S.A. 18A:6-16. However, "their charge cites no alternate basis for proceeding against this Respondent" unless "the District wishes to pursue tenure charges against Respondent, based on only one (1) year of deficient performance during that time, then they are required to reinstate the Respondent and go back to the proverbial drawing board and in accordance with the applicable statutory and regulatory procedure."

"Although the District now seeks to proceed under Section 8 of TEACH NJ, the charges are grounded specifically on alleged inefficiency pursuant to Section 25 of the TEACH NJ Act, N.J.S.A. 18A:6-17.3, and can only be based upon that provision. Further, and pursuant to Section 25, the District must abide by the statutory and regulatory requirements set forth therein – namely that they

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* For example, this FAQ indicates that the new teacher and principal evaluation system will be implemented in 2013-14 (p. 1); that summative ratings would not count until 2013-14 (p. 4); that certain milestones had to be met to "prepare to implement new teacher and principal evaluations in 2013-14." (p. 6); that "the pilot would use the information for full implementation in 2013-14." (p. 8, 9); that "beginning in 2013-14, growth data for all qualifying teachers...will be a part of educator evaluations." (p. 14).

undergo a specific review procedure for procedural compliance, and that if this review process reveals non-compliance, the charges cannot move forward in the filing process. Nor can they proceed to arbitration. These laws constitute a statutory (and regulatory) imposed prerequisite to tenure charges, and, permitting the District to proceed under another section based on a year that the statute and administrative guidance deemed experimental and not to be used in pursuing tenure charges would render the requirements of Section 25 meaningless."

If the Legislature had intended for "deficient" inefficiency charges to proceed to arbitration via Section 8 of the Act, it would have so stated. Instead, it specifically imposed an obligation for each deciding entity, or its "designee" in the case of the Commissioner, to review the charges for procedural compliance. In the absence of procedural compliance, the Legislature chose to prohibit such charges from proceeding to an arbitration hearing as a matter of law. And lest there be any doubt that this was the intention of the Legislature, the Department of Education explicitly advised districts that at a minimum, "[d]istricts must ensure the following evaluation procedures are followed (at minimum) prior to filing an inefficiency tenure charge" and that "[f]ailure to adhere to these requirements can result in the tenure charge being dismissed." See Certification of Counsel, Exhibit 10, p. 1.

The District reiterates its position that by transmitting the case to the arbitrator for determination, "the Commissioner did not make any decision, findings, factual or legal."

The Respondent argues that "the parties' MOA does not and cannot authorize the District to file tenure charges based on the 2012-2013 evaluations." Despite the District's adoption of the four summative ratings, and the evaluation rubric developed by the Board in its MOA, "the MOA does not mention tenure at all. The parties' MOA makes absolutely no reference to the substantive processions of tenure charges for the 2012-13 school year, nor did the parties agree to any such terms in the MOA."

Moreover, the Respondent cites State v. State Supervisor Employees Assn., 78 N.J. 54, 80-81 (1978) and its progeny for the proposition that "where, as here, a statute or regulation establishes a term and conclusion of employment, the statute preempts the negotiated term." Insofar as the waiver of a statutory mandate or right is concerned, "it must be plain and unambiguous." Red Bank Regional Ed. Assn. v. Red Bank Regional High School District, 78 N.J. 122, 140 (1978).

In the Respondent's view, "if the District wishes to proceed against Respondent on statutory grounds other than 'inefficiency' such as 'incapacity,' 'unbecoming conduct,' or 'other just cause,' it is free to do so by filing such charges against Respondent in accordance with the requirements of Section 8 of the Act. What it cannot do is file (obviously) deficient inefficiency charges pursuant to Section 25 of the Act, and when they are rightfully judged to be deficient and subject to dismissal, attempt to argue in the alternative that they are not 'really' inefficiency charges and therefore should proceed to arbitration in accordance with Section 8 of the Act."

Finally, the Respondent contends that the District's interpretation of the law finds no support in the arbitration awards it has relied upon. The tenure charges at issue in both I/M/O Tenure Hearing of Lawrence E. Hawkins and I/M/O Tenure Hearing of Gerald Carter are distinguishable in that they allege unbecoming conduct and/or insubordination in addition to inefficiency, pursuant to Section 8 of the Act. "The charges in instant matter only allege inefficiency, which must proceed, if at all, in accordance with Section 25 of the Act."

In addition, the cases of Pugliese and Chavez are distinguishable as they were filed after the effective date of the TEACHNJ Act but prior to the implementation of its substantive provisions in 2012-13. Given the filing of these charges in the interim period between August 6, 2012 and September 2012, an issue arose as to "what substantive law to apply." TEACHNJ provided that its substantive provisions did not take effect until the 2013-2014 school year.

District's Sur-Reply

The District denies that any ex parte communication took place between Assistant Commissioner Shulman and Charlotte Hitchcock, its General Counsel, "that violated the Respondent's rights in this matter...The correspondence from Ms. Hitchcock specifically related to the Cheatham matter. The teacher in the Cheatham [case] was not a party to this separate Tenure charge."

The District notes that it is a "State-Operated School District under full intervention of the State, principally, the District is an arm of the State. To allege that it improperly communicated with or sought clarification from the State is clearly wrong."

The District objects to the Respondent's inclusion of twelve (12) new documents. The District asserts that "it is undisputed that TEACHNJ went into effect prior to the beginning of the 2012-13 school year and its enactment occurred on August 6, 2012. The District finds nothing in the Respondent's additional documents that "explicitly say that the 2012-13 school year does not count toward in efficiency."

With respect to the implementation of evaluation rubrics, the District notes that "[t]he cited provisions provided the latest dates by which districts were required to test and implement their new rubrics; they did not prohibit implementation of approved rubrics earlier than the stated deadline. Nothing in TEACHNJ or its regulations provides that evaluations performed in 2012-2013 in accordance with an adopted, approved rubric are to be treated differently from those performed in 2013-2014, for purposes of triggering tenure charges under N.J.S.A. 18A:6-17.3."

According to the District, "the Respondent improperly relied on the Department of Education's Answer as a means to defer the tenure charge to the 2013-14 school year." It reiterates portions of the Shulman Clarification letter, emphasizing:

> Through this guidance, the department sought to clarify when summative ratings would count towards *earning* tenure. As mentioned above, such clarification did not indicate a prohibition on school districts to use 2012-2013 evaluation data to make personnel decisions, such as the decision to renew or non-renew a nontenured teacher or the decision to bring a tenure charge of inefficiency against a tenured teacher.

The District maintains that the Respondent's reliance on the Cheatham and Thomas cases is misplaced. "These issues are controlled by statute, not regulations." It distinguishes Thomas from the instant case since "this matter was initially plead under both sections." (See Exhibit A of Miller Cert.). Moreover, the District notes that neither Cheatham nor Thomas is precedential in this Tenure Charge." It cites the case of I/M/O Tenure Charge Against Edward Newton, Dkt. No. 286-9/14 where the District sought to terminate Newton based on an Inefficiency Charge pursuant to N.J.S.A. 18A:6-17.3 and the Commissioner, once Newton failed to timely respond, upheld his termination.

Respondent's Sur-sur Reply

The Respondent reiterates that 2012-13 was a pilot year and that once the TEACHNJ was enacted the evaluation criteria and procedures "dramatically changed."

The Respondent relies again on the Cheatham decision, supplemented by the Thomas decision. "Additionally, the Arbitrator found that the District, in filing tenure inefficiency charges, failed to follow the requisite evaluation process set forth in N.J.A.C. 18A:10-4.4, and presented no evidence that it was somehow exonerated from the Act."

The Respondent maintains that neither Assistant Commissioner Shulman nor NJDOE is the arbiter of the tenure charges. It disputes the District's contention that the District is the "arm of the State, and the two entities are ostensibly one, and may therefore communicate ex parte." This "completely ignores the simple fact that this is a contested legal action, in which both parties

are represented by counsel, and any dialogue between the government agency and the District during ongoing litigation – especially the nature of Mr. Shulman's and Ms. Hitchcock's communique – are entirely improper. And, notably, the law is well settled that a State Operated School District, such as Newark, remains a separate entity while under State control. See, N.J.S.A. 18A:7A-37. To accept the District's position, the District and Commissioner's office could communicate for any reason at any time, ex parte. The procedure for processing tenure charges simply does not contemplate this proposition. Indeed, if the District's position is accepted, in cases where the Commissioner decided to act himself, the District could communicate ex parte with the Commissioner without the Respondent's knowledge or input."

It further disputes the District's conclusion that the Motion to Dismiss is entirely reliant on the FAQ but rather "based upon the plain language of N.J.S.A. 18A:6-123."

The Respondent takes issue with the District's claim that Cheatham and Thomas are "anomalies," absent access to other tenure case decisions in the State.

The Respondent argues that "the District never filed under Section 8 of TEACHNJ, N.J.S.A. 18A:6-16, but under N.J.S.A. 18A:6-17.3 and N.J.S.A. 18A:6-10, the latter of which provides generally that a tenured teacher 'shall not be dismissed or reduced in compensation.' It also distinguishes the Newton and Pulliam-Newell cases where the Respondents failed to respond to the charges and the charges were therefore deemed admitted." In addition to Cheatham and

Thomas, the Respondent cites the recent I/M/O Tenure Charges Against Elena Brady, State-Operated School District for the City of Newark for its clarification of the distinction between Section 25 and Section 8 inefficiency charges.

DISCUSSION

A. Arbitrator's Authority re: Procedural Issues

In its filing of the Notice of Inefficiency charges pursuant to N.J.S.A.18A:17.3, N.J.S.A.18A:6-10, N.J.S.A.18A:6-11 and N.J.S.A.6A:3-5.1, the District has argued that since the Commissioner of Education has "the sole authority to determine if the 'evaluation process' was followed," the referral of those charges to the undersigned arbitrator was tantamount to a determination by the Commissioner that the District had complied with the requirements of the "evaluation process" and "[a]s such, the Respondent's Motion to Dismiss must be denied and the Arbitrator must render a decision on the merits as prescribed by statute."

Notwithstanding the contention of the District, it is clear that from the appointment of the Arbitrator, while the Commissioner of Education had the authority to decide the Motion to Dismiss, he was "unable to determine that the evaluation process has not been followed and accordingly on this date, the case is being referred to Arbitrator Robert T. Simmelkjaer as required by statute." Following the Commissioner's review of the case pursuant to N.J.S.A.18A:6-17.3e, and N.J.S.A.6-17.3(c), with the latter provision stating that "the Commissioner shall examine the charge," the statute states that the Commissioner "shall...refer the case to an arbitrator and appoint an arbitrator to

hear the case, unless he determines the evaluation process has not been followed."

Given the Commissioner's referral of the Inefficiency Charge to the Arbitrator, without ruling on whether the District complied with the evaluation process, the Arbitrator maintains that as the "designee" of the Commissioner pursuant to N.J.A.C. 6A:3-5.1(c)(5) he, as arbitrator, "shall examine the charge" and ascertain whether the charges constitute "a charge of Inefficiency," pursuant to N.J.S.A.18A:6-17.3 aka Section 25 of the TEACHNJ Act.

The District's assertion that the only authority vested in the Arbitrator is limited under N.J.S.A.18A:6-17.3 to determining whether or not one of four evaluative criteria were met is misplaced. These criteria, such as "the employee's evaluation failed to adhere substantially to the evaluation process including but not limited to providing a correction act plan" pertain only after a hearing on the merits has been conducted. As such, any reference to these criteria by the District is premature pending the Arbitrator's ruling on the Motion to Dismiss. The language cited by the District is contained in Section 23 of TEACHNJ, N.J.S.A.18A:6-17.2, namely, "materially affected the outcome of the evaluation in the relevant school year" under the Section entitled "considerations of the Arbitrator in rendering decision." Inasmuch as the criteria pertain to the post-hearing phase of an inefficiency charge, they have no bearing on the pre-hearing procedural issues set forth in the Respondent's Motion to Dismiss.

In the Arbitrator's opinion, the legal prerequisite to the arbitration of the Inefficiency charges pursuant to Section 25 of TEACHNJ is compliance with the

evaluation procedures. The Commissioner's ruling on the sufficiency of the charge was supplanted by his referral of the inefficiency charge to the Arbitrator to decide the Motion to Dismiss, including the Respondent's procedural claims. The appointment of an arbitrator does not constitute a substantive decision on the merits. As Respondent correctly notes, for a decision of the Commissioner to be valid, it must be included in a written decision that sets forth findings of fact and conclusions of law sufficient for a reviewing court to understand the basis for the decision.

N.J.A.C. 6A:3-5.5(a) provides further authority for the Commissioner to delegate the Motion to Dismiss to the Arbitrator. This referral is consistent with the Commissioner's authority to appoint a "designee" to examine the charge as provided in N.J.A.C. 6A:3-5.1(c)(5).

N.J.S.A.18A:6-16, which provides the Commissioner with the discretion to refer a summary judgment motion to arbitrator, can be equated with the Commissioner's authority "when a motion for summary decision has been made prior to that time, the Commissioner may retain that matter for the purposes of deciding the motion." (Emphasis added).

Finally, on this point, were the parties required to engage in extensive litigation up to the point of the Commissioner's decision, or during a motion for summary judgment pursuant to N.J.S.A.18A:6-16 prior to referring the matter to an arbitrator, the expeditious resolution of Inefficiency charges under TEACHNJ would be undermined.

B. NPS/NTU Memorandum of Agreement

The District has relied on a MOA with the Newark Teachers Union ("NTU) that the parties negotiated in October 2012 as a basis for included the 2102-2013 school year in its inefficiency charges. The MOA refers to the implementation of "a new evaluation system beginning SY 2012-13." It further states that "teachers will receive an annual summative evaluation rating that designates them as highly effective, effective, partially effective or ineffective." In addition, the District notes that Section 11 of the MOA links teacher compensation to teacher performance based as measured by the new evaluation framework.

Although the District adopted an evaluation rubric as part of the evaluation system known as the "Framework" and utilized the four-tier rating system in accordance with its MOA, the MOA did not address the issue of tenure, let alone the removal of a tenured teacher on efficiency grounds. Assuming arguendo that the MOA had addressed this subject, it would have been preempted by the TEACHNJ statute enacted on August 6, 2012. With respect to "Conflicts with collective bargaining agreements," N.J.S.A.18A:6-126 states: "21. No collective bargaining agreement or other contract entered into by a school after July 1, 2013 shall conflict with the educator evaluation system established pursuant to P.L. 2012 c.36 (C. 18A: 6-17 et al.)." Despite the fact the parties' MOA was negotiated before the effective date of the above provision, the Arbitrator maintains that the principle contained in this language should apply to the NPS/NTU MOA.

As the Respondent correctly notes, in reference to the District's pilot program, "[i]t is fundamental that where, as here, a statute or regulation establishes a term and condition of employment, that statute preempts the negotiated term. See, State v. Supervisory Employee Assn., 78 N.J. 54, 80-81 (1978).

Assuming arguendo that the NTU could waive an individual statutory benefit on behalf of a Union member, it is well-established that such wavier must be clear, unmistakable and unambiguous. The U.S. Supreme Court held in 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009), that "an arbitration clause contained in a CBA, freely negotiated by a union and an employer, which clearly and unmistakable waived the Union members' right to a judicial forum for their statutory discrimination claims was enforceable." See also, Wright v. Universal Maritime Serv. Corp., 525 U.S. 70 (1998).

New Jersey law on the waiver of statutory rights is in accord. In Red Bank Regional Ed. Assn. vs. Red Bank Regional High School District, 78 N.J. 122, 140 (1978), the Court held that "when a specific statute sets a term or condition of public employment, a negotiated agreement in contravention of that statute is not authorized by the Employer-Employee Relations Act."

In the instant case, the Arbitrator discerns no indication that the NTU in agreeing to adopt the four summative ratings that an employee could receive consistent with the Act and in accepting the District's evaluation rubric ipso facto waived teacher's rights and protections under TEACHNJ. In the absence of any specific reference in the MOA to the "substantive processing of tenure

inefficiency charges for the 2012-13 school year" or even a general reference to tenure acquisition or revocation, the District's reliance on the language in its MOA to file inefficiency charges against the Respondent including 2012-13 lacks legal sanction. It constitutes a quantum leap on the District's part to equate the movement of teachers on the salary scale based on its new evaluation system as tantamount to the Respondent's waiver of her statutory rights under TEACHNJ. The fact that the terms of the MOA to which the District contends the Respondent is bound contains no language addressing tenure inefficiency charges or tenure removal reinforces its inapplicability.

In conclusion, the Arbitrator finds that the parties' MOA neither authorized the District to include the Respondent's 2012-13 evaluations to support the District's tenure efficiency charges nor did it waive the Respondent's tenure rights under the TEACHNJ statute. The Arbitrator discerns no basis to deviate from his decision regarding the MOA in I/M/O Neil Thomas, supra, or the preceding decision of Arbitrator Bluth in Cheatham, supra.

C. The 2012-2013 Evaluation of the Respondent

The District has argued, inter alia, that the enactment of TEACHNJ on August 6, 2012 made it effective during the 2012-2013 school year. Although the District acknowledges that the "pilot" program of its proposed new evaluation system, which began in the 2011-2012 school year, did not "count" for official purposes, the District maintains that "the experience of that pilot program informed the development of the teacher evaluation process adopted, approved and implemented in 2012-2013."

According to the District, the Legislature, by purposefully adopting and approving TEACHNJ on "August 6, 2012 in the 2012-2013 school year" intended that there be "no question that the evaluations in the 2012-2013 school year were to be used towards determining if tenure charges were warranted."

The District further contends that statutory language in TEACHNJ requiring school districts to institute pilot programs to test their evaluation rubrics by January 31, 2013, at the latest. N.J.S.A. 18A:6-123(d) ("Beginning no later than January 31, 2013, a board of education shall implement a pilot program...") and requiring school districts to implement their evaluation rubrics by the beginning of the 2013-14 school year at the latest. N.J.S.A. 18A:6-123(e) ("[b]eginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric..."), "did not require school districts to treat 2012-13, and only 2012-2013 as a 'pilot' year. Nothing in TEACHNJ or its regulations provides that evaluations performed in 2012-2013 in accordance with an adopted, approved rubric are to be treated differently from those performed in 2013-2014, for purposes of triggering tenure charges under N.J.S.A. 18A:6-17.3.

In the Arbitrator's opinion, the District's utilization of 2011-2012 as a pilot year in seven NPS schools did not transform 2012-13 into a year where the evaluation rubrics and related procedures could be used to file inefficiency tenure charges. Whereas the District clearly benefitted from its 2011-12 pilot program, the fact that the evaluation procedures remained incomplete in 2012-13,

particularly their utilization for the purpose of filing inefficiency charges, negates 2012-13 as a year where the Respondent's evaluation could count.

A reasonable interpretation of the TEACHNJ language persuades the Arbitrator that the 2012-13 school year, irrespective of the enactment of the statute on August 6, 2012, was intended as a test year in preparation for the 2013-14 school year wherein all tenure related issues, including the establishment of the criteria for completing evaluations and observations under the new evaluation procedures and its teacher practice rubrics would be implemented.

Given the fact that the instant inefficiency charge is based on one count of inefficiency, encompassing the 2012-13 and 2013-14 school years, the statutory language indicates that it was not until the start of the 2013-14 school year that the implementation of the evaluation rubrics was mandated, namely "[b]eginning with the 2013-14 school year a board of education shall ensure implementation of the approved, adopted evaluation rubric..." Also, the first set of regulations implementing TEACHNJ became effective on March 4, 2013, including, inter alia, the establishment of a School Improvement Panel ("Panel") in each school. Moreover, it was not until October 2013 that the NJDOE promulgated a second set of regulations, including the requirement that all tenured teachers be observed at least three times per school year and that teachers with a Corrective Action Plan such as the Respondent receive one additional observation, and that at least one observation for a teacher with a CAP be announced, with a pre-observation conference.

As Respondent correctly notes, the foregoing statutory provisions are reinforced by regulations that "include, but are not limited to provisions governing the content of evaluation rubrics and components, N.J.A.C. 6A:10-4.1, procedures on rubric approval by the Commissioner, N.J.A.C. 6A:10-5.1, and procedures concerning the timing, form, nature and number of Teacher evaluations and observations, N.J.A.C. 6A:10-4.4." (Resp. brief @ 4).

Evidence in the Statement of Evidence that indicates that the District relied on two formal observations conducted in Respondent's class in February and June 2013, during the 2012-13 school year, before the second set of regulations in October 2013 were announced by NJDOE, including the requirement that at least one observation for a teacher with a CAP (which Whitehurst did not receive until October 2013) be announced, with a pre-observation conference. See, N.J.A.C. 6A:10-4.4. This deficiency combined with the unavailability of a Panel in Respondent's school during the 2012-13 school year, convinces the Arbitrator that the District could not and did not meet the standards set forth in TEACHNJ for rendering formal judgment on the Respondent's performance for that year pursuant to N.J.S.A. 18A:6-17.3.

A plain reading of the statutory scheme set forth in TEACHNJ reflects the Legislature's intent that, although the statute was enacted on August 6, 2012, an evolving set of standards would be developed during 2012-13 with deadlines, delineated and reinforced by NJDOE regulations, in anticipation of implementation in 2013-14. The fact that rubrics were not required until no later than December 31, 2012 and pilot programs were not required to be adopted

until January 31, 2013 – both in the midst of the 2012-13 school year – persuades the Arbitrator of the Legislature's unequivocal intent to treat 2012-13 as a work in progress. These 2012-13 interim "at the latest" deadlines are distinguishable from the mandatory statutory language providing that '[b]eginning with the 2013-2014 school year a board of education shall ensure implementation of the approved, adopted evaluation rubric..."

Considering the "actions required in law before bringing an inefficiency tenure charge based on the new tenure revocation process" under TEACHNJ, the District's inability to satisfy these requirements during the 2012-13 school year – a year that preceded the intended full implementation in 2013-14 – renders the inefficiency charge brought against the Respondent encompassing her annual summative evaluation for the 2012-13 school year violative of both TEACHNJ and Achieve NJ as well as legally and procedurally defective.

D. Section 25 of TEACHNJ/Shulman Letter

It is undisputed that the Tenure Charge of Inefficiency against Ms. Whitehurst was filed pursuant to Section 25 of the statute. N.J.S.A. 18A:6-17.3. The District's claim that it alternatively filed under N.J.S.A. 18A:6-10 and N.J.S.A. 18A:6-10 will be addressed infra. Section 25 mandates the filing of Inefficiency charges if a teacher has been rated ineffective or partially ineffective during two consecutive annual summative evaluations. The District's Statement of Evidence relies on the summative evaluations for 2012-13 and 2013-14, inter alia, to file the Inefficiency Charge and declare that Respondent's "dismissal is warranted."

A pivotal issue in the instant case as well as similarly situated Respondents in Brady and Thomas has been the District's reliance on a letter from Assistant Commissioner Peter Shulman dated October 24, 2014 "clarifying" the intent of NJDOE regarding a Department publication entitled "Excellent Educators for New Jersey: Educator Evaluation Frequently Asked Questions (FAQs)." To buttress its contention that not only was TEACHNJ in full force and effect during the 2012-13 school year, but additionally "there is no question that the evaluations in the 2012-2013 school year were to be used toward determining if tenure charges were warranted," the District sought "clarification" of the contested FAQ with respect to the Agency's intent. The excerpt cited by Arbitrator Bluth in the Cheatham decision dated October 16, 2014, and relied upon by the Respondent herein reads:

Q. Will summative ratings "count" this year (2012-13) toward tenure decisions?

A. No – only the item "on the clock" in the mentorship year for new teachers. No evaluation outcomes in the 2012-13 school year will impact tenure decisions. 2013-14 is the first year where the statewide system will be in place, and the first year when summative rating "clock" (i.e.: teachers needing to be rated at least effective for two of three years) will start.

The "clarification" provided by Assistant Commissioner Peter Shulman dated October 24, 2014 reads as follows:

> Dear Ms. Hitchcock:
>
> "Pursuant to your request, the Department of Education (Department) is providing clarification on factual issues arising in the context of a recent arbitration decision. Specifically, the Department hopes to clarify its intent in the "Guide to the TEACHNJ Act," as well as the status of the Newark Public Schools (Newark) evaluation rubric during the 2012-2013 school year.

I. "Guide to TEACHNJ Act"

The Teacher Effectiveness and Accountability for the Children of New Jersey (TEACHNJ) Act was approved and effective on August 6, 2012. This Act established a new educator evaluation system, and revised the process for the acquisition and revocation of tenure. As such, since August 2012, the Department has published many resources meant to support school districts in the implementation of the Act. One such document was a Frequently Asked Questions (FAQs) regarding TEACHNJ (noted in the above-referenced decision as the "Guide to TEACHNJ Act")[1]. Included within this FAQ document was a response to questions regarding TEACHNJ's new requirement that teachers must demonstrate four years of teaching within a school district, with a rating of effective or highly effective in two annual summative evaluations within the first three years of employment. Understandably, many nontenured teachers from school districts throughout the State reached out to the Department to clarify how the law applied to their tenure acquisition and the Department responded accordingly.

> No evaluation outcomes in the 2012-13 school year will impact tenure decisions. 2013-14 is the first year where [*sic*] the statewide system will be in place, and the first year when summative rating "clock" (i.e.: teachers needing to be rated at least effective for two of three years) will start.

Through this guidance, the Department sought to clarify when summative ratings would count towards *earning* tenure. As mentioned above, such clarifications did not indicate a prohibition on school districts to use 2012-2013 evaluation data to make personnel decisions, such as the decision to renew or non-renew a nontenured teacher or the decision to bring a tenure charge of inefficiency against a tenured teacher...

II. Status of Newark's Evaluation Rubric for the 2012-2013 school year

In regards to the status of Newark's evaluation rubrics during the 2012-2013 school year, please note that, on October 26, 2012, members of the Department met with Newark representatives to review and discuss the Newark Evaluation Rubric and the associated policies that would be put into place for the 2012-13 school year. At that time, the Commissioner's representatives found that the Evaluation Rubric met the intent of the recently

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[1] This document is no longer available on the Department website as some of its content is outdated.

> adopted TEACHNJ Act and were directionally aligned with the proposed regulations, which would be effective in March of 2013.
>
> I trust that this response has clarified the Department's positions in regard to these two issues. Please let me know if you have any additional questions."

Given Mr. Shulman's "clarification," the District argues that the FAQ at issue "by its terms...is irrelevant to any tenure charge because it refers only to the acquisition of tenure by non-tenured teachers rather than the evaluation or dismissal of tenured teachers...Thus it has been unequivocally established that the term 'tenure decisions' does not refer to the determination of whether to retain a teaching staff member past the date on which he or she will acquire tenure."

The Arbitrator, given the problematic timing of the Schulman letter and multiple references in the FAQ at issue, including communication from Shulman himself, that the new teacher evaluation system was scheduled to be implemented in 2013-14, is disinclined to accord the "clarification" any evidentiary weight. That Mr. Schulman would issue his October 24, 2014 "clarification" after the Cheatham decision on October 16, 2014 while several Inefficiency cases involving the Newark School District were pending and pursuant to an ex parte communication with Ms. Hitchcock, the NPS General Counsel, lends credence to the Respondent's assertion that letter lacks probative value.

In this regard, the Respondent raises several valid points that in the aggregate diminish the letter's consideration in the instant case. First, the letter was apparently written in response to a request by the Office of the Newark School District's General Counsel after the Cheatham decision was issued. The

letter has the ostensible intent of clarifying the FAQ upon which Arbitrator Bluth relied, in part, to rule in favor of the Respondent. The fact that the NJDOE, having appointed arbitrators to adjudicate several Inefficiency cases involving the NPS, would selectively clarify one FAQ within a comprehensive document permits an inference of inappropriate communication.

Notwithstanding the District's claim that as an "arm" of the State the District and NJDOE are inseparable entities, given the role of the Department in administering the statute and that of the Newark School District in bringing inefficiency charges pursuant to the statute, in the Arbitrator's opinion, for the purposes of the instant case, they are legally separate and distinct. Clearly, the District, in order to avoid the claim that it has engaged in "collusion" with the Office of the Commissioner, should have disclosed its interactions *vis-à-vis* the Commissioner's Office to the Respondent as she is entitled to an arm's length relationship between the charging party and the adjudicative entity – namely the Commissioner's Office -- which delegated the decision to the undersigned. The Arbitrator concurs with the Respondent in her assertion that as parties to an ongoing litigation, "the nature of Mr. Shulman's and Ms. Hitchcock's communique – are entirely improper."

Second, the Shulman letter is contradicted not only by other information contained in the FAQ but also by memoranda authorized by Mr. Shulman regarding the same subject matter. For example, the same FAQ indicates that "the new teacher and principal evaluation systems will be implemented in 2013"

(p. 1), "that summative ratings would not count until 2013-14" (p. 4), and "that the pilot would use the information for full implementation in 2013-14."

Moreover, on January 7, 2014, in a memo to all Chief State School Administrators, District Web User Administrators et al., Shulman advised that "As districts implement Achieve NJ for the first time in 2013-14, NJ SMART is preparing for modified data collection..." Previously, in his March 2012 Memo, Shulman announced to all Chief State Administrators, including Ms. Cami Anderson, Newark Superintendent, that "we have designated 2012-13 as a planning and capacity building year...through a defined series of steps for implementing the new system in 2013-14." In addition, in his July 30, 2012 Memorandum, Shulman announced that "[a]s we prepare for statewide rollout of an improved educator evaluation system in 2013-14, all districts will conduct capacity-building activities detailed in previous memos and explained in our FAQs."

Third, the distinctions made between tenure acquisition and tenure revocation in the Shulman letter, strictly limiting summative ratings to tenure acquisition, is inconsistent with the NJDOE's "Guide to the TEACHNJ Act," which addresses tenure decisions holistically, while indicating that the 2012-13 school year evaluations "do not count" for tenure revocation purposes. As the Respondent reasonably inquires, "if the 2012-13 evaluations were a work in progress or not reliable enough to form the basis for tenure acquisition, how could they reasonably be relied upon for tenure revocation purposes?" In fact, the summative evaluations are relied upon for both purposes. The Arbitrator is

compelled to conclude that the Shulman letter, addressing one FAQ out of an extensive document with several FAQs, shortly after the Cheatham decision, without notice to Respondent, is indicative of a concerted effort to impact decision making in the instant case and similarly situated cases.. As the Respondent argues, the FAQ publication, which was available to the public for two years until recently removed from the NJDOE website "lacks transparency and objectivity between the District and Commissioner's Office..."

On balance, the Arbitrator discerns no basis to credit the Shulman letter as dispositive evidence regarding whether the 2012-13 annual summative evaluation of the Respondent could be used by the District to support Inefficiency charges. The weight of the documentary evidence submitted by the parties persuades the Arbitrator that 2012-13 did not count for tenure revocation purposes, despite the belated and problematic Shulman letter.

E. Section 25 versus Section 8 of TEACHNJ

The District undoubtedly filed Inefficiency charges against the Respondent pursuant to N.J.S.A. 18A:6-17.3(c) and N.J.A.C. 6A:3-5.1(c)(6). The District has maintained that "[t]he tenure charges against the Respondent in this matter are based on inefficiency under both N.J.S.A. 18A:6-10 and TEACHNJ." In serving the Respondent with the Notice of Inefficiency and Statement of Evidence on or about August 29, 2014, the District provided Whitehurst with her annual summative evaluations for 2012-13 and 2013-14 as well as related documentation, including formal observations. (See, Miller Cert.).

While the District has correctly noted that the Commissioner has impaneled 25 permanent arbitrators "to hear matters pursuant to N.J.S.A. 18A:6-16 as well as Section 25 of TEACHNJ, N.J.S.A. 18A:6-17.3, the Arbitrator, other than acknowledging that both sections of the statute were cited in the Notice of Inefficiency, discerns no evidence that the charges were pleaded in the alternative. The Arbitrator is not convinced that, having dismissed the Inefficiency charge against Ms. Whitehurst based on the District's non-compliance with N.J.S.A. 18A:6-17.3, through its utilization of the Respondent's annual summative evaluation for the 2012-2013 school year, he can now proceed to a hearing under N.J.S.A. 18A:6-16.

The Arbitrator cannot concur with the District that the charge of Inefficiency it filed under Section 25, which has been found non-compliant with the requisite evaluation procedures that are a prerequisite to an arbitration hearing on the merits and warrant dismissal "if the charges are determined insufficient" [N.J.A.C. 6A:3-5.5(a)], should now proceed to arbitration pursuant to Section 8 of TEACHNJ.

Since the one charge of Inefficiency filed with the Commissioner alleges that over a two year period "from September 2012 to the present..." encompasses the two consecutive years of ineffective or partially effective annual summative ratings under Section 25 and the Statement of Evidence reinforces the charge, the District is bound by the procedural requirements of Section 25.

The District has cited no Legislative deliberations or statutory language that support an intent for "deficient" inefficiency charges filed under Section 25, as in the instant case, to proceed to a Section 8 hearing tantamount to a default position. The NJDOE, as Respondent notes, has explicitly advised Districts that "[d]istricts must ensure the following evaluation procedures are followed (at minimum) prior to filing an inefficiency tenure charge" and that "[f]ailure to adhere to these requirements can result in the tenure charge being dismissed." (See, Sokolowski Cert. @10).

Absent statutory support in the TEACHNJ Legislation for resort to Section 8 in the event Section 25 Inefficiency Charges are deemed insufficient, the District may not "write in an additional qualification which the Legislature has pointedly omitted in drafting its own enactment or 'engage in conjecture or surmise which will circumvent the plain meaning of the act.'" Id. (quoting Cratser v. 3d. of Comm'rs of Newark, 9 N.J. 225, 230 (1952) and In re Closing of Jamesburg High School, 83 N.J. 540, 548 (1980)). (Resp. brief @ 33).

The Arbitrator further maintains that assuming arguendo the District intended to file Section 8 tenure charges or other grounds such as incapacity, conduct unbecoming and/or insubordination, it did not allege such charges ab initio. Since the sole charge is inefficiency and TEACHNJ "dictates that all inefficiency charges must be filed, if at all, pursuant to the requirements set forth in Section 25," the Arbitrator cannot sustain the District's unsupported construction of the statutory language.

It is undisputed that the District may proceed against the Respondent on statutory grounds other than inefficiency by filing such charges in accordance with the requirements of Section 8. However, the District cannot file inefficiency charges on alternative grounds or once its filing under Section 25 has been found deficient rehabilitate these insufficient charges under Section 8 and then proceed to arbitration on this basis. Clearly, had the Legislature in enacting TEACHNJ intended this outcome, it would have written the appropriate language.

In the Arbitrator's opinion, the evaluation procedures set forth in Section 25 of TEACHNJ, N.J.S.A. 18A:6-17.3, pursuant to the filing of an inefficiency charge where the Respondent teacher has been rated "partially effective" and "ineffective" in two (2) consecutive years, have not been satisfied in the instant case. The statutory language, along with the implementing regulations, which were not in full force and effect during the 2012-13 year (See, N.J.A.C. 6A:10-1.1 et seq.), notwithstanding the District's assertions regarding its compliance with the requirements for inefficiency tenure charges under Section 25, convince the Arbitrator that the charge is "insufficient" and should be dismissed.

In the Arbitrator's opinion, had the Legislature intended that a teacher charged with inefficiency for two consecutive years, with ineffective or partially ineffective ratings on their annual summative ratings, be evaluated utilizing two different and asymmetric evaluation procedures – one consistent with Section 25 of TEACHNJ and the other consistent with Section 8, N.J.S.A. 18A:6-16 – it had the wherewithal to provide the appropriate statutory language. In the absence of such language, the Arbitrator is compelled to dismiss the charge.

The arbitration awards cited by the District in support of its Section 8 alternative are of no avail. In proposing that the inefficiency charge be considered on alternative grounds, the District has cited several arbitration awards where the standard of proof was "whether the evidence in the record supported the charge" by a preponderance of the evidence.

In contrast to the Cheatham decision of Arbitrator Bluth, which the District has challenged on the ground that the Arbitrator "overstepped his authority," the District deems relevant to the instant case several arbitration awards filed under Section 8, including I/M/O Tenure Hearing of Lawrence E. Hawkins, Agency Dkt. No. 243-10/13 (March 10, 2014) and I/M/O Tenure Hearing of Gerald Carter (Agency Dkt. No. 269-12/12 (July 18, 2013). Since the charges in these cases were filed pursuant to Section 8, as opposed to Section 25, the Arbitrator concludes they have no bearing on the instant case. As the Arbitrator in Carter, I note that the Respondent was terminated for inefficiency, specifically grounded in conduct unbecoming as well as insubordination.

The District has further cited I/M/O Tenure Hearing of Felicia Pugliese, Agency Dkt. No. 272 9/12 (February 15, 2013) and I/M/O Tenure Hearing of Chavez, Agency Dkt. No. 269-9/12 (February 6, 2013) as providing an alternative basis to proceed with Section 8 inefficiency charges in the instant case should the Section 25 filing be deemed deficient. However, as the Respondent has correctly pointed out, both of these cases are similarly distinguishable. "The charges in these cases were filed after the effective date of the TEACHNJ Act, but prior to the commencement of the 2012-2013 school year." Given the filing of

these charges in the interim period between August 6, 2012 and September 2012, an issue arose with respect to "what substantive law should apply." Since the District's filing of inefficiency charges against Ms. Whitehurst occurred on or about August 29, 2014, well after the commencement of the 2012-2013 school year, this fact renders comparison between Pugliese and Chavez unnecessary.

The District has also cited I/M/O Tenure Charge Against Edward Newton, Agency Dkt. No. 276-9/14, I/M/O Tenure Hearing of Renee Pulliam-Newell, Agency Dkt. No. 296-10/14 and I/M/O Tenure Hearing of Dr. Audrey Cuff, Cumberland Regional School District Board of Education, Agency Dkt. No. 71-3/14 as supportive of its position. In both Newton and Pulliam-Newell, the Respondents failed to respond to the charges and therefore the charges were deemed admitted. Although the inefficiency charge of inefficiency alleged against Pulliam-Newell, for example, included the 2012-13 and 2013-14 school years and two consecutive "partially ineffective/ineffective" annual summative ratings, the summary decision granted to the District sheds no light on whether the inefficiency charge would have been dismissed on other procedural grounds or would have proceeded to a hearing on the merits.

Finally, the Cuff case is distinguishable because, unlike the instant case where the District filed an inefficiency charge under Section 25, Arbitrator Gerber found in Cuff that arbitrators have authority "to hear matters pursuant to N.J.S.A. 18A:6-16" and that "inefficiency cases must be decided upon the old standard." Clearly, if inefficiency had been alleged on grounds other than two consecutive years of ineffective and/or partially ineffective ratings, or filed prior to the effective

date of TEACHNJ, Section 25, the old Section 8 standard could have been applicable. This was not the case for Ms. Whitehurst. The distinction between Section 25 and Section 8 has been addressed by Arbitrator Klein in I/M/O Tenure Charges Against Elena Brady, State-Operated School District for the City of Newark, Dkt. No. 270-9/14 as follows:

> The notice of "charges based upon inefficiency pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A.18A: 6-17.3 and N.J.A.C. 6A:3: 5.1" against the Respondent charge her with inefficiency under Section 25 N.J.S.A. 18A:6-17 rather than under Section 8 N.J.S.A. 18A:6-16 which covers tenure charges other than those of inefficiency under the provisions of TEACHNJ. The District's efforts to proceed under Section 8 are limited by the charges themselves, which include N.J.S.A. 18A:6 17.3 and not N.J.S.A. 18A:6-16 at this juncture. As there is no basis for proceeding under N.J.S.A. 18A:6-16, I do not address whether such a proceeding would be warranted based upon the record in this case.
>
> The Arbitrator dismissed the charges and reinstated Ms. Brady.

Conclusion

The Arbitrator finds that the Respondent's Motion to Dismiss the Inefficiency Charges is properly before me as the Commissioner's "designee." Considering the submissions of the parties, the Arbitrator further finds that the weight and probative value of the documentation provided by the Respondent is sufficient to sustain the Motion to Dismiss the tenure inefficiency charges against her.. Accordingly, the Respondent's Motion to Dismiss the tenure inefficiency charges filed against Ms. Ursula Whitehurst by the State-Operated School District of Newark under N.J.S.A. 18A:6-17.3 is granted. The District improperly relied on the Respondent's 2012-13 annual summative evaluation for the purpose of tenure revocation. The District's Charge of Inefficiency does not

include a basis for considering the tenure inefficiency charge under N.J.S.A. 18A:6-16. Based on the foregoing, I hereby issue the following:

AWARD

The Tenure Inefficiency Charge brought against the Respondent, Ms. Ursula Whitehurst, is dismissed in accordance with N.J.S.A. 18A:6-17.3(c), and N.J.A.C. 6A:3-5.1(c). The Arbitrator, in finding that "the evaluation process has not been followed," orders the dismissal of the instant charge. Respondent shall be reinstated, effective immediately, to her teaching position with the State-Operated School District of Newark with full back pay, benefits and seniority, and any other benefits commensurate with her employment.

January 5, 2015 Robert T. Simmelkjaer

STATE OF NEW JERSEY}
COUNTY OF BERGEN} SS:

On the 5th day of January 2015, before me personally came and appeared Robert T. Simmelkjaer to me known to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same as his Award.

January 5, 2015 Notary Public

Edward L. Craviolo
Notary Public, State of New Jersey
No. 2387644
Qualified in Bergen County
Commission expires 7/3: 2019

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of:

GREGORY SHORT,
SCHOOL DISTRICT OF THE CITY OF
ELIZABETH, UNION COUNTY

Agency Docket #263-9/14

Walt De Treux, Esq., Arbitrator

Hearing Dates: 11/20/14; 12/4/14
Briefs Received: 12/18/14
Decision Date: 1/4/15

Appearances: For the School District – John G. Geppert, Esq.; Patricia C. Melia, Esq. (on brief) *SCHWARTZ SIMON*
For the Respondent – Michael T. Barrett, Esq., *BERGMAN & BARRETT*

Introduction and Statement of Relevant Facts

Respondent Gregory Short has been employed as a Health and Physical Education teacher for the City of Elizabeth School District since January 2006. In observations and evaluations through the years, administrators and supervisors have rated Short as a consistently proficient teacher with one glaring problem – absenteeism. In 8 years, Short has been absent 131 days. He received numerous attendance memorandums stressing the importance of regular attendance from March 2009 through March 2014. After the 2009-10 and 2011-12 school years, the Board of Education voted to withhold Short's salary increment based on his attendance record. Short grieved the Board's action both times, and the grievances were resolved.

After the 2013-14 school year, Carlos Lucio, Principal of Dr. Antonia Pantoja School No. 27, again recommended increment withholding for the next school year.

Instead, in September 2014, the Board filed tenure charges against Short, alleging chronic absenteeism and incapacity. On October 9, 2014, the Commissioner deemed the charges "sufficient, if true, to warrant dismissal or reduction in salary" and appointed the undersigned as Arbitrator.

On November 20 and December 4, 2014, hearings were held at the School District offices in Elizabeth, New Jersey, during which time both parties had a full and fair hearing to present documentary and other evidence, examine and cross-examine witnesses, and offer argument in support of their respective positions. Both parties filed post-hearing briefs, and the matter was submitted to the Arbitrator for a decision.

Issue

Has the City of Elizabeth School District established the allegations of chronic absenteeism and incapacity against Gregory Short as set forth in the tenure charges? If so, do those charges warrant dismissal? To what remedies are the parties entitled?

Analysis and Decision

Respondent Short's absences are a matter of record. In 2006-07, he was absent 13.50 days, six of which were attributable to an accident on duty. In 2007-08, he was absent 10 days, including one professional day (an excused absence). In 2008-09, he missed 14.5 days, including a professional day. In 2009-10, he missed 14 days, including a professional day. In 2010-11, Short was absent 23 days, nine of which were attributable to an accident on duty and one for a funeral (also an excused absence). In 2011-12, Short missed 18 days; and in 2012-13, he was absent 15.5 days. In his final year, 2013-14, Short was absent 25.75 days, including a ½-day professional day and one funeral day. Excluding the excused absences and including the absences attributable to an accident on duty, Short missed 128.75 days in his eight years as a teacher in the City of Elizabeth School District.

If a teacher is absent more than six times, it is District policy to notify the teacher that his/her attendance is being monitored and to stress the importance of regular attendance. Principal Lucio issued attendance memorandums to Short on 13 occasions between March 2009 and March 2014.

In addition, Short's 2008-09 Annual Improvement Plan noted his attendance as an area of weakness and encouraged him to adhere to the District's attendance

policy. His 2010-11 Annual Professional Performance Report again urged him to follow the District attendance policy and noted no improvement in attendance from the previous year. The 2011-12 Annual Professional Performance Report discussed his poor attendance with no improvement and set a goal "[t]o attend work every day and attain 95% attendance." The same goal was included in a March 2012 Instructional Action Plan. A follow-up November 2012 Instructional Action Plan noted that he had met that goal and directed him "to be mindful of the importance of your punctuality."

Despite the short-term improvement, Short's attendance continued to be poor. On January 24, 2014, Principal Lucio directed that Short meet with the Superintendent regarding his attendance problems. Apparently, that conference never took place.

As previously noted, the Board withheld Short's salary increment for the 2010-11 and 2012-13 school years; but the withholding was grieved, and the grievances resolved. Principal Lucio recommended withholding again for the 2014-15 school year before the Board filed tenure charges.

Cases abound in which school district employees have been dismissed for chronic absenteeism, even when the absences were for legitimate reasons. This Arbitrator authored one such recent opinion. *In the Matter of the Tenure Hearing of Lenore Francis, Jersey City Board of Education,* Agency Docket #285-9/12 (January 10, 2013). Very generally, those cases examine whether the teacher's repeated

absences render the teacher ineffective and/or negatively impact his/her students by interrupting the continuity of education.

Although they reach different conclusions, both parties cite to *Tenure Hearing of White,* 92 NJAR 2nd (EDU) 157 for the elements of proof required for termination in an absenteeism case. The District must demonstrate,

> "there was consideration of (1) the particular circumstances of the absences and not merely the number of absences, (2) the impact that the absences had on the continuity of instruction during the period of time the absences occurred, not merely after the fact, and (3) that there be some warning given to the employee that his or her supervisors were dissatisfied with the pattern of absences." At 161.

Without question, the District has established the third element outlined in the *White* case. Short received 13 attendance memorandums in a 6-year period, several improvement plans and performance reports focused on his attendance problems, and Principal Lucio made three recommendations for salary increment withholdings. Short clearly was aware that the District was dissatisfied with his pattern of absences.

Whether Short's absences have impacted the continuity of instruction for his students raises an interesting question and highlights the dilemma Short presents as a teacher. Vice-Principal Jennifer Campbel described Short as "an average to above average" teacher who "engaged with the students." Observations, evaluations, and annual performance reports consistently rated Short as a "proficient" teacher. Observers and evaluators noted "a positive, encouraging and enthusiastic attitude," "the active participation" of his students, and the effective communication of his expectations for his students. Even his final evaluation in 2013-14 found him to be

"effective." In short, the District conceded that Short was a good teacher – when he was present. The question is whether his absences impacted that effectiveness.

District witnesses talked generally of the impact of a physical education teacher's absences on students. Districts have to provide 90-minutes per week (2-45 minutes sessions) of physical education for K-5 students and 180-minutes per week (4-45 minute sessions) for students in grades 6th through 8th. A teacher's absence threatens the District's ability to meet that state requirement. In addition, the District often has to find substitutes to cover the teacher's absence. When another regular teacher or a substitute without subject matter knowledge is used, students may go to study hall rather than to the gym. Substitutes, of course, cost the District additional money (in the present case, more than $17,000 to cover Short's absences). The District also expects teachers to model good attendance for students, who are expected to have less than 9 absences per year.

The District's testimony on the impact of a physical education teacher's absence is well noted. Respondent cannot seriously argue against the importance of regular attendance by a teacher. Respondent notes that the District did not offer much in the way of specific evidence on the impact of Short's absences. Short suggested that many times the District simply combines gym classes when one of the three physical education teacher is absent. But Respondent walks a fine line when he argues that his absences don't affect the continuity of education. Such an argument diminishes the importance of Short's employment. If he does not need to be present on a regular basis, what value does he bring to the District?

Although Short is considered a good teacher, he can only be effective if he is present on a regular basis. I find that the District has sufficiently demonstrated that Short's absences impacted the continuity of education for his students.

Neither the District nor the Respondent focused on the circumstances of Short's absences prior to the 2013-14 school year. Fifteen days of his absences were attributable to a work-related injury. In some cases, it would not be appropriate to hold absences related to an accident on duty against the employee; but in this case, the missed time due to work-related injury is relatively small (less than 12% of his absences). Even if they are excluded from consideration, Short still missed significant time over the course of his employment.

In the 2013-14 school year, Short testified that his newborn son suffered from chronic ear infections, a situation known to Principal Lucio and other administrators. Since Short's wife holds a part-time job and does not get paid sick leave, Short took time off to care for his son and take him to doctor's appointments. The infant had tubes placed in his ears in May 2014, which has apparently resolved his frequent illnesses.

It was the absences in the 2013-14 school year, added to the many absences in the previous years, which led the District to seek dismissal through tenure charges. The particular circumstances of those absences are significant because they are, at least in part, a predictor of whether Short's attendance will improve in the future. The District did not distinguish between Short's prior absences and his absences in 2013-14. Short's unrefuted testimony regarding his son's illness and

subsequent medical resolution suggests the possibility that Short can improve his attendance in the future.

Further, although not an overriding factor, it must be noted that Short's absences were covered by paid leave time. Many of the cases in which arbitrators, ALJs, and the courts have upheld dismissals for chronic absenteeism involve teachers whose absences exceeded the amount of paid leave time granted. While the District has a right and an obligation to stress the importance of regular attendance, it is more difficult for the District to demonstrate cause for dismissal when an employee's absences are within the limits of his/her paid leave time.

As noted, Short is considered "an average to above average" teacher who engages his students. His proficiency in the classroom holds the promise that he can be a very high-performing teacher if he could remedy his attendance problems. He has not done that yet, but the 2013-14 school year is not a fair gauge of his willingness to improve because of his son's illness and his family responsibilities. That illness is resolved, and there is no reason Short, if he so chooses, can meet the attendance goals set by the District.

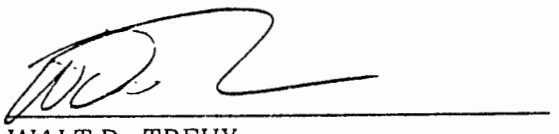
Because of the circumstances of his absences in 2013-14, I find that although the District has established the allegations of chronic absenteeism and incapacity, the charges are not sufficient to warrant dismissal. Principal Lucio did recommend salary increment withholding, which the Board did not address since it moved for termination. Increment withholding for 2014-15 is an appropriate sanction for Short's attendance issues. It should provide a necessary incentive for him to remedy his attendance problems to avoid more severe disciplinary action.

Award and Remedy

The School District of the City of Elizabeth has established its allegations of chronic absenteeism against Respondent Gregory Short. However, the charges are not sufficient to warrant termination.

As a remedy, the District is ordered to immediately reinstate Short to his tenured position with no loss of seniority. It is further ordered to make Short whole for back pay and all other benefits lost for the time period of his suspension without pay through the date of his reinstatement. In lieu of termination, Short shall be subject to salary increment withholding for the 2014-15 school year.

The Arbitrator shall retain jurisdiction of the case for the sole purpose of resolving any dispute over the implementation of the remedy.



WALT De TREUX

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of:

GREGORY SHORT,
SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY

Agency Docket #263-9/14

Affirmation

I, Walt De Treux, affirm that I am the individual who executed this Decision and Award.

WALT De TREUX

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
----------X
In The Matter of the **TENURE** Hearing

of the

SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY

"Petitioner" or "District"

-against-

LESLIE ANN RAMOS

"Respondent"

ARBITRATOR'S OPINION AND AWARD

PURSUANT TO P.L. 2012, C. 26
AGENCY DOCKET NUMBER: 261-9/14
----------X
BEFORE: RANDI E. LOWITT

APPEARANCES:
FOR THE DISTRICT:
JOHN G. GEPPERT, ESQ.
Schwartz Simon Edelstein & Celso, LLC

FOR THE RESPONDENT:
RANDI DONNER APRIL, ESQ.
OXFELD COHEN, P.C.

BACKGROUND

The School District of the City of Elizabeth, Union County, New Jersey (Petitioner or District) preferred charges against Respondent, Leslie Ann Ramos (Respondent), a teacher previously assigned within the District, which charges were filed with the Commissioner of Education of the State of New Jersey, pursuant to N.J.A.C. 6A:3-5.1(b)(6). The undersigned was designated to be the Arbitrator for this matter, by the State of New Jersey Department of Education, by letter dated October 10, 2014. (Joint Exhibit 1).

Hearings were held at the Offices of the School District's Counsel, Whippany, New Jersey, on November 10, 2014, and November 14, 2014. Written closings were received and the record was closed on December 10, 2014. No stenographic record of either the hearing or the teleconferences was taken. All matters, while not necessarily cited in this Opinion and Award, have been considered.

Ms. Leslie Ann Ramos was a teacher in the City of Elizabeth School District, in Union County, New Jersey. In or about August 11, 2014, the City of Elizabeth Board of Education determined to certify charges against Ms. Ramos to the Commissioner of Education.

Charge Number 1 charges Ms. Ramos with Chronic Absenteeism, in that she has been absent approximately 490.75 days between July 1, 2007 and June 30, 2014.

Charge Number 2 charges Ms. Ramos with Incapacity, alleging that, by virtue of the absences and the conditions which led to them, Ms. Ramos has been rendered incapable of performing her assigned duties and, therefore, should be immediately terminated from her position

SPECIFICATION OF CHARGES

CHARGE I
(CHRONIC ABSENTEEISM)

The foregoing background information and the facts alleged therein, are incorporated by reference as if fully set forth herein. Leslie Ann Ramos has displayed chronically poor attendance during the last seven (7) years of her employment with the Elizabeth Public Schools District, and has been absent approximately 490.75 days, which has adversely affected the proper operation of the school, despite repeated warnings, and shows no sign of abating. These acts and omissions, more specifically set forth below, constitute just cause for immediate dismissal due to chronic absenteeism:

Count 1

During the time period from July 1, 2007 through June 30, 2008, Ms. Ramos was absent from her post on some twenty-two and one-half (**22.5**) occasions: 1 family illness; 1 funeral; 2 "other;" 2 personal; and 16.5 sick, not counting any leave taken pursuant to military service, jury duty, on-the-job injury, or vacation.

Count 2

During the time period from July 1, 2008 through June 30, 2009, Ms. Ramos was absent from her post on some forty-seven (**47**) occasions: 1 family illness; 1 funeral; 18 "other" (leave of absence); 2 personal; and 25

sick, not counting any leave taken pursuant to military service, jury duty, on-the-job injury, or vacation.

Count 3

During the time period from July 1, 2009 through June 30, 2010, Ms. Ramos was absent from her post on some sixty-seven (**67**) occasions: 1 family illness; 2 personal; 12 sick; and, 52 "other" (sick no pay and leave of absence), not counting any leave taken pursuant to military service, jury duty, on-the-job injury, or vacation.

Count 4

During the time period from July 1, 2010 through June 30, 2011, Ms. Ramos was absent from her post on some fifty-eight and one-half (**58.5**) occasions: 1 family illness, 1 funeral; 2 personal; 12 sick; and 42.50 "other" (sick no pay and leave of absence), not counting any leave taken pursuant to military service, jury duty, on-the-job injury, or vacation.

Count 5

During the 2011-2012 school year, administrators repeatedly admonished Respondent for her ever-worsening attendance record, referred her to the District's attendance policies, and warned her of the potential adverse consequences of continuing excessive absences, including absence without pay and disciplinary action. By way of example, without limitation:

- On October 20, 2011, Principal Jennifer Campel ("Principal Campel") admonished Respondent, in an attendance memorandum, for her fifth (5th) intermittent absence, and advised Respondent that her "attendance is essential in contributing to the success of our District's Mission" and further, that the "absence of any Elizabeth Public School employee adversely affects the sequence of instruction, as well as disrupts the daily work schedules of all District operations," and referred Respondent to a copy of District Policy 4151/4251, the Staff Attendance Improvement Plan.
- On November 7, 2011, Principal Campel, in an attendance memorandum, cited Ms. Ramos for her ninth (9th) intermittent absence, again admonished Respondent that her attendance is essential and that her absence adversely affects instruction and disrupts District operations, and referred Respondent to a copy of District Policy 4151/4251.
- On November 29, 2011, Principal Campel, in an attendance memorandum, cited Ms. Ramos for her twelfth (12th) intermittent absence, similarly admonished Respondent and again referred her to the District's Attendance Policy, and further warned Respondent that as of November 30, 2011, she would be "on deduction" if she took further sick days.

- On December 6, 2011 Principal Campel, following a conference with Respondent after her seventeenth (17th) intermittent absence, authored a Staff Attendance Improvement Plan which recommended to the Superintendent of Schools a review of Respondent's current and past absence record, noting Respondent "had the same type of attendance pattern as last year," and further noting Principal Campel had spoken to Respondent "numerous times" about her attendance record.
- On January 2, 2012, Principal Sulisnet Jimenez ("Principal Jimenez"), in an attendance memorandum, cited Ms. Ramos for absences totaling some nine (9) sick days, admonished Respondent that her attendance is essential to the success of the District's mission, and referred Respondent to the District Attendance Policy.
- On January 18, 2012, Principal Campel, following a conference with Respondent after her twenty-second and one-half (22-½) intermittent absence, issued a "Second Notice" Staff Attendance Improvement Plan, again recommending a review of Respondent's current and past absence record, and further recommending an immediate withholding of Respondent's increment.

- On February 7, 2012, Principal Campel, in an attendance memorandum, cited Ms. Ramos for her twenty-sixth (26th) intermittent absence, again admonished Respondent that her attendance is essential and that her absences adversely affect instruction and disrupt District operations, and again referred Respondent to District Policy 4151/4251.

Despite having received the foregoing numerous and repeated admonitions and warnings, during the time period from July 1, 2011 through June 30, 2012, Ms. Ramos was absent from her post on some ninety-nine and one-fourth (**99.25**) occasions: 1 family illness; 2 personal; 12 sick; and 84.25 "other" (sick no pay and leave of absence), not counting any leave taken pursuant to military service, jury duty, on-the-job injury, or vacation.

Count 6

Despite Respondent's prior excessive absences having resulted in her increment being withheld by the Board for the 2012-2013 school year, during that year Respondent continued to amass an excessive number of absences, notwithstanding the warnings and admonitions of the administration. By way of example without limitation:

- On February 8, 2013, in an attendance memorandum, Principal Jimenez cited Ms. Ramos for absences totaling thirteen (13) sick days, admonished Respondent that her

attendance is essential, and again referred Respondent to the District Attendance Policy.

- On June 14, 2013, in an Annual Evaluation, Principal Jimenez, rated Respondent unsatisfactory in all evaluated categories of performance, and unsatisfactory overall; and further encouraged Respondent to improve her attendance, repeatedly noting she had been absent 86.5 days as of June 14, 2013, and repeatedly emphasizing, "SHE HAS NOT INSTRUCTED AT LEAST 60% OF THE REQUIRED INSTRUCTIONAL TIME" (capitalization in original), as a result of which, Principal Sulisnet noted, Respondent was not in attendance enough for her performance strengths (if any) to be determined.

Notwithstanding the foregoing, during the time period from July 1, 2012 through June 30, 2013, Ms. Ramos was absent from her post on some ninety-four and one-half (**94.5**) occasions: 1 family illness; 2 personal; 12 sick; 1 sick additional; 1 non-accumulated; 1 personal additional; and, 76.50 "other" (sick no pay, leave of absence and funeral-family), not counting any leave taken pursuant to military service, jury duty, on-the-job injury, or vacation.

Count 7

Notwithstanding the foregoing, during the time period from July 1, 2013 through June 30, 2014, Ms. Ramos was absent from her post on some

one hundred and two (**102**) occasions: 1 family illness; 1 funeral; 2 personal; 12 sick; 2 sick additional; 2 personal additional; and 82 "other" (sick no pay and leave of absence), not counting any leave taken pursuant to military service, jury duty, on-the-job injury, or vacation.

The foregoing acts and omissions by Leslie Ann Ramos, individually and cumulatively, constitute just cause based on chronic absenteeism warranting dismissal. In total, over the last seven (7) school years, Ms. Ramos has been absent some **490.75 days**, not counting any leave taken pursuant to military service, jury duty, on-the-job injury, or vacation. Ms. Ramos' ongoing failure to fulfill her assigned duties on those days has adversely affected the operation of the District and shows no signs of abating. The Board, a public employer charged with providing a thorough and efficient education without discontinuity and disruption of services, should no longer have to be burdened by such misfeasance. Immediate dismissal is fully warranted.

CHARGE II
(INCAPACITY)

The foregoing background information, Charge, specific Counts and the facts alleged therein, are incorporated by reference as if fully set forth herein. The acts and omissions set forth therein, in addition to chronic absenteeism, constitute incapacity. By virtue of the condition or conditions causing and/or associated with Respondent's chronic and excessive absences, she has been effectively rendered incapable of

performing her assigned duties, therefore requiring immediate termination from her tenured position. There is simply no meaningful accommodation to be made for an employee who persistently is unable to report to work over a protracted period of time. Immediate dismissal is the only meaningful remedy and is fully warranted here.

POSITIONS OF THE PARTIES

The District:

The District argues that "...(t)his case is a clear one. ...Notwithstanding the seeming validity of some of her absences or the fact Respondent presented for the most part as a satisfactory teacher, Respondent failed to perform her primary function, to be at work fulfilling her responsibilities as a teacher. Despite repeated verbal and written warnings, spanning many years, an increment withholding, and based upon legal precedent, Respondent was chronically absent. ...It is beyond dispute that excessive absenteeism may constitute either incapacity, unbecoming conduct, or just cause sufficient to warrant dismissal, even when legitimate medical reasons caused some of the absences, and accordingly, Respondent should be dismissed from her tenured position." (District Post Hearing Brief, pp. 16, 25).

The District cited New Jersey statutes regarding the burden of proof in a tenured teacher case and the demand for dismissal. The District reviewed the case law regarding dismissal, absenteeism, excessive absenteeism, and focused on *White, 92 N.J.A.R.2nd (EDU)(191)*, specifically on the need to demonstrate that it had "(1) the particular circumstances of the absences and not merely the number of absences, (2) the impact that the absences had on the continuity of instruction during the period of time the absences occurred, not merely after the fact; and (3) that there

be some warning given to the employee that his or her supervisors were dissatisfied with the pattern of absences." (Id., p. 18, quoting *White*). By way of comparison, the District also examined the 2011 case of *True* and the 2012 case of *Dugan*, both of which involved chronic absences of a teacher.

Turning to the instant case, the District avers that "(t)he District has satisfied its burden. The Board has considered the circumstances of Respondent's absences. ...The Board has given Respondent numerous opportunities to improve her attendance over the course of her employment. Despite the same, Respondent's attendance has not improved. ...In fact, the record vividly illustrates that Respondent's attendance record has worsened. ...Respondent has been given several warnings about her lack of attendance, which resulted in the denial of a salary increment for the 2012-2013 school year. Notwithstanding these warnings, Respondent continued to exhibit the same behavior. Therefore, it is reasonable for the Board to conclude that this conduct is likely to continue in the future." (Id., pp. 21-22).

As to the question of negative impact, the District acknowledged that, although it did not point to specific instances regarding impact on students, it did rely on the testimony of Principal Sulisnet Jimenez and the documentation of Principal Jennifer Campel, as well as the emails received. It also relied on the testimony of Ms. Ramos, herself, in which

she acknowledged that her absences would have had a negative impact on her students. Finally, the District notes that Ms. Ramos was warned about her behavior; Ms. Ramos acknowledged as much. "Respondent does not dispute the accuracy of the Board's contention that she was absent 490.75 days. Moreover, Respondent admits that she was aware of the detrimental effect her absence had on her students educational progress. In addition, Respondent admits to receiving multiple warnings meetings with supervisors, and having her increment withheld. Notwithstanding these warnings, the record is clear that Respondent continued to exhibit the same behavior. For these reasons, the record in this matter clearly demonstrates that the Board has met its burden of establishing by a preponderance of the credible evidence that Respondent is guilty of chronic absenteeism and/or other just cause, including, but not limited to incapacity, warranting respondent's (sic) dismissal from her tenured position of teacher in the Elizabeth School District." (Id., p. 24).

Therefore, the District demands that Ms. Ramos be dismissed.

The Respondent:

The Respondent highlights that "(t)his matter is unusual in that there is no dispute regarding the days that Ms. Ramos has been absent over the course of her tenure with the Board. There is no dispute as to the reasons why she has been absent. The Board has not argued that Ms. Ramos

failed to provide proper documentation for her sick days, funeral days or leaves of absence. The Board has not disputed the reasons for the leaves of absences taken by Ms. Ramos. Ms. Ramos admitted that she received memoranda regarding her absences. Sadly, Ms. Ramos went through an extraordinarily (sic) run of bad health due to two extremely dangerous pregnancies and gall bladder surgery." (Respondent Brief, p. 7).

Respondent focuses on the burden placed on a District to terminate a teacher in absenteeism cases. It avers that, while it is true that Ms. Ramos may have been absent a great deal, and while those absences may be viewed under the microscope of In re the Tenure Hearing of White, 92 N.J.A.R. 2d (EDU) 76, it is still incumbent upon the district and the Arbitrator to examine the circumstances that led to the absences. Moreover, Respondent notes that Ms. Ramos always complied with District rules and policies regarding her absences, requests for leaves of absence, the furnishing of doctor's notes and whatever else might have been necessary to gain permission for her absences. And, it queries how the District could argue any adverse impact that Ms. Ramos's absences had on the educational system, in light of the fact that there was no testimony regarding adverse impact. In fact, it points out that the only testimony of the only witness, Ms. Sulisnet Jimenez, was based on one school year, was inconsistent, and proved nothing regarding adverse impact. And, the emails that were admitted, from another principal, are

inconclusive and do not prove or even imply that Ms. Ramos was made aware of the complaints contained within them. "Thus, for the one school year that The Board provided testimony, there was not a shred of evidence that the educational process was hindered. Surely, if the Board had any evidence that Ms. Ramos' absence led to any educational issues it would have so offered it. By failing to do so, it must be accepted that there is no such evidence." (Id., p. 9, citations omitted).

As to notice of her obligations and responsibilities, Ms. Ramos acknowledged receipt of the Board's policies, but contended that they were provided to her at times when she was having serious health issues. Additionally, although the District did withhold her increment one year, it did not provide documentation or explanation to her as to why that was done.

"...Ms. Ramos' issue of absenteeism is in the past. She testified that she is health (sic) and eager to return to work. The particular medical reasons that caused her absenteeism no longer exist. Her teaching ability was never an issue.... The Board in this matter has the burden of proof and must prove by a preponderance of the credible evidence that the allegations are not only true but the penalty of dismissal is just. ...While there may be agreement regarding the sheer number of days that Ms. Ramos was absent, the penalty of dismissal is not fair or just in this case." (Id., pp. 9-10, citations omitted).

Therefore, Respondent pleads for dismissal of the charges or, in the alternative, a penalty that does not include discharge, but that is deemed necessary by the Arbitrator.

OPINION

The facts are not in dispute, based on the documentary evidence. Ms. Ramos's attendance calendars show the absences alleged, and she acknowledged as much. Rather, Ms. Ramos asks that her acknowledgement of the issue be accepted hand-in-hand with her acknowledgement of her culpability, and then asks that she be given one more chance to prove that she will be present and able to teach. That opportunity will be given.

Through review of the testimony and the joint exhibits, it is clear that Ms. Ramos was, indeed, absent for all the days that the District noted within its charges. (Joint Exhibit #1). It is clear that Ms. Ramos received numerous attendance memoranda from her principals. (Joint Exhibit #s 2-6, 8). Additionally, Ms. Ramos did have an increment withheld for the 2012-2013 school year; however, it is not clear that Ms. Ramos was ever made aware of the exact reason for the withholding (although it should have been something about which she could draw a logical conclusion). (Joint Exhibit #7; District Exhibit #7).

The question now changes. Even if Ms. Ramos is culpable of charges preferred against her, is the appropriate penalty termination. Termination is not the appropriate penalty, in this instance. While it is true that a District has the right to expect its employees to be available to work each and every day, and while it is true that even legitimate illnesses and absences may result in termination, there may be circumstances that mitigate the result of termination. One example of that circumstance can be found the commentary by Principal Campel in her formal observation of Ms. Ramos in January 2012. Ms. Campel states that "Mrs. Ramos has the ability to plan and write lesson plans. ...She can take them (her students) to great places." (Joint Exhibit #10). In a February 2013 observation, Vice Principal Joan Tomek said that Ms. Ramos's "...kindergarten plans and methods of instruction are carefully implemented to ensure student progress and growth." (Joint Exhibit #11). And, in an April 2014 observation, Dora Kunitz told Ms. Ramos that she "...could be a master teacher if (her) attendance were to improve." (Joint Exhibit #12). Notwithstanding all her absences, it is clear that when Ms. Ramos was in the classroom, she had the ability to be an effective teacher, one from whom a kindergartener would benefit. It is important for a district to have a teacher on whom it may rely. Ms. Ramos has not been present sufficiently to be that teacher, but she appears to have the qualifications and talent to be that teacher, if she, indeed, corrects her

attendance issue. I found Ms. Ramos to be a credible witness. She testified honestly and sincerely, not denying or making excuses for her absences, but, rather, acknowledging her past health issues and maintaining that they are behind her. She asserted that she would be more than capable of working, as required, when required, and would relish the opportunity to do so.

If Ms. Ramos shows the District that she is that teacher, that she can be present to teach her students, then it would be a positive event for the District and a positive event for Ms. Ramos. If, however, it becomes clear that Ms. Ramos is not capable of being at work, ready to work, as she should be, then she will have wasted this opportunity and the District would certainly be able to seek to dismiss her.

In conclusion, I am persuaded that, if given the chance, Respondent would render competent service. However, I am compelled to remind Ms. Ramos that she is being given this opportunity, in part, because she has the potential to be a wonderful addition to the District, if she teaches in the manner in which she is capable and if she is not absent, except as permitted. Ms. Ramos is cautioned that future instances of excessive absenteeism will be juxtaposed with this opportunity and will likely not result in a similar opportunity being given. In lieu of removal, it will be directed that Ms. Ramos be suspended for the remainder of the 2014-2015 school year, that her increment be withheld

upon her return, in the 2015-2016 school year, and that she not receive any payment for any time lost.

Therefore, based on the above, I render the following

AWARD

1. I find Respondent Leslie Ann Ramos culpable of the charge of Chronic Absenteeism, as preferred against her in Charge I.

2. I do not find Respondent Leslie Ann Ramos culpable of the charge of Incapacity, as preferred against her in Charge II.

3. Ms. Ramos shall remain on suspension for the remainder of the 2014-2015 school year, returning to work in the District at the appropriate time for teachers to return to work for the 2015-2016 school year. There shall be no back pay for any time during which Ms. Ramos was out of work.

4. Ms. Ramos is reminded that she is expected to be at work, ready to work, and that she is entitled to a very specific number of absences within the bounds of the collective bargaining agreement that covers her.

Randi E. Lowitt
Arbitrator

Dated: January 5, 2015

STATE OF NEW JERSEY)

ss:

COUNTY OF MORRIS)

On this 5th day of January 2015 before me came and appeared Randi Elyse Lowitt, Esq., to me known and known to me to be the individual described herein, and who executed the foregoing instrument and she acknowledged to me that she executed the same.

Notary Public

ROSS L. GNESIN
Notary Public State of New Jersey
Commission Expires April 4, 2021
2020

CITY ASSOCIATION OF SUPERVISORS AND ADMINISTRATORS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, the City Association of Supervisors and Administrators (Association), asserted that the respondent District violated the rights of seven Association members by transferring them to positions at the District's central office. The Association sought the reinstatement of its members to positions as building principals, together with reimbursement for lost benefits and emoluments of employment. The respondent contended that the positions to which these principals were transferred are within the scope of their certifications and that, accordingly, their tenure rights were not violated.

The ALJ found, *inter alia*, that: the Association's claims spring from their members' tenure status under *N.J.S.A.* 18A:28-5, which protects them from dismissal or reduction in compensation without just cause; the Association members whose transfer is at issued herein held their positions as principal under tenure; although it is well-established that a school board has the right to deploy staff as it sees fit, the right to make involuntary transfers is not entirely without limitations; under the principles set forth in *Philip Howley and Dewey Bookholdt v. Ewing Township Board of Educ.*, 1982 *S.L.D.* 1328, 1340, *aff'd.* 1983 S.L.D. 1554, a person tenured in a specific position may not be transferred from that position without his or her consent, but may be involuntarily transferred to another assignment within the same position where there is no loss of salary or other reduction in employment; although the Association members were transferred by the District as part of a larger effort to revitalize Newark schools, it is uncontroverted that they were transferred to entirely new positions and are no longer performing the work of building principals; there was, however, no loss of compensation nor emoluments as a result of the transfers. Accordingly, the ALJ concluded that the involuntary transfer of these Association members was in violation of their tenure rights under *N.J.S.A.* 18A:28-5, and ordered the District to restore them to positions as building principals in accordance with their tenure entitlements.

Upon full consideration of the record, the respondent District's exceptions and the Association's reply thereto, the Commissioner remanded the matter to the OAL for further development of the record and recommendations regarding to the District's position with respect to the authority granted to the Commissioner pursuant to *N.J.S.A.* 18A:7F-6(b)(2) and *N.J.A.C.* 6A:33-1.1(b)2.

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

Issued 1/12/15

OAL DKT. NO. EDU 849-13
AGENCY DKT. NO. 318-11/12

CITY ASSOCIATION OF SUPERVISORS AND ADMINISTRATORS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the State-Operated School District of Newark (District) and the reply thereto from petitioner, the City Association of Supervisors and Administrators (Association). In this matter, the Association claims that the District's decision to transfer seven of its building principals to positions at the central office violated the members' tenure rights because they were given responsibilities not in line with their tenured positions or certifications. The Administrative Law Judge (ALJ) determined that the aggrieved members were reassigned to positions that had little or no relation to the role of building principal, and therefore the involuntary transfer of these building principals to positions in the central office violated their tenure rights under *N.J.S.A.* 18A:28-5. As a result, the ALJ recommended that the District reassign the members to building principal positions in accordance with their tenure entitlement.

The District's exceptions substantially reiterate the substance of its post hearing submission at the OAL, recasting the arguments therein to support the contention that the ALJ erroneously determined that the transfer of the building principals to positions in the central

office violated their tenure rights. The District maintains that the ALJ took an overly narrow view of the definition of "principal" and erroneously ruled for the purposes of determining tenure rights that being a principal necessarily entails an assignment to a school-based position. The District also contends that the claims of one Association member, Donna Marable, were barred by the 90-day rule.

In its exceptions, the District points out that the ALJ correctly acknowledged that a school board has a right to deploy staff as it sees fit including the right to make involuntary transfers. However, in concluding that the District violated the members' tenure rights, the ALJ failed to follow the relevant case law, i.e. *Bigart v. Board of Educ. of the Borough of Paramus, Bergen County*, 1979 *S.L.D.* 123 and *Jeannette Williams v. Board of Educ. of the City of Plainfield, Union County*, 1980 *S.L.D.* 1552, *aff'd*, 176 *N.J. Super.* 154 (App Div. 1980). In *Bigart*, *supra*, the Commissioner stressed that "[t]eaching duties are not restricted to classroom instruction", and that statement is equally applicable to principals because their duties are not restricted to administering a school. Therefore, the ALJ's overly narrow reading of the definition of "principal" based on the failure to see the parallels between *Bigart, supra,* and the instant case was incorrect and should be rejected by the Commissioner.

The District also argues that the ALJ failed to apply the balancing test established by the State Board of Education in *Williams*, *supra*, for determining whether a reassignment to a position of comparable rank is in violation of the tenure laws. Under the *Williams*, *supra*, balancing test, the interests of the District clearly outweigh the members' interest in job and financial security, which have not been threatened because the salaries have not been reduced. Additionally, the District contends that the ALJ failed to recognize that the school improvement measures were mandated by federal law. The District argues that the reassignment of the

principals was a necessary consequence of an educational policy determination as to how to address schools that are chronically "in need of improvement", which is a feature of the No Child Left Behind Act, 20 U.S.C. §§6301 et seq.

Finally, the District takes exception to the ALJ's reliance on *N.J.A.C.* 6A:9B-11.3 as additional support for her determination because the regulation has no applicability to the issue in this case, and it was not relied upon by the Association during the proceedings. *N.J.A.C.* 6A:9B-11.3 is in the certification section of the Administrative Code and it simply lists the positions for which the principal endorsement is required. The regulation does not define the position of principal or limit the scope or describe the duties of a principal. Thus, the District urges the Commissioner to reject the Initial Decision in its entirety.

In reply, the Association argues that the ALJ rendered a correct decision on all of the issues in this matter and that the District's exceptions are without merit. With respect to Ms. Marable's claims, the Association asserts that the ALJ properly found that her claims were exempt from the 90-day rule because there was a continuing statutory violation. The Association also maintains that the Initial Decision was consistent with the relevant case law, and that the ALJ effectively distinguished *Bigart*, *supra*, from this matter. Additionally, the Association argued that the balancing test established by the State Board of Education in *Williams*, *supra*, was not applicable to the facts of this case and does not support the District's contention that the transfers to positions in the central office were valid exercises of the District's discretion. Finally, the Association stresses that the No Child Left Behind Act, 20 U.S.C. §§6301 et seq., does not abrogate tenure protections because in order to do so, there must be express statutory authority.

Although the majority of the arguments advanced by the District in its exceptions were fully considered by the ALJ and thoroughly discussed in the Initial Decision, the Commissioner is not persuaded that the district's position with respect to the authority granted to him pursuant to *N.J.S.A.* 18A:7F-6(b)(2) and *N.J.A.C.* 6A:33-1.1(b)2 was fully explored and considered. Accordingly, he hereby remands this matter to the OAL for further development of the record and recommendations with respect to the arguments raised by the District in section C of its October 3, 2014 exceptions.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 1/12/15

Date of Mailing: 1/13/15

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00849-13
AGENCY DKT. NO. 318-11/12

CITY ASSOCIATION OF SUPERVISORS AND ADMINISTRATORS,

Petitioner,

v.

THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Dennis McKeever, Esq., for petitioner (Lindabury, McCormick, Estabrook and Cooper, attorneys)

Brenda Liss, Esq., for respondent (Riker, Danzig, Scherer, Hyland and Perretti, attorneys

Record Closed: July 14, 2014 Decided: August 27, 2014

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Petitioner, the City Association of Supervisors and Administrators (CASA), asserts that the State-Operated School District of the City of Newark (the District)

violated the rights of seven CASA members by transferring them to positions at central office. CASA seeks the reinstatement of its members to positions as building principals, together with reimbursement for lost benefits and emoluments of employment. The District replies that the positions to which these principals have been transferred are within the scope of their certifications, and that accordingly, their tenure rights have not been violated and the petition of appeal should be dismissed.

PROCEDURAL HISTORY

CASA filed its appeal with the Commissioner of Education (the Commissioner) on November 2, 2012. An answer was filed on behalf of the District on January 16, 2013, and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case on January 17, 2013. After several unsuccessful settlement conferences, hearings were conducted on March 26, 2014, April 30, 2014, and May 15, 2014. At the close of petitioner's case, the District made several motions to dismiss. A motion to dismiss the petition in its entirety was denied on the record. I reserved decision on a motion to dismiss the petition as to Donna Marable on timeliness grounds, and invited counsel to more fully brief this issue post-hearing. A motion to dismiss the petition as to Lavonne Pack was granted on the record, as she has retired from the district, did not appear at the hearing, or present any proofs in support of her claims.

Post-hearing briefs were filed on July 14, 2014, at which time the record closed.

FINDINGS OF FACT

Stipulated Facts

The following facts are uncontroverted and I **FIND**:

1. In August 2012 the District reassigned Zakiyya Abdul Razzaq from Cleveland Street School to the Office of Academic Services, located in the District's central office.

2. In August 2012 the District reassigned Joann Gilmore from Sussex Avenue School to the Office of Planning, Research and Assessment, located in the District's central office.

3. In August 2012 the District reassigned Gerald Samuels from Speedway Street School to the Office of Title I/Federal Programs, located in the District's central office.

4. In August 2012 the District reassigned James Carlo from Newton Street School to the Purchasing Department, located in the District's central office.

5. In August 2012 the District reassigned Roy T. Wilson to the Office of Student Information Services, located in the District's central office.

6. In August 2011 the District reassigned Donna Marable to the Office of the Chief Financial Officer, located in the District's central office.

7. Razzaq, Gilmore, Samuels, Carlo, Wilson, and Marable each held tenure as a principal at the time of their reassignment.

8. Each of the principals served in the assignments noted above for the entire 2012-2013 school year. Marable also served in the Office of the Chief Financial Officer for the entire 2011-2012 school year, and was reassigned within that office for the 2012-2013 school year.

The petitioning principals lost no salary or benefits as a result of the transfers at issue, with the arguable exception of free parking, which will be discussed in greater detail below. They all hold administrative certificates with the principal endorsement.

The Testimony

The 2012-2013 School Year

Roger Leon has been an assistant superintendent in Newark for the past eight years, and he explained the genesis of the controverted transfers. He comes to his position with a long history of service to the public schools, beginning as a classroom teacher, and continuing through the ranks with service as a principal and supervisor. Leon reports directly to the Superintendent of Schools, and during the 2012-2013 school year supervised the petitioning principals. His commitment to the Newark school system and its students resonated in his testimony, and he was a compelling and credible witness.

The reassignment of the CASA members came in the aftermath of an extensive initiative by District administration to reorganize failing schools; the unfortunate reality is that there remain many such schools in Newark. The neediest schools were designated as "renew schools," where a concerted effort would be made to create an optimal teaching environment by having a great leader; great teachers; a renewed vision for the school; improved technology; and a longer school day. Eight buildings were converted to "renew schools"; as a result Razzaq, Carlo, and Gilmore were displaced. Additionally, eight school buildings were closed. Wilson had been previously assigned to one such school. Marable had already been assigned to central office, effective with the 2011-2012 school year. An executive decision was made to change principals at the school to which Samuels had been previously assigned.

As part of the "renew" process, a thorough interview system was developed to ensure that candidates selected to serve as building principals would be a "great leaders." This process included an on-line application followed by a phone interview, and then a seven hour group interview. A candidate who successfully completed these steps would be invited to a panel interview that included the Superintendent of Schools. Leon stressed that it was an intentionally rigorous process. Only Gilmore went through the entire interview process, but was not assigned to a "renew school." Wilson and Carlo applied for principal positions, but their candidacy ended at the group-interview

stage. Marable contended that she also applied for a principal position, but without success.[1] Samuel and Razzaq did not apply. Leon noted that at the conclusion of the 2012-2013 school year, the petitioning principals could have again applied for principal openings in the District, but that none did so.[2]

In or about June of 2012 the petitioning principals were reassigned to central office, the work site for approximately 125 professionals, including some 80 certificated administrators.[3] Central office personnel support the instructional, student service, and operational functions of the District. Principals have been previously assigned to central office; thus, the assignments at issue here were not novel. Leon noted the "us and them" mentality that is often prevalent in a school district; he urged that placing building level administrators in central office was an attempt to create a "we."

Leon met with the reassigned principals as a group four times to collaboratively develop job descriptions for their roles at central office. Leon likewise worked collaboratively with them to secure positions in departments within central office that would best suit their skills, talents, and interests. In Leon's view, the reassigned principals did well in their new positions, used their skills as administrators, and brought value to the District. While he conceded that there were some initial bumps in the road as he and the principals alike needed to adjust to their new roles, he was quite adamant that it was not his intent, nor that of the District, that these individuals waste time or make work. Leon stressed that the duties that were actually performed by each individual were as set forth in their job descriptions, and as described in their year-end evaluations.

But it is uncontroverted, and I **FIND**, that upon reassignment, the principals were no longer required to administer a school; to routinely evaluate teaching staff; to supervise and discipline students; to interact regularly with parents and other members

[1] Leon had no record of her application; Marable shared documentary evidence that she did apply through an on-line program, Talent Match. (P-24.)

[2] Leon explained that it was a long-standing practice in the District to require tenured administrators who desired a change in building or assignment to apply for the positions they sought.

[3] With the exception of Marable, who had been assigned to central office a year earlier.

of a school community; or to review and formulate school building budgets or schedules. Leon shared postings for job vacancies for principal positions at the secondary and elementary level. (R-15, R-16, R-17). These documents were offered to demonstrate that there were openings available for 2013-2014 school year for which the petitioning principals could have applied. But these documents are more useful for what they share about the role and responsibility of a building principal.

The postings clearly indicate that a principal coordinates all school programs; ensures implementation of the school's operational budget; reviews test data and plans instructional direction to ensure student achievement; supervises and evaluates staff members; performs classroom observations and provides feedback to instructional staff; organizes and participates in parent conferences; plans faculty meetings; develops a Professional Improvement Plan that provides training for faculty; and interviews and recommends the appointment of teachers and other staff members for the school. I **FIND** that the displaced CASA members did not perform these functions while at central office.

The displaced principals testified at hearing. Uniformly, their focal point was that their new assignments involved work that was inconsistent with their rank as principal; could have been completed by an administrative assistant; or worse yet, for extended periods involved absolutely no work at all. But all conceded that their job descriptions had been collaboratively developed and that their year-end evaluations were authored by them and accurately described their professional accomplishments. These documents support Leon's assertion that he intended to give actual work to the displaced principals. Nonetheless, an analysis of the work each completed buttresses their contention that the work assigned was not that of a building principal.

Zakiyya Abdul Razzaq

Upon her reassignment from a school building, Razzaq worked at central office in Intervention and Referral Services (I&RS). She offered a log of her daily responsibilities. For the period from October 2012 through January 2013, she noted that "No specific job duties [were] assigned." Elsewhere, the log recorded ostensibly

trivial responsibilities, such as "[typing] an excel spreadsheet," and "[inserting] names of I&RS Coordinators and phone numbers on to [sic] excel spreadsheet." (P-13.) While the log purports to memorialize all that Razzaq did during that year, many work days are omitted altogether.

In contrast, the job description for her new assignment indicates that Razzaq will be responsible for "[creating] rigorous learning goals for students with I&RS coordinator"; will "[use] multiple forms of student-level data to drive the instructional Intervention Strategies"; will "[develop] concrete plans with effective solutions to address the new regulations related to the 504 process"; and "strategically [develop] clear and appropriate communication with community and outside referral agencies to support students with additional resources for interventions." (R-1.) Razzaq's evaluation of her performance during the 2012-2013 school year likewise describes an administrator with responsibility for driving school district academic performance. It reflects that Razzaq "maintain[ed] consistent rapport and collaboration amongst colleagues to turnkey research-based strategies and current educational trends," and "collaborat[ed] with district I&RS Coordinator to identify referral process trends, problems and solutions." The evaluation states that Razzaq "provid[ed] effective, relevant feedback to improve quality of I&RS services."[4]

Gerald Samuels

Samuels was reassigned to the Office of Title I/Federal Programs. He likewise kept a log of his daily activities during the 2012-2013 school year. (P-17.) That log reflected no work assignments for days on end. But his job description indicates that he would be required to "[assist] in the evaluation of nonpublic school instructional programs and [make] recommendations to instructional staff to support increased student achievement," as well as "[provide] technical assistance via principal perspective to Title I administrative team in planning, developing and implementing parent programmatic support to Title I Schools." He was required to assist "with in-service training for Title I teachers"; "solve practical problems and deal with concrete

[4] Razzaq's evaluation, and that of her colleagues, stated that they were not conceding that their job functions were consistent with their title as principal.

variables in situations where limited standardization may exist"; and "collect, interpret, identify data trends, and generate tools to enhance district, department and office initiatives." (R-7.)

Samuels confirmed that he drafted his evaluation for the 2012-2013 school year. In contrast to his daily log, Samuels wrote that he served as a "liaison to the principals of schools that received Title I funds and reminded them of time sensitive dates for submission"; responded to principal inquiries about proper usage of Title I funds; attended workshops and turnkeyed the information gathered; and assisted in "helping to create staff development opportunities [for] the non-public teachers who provided services for the Title I office." (P-18.) Samuels claimed to have "exemplary communication skills with Title I staff and non-public school teachers," this despite the fact that he also claimed that upon reassignment he was isolated, given no duties, and thus, one would presume, communicated with no one.

Donna Marable

Marable was reassigned from a building principal position effective with the 2011-2012 school year. Her first assignment was to the "call center," a hotline intended to field community phone calls and inquiries. She remained there until January 30, 2012, when she was reassigned to central office. According to Marable, for about a month she sat in the human resources office with no duties; in April she began working with various District departments in revising the e-procurement process. As of August 2012, her position was as Principal on Special Assignment to the Grants Development and Implementation Office.

Marable's job description indicates that she will be responsible for cultivating student academic progress by reviewing and recommending requests for proposals that promote student achievement; by analyzing grant budgets and expenditures in conjunction with the senior accountant; and by continuing her efforts to achieve departmental efficiency through the e-procurement process. (R-13.) Notwithstanding her job description, Marable authored a daily log that described few duties during the period from August 2011 through June 2013. (P-22.)

But on June 21, 2013, Marable authored a self-evaluation. (R-14.) She wrote that she "[l]ed, coordinated and supported cross-divisional and departmental efforts among team members to review and revise procurement system for a 2 billion dollar budget servicing 73 schools, 39,000 students and 3,500 staff members." Marable wrote that she "[c]reated high level documents to inform all stakeholders on progress on e-Procurement, NJSmart and grant Development and Implementation Projects." She "[i]nterfaced with local grant recipients to facilitate use of funds and minimize errors and return of funding." Marable "[u]sed strong team leadership building skills to clearly define roles and responsibilities, strategically leveraging strengths of department leaders to gather data for district initiatives." (R-14.) Although she contended that she had no real responsibilities, Marable's evaluation notes that she "[d]emonstrated a dedication to responsibilities."

Roy Wilson

Wilson was transferred to the office of Student Information Services, where he was tasked with identifying duplicate student records, and otherwise updating the District's data-management system. He noted that this sort of database maintenance had not been completed for years. An assignment log completed by Wilson memorialized his responsibilities that year. (P-26.) He began the year by collecting data regarding available seats in the schools, and assisted school personnel in allocating available seats. In February 2013, Wilson was assigned to establish and maintain contact with charter, religious, and other out-of-district schools to ensure compliance with applicable deadlines for the Non-Newark Public School Application, the process through which students not currently enrolled in the public schools apply to attend District high schools.

Wilson gave the impression in his testimony that these were menial tasks, not warranting his credentials or experience to properly complete. The job description for his position described a responsible position, however, noting that Wilson would be required to "[l]ead the district's Available Seats in Schools process," and "[a]ct as liaison between Student Information Services and the Office of Attendance," so that he

could "identify policies and practices that should be changed." (R-11.) Like his colleagues, Wilson self-evaluated his work for the 2012-2013 school year. Wilson's managerial achievements and contributions to the District during the 2012-2013 school year, included "provid[ing] oversight to ensure that timelines are met and stakeholders receive complete and unambiguous documents and materials," and "meet[ing] with stakeholders and provid[ing] oral and written explanations of the Student Information Services departments' vision and strategic plan and how they support the school system's vision and strategic plan." (P-27.) Wilson "communicat[ed] and collaborate[d] with other offices, programs, and schools to support the school system's strategic plan and vision for success for all students." He "[recognized] the evolving needs of the school system and work[ed] with other school system staff to plan to address these needs"; and he "[served] as a liaison between the school system and stakeholder groups.

James Carlo

Upon reassignment, Carlo initially was asked to assist with developing District policies and procedures relative to Harassment, Intimidation and Bullying. He was transferred to the purchasing department in or about October 2012. Like his colleagues, he completed a daily log of his activities. (P-30.) It reflects minimal job duties and responsibilities, often noting periods of time where there was "no assignment." But it makes no pretense of being comprehensive, memorializing only activities in October 2012. In his testimony, Carlo stressed that his job required no real critical thinking or other skills commensurate with his title and certification. Yet his job description required that he participate in the "development and design of procurement initiatives designed to optimize efficiency in delivering goods and services to schools [sic] instructional programming"; "identify and solicit community partners with ongoing programs for collaboration"; and provide consulting assistance for the development of "new and revised procurement manuals." (R-9.)

Carlo drafted his evaluation for the 2012-2013 school year. Under the heading "Ability to Manage," he noted that during the past year he had "collaborated with Purchasing Department staff to revise Policy and Procedure Guide for procurement";

"participated in the evaluation of RFP proposals"; and "collaborated with Purchasing Department staff in the development of PeopleSoft e-Supplier vendor integrated system." Carlo "provided one-to-one training for school-based administrators requiring support beyond normal Purchasing Department training workshops." Notwithstanding his contention that his work could be done by a support person, Carlo noted in his evaluation that he brought a "'school based' mindset into decision making regarding proposals received from vendors responding to various RFPs and Pre-Qualification Solicitations." According to his evaluation, Carlo was called upon to "effectively [function] as a member of various work groups." He clearly had projects to complete, because the evaluation notes that he did so "consistently . . . before scheduled deadlines." (R-10.)

JoAnn Gilmore

Gilmore was assigned to the Office of Policy, Planning and Assessment. Gilmore's testimony downplayed her contributions, asserting her role was limited to ministerial duties related to test security. Yet her job description provides that she "strategically liaises with school administrators on alignment with testing protocols"; "advises on potential strategies to engage principals in the interpretation of achievement trends and implications for practice"; and "develops, under the guidance of the District Test Coordinator and in partnership with principals and school test coordination teams, innovative, concrete solutions to root causes of school level departures from testing guidelines." (R-5.)

Like her peers, Gilmore completed a self-evaluation. Gilmore wrote that she "proactively [participated] and [supported] all departmental activities, such as local and district test security/testing protocol meetings, state assessment distribution and collection, and independent monitoring of individual testing sites to determine if immediate readjustments [were] necessary." Gilmore "proactively [shared] professional and technical knowledge with school administrators on the interpretation of achievement trends and implications for individual school practice . . . ." (R-6.) Gilmore assisted the department supervisor with professional development sessions; and supported building administrators needing assistance with testing and testing data

issues. Gilmore states in her evaluation that she "[infused] trust and respect during constructive conversations with school administrators . . . and staff in regards to the improvement of student progress."

The Transfer in November 2013

In November 2013, the principals were reassigned yet again to one of six "networks," each of which is lead by an assistant superintendent who supervises one aspect of the public schools. The record revealed that no formal job descriptions were created in the aftermath of these reassignments, nor were job evaluations offered in evidence that described the duties and accomplishments of the reassigned principals.

Leon explained what these most recent reassignments entailed, noting that the work for the displaced principals would continue to evolve because there had been a lot of downsizing at the central office. His testimony was essentially consistent with that of the CASA members, except, unsurprisingly, they attempted to denigrate their responsibilities while Leon urged that these responsibilities were valuable to the overall goals of the District. Upon reassignment to a network the petitioning principals reviewed and critiqued strategic and safety plans for the schools in their network. Additionally, the principals were asked to review and critique videoed instruction, as part of a process of "norming" evaluations. The process was designed to ensure that building principals are rating teachers correctly.

Professional Development

It is uncontroverted and I **FIND** that, upon their transfers to central office, the petitioning principals were no longer invited to a professional development opportunity known as the Principal's Learning Institute (PLI). These are monthly informational and professional development workshops led by central office administration, and are intended to guide and inform the work of building principals. They likewise have been excluded from receipt of other inter-office emails and memoranda typically directed to principals, such as an informational update entitled "Principal Points."

Leon took pains to point out and I **FIND**, however, that the reassigned CASA members continued to have professional development opportunities that focused on their current role and responsibilities in the District. The District maintains a Professional Improvement Fund, through which staff can register for pertinent in-service trainings and workshops and receive reimbursement. Leon stressed that no offense was intended by excluding the petitioners from PLI's. Nonetheless, the principals felt quite affronted. Samuels clearly spoke for all of his colleagues when he testified that his nonparticipation in the PLI's left him feeling "ostracized" and as if he had done something "heinous and unacceptable."

But Leon also urged and I further **FIND** that central office administration viewed it as unnecessary for the displaced CASA members to attend PLI's or receive other updates directed to building principals precisely because the information offered was pertinent only to school building administration. This assertion further buttressed the CASA contention that its members were working as something other than as principals.

Parking

CASA urges that as result of the move to central office, its members now have to pay for costly parking, whereas in the past, parking adjacent to their school buildings was free. Leon explained that parking in Newark indeed can be problematic, and that free parking is simply fortuitous. Leon took exception to the notion that assignment to a school building "came with" free parking. He urged that available free parking varied by school, with some principals able to park on school property; some who were able to find street parking; and some who were required to pay for parking. I **FIND** that Leon's explanation of the principals' prior access to parking was credible and made sense; and indeed, the petitioning principals pointed to no writing that guaranteed any form of reimbursement for parking while assigned to a school building.

It is uncontroverted and I **FIND** that for administrators assigned to central office, their entitlement to parking is as governed by the District collective bargaining agreement with CASA. Twelve-month directors receive a free parking pass; per the agreement. Supervisors receive two free months of parking on a rotational basis.

According to Leon, the CASA agreement was silent as to the parking entitlements of principals assigned to central office, so it was agreed between the parties that they would have access to the two-month rotational pass. This agreement is likewise not in dispute, and indeed all of the principals were aware that they could access limited free parking on a rotational basis, although not all availed themselves of this benefit, and several professed ignorance as to the origins of this benefit.

All of the principals confirmed that when they did pay for parking, the cost was $95 per month during the 2012-2013 school year and $100 per month during the 2013-2014 school year. Razzaq did not avail herself of the rotational two months free parking. Wilson and Carlo received free parking during both academic years. Samuels received free parking for two months during both years, but declined to use it during the 2012-2013 school year. Gilmore only received free parking once, for two months during the 2012-2013 school year, although she applied through the lottery during both years. Marable received free parking during the 2011-2012 school year. She received two months of free parking during both the 2012-2013 and 2013-2014 school years, although she did not use the parking during the latter year because she was absent from her duties due to illness.

ANALYSIS AND CONCLUSIONS OF LAW

The Motion to Dismiss as to Donna Marable

The time for filing a petition of appeal before the Commissioner is clearly set forth at N.J.A.C. 6A:3-1.3(i), which provides that a petition must be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education . . . which is the subject of the requested contested case hearing." The "notice of a final order, ruling or other action" of the District contemplated by the rule has been defined as notice "sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." Kaprow v. Bd. of Educ. of Berkeley, 131 N.J. 572, 587 (1993). Marable unequivocally knew that she would not be reassigned to a building at the very latest in September 2011 when she reported to central office, as directed. Thus, the

District urges that Marable's challenge to her reassignment should have been filed within ninety days of her first day of employment in September 2011; that is, sometime in December 2011. Her claims were not filed until November 2, 2012, and accordingly, the District asks that they be dismissed.

But the District ignores the fact that the tenure rights Marable asserts have been violated are guaranteed her by N.J.S.A. 18A:28-5. Our Supreme Court has recognized the inapplicability of the statute of limitations contained at N.J.A.C. 6A: 3-1.3(i), where the claimed violation of rights is grounded in statute. Bd. of Educ. of the Borough of Alpha v. Alpha Educ. Ass'n, 190 N.J. 34, 46-47 (2006) (citing N. Plainfield Educ. Ass'n v. N. Plainfield Bd. of Educ., 96 N.J. 587 (1984)). Moreover, each day that Marable's work assignment was not within the scope of her certification her tenure rights were violated anew. Our courts have recognized the inappropriateness of strictly applying a statute of limitations to a continuing violation. Bd. of Educ. of the Borough of Alpha, supra, 190 N.J. at 45-46. I **CONCLUDE** that Marable's claims are not barred by application of N.J.A.C. 6A:3-1.3(i).

In Alpha, a labor arbitrator had determined that contractual timelines were no bar to his consideration of the case before him because the grievant's claims constituted a continuing violation. But he likewise determined that the local school board should not be prejudiced by the grievant's delay in asserting her rights, and thus ordered only prospective relief. Id. at 41. As in Alpha, the District should not be prejudiced by Marable's failure to more promptly assert her rights. Accordingly, I **CONCLUDE** that any entitlement she might have to relief would be prospective only.

The Transfer to Central Office

CASA's claims spring from their members' tenure status under N.J.S.A. 18A:28-5, which protects them from dismissal or reduction in compensation without just cause. It is well-established that teaching staff members earn tenure not just in a district as a whole, but also in specific positions of employment. See Howley v. Ewing Bd. of Educ., 1982 S.L.D. 1328, 1339, aff'd, 1983 S.L.D. 1554. The "position" in which a teaching staff member achieves tenure is either one of the specifically designated positions in N.J.S.A.

18A:28-5 or other employment for which an appropriate certificate is required. Ellicott v. Frankford Twp. Bd. of Educ., 251 N.J. Super. 342, 347 (App. Div. 1991); see Howley, supra, 1982 S.L.D. at 1337. Insofar as the position of principal is specifically enumerated in the tenure statute, our courts have held that this position is "separately tenurable." Nelson v. Old Bridge Bd. of Educ., 148 N.J. 358, 366 (1997). It is uncontroverted that the CASA members whose transfer is at issue here held their positions as principal under tenure.

It is moreover well-established that a school board has the right to deploy staff as it sees fit, including the right to make involuntary transfers. Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 529 (App. Div. 1999). But the right to make such transfers is not entirely without limitations, as clarified in the seminal discussion of tenure and seniority rights contained in Howley, supra. at 1339-40:

> The power of a board of education to transfer teachers is limited only to the extent provided by the Tenure law . . . . The word "transfer" is most often used in tenure related cases in the context of the proposition that teaching staff members may be transferred within the scope of their certificates. As a blanket statement, this is not entirely correct . . . . Under the tenure statutes it is clear that a person tenured in a "position" may not be transferred from that position without his or consent . . . . Transfer without such consent constitutes a dismissal from the position and cannot be accomplished without compliance with the tenure hearing law.

But tenured teaching staff members may be involuntarily transferred to another assignment within his or her position, "where no loss of salary or other reduction in employment is suffered and the [teaching staff member] is not singled out for the transfer on a prohibited basis." Id. at 1340; Williams v Plainfield Bd. of Educ., 176 N.J. Super. 154 (App. Div. 1980). Such a transfer does not rise to a violation of that teaching staff member's tenure rights. See also Sheffield v New Jersey State Dep't of Human Serv., 93 N.J.A.R.2d (EDU) 26. Thus, an individual employed as a building principal can be transferred to principal positions other than the one currently held, provided there is no loss in rank or compensation. Indeed, in Williams, supra, the Court upheld the transfer of a high school principal to an elementary school

principalship, this notwithstanding that there would be a diminution in her earning potential as a result of the transfer.

Leon testified with passion and credibility that the transfer of these principals was part of a larger effort to revitalize the struggling Newark Schools, and that he sincerely thought that their presence in central office would add value to Newark's educational programs. The factual record corroborates Leon's testimony that their new positions of employment entailed real duties; that they were not assigned to central office with the intent that they do nothing. But it is incontrovertible that the CASA members are no longer doing the same work they did when assigned to a building. The factual record makes it equally clear that they are not doing the work of a building principal. For this reason, I am compelled to **CONCLUDE** that the involuntary transfer of these CASA members to central office violated their rights under N.J.S.A. 18A:28-5.

This conclusion finds further support in the language of N.J.A.C. 6A:9B-11.3(b) which defines the scope of the principal endorsement to the administrative certificate as follows:

> The principal endorsement is required for any position that involves service as an administrative officer of a school or other comparable unit within a school or school district. Such positions shall include assistant superintendent for curriculum and instruction, principal, assistant principal, vice principal, and director. The holder of a standard principal endorsement is also authorized to serve in the position of supervisor. Holders of this endorsement are authorized to provide educational leadership by directing the formulation of goals, plans, policies, budgets, and personnel actions of the school or other comparable unit, and recommending them to the chief district administrator, and by directing their implementation in the school or other comparable unit. Holders of this endorsement also are authorized to direct and supervise all school operations and programs, to evaluate school staff, including teaching staff members, and to direct the activities of school-level supervisors.
>
> [Emphasis supplied.]

The regulation makes it clear that the principal endorsement is intended to authorize its holder to perform school building level administrative functions. Indeed, the petitioning principals took pains to note repeatedly that they are no longer evaluating or supervising building-level staff or otherwise providing "educational leadership by directing the formulation of goals, plans, policies, budgets, and personnel actions" of a school building. While the evidence did not bear out their contention that they are doing nothing at all, or that the projects to which they were assigned were inconsequential or menial, the record nonetheless incontrovertibly revealed that they are no longer at the helm of a school building, and per N.J.A.C. 6A:9B-11.3, this is the role of a principal.

The language of N.J.A.C. 6A:9B-11.3(a) makes this even more apparent. This code provision speaks to the school administrator endorsement, and provides that the holder of this endorsement is responsible for administrative tasks at the central office or district-wide level, stating that "the school administrator endorsement is required for any position that involves services as a district-level administrative officer." This regulatory language compels me to query whether these petitioning principals were even qualified via certification to hold central office administrative positions.[5]

The District's reliance on Bigart v Paramus Board of Education, 1979 S.L.D. 123, is misplaced. There, the Commissioner held that the transfer of a classroom teacher to a position as an "unassigned teacher," was a valid exercise of the local board's discretionary authority, where the board had offered legitimate managerial reasons for the assignment, and had provided convincing evidence that the assignment would enhance the delivery of educational services to district students. But importantly, the petitioning teacher was still employed to offer instructional support, both in departmental centers as a resource for students, and to cover teachers who were called away from their classrooms. Hence, the transfer at issue was not outside the scope of her tenure protection. Conversely here, the aggrieved CASA members were reassigned to positions that had little or no relation to the role of a building

[5] Indeed, if they were performing central office administrative tasks these principals were improperly certificated, except for those who held the school administrator endorsement. If they were not doing administrative tasks, then the work they were performing was clearly not commensurate with their rank. Either way, their transfer and reassignment was improper.

principal, and thus I **CONCLUDE** that their transfers were to an altogether new position, in violation of their tenure rights under N.J.S.A. 18A:28-5.

The District correctly distinguishes Ruby v Board of Education of the Hudson Area Vocational-Technical Schools, 1983 S.L.D. 941, which reversed the transfer of a principal to a position with no duties or responsibilities. Unlike the reassignment there, I have no doubt that these transfers were intended to promote the overall betterment of school district operations, by allowing the District the leeway to hand-select what its central office administration felt was the best leadership for its "renew schools." I moreover believe that a sincere attempt was made to assign appropriate tasks to the displaced principals. But while their reassignments were neither a sham nor a fraud, the District has nonetheless impermissibly transferred these principals to positions that are "principalship[s] in name only." Ruby, supra, 1983 S.L.D. at 949. For this reason, and notwithstanding the inapplicability of the Ruby holding, CASA has successfully asserted on its members' behalf that this transfer is violative of their rights under the tenure laws.

The District's arguments that the No Child Left Behind Act (NCLB), 20 U.S.C. §§ 6301 et seq., mandates a different result are unavailing. The District points out that the United States Department of Education has viewed changes in leadership as a "vital tool" in turning around academic achievement. 74 Fed. Reg. 59776 (Nov. 18, 2009). According to the District, consistent with Federal mandates, recent New Jersey regulations include "staff retraining or reassignment" among the appropriate responses if school improvement efforts fail. See N.J.A.C. 6A:33-2.5(b)(2)(ii). But that option is clearly a regulatory "last resort," intended to come after a district has developed a School Improvement Plan (SIP) with the support of a Regional Achievement Center (RAC) designed to improve instruction in a priority or focus school. N.J.A.C. 6A:33-2.4. Only if a priority or focus school "fails to implement the SIP either in whole or in part, or if the SIP does not lead to an adequate increase in student performance outcomes," may the Commissioner take the drastic step of directing staff reassignment. N.J.A.C. 6A:33-2.5(b). I heard no evidence that a SIP was developed; that there was a failure to implement it; or inadequate improvement thereafter, relative to the schools previously led by the aggrieved principals. This is unsurprising, because these regulations post-

date the reassignments at issue here. But by like measure, the District cannot now rely on these same regulations to justify its actions.[6]

Nor did the District convince me that N.J.A.C. 6A:33-2.5(b)(2)(ii) intended to abrogate statutory tenure protections; nor could it have done so without express statutory authority. I have reviewed the regulation's enabling statute, N.J.S.A. 18A:7F-6(b), and while it grants the Commissioner the authority to direct staff reassignments in failing schools, I see no language that would permit such reassignments to violate employee tenure rights. The District points to comments offered during the regulatory adoption process that question if a local district would be compelled to file tenure charges against the principal of a failing school. The District notes that the Department of Education assured the public that tenure charges would not be needed because nothing in the rule requires the dismissal of a principal, rather than reassignment. See 45 N.J.R. 1637(a), comment 19 and response. But a review of that agency response nonetheless reveals no intent to abrogate staff tenure rights, as it indicates, quite clearly that, "the Commissioner has the flexibility to reassign the removed principal to another position within the school district, consistent with applicable State law and regulation." Ibid. (emphasis supplied).

The parties have agreed that there has been no loss of compensation as a result of the transfers, and accordingly I **CONCLUDE** that there is no entitlement to back pay or other compensation, notwithstanding the violation of the CASA members' tenure rights. Relative to parking, I **CONCLUDE** that; per Leon's credible and essentially uncontroverted testimony, the free parking previously enjoyed by these principals was merely fortuitous, and was neither a contractual entitlement nor a benefit uniformly provided to principals via District policy. Accordingly, the request to be reimbursed for parking expenses incurred subsequent to the controverted transfers is **DENIED**.

[6] It is noteworthy that three of the displaced principals were not previously at the helm of "renew schools," to include Wilson, Marable, and Samuels.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the District restore the petitioning CASA members to positions as building principals in accordance with their tenure entitlements.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

August 27, 2014

_____ _____

DATE **ELLEN S. BASS**, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

APPENDIX

Witnesses

For Petitioner:

Zakiyya Abdul Razzaq
Joann Gilmore
Gerald Samuels
James Carlo
Roy T. Wilson
Donna Marable

For Respondent:

Roger Leon

Exhibits

For Petitioner:

P-1 through 10 Not admitted
P-11 Certificates
P-12 Letter of reassignment, Razzaq
P-13 Activity log
P-14 Evaluation for 2012-2013
P-15 Letter of appointment
P-16 Letter of reassignment, Samuels
P-17 Activity log
P-18 Evaluation
P-19 Letter seeking reassignment
P-20 Certificates
P-21 Letter of appointment
P-22 Activity log
P-23 Evaluation for 2012-2013
P-24 Application for school based position

P-25 Letter seeking reassignment to school based position
P-26 Activity log
P-27 Evaluation for 2012-2013
P-28 Certificates
P-29 Letter of appointment
P-30 Activity log
P-31 Letter seeking reassignment
P-32 Letter of appointment
P-33 Letter of reassignment
P-34 Activity log
P-35 Letter seeking reassignment
P-36 Letter regarding PLIs
P-37 Not admitted
P-38 Not Admitted
P-39 August 2011 letter

For Respondent:
R-1 Job description
R-2 Admitted as P-14
R-3 Not admitted
R-4 Not admitted
R-5 Job description
R-6 Evaluation report
R-7 Job description
R-8 Admitted as P-18
R-9 Job description
R-10 Evaluation
R-11 Job description
R-12 Admitted as P-27
R-13 Job description
R-14 Admitted as P-23
R-15 Job Posting
R-16 Job posting

R-17 Job posting

EDUCATION LAW CENTER ON BEHALF OF ABBOTT V. BURKE PLAINTIFF SCHOOL CHILDREN,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL FACILITIES,	:	
RESPONDENT.	:	

SYNOPSIS

The petitioner, on behalf of the "Abbott v. Burke" school children of New Jersey, alleged that the respondent Office of School Facilities (OSF) failed to ensure the timely submission and approval of updated long range facilities plans (LRFP) for New Jersey's low income school districts (SDA districts) as required by the Educational Facilities Construction and Financing Act (EFCFA), *N.J.S.A.* 18A:7G-4(a). The OSF asserted that it has substantially complied with its statutory and regulatory obligations; that the failure to timely update LRFPs has not been detrimental to the SDA districts or their students; and that accordingly, the petition should be dismissed. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue, and the case is ripe for summary decision; in November 2013, the Education Law Center (ELC) notified the Commissioner and the OSF Director that updated LRFPs were more than five years overdue in all 31 SDA districts; the within petition of appeal was filed after the ELC received no response to its notification letter; analysis of whether the OSF has complied with the requirements of the EFCFA, *N.J.S.A.* 18A:7G-2 *et seq.*, and its implementing regulations relative to the timely updating of LRFPs in the SDA districts leads to the conclusion that the OSF is not in compliance with its obligations under the law; OSF's argument that there is no harm caused by its failure to compel SDA districts to timely file updated LRFPs is unavailing, as the laws are clear that facilities projects cannot be undertaken unless they are consistent with the LRFP. The ALJ concluded that the OSF is noncompliant with *N.J.S.A.* 18A:7G-2 *et seq.*, and ordered that the OSF direct those SDA districts without up-to-date LRFP to submit same within 60 days of the date of the order. Further, the ALJ ordered the OSF to adhere to specific timelines for development of needs assessments and educational priority rankings in order to ensure that students in the SDA districts "...are educated in physical facilities that are safe, healthy and conducive to learning." *N.J.S.A.* 18A:7G-2(a).

Upon full consideration, the Commissioner, *inter alia*, concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision with modification to the timelines for completion of the LRFP approval process. The SDA districts were directed to file up-to-date LRFPs within 90 days of the date of this final decision; after submission of the LRFPs, the OSF was directed to comply with the timeframes outlined in *N.J.S.A.* 18A:7G-4(i).

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

Issued 1/13/15

OAL DKT. NO. EDU 4670-14
AGENCY DKT. NO. 30-2/14

EDUCATION LAW CENTER ON BEHALF OF ABBOTT V. BURKE PLAINTIFF SCHOOL CHILDREN,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL FACILITIES,	:	
RESPONDENT.	:	

In this matter the petitioner, the Education Law Center (ELC) on behalf of the "Abbott v. Burke" school children of New Jersey, alleges that the respondent Office of School Facilities of the Department of Education (OSF) has failed to ensure the timely submission and approval of updated long range facilities plans (LRFP) for New Jersey's low income school districts (SDA districts), as required by *N.J.S.A.* 18A:7G-4(a). The Administrative Law Judge (ALJ) found that OSF was not in compliance with the Educational Facilities Construction and Financing Act (EFCFA), *N.J.S.A.* 18A: 7G-1 *et seq.*, and with the regulations relative to the approval of LPFPs for the SDA districts. The ALJ granted the petitioner's motion for summary decision and ordered time frames for the completion of the LRFP approval process.

In its exceptions, OSF maintains that the Initial Decision should be rejected because the ALJ failed to recognize that OSF has taken substantial steps to ensure the submission and approval of amended LRFPs by the SDA districts. The OSF also takes exception to the timeline that the ALJ recommended for the completion of the approval process. First, OSF maintains that the strict 60-day timeline set by the ALJ for the SDA districts to amend their LRFPs is not feasible because the amount of time required to complete an LRFP amendment

varies depending upon the size of the district, the degree of change from existing conditions and the previously approved LRFP, required field survey work, and the amount of consensus-building needed for board of education endorsement. The OSF asserts that such a truncated timeline could result in many of the submissions being incomplete or inaccurate. The OSF also argues that the ALJ's directive that the OSF not only review the submitted LRFP amendments, but approve the LRFPs within 90 days is improper as there can be no guarantee that the submitted LRFP amendments will warrant approval by the OSF. The OSF points out that the direction to "review and approve" the LRFPs is contrary to the applicable procedures contained in *N.J.S.A.* 18A:7G-4(i). Finally, the OSF contends that the ALJ failed to recognize that the Educational Facilities Needs Assessment and Educational Priority Ranking (Needs Assessment) is up to date. The OSF notes that the Needs Assessment was last completed in 2013, based upon then-current information and within the timeframes established by the EFCFA. Therefore, the OSF requests that the Initial Decision be rejected and that summary decision be granted in its favor.

In reply, the petitioner urges the Commissioner to reject the OSF's exceptions and to adopt the Initial Decision as the final decision in this matter. With respect to the OSF's challenge to the timelines recommended by the ALJ, the petitioner stresses that the OSF simply contends the timeline recommended by the ALJ for the submission of the LRFPs is not feasible, yet the OSF offered no alternative timeline for the competition of the LRFP amendment process. The petitioner argues that the establishment of a 90 day time limit for the approval of all the LRFPs is well within the Commissioner's equitable authority to remediate the violation that has occurred. Additionally, the petitioner contends that the EFCFA requires that the Needs Assessment occur only after the approval of an SDA district's long range facilities plan and – as a result – once the submitted LRFPs are approved by the OSF, the Needs Assessment will not be

up to date. Therefore, petitioners argue that the ALJ's order requiring the completion of an updated Needs Assessment and priority ranking must be affirmed.

The Commissioner recognizes that OSF has made substantial efforts toward approving amended LRFPs for the SDA districts. Nevertheless, after consideration of the record, the Commissioner is in accord with the ALJ's determination – for the reasons stated in the Initial Decision – that the OSF has not yet fully complied with the EFCFA in this regard. The Commissioner notes, however, that the ALJ recommended that the OSF order the SDA districts to file an up-to-date LRFP within 60 days of the date of the October 16, 2014 Initial Decision. This date has preceded the consideration of the Initial Decision by the Commissioner and shall be modified as follows.

The SDA districts are directed to file an up-to-date LRFP within 90 days from the date of the final decision. The 90 day timeframe for the approval of the LRFPs recommended by the ALJ is inconsistent with the procedures contained in *N.J.S.A.* 18A:7G-4(i), and is therefore rejected. After the submission of the LRFPs, the OSF shall comply with the timeframes outlined in *N.J.S.A.* 18A:7G-4(i) in connection with the review and approval of LRFPs. Additionally, to the extent that the Needs Assessment must be updated following the approval of an SDA district's LRFP, OSF shall do so in accordance with *N.J.S.A.* 18A:7G-5m(2).

Accordingly, the Initial Decision in this matter is adopted as the final decision as modified with respect to the timelines for the completion of the LRFP approval process.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/13/15

Date of Mailing: 1/13/15

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 04670-14
AGENCY DKT. NO. 30-2/14

EDUCATION LAW CENTER ON BEHALF OF ABBOTT V. BURKE PLAINTIFF SCHOOL CHILDREN,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL FACILITIES,

Respondent.

Elizabeth Athos, Esq. (Education Law Center, attorneys) and **Marika M. Lyons**, Esq. (White and Case, attorneys), for petitioner

Lauren Jensen, Deputy Attorney General, for respondent, (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: September 8, 2014 Decided: October 16, 2014

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Petitioner, Education Law Center (ELC), alleges, on behalf of the Abbott v. Burke school children, that respondent, New Jersey Department of Education, Office of School Facilities (the OSF), has failed to ensure the timely submission and approval of updated long range facilities plans (LRFP) for New Jersey's low income school districts, as required by N.J.S.A. 18A:7G-4(a). The OSF replies that it has substantially complied with its statutory and regulatory obligations; that the failure to timely update LRFPs has not been detrimental to the subject school districts or their students; and that accordingly, the petition of appeal should be dismissed.

PROCEDURAL HISTORY

ELC filed its petition of appeal with the Commissioner of Education (the Commissioner) on February 7, 2014. OSF filed an answer and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case on April 15, 2014. ELC filed a motion for summary decision and accompanying brief and certification on July 25, 2014. The OSF filed a cross-motion for summary decision with accompanying brief and certification on August 26, 2014. ELC replied via letter memorandum filed on September 8, 2014, at which time the record closed.

FINDINGS OF FACT

The material facts are not in dispute. I **FIND** that ELC is a non-profit organization that, since 1981, has served as counsel in the Abbott v. Burke cases for the class of children who attend school in thirty-one poor or urban school districts. OSF is the office within the Department of Education (DOE) responsible for reviewing and approving school facility projects, under the Educational Facilities Construction and Financing Act (EFCFA). N.J.S.A. 18A:7G-1 et seq. In 2007, amendments to the EFCFA created the School Development Authority (SDA), which provides financing and direct construction of school facilities projects in low-income districts, now denoted as "SDA districts." N.J.S.A. 18A:7G-3.

Under the EFCFA, districts are required to file LRFPs that detail their school facilities needs and their plans to address those needs for the ensuing five years. N.J.S.A. 18A:7G-4(a). After submission of an initial LRFP, SDA districts must revise their plans every five years by updating enrollment projections, building capacities, and health and safety conditions; these plans must be submitted to the DOE for review and approval. The EFCFA limits DOE approval of individual school facilities projects to those contained in an approved LRFP or in an approved amendment to the plan. N.J.S.A. 18A:7G-4(b) and (c). As required by the EFCFA, the DOE has adopted rules governing the submission, review and approval of facilities plans and projects. N.J.A.C. 6A:26-1.1 et seq. Via letter dated January 29, 2010, the OSF Director Bernard Piaia reminded the SDA districts of their obligation to update their LRFPs "at least" every five years. But on or about November 25, 2013, ELC notified the Commissioner and Piaia that updated LRFPs were overdue in all 31 of the SDA districts. At the writing of that letter, it had been well over five years since the 31 SDA districts had last had an LRFP approved; for two-thirds of the districts their last LRFP approval was more than six years old. ELC received no response to its letter, and this petition of appeal followed.

The OSF Director of Policy and Planning Susan Kutner does not dispute that the SDA districts are required to amend their LRFPs every five years; or that as of the date of her certification, only eight of the 31 SDA districts have up-to-date approved plans.[1] Kutner described the process through which LRFPs are approved by her office. Much of her certification reads like an apologia for the failure of the SDA districts and her office to meet statutory and regulatory timelines. Indeed, Kutner emphasizes that amending the LRFP is work intensive. A district must prepare enrollment projections; determine the functional capacity of each school facility; take an inventory of district-owned land; prepare a listing of any proposed new sites for school facilities; determine the scope of work for any proposed projects for the ensuing five years; determine plans for new construction; prepare a preliminary estimate of the costs attached to each

[1] Kutner points out that, in the interim, districts can move forward with a capital improvement project that is not consistent with an existing approved LRFP, provided the district makes an amendment request. N.J.A.C. 6A: 26-2.3(c).

proposed facilities project; and obtain local school board approval of submission of the LRFP amendment.

In developing a viable facilities plan for a district, consensus must be obtained among school administrators, the local school board, and the public. Community input is encouraged, particularly if a facilities plan will reconfigure school zones, as this is often controversial. Kutner explained that "[t]he exploration of different scenarios and their presentation to various stakeholders can add considerable but necessary time to the planning process." Some districts retain consultants to assist them, but such consultancy services are costly. Accordingly, completion of an amended LRFP is an arduous and complex task; both Kutner's office and the local districts essentially do the best they can. Kutner noted that she works closely with districts to avoid the problems encountered during the 2005 approval process, when her department needed to address many deficient applications. Kutner clarified that she now provides a preliminary review of select LRFP amendment elements rather than wait for a complete submission to avoid these difficulties. This process may delay the filing of a complete submission, but in Kutner's view, significantly improves review, revision and approval time.

Pursuant to N.J.A.C. 6A:26-2.1(a), the LRFP must be amended on software made available by the DOE via a web-based system. To complete amendments to its LRFP, a district must first request that the department's system be unlocked. After inputting any updated information, the district can formally submit the LRFP amendment; once it is submitted no further changes can be made. The DOE will be updating to a new web-based reporting system by the end of 2014. This change is needed to coordinate with a new project application component that will be available in early 2015. Districts have been advised via memorandum dated August 12, 2014, about the changes in the web-based system, and the memorandum directs districts to immediately begin planning for an amendment submission using the new system if prior LRFP approval was not issued with the last five years. The OSF has also posted Preliminary LRFP Guidelines for the new system on its website.

Facilities projects in the SDA districts flow from approval of the LRFP; it is correctly described by ELC as a "crucial first step" in the process of securing approval for needed improvements to school facilities. Once the plan is approved, the Commissioner must develop a facilities needs assessment for each SDA district, to be used to initiate facilities projects. N.J.S.A. 18A:7G-5(m)(1). An educational priority ranking of all school facilities projects in the SDA districts must be established based on a determination by the Commissioner of "critical need." N.J.S.A. 18A: 7G-5(m)(2). The Commissioner is then required to transmit that ranking to the SDA for use in establishing a statewide strategic plan for sequencing the construction of school facilities projects in all of the SDA districts. N.J.S.A. 18A:7G-5(m)(3). Accordingly, in ELC's view, if the LRFPs are out-of-date and do not reflect the actual and changing needs of each SDA district, all downstream decisions and actions taken by the DOE based on these LRFPs likewise will be out-of-date and inaccurate.

But Kutner stresses in her certification that the Educational Facilities Needs Assessments for each SDA district and the Educational Priority Rankings for all school facilities projects state-wide are neither out-of-date nor based on inaccurate information. The first Educational Facilities Needs Assessments and Educational Priority Rankings were completed by the Department in 2008, based on data provided in the 2005 LRFPs. Both were updated in 2010 and again in 2013. Kutner explained that since the EFCFA no longer requires LRFPs to be revised at the same time, the data from the 2008 assessment has been updated independent of the LRFPs in order to utilize the most current information.[2] The update includes existing enrollments as reported on the Application for School Aid; a review of active district schools using the Department's County District information system; and an updating of inventory for funded and completed projects. In many cases, districts are contacted to verify inventory changes that may have occurred from the last assessment, or to explain capacity shortages or surpluses based on a comparison of updated enrollments and inventory data. The needs assessment thus is not tied to LRFPs, and does not consider the projected enrollments or specific proposed projects found in the LRFP.

[2] Previously, submissions of LRFPs were made uniformly on years ending with a "0" or a "5."

There has been some progress in the submission and approval of LRFPs for the SDA districts since the petition of appeal was filed. Kutner has advised as follows:

1. Asbury Park, Monmouth County: An LRFP was last approved on April 10, 2008, over six years ago. The district requested password access to the LRFP on-line system in June 2014.

2. Bridgeton, Cumberland County: An LRFP was last approved on June 20, 2007, over seven years ago. The district has submitted enrollment projections, updated school grade alignments, and scopes of work. It is anticipated that an amended plan will be completed in late Fall 2014.

3. Burlington City, Burlington County: An LRFP was last approved on February 11, 2008, over six years ago. The district submitted an amendment request form in July 2013 and contacted the OSF on August 14, 2014, for assistance in completing the amendment.

4. Camden City, Camden County: An LRFP was last approved on January 15, 2008, over six years ago. Although an amendment request form was submitted by the district in February 2013, OSF does not anticipate final submission of an amended LRFP until December 2014.

5. City of Orange, Essex County: An LRFP was last approved on March 25, 2008, over six years ago. Updated district enrollment projections were approved by the Department on May 1, 2014. The district is currently assessing potential project scopes for inclusion in an amended plan.

6. East Orange, Essex County: An LRFP was last approved on December 14, 2007, close to seven years ago. The district submitted an amended LRFP in August 2013, which was determined to be deficient. OSF last heard from the district's consultant in August 2014, and a revised submission is anticipated by November 2014.

7. Elizabeth, Union County: An LRFP was approved on May 14, 2013.

8. Garfield, Bergen County: An LRFP was last approved on May 9, 2008, over six years ago. The district submitted an LRFP Amendment Request Form in June 2012 and is currently assessing potential projects for inclusion in an amended LRFP.

9. Gloucester City, Camden County: An LRFP was approved on August 12, 2014.

10. Harrison, Hudson County: An LRFP was last approved on September 12, 2007, over seven years ago. An amended LRFP submitted in August 2013 was found to be deficient. A revised LRFP has yet to be submitted by the district.

11. Hoboken, Hudson County: An LRFP was last approved on March 25, 2008, over six years ago. The district submitted an enrollment projection on April 30, 2014, has retained a consultant, and is currently assessing potential projects for inclusion in an amended plan.

12. Irvington Township, Essex County: An LRFP was approved on November 13, 2011.

13. Jersey City, Hudson County: An LRFP was last approved on November 13, 2007, close to seven years ago. According to Kutner, the district is actively working on an amended LRFP, which she anticipates receiving by November 2014.

14. Keansburg, Monmouth County: An LRFP was last approved on September 12, 2007, over seven years ago. The district submitted an amendment request in August 2012 and has submitted enrollment projections, updated school grade alignments, and scopes of work. It will be unable to

finalize a proposed amended LRFP until proposed room inventories and capacities are finalized.

15. Long Branch, Monmouth County: An LRFP was last approved on October 16, 2007, exactly seven years ago. An Amendment Request Form was submitted in May 2013, but completion of the LRFP is pending a determination regarding disposition of an "old high school building."

16. Millville City, Cumberland County: An LRFP was last approved on September 12, 2007, over seven years ago. District enrollment projects were reviewed by the DOE on July 2, 2014, and the district continues to explore high school building options, which is its major facilities concern. An amendment will be submitted "once a course of action has been decided."

17. Neptune Township, Monmouth County: An LRFP was approved on December 16, 2013.

18. New Brunswick, Middlesex County: An LRFP was approved on May 14, 2013.

19. Newark, Essex County: An LRFP was approved on June 23, 2014.

20. Passaic City, Passaic County: An LRFP was last approved on September 12, 2007, over seven years ago. The district is currently assessing capacities and building scopes for three major projects, after which it will be in a position to amend its plan.

21. Paterson, Passaic County: An LRFP was last approved on September 12, 2007, over seven years ago. The district submitted a LRFP Amendment Request Form in August 2013, and Kutner believes it is in the process of retaining a consultant.

22. Pemberton Township, Burlington County: An LRFP was last approved on June 18, 2007, over seven years ago. The district submitted an amendment request, is currently assessing building options, and "will amend its plan once a consensus is reached."

23. Perth Amboy, Middlesex County: An LRFP was last approved on September 12, 2007, over seven years ago. Enrollment projections have been completed and the "district's LRFP amendment is pending a determination of project scopes."

24. Phillipsburg, Warren County: An LRFP was approved on June 30, 2014.

25. Plainfield, Union County: An LRFP was last approved on January 22, 2008, over six years ago. The district submitted updated enrollment projections in May 2014 and its LRFP amendment is "pending a determination of project scopes."

26. Pleasantville, Atlantic County: An LRFP was approved on October 8, 2013.

27. Salem City, Salem County: An LRFP was last approved on September 12, 2007, over seven years ago. The district submitted an LRFP Amendment Request Form in September 2013 and submitted enrollment projections in April 2014.

28. Trenton, Mercer County: An LRFP was last approved on September 12, 2007, over seven years ago. The district is in the process of retaining a consultant.

29. Union City, Hudson County: An LRFP was last approved on March 25, 2008, over six years ago. The district has submitted an amendment request and is actively working on amending its LRFP with a consultant.

30. Vineland City, Cumberland County: An LRFP was last approved on December 3, 2007, close to seven years ago. The district submitted an Amendment Request Form in January 2013 and is working on finalizing middle school building options.

31. West New York, Hudson County: An LRFP was last approved on September 12, 2007, over seven years ago. The district has submitted an amendment request and is actively working on amending its LRFP with the help of a consultant.

CONCLUSIONS OF LAW

N.J.A.C. 1:1-12.5 provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c), which provides that "the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995) (citing Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, supra, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214. I **CONCLUDE** that this matter is ripe for summary decision. There are no material disputed facts, and ELC is entitled to judgment as a matter of law.

The claims raised by ELC demand an analysis of whether the OSF has complied with the requirements of the EFCFA, N.J.S.A. 18A:7G-2, et seq., and its implementing regulations relative to the timely updating of LRFPs in the SDA districts. N.J.A.C. 6A:26-1.1 et seq. The constitutional mandate that New Jersey school children receive a thorough and efficient free public education includes the assurance "that students are educated in physical facilities that are safe, healthy, and conducive to learning." N.J.S.A. 18A:7G-2(a). Although seeking to address the adequacy of school facilities statewide, the legislature acknowledged that "[e]ducational infrastructure inadequacies are greatest in the SDA districts where maintenance has been deferred and new construction has not been initiated due to concerns about cost." N.J.S.A. 18A:7G-2(c). Thus, the EFCFA requires that:

> To remedy the facilities inadequacies of the SDA districts, the State must promptly engage in a facilities needs assessment and fund the entire cost of repairing, renovating, and constructing the new school facilities determined by the Commissioner of Education to be required to meet the school facilities efficiency standards in the SDA districts.
>
> [N.J.S.A. 18A:7G-2(c).]

The EFCFA, and its accompanying regulations, were enacted in response to a school funding process that was deemed constitutionally infirm, in part, because facilities in poor and urban districts were "crumbling and obsolescent and . . . this grave state of disrepair not only prevents children from receiving a through and efficient education, but also threatens their health and safety." Abbott v. Burke, 153 N.J. 480, 519 (1998). The LRFPs that are the focal point of this litigation are part of the statutory scheme intended

to expedite the repair of these crumbling and obsolescent schools. Indeed, N.J.A.C. 6A:26-1.2 defines an "approved LRFP" as "an LRFP that conforms to the requirements of N.J.A.C. 6A:26-2 and that has been determined by a Commissioner's final determination to ensure the school facilities are educationally adequate to support over the next five years the achievement of the Core Curriculum Content Standards."

It requires little discussion or analysis to **CONCLUDE** that the OSF is noncompliant with the EFCFA and with agency regulations relative to the approval of updated LRFPs. N.J.S.A. 18A: 7G-4(a) is unequivocal, speaks in the imperative and provides:

> Following the approval of the 2005 long-range facilities plan, each district shall amend its long-range facilities plan at least once every five years to update enrollment projections, building capacities, and health and safety conditions. The long-range facilities plan shall incorporate the facilities efficiency standards and shall be filed with the Commissioner for approval in accordance with those standards. (Emphasis supplied)

The statute moreover states, consistent with ELC's contention that an up-to-date plan is a prerequisite to any facilities project, as follows:

> Notwithstanding any other law or regulation to the contrary, an application for a school facilities project pursuant to section 5 of P.L.2000. c. 72(C.18A:7G-5) shall not be approved unless the district has filed a long-range facilities plan that is consistent with the application and the plan has been approved by the commissioner.
>
> [N.J.S.A. 18A:7G-5(b)]

The accompanying regulations likewise make the SDA districts responsible for submission of an amended LRFP "at least once every five years." N.J.A.C. 6A:26-2.1(a). Both statute and regulation are a response to the Supreme Court directive that the Commissioner ensure that such plans are completed. See: N.J.A.C. 6A:26-1.1. The Court stated:

> Before any new classrooms are built, however, each district is expected to complete an enrollment projection and a Five-Year Facilities Management Plan (Plan). This Plan will enable the State and the district to work together to determine how to make the "best use" of existing space...The Commissioner is directed to ensure that the Plans are completed and that the deadlines are met.
>
> [Abbott v. Burke, supra, 153 N.J. at 521 (1998)]

Through Kutner's certification, the OSF has offered what I have no doubt is a sincere and compelling description of the logistical and technical complexities that delay the finalization of updated LRFPs for the SDA districts. But the agency is required to comply with its own regulations. Our courts have recognized that "[b]ecause administrative regulations that apply to the regulated public have the force and effect of statutory law, an administrative agency ordinarily must enforce and adhere to, and may not disregard, the regulations it has promulgated." Cnty of Hudson v. Dept. of Corrections, 152 N.J. 60, 70 (1997). An agency may amend its regulations, but "so long as they are in force the agency is bound by them." Id. at 71. Moreover, any doubt that the OSF has the authority and obligation to compel the local districts to meet their obligations to timely update their LRFPs is assuaged by reference to N.J.A.C. 6A: 26-14.1(a), which authorizes the Commissioner to withhold state aid from any district that fails to obey "the law, or the rules or directions of the State Board or the Commissioner."

The OSF's argument that there is no harm caused by its failure to compel the SDA districts to timely file updated LRFPs is unavailing. The statute and regulations are clear that facilities projects cannot be undertaken unless they are consistent with the LRFP. See: N.J.S.A. 18A:7G-4(b); N.J.A.C. 6A:26-2.3(c). ELC compellingly urges that all facilities construction in the SDA districts flows from the finalization of the LRFP, including the prioritization of projects that must be later undertaken in conjunction with the SDA. N.J.S.A. 18A:7G-5(m)(3). While Kutner's assertion that the OSF keeps facilities priorities up-to-date notwithstanding the failure of the SDA districts to timely update their LRFPs is somewhat reassuring, the steps she describes nonetheless do not constitute compliance with the agency's clear statutory obligations. Under the plain language of the EFCFA, prioritizations of school facilities projects state-wide "[follow]

the approval of an SDA district's long-range facilities plan or of an amendment to that plan..." N.J.S.A. 18:7G-5(m)(2). Thus, to the extent that OSF is prioritizing projects without reference to timely LRFPs, it is doing so in a manner that is noncompliant with the law.

The OSF urges that strict enforcement of the regulatory requirements through a withholding of state aid would serve only to harm the SDA districts and their students, who our courts have described as the "the most disadvantaged school children in the state." Abbott v Burke, supra, 153 N.J. at 528. I agree. But there must be some mechanism at the agency's disposal to ensure that these plans are quickly completed, whether it is via redirecting more funds, time or personnel to ensuring that the agency's legal obligations are met. In any event, the statute and regulations as they now read leave me no option but to **CONCLUDE** that the OSF is in noncompliance with its obligations under law, and that the relief sought by ELC should be granted.

I am likewise compelled to direct that this work be completed under the timeline proposed by ELC in its pleading. The OSF has replied to that timeline only with vague promises that the needed work will be done. These assurances do not pass statutory or constitutional muster.

ORDER

Based on the foregoing, I **ORDER** that the OSF direct those SDA districts that have yet to file an up-to-date LRFP to do so within 60 days of the date of this order. Upon receipt of the updated LRFPs, the OSF is **ORDERED** within 90 days to review and approve the LRFPs, and to thereafter take the steps required under the relevant statutes and regulations to develop a needs assessment and create priority rankings. The needs assessment must be completed within 60 days from the date of approval of the updated LRFP; an educational priority rating must be transmitted to the SDA within 30 days thereafter.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration

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

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

October 16, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: October 16, 2014

Date Mailed to Parties: OCT 17 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
----------X
In the Matter of the TENURE Charges Against

THOMAS WILLIAMS,

Agency Dkt. No.
239-8/14

By: STATE OPERATED SCHOOL DISTRICT OF
THE CITY OF NEWARK, ESSEX COUNTY

----------X
Before **MELISSA H. BIREN, Esq.,** Impartial Arbitrator

ORDER APPROVING SETTLEMENT OF TENURE CHARGES

The State District Superintendent of the State Operated School District of the City of Newark, Essex County (the "District") certified tenure charges against Thomas Williams ("Respondent" or "Williams"), a tenured teacher in the District. The District's counsel, Adams Gutierrez & Lattiboudere, LLC, filed the tenure charges with the Commissioner of Education of the State of New Jersey on August 29, 2014. The charges allege conduct unbecoming, insubordination and other just cause for termination. Respondent, by his counsel, Stuart Ball, Esq., Stuart Ball, LLC, filed an answer with the Commissioner, received on September 10, 2014, denying the allegations and asserting various defenses. These charges were referred to the undersigned Arbitrator on September 22, 2014 pursuant to *N.J.S.A.* 18A:6-16, as amended by *P.L.* 2012, c. 26. A timely request for an extension of time to conclude the hearing and submit a decision was granted.

Counsel for the District and the Respondent advised that the parties reached a mutually acceptable settlement of the tenure charges against Respondent. On December 30, 2014, a Stipulation of Settlement ("Stipulation") was forwarded to the arbitrator for review and approval. In accordance with *N.J.A.C.* 6A:3-5.6, the settlement of the tenure charges pursuant to the terms of the Stipulation is hereby approved; the standards for settlement have been satisfied as set forth below.

1. A copy of the Tenure Charges and the Answer are annexed to this Order.
2. The settlement of the tenure charges is warranted as it resolves the charges without the need for multiple hearing dates with numerous witnesses,

including two young students. Settlement of the charges without a hearing removes the uncertainty of litigation for both the District and the Respondent. It avoids disruption to the District that would have to devote resources and time to the hearing; school personnel may now devote their attention to their usual duties and responsibilities and not to preparation and participation in the hearing. It also allows Respondent to avoid the stress of proceeding with a hearing on these charges and puts him in the position to move on with his life.

3. Both the charged and charging parties have consented to the settlement terms. Both parties were represented by counsel in the negotiation of the settlement and the preparation of the Stipulation. Williams signed the Stipulation indicating his voluntary agreement to its terms on December 12, 2014. The State District Superintendent signed the Stipulation indicating her voluntary agreement to its terms on December 29, 2014. In addition, counsel for the District, Adam Herman, Esq., Adams Gutierrez & Lattiboudere LLC, signed a Certification of Consent to Settlement Terms Pursuant to N.J.A.C. 6A:3-5.6(b) on December 30, 2014.
4. Respondent entered into the Stipulation with a full understanding of his rights. Competent counsel provided advice and counsel to the Respondent throughout the settlement process. In addition, the Stipulation contains detailed terms to which Respondent indicated his consent.
5. The settlement is in the public interest. Pursuant to the settlement, Respondent resigns from his position as a tenured teacher in the District. Further, as discussed above, by the settlement, the District (an *Abbott* District with stringent budget limitations) avoid the uncertainty of the outcome of the arbitration, the time and expense associated with litigation and any disruption to the District resulting from school personnel's participation in multiple hearing days.
6. The Stipulation clearly and expressly indicates that the Respondent has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners. Further, as discussed above,

Respondent was advised and represented by counsel throughout the settlement process.

By reason of the foregoing, the settlement of the tenure charges against the Respondent, Thomas Williams, pursuant to the terms set forth in the Stipulation, is approved.

Dated: January 8, 2015

Melissa H. Biren, Esq., Arbitrator

State of New Jersey)

County of Essex)

On this 8th day of January 2015 before me personally came and appeared MELISSA H. BIREN, to me known to be the individual described in and who executed the foregoing instrument and acknowledged to me that she executed the same.

Robert D. Agree
Notary Public

ROBERT D AGREE
ID # 2429835
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires February 8, 2018

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

In the Matter of the Tenure Charges of

CARLY OLIVIER

and

THE STATE-OPERATED SCHOOL DISTRICT

OF THE CITY OF NEWARK

Agency Reference No.: 302-10/14

Hearings in the above-entitled matter were held on December 11, 2014 and December 23, 2014 at the New Jersey State Board of Mediation in Newark, New Jersey, before Daniel F. Brent, duly designated by letter dated November 17, 2014 as Impartial Arbitrator pursuant to the TEACHNJ Act, for the purpose of adjudicating the tenure charges filed by the State-Operated School District of the City of Newark against Carly Olivier, a tenured teacher, based on inefficiency and conduct unbecoming for failure to report as scheduled for his teaching

assignment during a protracted period. The District introduced documentary evidence and testimony by the custodian of official school records setting forth in detail the basis for these charges. On December 23, 2014, during the course of the second hearing, the parties advised the Arbitrator that they had been able to resolve their dispute amicably.

The terms and conditions of their settlement were memorialized in a Stipulation of Settlement agreement that was executed by both parties after Respondent Olivier consulted with his attorney. The Stipulation of Settlement resolves an issue of inefficiency and performance based on attendance-related conduct, and is hereby incorporated by reference. The Arbitrator inquired of Respondent to be sure that he understood the terms of the agreement, was satisfied by the representation afforded him by his counsel, and that he had no questions regarding the Stipulation of Settlement before he executed the document setting forth the parties' entire agreement. The Arbitrator witnessed the execution of the Stipulation of Settlement.

AWARD OF ARBITRATOR

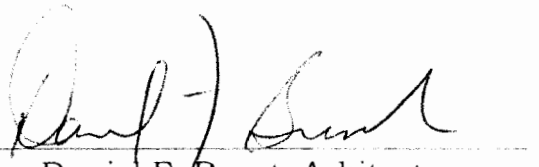
Daniel F. Brent, having been duly designated as Impartial Arbitrator pursuant to NJSA 18A:6—16 as amended by P.L. 2012, c. 26, AWARDS as follows:

After duly considering the nature of the tenure charges brought by the State-Operated School District of Newark against Respondent Carly Olivier, the Respondent's record of service to the School District of the City of Newark, the absence of harm to any student for the whom the Respondent was responsible, and the advantages and factors cited by the parties as a basis underlying their Stipulation of Settlement, I hereby find that the terms and conditions contained in the Stipulation of Settlement dated December 23, 2014 as agreed upon by the Respondent and the School District, each of whom has been advised by counsel, are reasonable and in the best interest of both the parties and the public.

Based on the facts elicited by the evidentiary record in the instant matter, and given the defenses asserted by Respondent Carly Olivier, and having examined the terms of the Stipulation of Settlement, I find that the terms and conditions set forth in the parties' Stipulation of Settlement dated December 23, 2014 appear to me to be reasonable, to be consistent with the terms and intent of the TEACHNJ Statute and

applicable regulations, and to reflect that Respondent has not committed any conduct unbecoming a tenured teacher. I hereby endorse and approve the parties' Stipulation of Settlement as appropriate under the circumstances and as satisfying the requirements of the TEACHNJ statute.

Consequently, I hereby issue a Consent Award incorporating the terms of the settlement agreement executed by the parties, which will be effective as of December 23, 2014.



January 6, 2015 Daniel F. Brent, Arbitrator

State of New Jersey
County of Mercer

On this 6th day of January, 2015 before me personally came and appeared Daniel F. Brent, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.

An Attorney at Law of the
State of New Jersey

Purcell Mulcahy Hawkins Flanagan
& Lawless, LLC
One Pluckemin Way
Bedminster, NJ 07921
908-658-3800
Attorneys for the State Operated
School District of the City of Newark
File No. 650-10158

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IN THE MATTER OF TENURE CHARGES OF CARLY OLIVIER	AGENCY REF. NO. 302-10/14
and the	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK	**STIPULATION OF SETTLEMENT**

The State-Operated School District of the City of Newark (the "District"), whose principal office is located at 2 Cedar Street, Newark, New Jersey 07102, and its successors, assigns, officers, employees, agents and representatives (collectively, "School District"), and Carly Olivier, residing at 420 Pacific Avenue, Jersey City, NJ 07304 ("Respondent") (collectively, the "Parties") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

WHEREAS Respondent is a tenured teaching staff member employed by the District as a teacher; and

WHEREAS the State District Superintendent of the School District ("Superintendent") certified tenure charges of conduct unbecoming to the Commissioner of Education of the State of New Jersey, captioned *In the Matter of Tenure Charges Against Carly Olivier, State-Operated*

School District of the City of Newark, Essex County ("Tenure Charges"), primarily based upon allegations that Respondent had engaged in chronic and excessive absenteeism and had been absent without leave from his position, and such charges were assigned Docket No. 302-10/14; and Respondent filed an answer opposing the charges; and the Commissioner of Education, having reviewed the charges and Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation, and accordingly referred the matter to Arbitrator Daniel Brent ("Arbitrator") for a hearing; and

WHEREAS, the District is an *Abbot* District, with stringent budget limitations and due to the uncertainty of the outcome of arbitration as well as the expenditure of resources due to multiple days of hearings with numerous witnesses, and the concern that school personnel will be removed from their educational duties and responsibilities during that time, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

WHEREAS the proposed Stipulation of Settlement is in the best interest of the Parties and the public because Respondent resigns from his employment without further litigation and it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

NOW, THEREFORE, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. Concurrent with the execution of this Stipulation, Respondent shall submit an irrevocable letter of resignation to the District, which shall provide for his permanent resignation from his tenured position with the District effective January 1, 2015, ("Effective Date"). (See Exhibit A to the Stipulation, a copy of Respondent's signed letter of resignation).

2. Upon final approval of the signed Stipulation by the District, and its receipt and acceptance of the Respondent's irrevocable letter of resignation, the District shall and hereby

does withdraw the instant Tenure Charges. The District agrees to not pursue the subject Tenure Charges against Respondent as long as this Stipulation remains in effect and is not voided by any court or administrative agency of competent jurisdiction. In the event the Stipulation is voided, the District retains the right to file and consider for certification, tenure charges against Respondent, including those tenure charges which have been previously filed against him by the District, and Respondent reserves the right to defend same

3. Upon final approval by the arbitrator of the signed Stipulation by the District and Respondent's irrevocable letter of resignation, Respondent will be restored to paid administrative leave effective September 2, 2014. Respondent will be paid all salary and benefits from September 2, 2014 through the Effective Date of December 31, 2014, which shall include payment for the period of unpaid suspension (a maximum of 120 days' salary), minus all applicable taxes, withholdings and deductions.

4. This Stipulation is based upon the understanding that Respondent's separation from employment with the District, effective January 1, 2015, will be deemed a voluntary resignation in good standing. Upon inquiry from any third party to authorized employees or representatives of the District, those employees or representatives will provide no information other than to confirm Respondent's employment, position, salary and dates of employment, and state that the reason for his separation from employment was his voluntary resignation.

5. In accordance with N.J.A.C. 6A:9-17.4, et seq., Respondent has been advised that the District must refer this matter to the State Board of Examiners and that pursuant to N.J.A.C. 6A:3-5.6 this matter may be referred by the Commissioner to the State Board of Examiners. Respondent has also been advised that the District is legally required to participate in any proceedings therefrom and cooperate with the State Board of Examiners.

6. As of the Effective Date, all of Respondent's rights of employment with the District, including but not limited to accrued salary, benefits, tenure and seniority, will permanently end. This paragraph will not affect, limit or preclude the Respondent from seeking or receiving any accrued salary and/or pension benefits to which she is entitled or becomes entitled by the Effective Date.

7. Respondent will not apply for reemployment with the District at any time. If Employee does apply for reemployment with the District and is approved for employment, the terms of this Agreement shall control and shall be grounds for termination of Respondent's employment.

8. Except as noted above, Respondent waives all claims of any nature against the District with regard to his employment with and/or separation from the District including fees, or other monetary relief, with the exception of workers' compensation claims.

9. In exchange for the consideration set forth in paragraph 3 above, the sufficiency of which is hereby acknowledged, Respondent hereby waives, releases and discharges any and all claims or rights that he has or may have against the District, the State District Superintendent, its Advisory Board of Education and its Advisory Board members, and any and all other District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Respondent's employment with the District or separation from employment with the District. It specifically includes, without limitation, all claims which Respondent may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination

C.C.

in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on her employment by and/or termination of her employment with the District, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, wages, attorneys' fees, costs, and/or future wage loss, except for workers compensation claims.

10. Notwithstanding the terms of paragraph 9 of this Agreement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any

administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commissioner, or any other federal, state or local law agency. However, should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 9, Respondent agrees not to seek or accept any resulting relief whatsoever.

11. Notwithstanding the terms of paragraph 9 of this Stipulation, Respondent does not hereby waive any right he may have to workers compensation benefits or pension benefits.

12. To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises Respondent of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Stipulation of Settlement. Accordingly, by executing this Stipulation, Respondent acknowledges that he: (i) fully understands the terms and conditions of this Stipulation of Settlement; (ii) has consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Stipulation of Settlement; and (v) has 7 days from the date of the execution of this Stipulation of Settlement to revoke it. Respondent understands that he may rescind this Agreement within 7 calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the 7 day period.

13. This agreement shall not constitute a precedent in any matters involving other District employees.

14. This Stipulation, and all of its terms, are and will remain confidential to the maximum extent permitted by law. Respondent is expressly forbidden from discussing this Stipulation with any person, other than his accountant, tax advisor and attorney ("permitted disclosures") and any

other individual or entity as necessary to implement the Stipulation or to which it is legally obligated to respond ("legally-required disclosures"). In making any permitted disclosure, Respondent agrees that it will inform the person to whom it is making the permitted disclosure that the existence and substance of this Stipulation, the settlement giving rise to this Stipulation and the sum of money paid pursuant to this Stipulation are to be held strictly confidential to the fullest extent permitted by law. Respondent specifically agrees not to discuss the nature, terms, conditions of this Stipulation with others, any representative of the media, or any past, present, or prospective employee of the District, or its agents or attorneys. Respondent understands that this provision is not a simple recital but is an important, integral part of this Stipulation. The District agrees that it will keep this Stipulation confidential to the extent permitted by law.

15. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

16. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

17. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Stipulation.

18. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

19. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

20. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

21. If any provision of this Stipulation is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

22. This Stipulation of Settlement will be construed in accordance with the laws of the State of New Jersey.

23. This Stipulation of Settlement is subject to the final approval of the State District Superintendent of the State-operated School District of the City of Newark and will only become effective upon the final approval of the Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue the matter.

24. Additionally, this Stipulation is subject to approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and will become effective only upon approval by the Arbitrator. Counsel for the

Parties shall jointly request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

Dated: 12/23/14

CARLY OLIVIER

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK

Dated: _____

By: CAMI ANDERSON
State District Superintendent

CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):

Dated: _____

Virginia B. Moran
Attorney for State-operated School District
of the City of Newark

[redacted]:

Dated: 12/24/14

Daniel Brent, Arbitrator As Witness

12/23/14
Dated

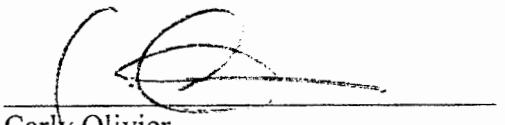
[redacted]
Attorney for [redacted]

CERTIFICATION

I, Carly Olivier, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 12/23/14



Carly Olivier

EXHIBIT A

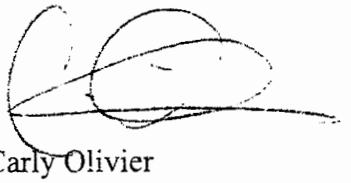
December 23, 2014

Ms. Cami Anderson, Superintendent
State-Operated School District of the City of Newark
2 Cedar Street
Newark, NJ 07102

Dear Ms. Anderson:

I hereby resign from my tenured position as a teacher in the State-Operated School District of the City of Newark, effective January 1, 2015. I understand that my resignation is irrevocable, and that as of the Effective Date, all of my rights of employment with the District, including but not limited to accrued salary, benefits, tenure and seniority, will permanently end.

Very truly yours,



Carly Olivier

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Charges Against

ANTOINETTE MODRAK, EDWARD J. MACK,

AND PHYLLIS MACK

and

THE SCHOOL DISTRICT OF THE CITY OF LINDEN

INTERIM AWARD OF ARBITRATOR

The undersigned Arbitrator, having been designated in accordance with the arbitration agreement entered into by the above-named parties, and having been duly sworn, and having duly heard the proofs and allegations of the parties, AWARDS as follows:

For the reasons set forth in the accompanying Opinion, the more prudent and more legally defensible procedure regarding tenure charges brought against the three Respondents by the School District of Linden, is to conduct a single consolidated proceeding throughout which the Respondents and their counsel may participate. The sequestration of non-party witnesses remains available as of right.

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Charges Against

ANTOINETTE MODRAK, EDWARD J. MACK,

and PHYLLIS MACK

and

THE SCHOOL DISTRICT OF THE CITY OF LINDEN

The undersigned was duly appointed by the Commissioner of Education as Arbitrator to adjudicate three separate tenure charge cases brought by the Board of Education of Linden against three employees of the School District of the City of Linden. The District requested that these three cases be heard by one arbitrator in order to minimize the possibility of inconsistent results. Each Respondent retained counsel, and did not initially oppose the District's request that each of their cases be heard by the same arbitrator. The Board thereafter requested that each case be conducted as a separate proceeding in order that the Respondents not observe the testimony of the other two Respondents.

The Board also contended that, if its motion to conduct three separate proceedings before the same arbitrator were denied, each Respondent be sequestered during the testimony of the other Respondents.

Respondents' counsel disputed the right of the Commissioner of Education, or the Commissioner's designee, to determine unilaterally that the same arbitrator would be appointed in all three cases, and the Commissioner's assumption that an arbitrator appointed by the Commissioner of Education could determine whether to consolidate three tenure charge proceedings into a single proceeding. Counsel for Respondents predicated their willingness to submit their cases to the same arbitrator on the granting of their Motion of Consolidation of the three matters into a single proceeding, provided that each Respondent could be present to hear the testimony of the other two Respondents, as well as testimony by all of the Board's witnesses.

After a lengthy pre-hearing conference call with the Arbitrator, the parties prepared and executed an agreement, acquiescing to the Arbitrator the initial exercise of his authority to determine the issues of consolidation and sequestration raised by the parties. The terms of this agreement are set forth below.

charged by the District with colluding with Mr. Mack to fabricate an evaluation purportedly giving the Grievant a satisfactory evaluation and with enlisting the aid of Respondent Antoinette Modrak, who is the Principal of Linden High School and a long time friend of Miss Mack, to sign and falsely date the evaluation for the purpose of submitting the evaluation as evidence in the grievance and arbitration proceeding concerning the denial of the annual increment to Mr. Mack. The Linden Board of Education certified tenure charges, alleging conduct unbecoming each Respondent in their respective roles as employees of the School District.

Although the request for appointing a single arbitrator was made by the District and processed by the Commissioner of Education's office, the parties were not in agreement as to whether the matters would be consolidated into a single proceeding. Thus, the Respondents' failure immediately to object to the same arbitrator hearing the case should not be construed as precluding from the Respondents from arguing that their consent to the single arbitrator is predicated on their being a consolidation into a single proceeding.

Respondents and the District recognized the advantage in having one arbitrator weigh the charges against the three Respondents, each of whom belong to a different bargaining unit, performs a different function

for the School District of Linden, and arguably may have different levels of responsibility for the events at issue in the instant case. Where the parties disagree is whether the Respondents can be precluded from hearing testimony of the other Respondents that are made to the decision maker who will adjudicate these tenure charges. The parties' positions have been set forth at great length in the documents they submitted. The parties' arguments and case citations are hereby incorporated by reference.

Stated succinctly, the Board contended that the potential advantage to tailor testimony that would accrue to the Respondents if they could be present for the testimony of other Respondents would significantly handicap the District's ability to meet its burden of persuasion in a tenure charge hearing. The District asserted that permitting the Respondents to be present for the testimony of other Respondents in a consolidated proceeding would so taint the ability of the Arbitrator to determine the credibility of witnesses, including the Respondents, as to impair the conduct of a fair hearing and materially affect the outcome of the instant proceeding.

Respondents asserted that sequestering Respondents would unfairly exclude them from hearing all of the testimony on which the tenure charges brought against them would be evaluated, and thus

deprive them of an essential procedural right and eliminate a fundamental element of due process. Respondents further contended that there is no valid legal basis for excluding them from a consolidated proceeding by exercise of the practice of sequestration as applicable to non-party witnesses. Respondents further asserted that the Arbitrator should either recuse himself from two of the three cases, or declare a consolidated proceeding in the interest of fairness and justice.

MEMORANDUM OF UNDERSTANDING

It is hereby agreed by and between the parties hereto as follows:

1. The threshold issue of whether these three procedural matters shall be consolidated into a single proceeding will be decided by Arbitrator Daniel Brent;
2. For purpose of these three cases only, each party hereby respectively agrees that Arbitrator Brent will have jurisdiction to decide the issue of consolidation and not the Commissioner of Education and shall not challenge the authority/jurisdiction of the Arbitrator to make this determination in any subsequent Appeal;
3. Each party specifically reserves the right and does not waive the right to Appeal or challenge any other issues or rulings made relative to the arbitration(s) hearings being conducted, including

but not limited to, the right to challenge the merits of Arbitrator Brent's ruling(s) on the issue of consolidation. This includes possible interlocutory appeals.

Signatories to this Memorandum have been authorized y his/her client to execute this Memorandum. This Memorandum may be executed in counterparts.

DISCUSSION AND ANALYSIS

The instant matter apparently presents a case of first impression under the new TeachNJ statute, which provides that arbitrators appointed to adjudicate tenure charge proceedings shall conduct such hearings using the Labor Arbitration Rules established by the American Arbitration Association. Rule 27 in the most recent version of the AAA Labor Arbitration Rules, amended and effective as of July, 2013, provides that:

> The parties may offer such evidence as is relevant and material to the dispute, and produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. An arbitrator or other person authorized by law to subpoena witnesses and documents may do so independently or upon the request of any party. The arbitrator shall determine the admissibility, the relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant and conforming to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all the arbitrators and all of the parties, except for any of the parties' absent, in default or has waived the right to be present.

AAA Labor Arbitration Rule 47 provides that:

> The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties...all other rules shall be interpreted and applied by the AAA."

Rule 21 provides that:

> The arbitrator and the AAA shall maintain the privacy of the hearing unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party, during the testimony of other witnesses. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person other than a party and its representatives.

The four parties to this dispute, the School District of Linden and the three Respondents, have affirmatively indicated their understanding, and conditional acceptance, of the benefits of having the three sets of tenure charges adjudicated by the same arbitrator. These charges arose from allegations of misconduct that, according to the charges, appears to be inextricably interrelated and would require overlapping proofs if tried in separate proceedings.

If these matters had arisen in an employment relationship governed by a collective bargaining agreement, the usual custom and practice for applying the AAA Labor Arbitration Rules would mandate that a decision to join or consolidate multiple grievances be predicated on the consent of both parties, who are usually the employer and the

union representing the aggrieved employee, as it is well settled practice in this Arbitrator's thirty-five years of experience that a party in a dispute arising under a collective bargaining agreement may decline to consent to join multiple grievances into a single proceeding unless the parties have specifically provided otherwise in their collective bargaining agreement. However, the three instant tenure charge cases did not arise under a collective bargaining agreement, but occurred under a statutory framework for determining whether the status of tenure conferred by an employer by operation of law can be rescinded and the employees subject to the instant tenure charges may be dismissed.

Although there is merit to the District's contention that separate proceedings would create more equitable opportunities for the District to present its case by avoiding having Respondents listen to other testimony, from both parties' perspective, adjudicating these three sets of tenure charges in three entirely separate cases before three different arbitrators would create greater risk not only for inconsistent results, but also for erroneous results, as each arbitrator would only have access to a limited portion of the evidence addressing less than the totality of facts and circumstances underlying the allegedly interrelated conduct of the three Respondents. Neither party will benefit from a disparity of testimony or credibility determinations resulting from hearings dealing with the same conduct that are conducted independently of each other. .

Consequently, the Linden Board of Education did not fail timely to produce required documents and information in violation of any clear or unambiguous standard established by the TEACHNJ statute.

Neither did the Board's premature, and thus erroneous, submission of a demand for production of documents create any legal or equitable basis to foreclose further administration or litigation of these tenure charges. Respondents could simply refuse to comply with the Board's demand for the production of documents until after the procedural posture of the three sets of tenure charges had been clarified and the matters were ready for referral for adjudication to either one, two, or three arbitrators, either as independently conducted cases or as one consolidated matter.

Respondents cited an award by Arbitrator Edmund Gerber in the Cuff case. However, the Cuff decision is not on point, as it deals with the exclusion of evidence that was not provided within the statutorily determined ten-day time frame after the matter has been properly referred to arbitration. If the Linden Board of Education had failed to comply with the applicable time requirement after receiving the Interim Award on December 15, 2014, then the principles espoused in the Cuff decision might properly be cited as a basis for excluding additional evidence, other than for the purposes of impeachment, as specifically provided by the TEACHNJ statute.

The Linden Board of Education's brief opposing Respondents' Motions to Dismiss raised and analyzed several grounds for denying the motion, including laches, unclean hands, public policy, and absence of prejudice. Each of these arguments has been considered thoroughly in reaching the Arbitrator's determination regarding Respondents' Motions to Dismiss. Significant weight was, however, afforded to the absence of any explicit definition of 'referral' in the body of the statute. Based on the analysis set forth above, such referral could not reasonably be deemed to have occurred before the issuance of the Interim Award on December 12, if not the receipt of the Award on or about December 15, 2014 because the preliminary procedural issues raised by both parties precluded identification not only of which arbitrator would hear each case, but also whether the Board had to present one integrated case in a consolidated proceeding or three separate cases. Thus, the Board could not determine with reasonable specificity what materials should be provided to whom until the issues of consolidation and sequestration had been definitively determined.

Furthermore, the District reasonably relied on the representations made among counsel at the preliminary conference regarding the authority of the Arbitrator to determine the procedural posture of the tenure charges, including consolidation and sequestration, and thus properly deferred providing the information required by N.J.S.A. 18A:6-17.1(b)(3) until the Arbitrator's determination of the dispute regarding consolidation and sequestration and my

assertion of jurisdiction over all three cases was finalized by the issuance of the Interim Award.

For all these reasons, the Respondents' Motions to Dismiss are hereby denied. The matter shall proceed to hearing as previously scheduled on February 5 and 6, 2015.

The Arbitrator hereby retains jurisdiction for the purpose of resolving any disputes regarding the tenure charges filed by the Board of Education of Linden Public Schools against Antoinette Modrak, Edward Mack and Phyllis Mack.

January 8, 2015

Princeton, NJ

Daniel F. Brent, Arbitrator

State of New Jersey
County of Mercer

On this 9th day of January, 2015 before me personally came and appeared Daniel F. Brent, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.

Dennis G. Grzenda
Notary Public of the State of New Jersey

DENNIS G. GRZENDA
A Notary Public of New Jersey
My Commission Expires October 18, 2019

DAVID SIMS,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

The petitioner – who is employed as a non-tenured instructional aide in respondent Board's school district – contended that the Board violated his rights under *N.J.S.A.* 18A:6-8.3 when it suspended him without pay from June 5, 2014 until the conclusion of the 2013-2014 school year, for a total of thirteen work days. The Board asserted that *N.J.S.A.* 18A:6-8.3 does not prohibit the disciplinary action it took against petitioner, which came in the aftermath of a finding that he had engaged in unbecoming conduct. The parties filed cross motions for summary decision.

The ALJ found, *inter alia,* that: the issue to be determined was whether *N.J.S.A.* 18A:6-8.3 prohibits the Board from placing petitioner on unpaid status until after he has exhausted all available appeals of the Board's determination; there are no material facts in dispute, and the matter is ripe for summary decision; the plain language of *N.J.S.A.* 18A:6-8.3 prohibits the Board from suspending the pay of an employee during the pendency of the contractual grievance process and any appeals therefrom; and the statute makes it clear that a suspension must be with pay until an investigation is completed, or the employee is indicted or served with formal tenure charges; accordingly, that an unpaid suspension of thirteen days may only be imposed on the petitioner after his appeals of the discipline imposed upon him have been exhausted. The ALJ concluded that the Board violated the provisions of *N.J.S.A.* 18A:6-8.3 when it suspended the petitioner without pay for thirteen days in June 2014, and ordered the Board to reimburse petitioner for all lost salary, benefits and emoluments of employment during that period.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision as the final decision in this matter.

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

January 20, 2015

OAL DKT. NO. EDU 8149-14
AGENCY DKT. NO. 153-6/14

DAVID SIMS,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,	:	
RESPONDENT.	:	

Before the Commissioner is a demand from petitioner, David Sims, for reimbursement of salary which was withheld by respondent Hackensack Board of Education during a thirteen-day suspension imposed upon petitioner for alleged unbecoming conduct. Petitioner contends that the suspension without pay violated his rights under *N.J.S.A.* 18A:6-8.3. After review of the record and Initial Decision of the Office of Administrative Law (OAL), the Commissioner agrees.

As was found by the Administrative Law Judge (ALJ) in an Initial Decision dated December 5, 2014, petitioner is employed by respondent as an instructional aide. As a result of a May 1, 2014 police report describing remarks allegedly made by petitioner to a police officer, respondent's Superintendent of Schools, Karen Lewis, suspended petitioner with pay pending an investigation into the alleged unbecoming conduct. A disciplinary hearing took place before Superintendent Lewis on June 5, 2014, at which she found that petitioner had engaged in unbecoming conduct. Lewis suspended petitioner without pay for the balance of the school year,

i.e., thirteen days, and directed petitioner to participate in sensitivity training. The suspension without pay precipitated the instant petition to the Commissioner on June 13, 2014.

Thereafter, petitioner was granted a third-step grievance hearing before the respondent board to appeal the discipline imposed by Lewis – in accordance with the grievance procedures contained in the collective bargaining agreement (CBA) between respondent and the Hackensack Education Association. At the conclusion of the July 29, 2014 hearing, the respondent board upheld Superintendent Lewis' findings, as well as the thirteen-day suspension without pay. Petitioner appealed respondent's decision and, pursuant to the CBA, said appeal is scheduled to be heard by an arbitrator on January 21, 2015.

During the same time period, petitioner's appeal to the Commissioner progressed in the OAL via cross motions for summary disposition. The ALJ closed the record on November 24, 2014 and issued the above-referenced Initial Decision on December 5, 2014. The decision granted summary disposition to petitioner, ordering respondent to reimburse petitioner "for all lost salary, benefits, and emoluments of employment during the period of his thirteen-day suspension in June 2014." (Initial Decision at 6)

Having first determined that the matter was appropriate for summary decision, the ALJ studied the wording of – and intent behind – *N.J.S.A.* 18A:6-8.3, which provides that:

> [a]ny employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement.

She concluded that since the statute applies to all employees of public school boards, it barred respondent from withholding petitioner's pay until all proceedings regarding petitioner's alleged unbecoming conduct, including any appeal therefrom, came to a conclusion. (Initial Decision at 5) Noting that an arbitration concerning the allegations of unbecoming conduct was still pending, the ALJ found that petitioner's salary had been prematurely withheld. (*Ibid.*) The ALJ also reviewed the collective bargaining agreement between respondent and the Hackensack Education Association, and found that it contained no provisions that would allow respondent to impose discipline upon petitioner before the proceedings regarding his behavior – including his appeal – were resolved. (*Id.* at 5-6)

Respondent filed exceptions to the Initial Decision on December 19, 2014. They are, on the whole, without merit. However, the Commissioner will address respondent's contention that it was not required to pay petitioner a salary during his suspension – by virtue of the provision in *N.J.S.A.* 18A:6-8.3 that allows boards of education to impose unpaid suspensions where "charges" against the employees have been "brought before the board of education or the Commissioner of Education."

As mentioned above, *N.J.S.A.* 18A:6-8.3 protects a suspended board of education employee from the deprivation of his salary while – as in this case – an investigation, hearing and/or appeal process progresses, unless one or both of the following two exceptions are present: 1) an indictment has been brought against him, or 2) charges against him have been brought before the board of education or Commissioner – in which case the board may issue a suspension with or without pay. Respondent does not assert that petitioner has been the subject of an indictment. Rather, it contends that "charges" against petitioner were brought before the board of education, thereby implicating the above-identified second exception in *N.J.S.A.* 18A:6-8.3.

Respondent's analysis begins with the premise that because district superintendents are described, in *N.J.S.A.* 18A:17-20(a), as members of boards of educations, the transmission to respondent's Superintendent Lewis of information about alleged infractions by petitioner somehow constituted the institution of 'charges' before the board of education. Relying on this premise, respondent urges that Lewis's consideration of the report of petitioner's alleged unbecoming conduct falls into the above-articulated second category of exceptions to the general rule that suspended employees must be paid salary pending investigations, hearings or trials. (Respondent's Exceptions at 2.) The Commissioner cannot agree.

At the outset, "charges" are generally understood to be formal accusations against tenured employees, not instructional aides such as petitioner – who are not tenure eligible. The imposition of discipline against instructional aides proceeds pursuant to the parameters of the relevant collective bargaining agreement. It is undisputed that 1) such contractual proceedings were held for petitioner – before Superintendent Lewis and before the respondent board, 2) petitioner appealed the resulting suspension, and 3) that an arbitration has been scheduled – pursuant to the procedures set forth in the collective bargaining contract.

Second, discipline of tenured employees is meted out solely by voting members of boards of education:

> After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary.
> *N.J.S.A.* 18A:6-11. [Emphasis added.]

> [A] district board of education shall determine by a majority vote of its full membership . . . whether there is probable cause to credit the evidence in support of the [tenure] charges and whether such charges are sufficient to warrant a dismissal or reduction of salary."
> *N.J.A.C.* 6A:3-5.1(b)(4) [Emphasis added.]

In light of the clear directive of *N.J.S.A.* 18A:17-20(a) that a superintendent of schools "shall have no vote" as to educational matters at board meetings, superintendents are not board members for purposes of the prosecution of "charges." Thus, the fact that the allegations against petitioner were brought to Superintendent Lewis, and adjudicated by her at the first step, signifies that the matter was governed by contractual disciplinary and grievance procedures – not by the statutory requirements governing the adjudication of "charges."

In summary, the transmission to Lewis of a May 1, 2014 report of petitioner's remarks to a police officer was not a "charge," and her investigation and hearing of the matter did not constitute a proceeding "before the board of education." The second exception in *N.J.S.A.* 18A:6-8.3 may therefore not be invoked by respondent.

Accordingly, summary disposition is granted in favor of petitioner and respondent's cross-motion for summary disposition is denied. The Initial Decision is adopted, and respondent will reimburse petitioner for all lost salary, benefits, and emoluments of employment during the period of his thirteen-day suspension in June 2014.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 1/20/15

Date of Mailing: 1/22/15

[1] This decision, as the final decision of the State administrative agency, may be appealed to the Superior Court, Appellate Division pursuant to *N.J.S.A.* 18A:11-3 and *N.J.A.C.* 6A:3-7.6.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 08149-14
AGENCY DKT. NO. 153-6/14

DAVID SIMS,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,

Respondent.

Sheldon Pincus, Esq., for petitioner (Bucceri and Pincus, attorneys)

Richard Salkin, Esq., for respondent

Record Closed: November 24, 2014 Decided: December 5, 2014

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Petitioner, David Sims (Sims), an employee of the Hackensack Board of Education (the Board), contends that the Board violated his rights under N.J.S.A. 18A:6-8.3 when it suspended him without pay from June 5, 2014, until the conclusion of the 2013-2014 school year, for a total of thirteen work days. The Board replies that

N.J.S.A. 18A:6-8.3 does not prohibit the disciplinary action it has taken against Sims, which came in the aftermath of a finding that he engaged in unbecoming conduct.

PROCEDURAL HISTORY

Sims filed a petition of appeal with the Commissioner of Education (the Commissioner) on June 13, 2014. The Board filed an answer on June 27, 2014, and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case on June 30, 2014. Sims filed a motion for summary decision on September 25, 2014. The Board replied via cross-motion on October 30, 2014. Sims responded to the cross-motion via letter memorandum filed on November 6, 2014.

After reviewing the submissions of the parties, via letter dated November 12, 2014, I asked counsel to supply a copy of the Collective Bargaining Agreement (CBA) between the Board and the Hackensack Education Association, and invited supplemental briefs on the applicability of N.J.S.A. 34:13A-24(a). Sims's counsel replied via letter dated November 21, 2014, and enclosed a copy of the CBA. I received a supplemental brief and additional copy of the CBA from counsel for the Board and closed the record on November 24, 2014.

ISSUE PRESENTED

The Board determined that Sims, a non-tenured staff member, engaged in unbecoming conduct. It imposed discipline in the form of an unpaid suspension. Does N.J.S.A. 18A:6-8.3 prohibit the Board from placing Sims on unpaid status until after he has exhausted available appeals of the Board's determination?

FINDINGS OF FACT

The salient facts are uncontroverted, and I **FIND**:

Sims is employed by the Board as an instructional aide. Via letter dated May 19, 2014, Superintendent of Schools Karen Lewis advised Sims that he was being

suspended with pay pending an investigation into alleged unbecoming conduct. Sims requested a hearing before the Superintendent, which took place on June 5, 2014. Via letter dated June 18, 2014, Lewis found that Sims had engaged in unbecoming conduct and imposed a suspension without pay for the balance of the school year, or thirteen days. She moreover directed that Sims participate in sensitivity training.

Thereafter, Sims requested and was granted a hearing before the Board in accordance with the grievance procedures contained in the CBA between the Board and the Hackensack Education Association. The hearing took place on July 29, 2014. Via letter dated July 31, 2014, the Board upheld the thirteen-day suspension imposed by Lewis. Sims appealed the Board's decision, which is scheduled to be reviewed at an arbitration proceeding on January 21, 2015.

ANALYSIS AND CONCLUSIONS OF LAW

The parties' motions are filed in accordance with N.J.A.C. 6A:3-1.5(g), which permits the filing of a motion to dismiss in lieu of an answer. The rule provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c), which provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla,

'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214. This matter is ripe for summary decision. There are no material facts in dispute and I **CONCLUDE** that Sims is entitled to judgment as a matter of law.

Sims's claims spring from N.J.S.A. 18A: 6-8.3, which provides that

> [a]ny employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement.

When interpreting a statute or regulation, our courts assume that the framers intended to ascribe to words their ordinary meaning. Jablonowska v. Suther, 195 N.J. 91, 105 (2008); In re N.J.A.C. 14A:20-1.1, 216 N.J. Super. 297, 306 (App. Div. 1987). The intent of a statute or regulation should be gleaned from a view of the whole and of every part of the statute, with the real intention prevailing over the literal sense of its terms. Schierstead v. City of Brigantine, 29 N.J. 220 (1959). Sims asserts that the plain language of this statute prohibits the Board from suspending his pay during the pendency of the contractual grievance process, and any appeals therefrom. I agree.

N.J.S.A. 18A:6-8.3 addresses the rights of a Board "employee" who is suspended from his position of employment while the Board and/or its administration investigate alleged misconduct. Insofar as N.J.S.A. 18A:1-1 defines "employee" as "the holder of any position or employment," the requirements of N.J.S.A. 18A:6-8.3 clearly apply to Sims, as they are in no way limited only to tenured or tenure eligible school staff. The statute makes it clear that a suspension must be with pay until an investigation is completed; or the employee is indicted or served with formal tenure charges. While the facts presented here do not concern the investigation of misconduct, but rather, a challenge to the imposition of discipline after a finding of misconduct, the statute likewise proscribes unpaid leaves of absence during any "hearing or trial or any appeal therefrom." (Emphasis supplied.) Sims thus correctly contends that N.J.S.A. 18A: 6-8.3 prohibits the imposition of an unpaid suspension while his appeals of his disciplinary sanction are pending.

N.J.S.A. 34:13A-24(a) provides for the imposition of minor discipline in the public employment setting, and at first blush would appear to supersede the statute relied upon by Sims and compel a determination in the Board's favor. The statute reads:

> Notwithstanding any other law to the contrary, and if negotiated with the majority representative of the employees in the appropriate collective bargaining unit, an employer shall have the authority to impose minor discipline on employees. Nothing contained herein shall limit the authority of the employer to impose, in the absence of a negotiated agreement regarding minor discipline, any disciplinary sanction which is authorized and not prohibited by law.
>
> [Emphasis supplied.]

But a review of the CBA between the Board and the Hackensack Education Association reveals no negotiated provision for minor discipline. The "notwithstanding" language in N.J.S.A. 34:13A-24(a) would provide solace to the Board if, and only if, its agreement with the Association referenced such minor discipline. Absent such negotiated language, the Board may impose only "any disciplinary sanction which is authorized and not prohibited by law." N.J.S.A. 34:13A-24(a). In light of the prohibitions contained in N.J.S.A. 18A:6-8.3, an unpaid suspension of thirteen days may be imposed on Sims

only after his appeals of the discipline imposed against him are exhausted. Accordingly, I **CONCLUDE** that the Board violated the provisions of N.J.S.A. 18A:6-8.3 when it suspended Sims without pay for thirteen days.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the relief sought by the petition of appeal is **GRANTED**. The Board is directed to reimburse Sims for all lost salary, benefits, and emoluments of employment during the period of his thirteen-day suspension in June 2014. I make no ruling in regard to the Board's ultimate right to impose the controverted unpaid suspension, as this is not the issue before me.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

December 5, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: December 5, 2014

Date Mailed to Parties: DEC - 8 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OAL DKT. NO. EDU 2793-13
AGENCY DKT. NO. 9-1/13

BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, MIDDLESEX COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF JAMESBURG, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

Examination of the record of this matter, the Initial Decision and the "Agreement" articulating the proposed terms of a settlement, revealed neither copies of each Board's resolution evidencing its approval of the Agreement nor, in the alternative, the signatures on the Agreement of each board's attorney – its duly authorized representative in litigation.

Consequently, the Commissioner cannot approve the within settlement and hereby remands this matter to the OAL for revision of the Agreement to either be executed by the parties' attorneys or to include as exhibits Board resolutions approving the settlement and authorizing representatives to execute the Agreement. If the parties are unwilling or unable to accomplish the foregoing, the matter shall proceed to hearing.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/22/15
Date of Mailing: 1/22/15

* This decision may be appealed to the Superior Court, Appellate Division pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 02793-13

AGENCY DKT. NO. 9-1/13

BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, MIDDLESEX COUNTY,

Petitioner,

v.

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

Respondent.

Mary H. Smith, Esq., for petitioner

Nathanya G. Simon, Esq., for respondent (Schwartz, Simon, Edelstein & Celso, attorneys)

Record Closed: December 1, 2014 Decided: December 5, 2014

BEFORE **BARRY E. MOSCOWITZ,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on February 26, 2013, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The attached Settlement Agreement was submitted on December 1, 2014, indicating the terms of agreement which are incorporated herein by reference.

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

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

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

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

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

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

12/5/14
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency:

12-9-14

Date Mailed to Parties: DEC - 9 2014
dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Agreement

THIS AGREEMENT made on this 23 day of October, 2014, between the Jamesburg Board of Education in the County of Middlesex in the State of New Jersey (hereinafter referred to as "Jamesburg") and the Monroe Township Board of Education in the County of Middlesex in the State of New Jersey (hereinafter referred to as "Monroe");

WHEREAS, Jamesburg sends its students to the high school of Monroe ("Monroe Township High School" or "High School"); and

WHEREAS, the parties have executed an Agreement made as of March 2011 regarding tuition due from Jamesburg to Monroe; and

WHEREAS, Monroe's certified tuition calculation includes an allocation of general fund expenditures as well as an allocation of annual interest charges on the bond indebtedness relating to the construction of the Monroe Township High School; and

WHEREAS, Jamesburg has alleged that it is unable to pay the arrearages in tuition it owes to Monroe and has disputed this amount; and

WHEREAS, Monroe has filed a Petition of Appeal with the Commissioner of Education, Agency Ref. No. 9-1/13, OAL Dkt. No. EDU02793-2013N, alleging that Jamesburg owes past due tuition to Monroe; and

WHEREAS, the matter is pending in the Office of Administrative Law; and

WHEREAS, the parties desire to amicably resolve the dispute.

W I T N E S S E T H:

NOW THEREFORE, in consideration of the agreements, covenants and conditions herein contained, the parties agree as follows:

1. The parties acknowledge that the certified tuition rate used by Monroe for calculating the actual tuition rate and the "Current Indebtedness" includes an allocation of general fund expenditures as

well as an allocation of annual interest charges on the bond indebtedness relating to the construction of the Monroe Township High School.

2. Jamesburg acknowledges that: (1) it owes past due tuition to Monroe for the years 2011-12 and 2012-13, $615,213.00 and $333,898.00, due in the 2013-14 and 2014-15 school years respectively; and (2) it may owe additional tuition for the 2013-2014 and 2014-2015 school years (collectively the "Current Indebtedness"). If the tuition amount due from Jamesburg continues to decrease as shown in the trend from the 2011-12 and 2012-13 school years, the parties anticipate that the certified tuition for the 2013-14 school year could decrease from the 2012-2013 school year and Monroe may eventually owe Jamesburg a credit in which case Monroe may apply any such credit against the Current Indebtedness.

3. Jamesburg acknowledges that it has received a school warrant demand from Monroe for payment of the Indebtedness.

4. Jamesburg agrees to pay the Current Indebtedness owed to Monroe upon the terms set forth in this Agreement.

5. The parties anticipate that the High School tuition rate will decrease in future school years, because the High School costs are anticipated to increase slightly and enrollment is anticipated to steadily increase, thus driving the tuition rate per pupil down. The parties acknowledge and agree that in the event the change in the High School tuition rate does not result in Jamesburg's ability to pay the Current Indebtedness in a seven (7) year timeframe, Monroe may re-file its Petition of Appeal in accordance with Paragraph 9 below.

6. The State Certified Tuition and the NJ Department of Education budget tuition figures for the High School are set forth as follows:

YEAR	STATE CERTIFIED TUITION	DOE BUDGET TUITION (This DOE software calculation does not include bond interest cost)
2007-08	$ 15,990.00	$ 13,704.00
2008-09	$ 17,957.00	$ 13,893.00
2009-10	$ 17,965.00	$ 14,126.00
2010-11	$ 17,363.00	$ 14,691.00
2011-12	$ 16,564.00	$ 16,107.00
2012-13	$ 15,900.00	$ 15,264.00
2013-14	N/A	$ 14,685.00
2014-15	N/A	$ 14,291.00

7. Jamesburg agrees to budget and pay to Monroe the Current Indebtedness on the terms as set forth in this Agreement until the Current Indebtedness is satisfied. Jamesburg shall pay $14,291.00 per student for 267 students for a total payment of $3,815,697 each school year even if Monroe's estimated tuition rate and/or Jamesburg's estimated number of students attending the High School in any school year is projected at a lesser amount. Monroe shall apply any difference between the $3,815,697 and the actual total tuition amount owed by Jamesburg to Monroe, as certified by the state from the A4-1/A4-2 tuition calculation, to the Current Indebtedness. In the event the estimated per pupil tuition rate is higher than $14,291.00 in any school year and/or in the event the estimated number of students attending the High School in any school year is higher than 267 students, the total amount that Jamesburg shall pay to Monroe as estimated tuition for that school year shall be calculated based upon these higher figures.

8. As acknowledged that Monroe continues to expand its housing capacity and continues to grow its population and Jamesburg does not have the capacity for development and that Jamesburg's enrollment has remained constant other than for normal fluctuations in household size, Monroe shall not charge Jamesburg and Jamesburg shall not be responsible for any further debt services associated with the construction of a new high school, or additions or renovations to the existing High School.

9. In consideration of Jamesburg's approval and execution of this Agreement, Monroe will voluntarily dismiss its Petition of Appeal without costs against any party but Monroe may re-file its Petition of Appeal without regard to any Statute of Limitations or time limitations under any rules or

regulations or otherwise and no defense will be raised by Jamesburg that the reassertion of the claim is untimely for any of the years in which tuition is past due now or in the future.

10. This Agreement shall not become effective and enforceable until: (1) Jamesburg and Monroe approve this Agreement by resolution; and (2) the Agreement is signed by both parties. Once effective, the Agreement shall continue in full force and effect until Jamesburg pays the total Current Indebtedness to Monroe, at which time the Agreement shall expire.

11. This Agreement shall be made part of an Order of the Commissioner of Education dismissing the Petition of Appeal and Counterclaim.

IN WITNESS WHEREOF, the Parties, by their duly authorized representatives, have executed this Agreement on the date shown by their signatures below.

JAMESBURG
BOARD OF EDUCATION

ROBERT CZARNESKI
President

10-23-14
Date

ATTEST:

Beth Brooks

BETH BROOKS
Business Administrator/Board Secretary

10/23/14
Date

MONROE TOWNSHIP
BOARD OF EDUCATION

Kathy Kolupanowich

KATHY KOLUPANOWICH
President

10/23/14
Date

ATTEST:

MICHAEL C. GORSKI, CPA
Business Administrator/Board Secretary

10/23/14
Date

This Agreement is consented to by the Middlesex County Superintendent of Schools on behalf of the County Superintendent and on behalf of the New Jersey Department of Education.

Dated: 11/6/14

Middlesex County Superintendent of Schools

JODI ANN BOCCO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WEST LONG BRANCH, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

This matter arose out of a decision by the respondent Board to reassign petitioner from her title of school counselor and substance awareness coordinator to the title of health and physical education teacher. Shortly after the reassignment, the school district filed tenure charges against petitioner, and she was ultimately dismissed. In the instant case, petitioner asserted that her reassignment prior to the filing of tenure charges was improper, and that – her subsequent dismissal notwithstanding – the Commissioner must correct the district's error because of its public importance and because it is a mistake that is "capable of repetition yet might evade review" (*Brady v. Department of Personnel,* 149 *N.J.* 244 [1997]). The Board filed a motion for summary decision.

The ALJ found, *inter alia,* that: petitioner was hired by the Board in 1997 and holds an instructional certificate with endorsement as a teacher of health and physical education, and an educational services certificate with endorsements as a substance awareness coordinator and school counselor; petitioner acquired tenure in both titles; in September 2012, petitioner was reassigned from her post as school counselor and substance awareness coordinator to the position of health and physical education teacher – a position she previously held; tenure charges of unbecoming conduct were filed in November 2012 and subsequently sustained; petitioner's reliance on *Brady,* supra, for her assertion that the Board's decision to reassign her was improper and must be reviewed is inapposite; tenure and seniority questions tend to be fact-sensitive; the transfer between titles in this case was associated with the subsequent filing of tenure charges; and with petitioner's removal following the sustainment of tenure charges, further exploration of the issues is moot. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the case.

Upon review, the Commissioner concurred with the ALJ 's determination that the issues raised by the petitioner are moot. Accordingly, the Initial Decision was adopted as the final decision in this case, and the petition was dismissed.

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

Issued 1/22/15

OAL DKT. NO. EDU 14206-12
AGENCY DKT. NO. 242-8/12

JODI ANN BOCCO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WEST LONG BRANCH, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

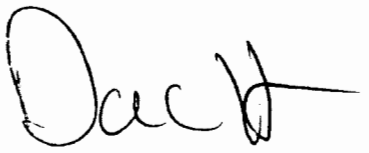
The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner and the Board of Education's (Board) reply thereto.

In her exceptions, the petitioner reiterates the arguments that were made below contending that the Administrative Law Judge (ALJ) erroneously determined that the petition should be dismissed as moot. The petitioner asserts that in reaching his decision, the ALJ confuses tenure-seniority issues that involve movement within a certificate with transfers of personnel between different certificates. The petitioner stresses that the Commissioner should decide this matter, despite the fact that the petitioner lost her tenure and was dismissed after the culmination of tenure charges, because the issue raised by the petitioner is of extreme importance and will arise again if it is not properly addressed.

Upon the review of the record, the Commissioner is in accord with the ALJ's conclusion – for the reasons set forth in the Initial Decision – that the issues raised by the petitioner are moot. Despite the petitioner's assertion to the contrary, the arguments made by the

petitioner were thoroughly considered and discussed by the ALJ in rendering the specific determinations outlined in the Initial Decision. Accordingly, the petition is hereby dismissed as moot.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 1/22/15

Date of Mailing: 1/22/15

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 14206-12
AGENCY DKT. NO. 242-8/12

JODI ANN BOCCO,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF WEST LONG BRANCH, MONMOUTH COUNTY,
Respondent.

Nancy I. Oxfeld, Esq., for petitioner (Oxfeld Cohen, LLC, attorneys)

David G. Lucas, Jr., Esq., for respondent (Wolf, Helies, Duggan, Spaeth & Lucas, attorneys)

Record Closed: October 30, 2014 Decided: December 9, 2014

BEFORE **SOLOMON A. METZGER**, ALJ t/a:

This matter arises out of a decision by the Board of Education of West Long Branch to reassign petitioner from her title of school counselor and substance awareness coordinator to the title of health and physical education teacher. Soon thereafter tenure charges were filed and petitioner was ultimately dismissed. Petitioner asserts that her reassignment was improper and the subsequent removal

notwithstanding, the Commissioner of Education must correct the error. The matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 to -13. The district has now filed a motion for summary decision pursuant to N.J.A.C. 1:1-12.5; Brill v. Guardian Life Ins. Co. of Amer., 142 N.J. 520 (1995).

The substantive facts are undisputed. Petitioner commenced employment with the district in September 1987. She holds an instructional certificate with an endorsement as a teacher of health and physical education and an educational services certificate with endorsements as a substance awareness coordinator and a school counselor. Petitioner acquired tenure in each of these titles. By majority vote of the Board of Education effective in September 2012, petitioner was reassigned from her position of school counselor and substance awareness coordinator to the position of health and physical education teacher, a position she previously held. Compensation remained the same. In November 2012, tenure charges were filed against petitioner alleging conduct unbecoming a public employee. The charges were sustained in July 2013 following an arbitration proceeding. An appeal to the Law Division failed and no further appeals have been filed. This is the substance of the record.

Petitioner maintains that the decision to reassign her to a title outside of her educational services certificate was improper and must be reviewed because of its public importance and because it is a wrong "capable of repetition yet may evade review," relying primarily on Brady v. Dep't of Personnel, 149 N.J. 244 (1997); Finkel v. Twp. of Hopewell, 434 N.J. Super. 303 (App. Div. 2013). These precedents are inapposite.

A final resolution having been achieved concerning petitioner's removal, further exploration of issues would generally be foreclosed as moot. The decisions cited by petitioner reflect exceptions in which the instructive value of a ruling outweighs policy considerations, such as judicial economy, that underlay mootness doctrine. Brady involved access to civil-service testing materials by a police officer questioning the results of a promotional exam. The desired records were produced before the issue

reached the Supreme Court, but the Court reasoned that enunciating principles by which to measure the levels of access due would assist the Department of Personnel as it evaluated such questions in the future. Finkel involved a non-binding referendum that had already been held. The Court reached the underlying issues to explain statutory ambiguities that might continue to trouble the process. Our own matter raises no broad policy question. Petitioner believes that the Commissioner must make a ruling because her circumstance is not resolved by the decision in Carpenito v. Board of Education of Rumson, 322 N.J. Super. 522 (App. Div. 1999). There the court held that managerial prerogative allowed for the transfer of a tenured teacher to other endorsements within an instructional certificate. The instant matter involves movement across certificates.

Of course, districts may in the future assign staff members between educational services and instructional certificates and then assign them back before the matters can be adjudicated. This is a nuance and nothing in the record suggests it as an ongoing problem. Moreover, tenure and seniority questions tend to be fact-sensitive. The instant transfer did not arise in a vacuum; it is associated with the tenure charges that followed. Finally, it strains to suggest as petitioner does, that the issue may recur for her, as she might be rehired, attain tenure and again face reassignment. The standard is not whether some benefit may be achieved by exploring untreated questions in moot cases. Rather, there must be some reasonable likelihood that the benefit will eclipse the important interests of repose.

Based on the foregoing, the district's summary-decision motion is granted and this matter is dismissed.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

December 9, 2014
DATE

Solomon A. Metzger
SOLOMON A. METZGER, ALJ t/a SMS

Date Received at Agency: 12/9/14

Date Mailed to Parties: 12/9/14

mph

In the Matter of the Tenure Hearing of Carson Steltz, School District of the City of Elizabeth, Union County, Agency Dkt. No. 260-9/14

DECISION

Before
Robert C. Gifford, Esq.
Arbitrator

Appearances:

For the School District:
John G. Geppert, Jr., Esq.
Richard E. Golden, Esq. (Brief only)
Schwartz Simon Edelstein & Celso

For Carson Steltz:
No Appearances

The City of Elizabeth ["Board" or "Petitioner"], pursuant to N.J.S.A. 18A:6-10 *et. seq.*, certified tenure charges with the Commissioner of Education against Respondent Carson Steltz. The Board charged the Respondent with "incapacity and/or other just cause, including, but not limited to, chronic absenteeism, constituting cause for dismissal and/or reduction in salary...." The Respondent filed an Answer in response to the charges.

On October 17, 2014, I received notice from M. Kathleen Duncan, the Director of the Bureau of Controversies and Disputes, New Jersey Department of Education, that this matter was referred to me pursuant to *N.J.S.A.* 18A:6-16 as amended by *P.L. 2012, c. 26*. Hearing dates were scheduled for November 12 and 18, 2014. On November 12, 2014, the hearing officially commenced. Mr. Geppert was present on behalf of the Petitioner. Attorneys Nicholas Poberezhsky and Timothy Smith from the law offices of Caruso, Smith, and Picini were present on behalf of the Respondent. Although the hearing officially commenced, the parties held settlement discussions in lieu of proceeding on the record. The parties requested that the first day of hearing be adjourned in order to permit them to continue with their settlement discussions.

On November 17, 2014, the parties' attorneys informed me that a settlement agreement had been drafted, but remained unsigned. They requested, and I granted, a postponement of the November 18th hearing. On

November 18, 2014, I conducted a telephone conference with Counsel to confirm that the parties were still attempting to reach a settlement. On November 25, 2014, Mr. Geppert informed me that the settlement agreement remained unsigned. Mr. Poberezhsky did not object to scheduling a hearing date in December in the event that the parties were unable to execute a settlement agreement.

On December 1, 2014, I inquired into the status of the parties' settlement discussions. On December 2, 2014, I conducted a telephone conference with Mr. Geppert and Mr. Poberezhsky who agreed to schedule the hearing for Wednesday, December 17, 2014, 10:00 a.m. at Mr. Geppert's office in Whippany. On December 2, 2014, with the consent of the parties' attorneys, I requested an extension of time due to the fact that the parties had yet to execute a settlement agreement. Director Duncan granted my request later that day.

On December 4, 2014, Mr. Geppert wrote the following e-mail to me, a copy of which was sent to Mr. Poberezhsky and Mr. Smith:

> In the event Mr. Steltz does not attend the trial on December 17, we may need to proceed simply as an ex parte hearing by the District.

I requested Mr. Poberezhsky to respond to Mr. Geppert's e-mail.

On December 9, 2014, Mr. Poberezhsky informed me of the following: (1) he has been unable to make contact with the Respondent; (2) he does not know whether the Respondent is aware that the hearing has been rescheduled for December 17th; and (3) his office is in the process of withdrawing its representation of the Respondent. That day, I provided an update on this matter to Director Duncan. The letter expressly indicated that the hearing remained scheduled for Wednesday, December 17, 2014, 10:00 a.m. at the law offices of Schwartz, Simon, Edelstein and Celso located at 100 South Jefferson Road, Suite 200, in Whippany, New Jersey. A copy of the letter was sent to the parties attorneys. In addition, a copy was sent to Mr. Steltz's last known address via first-class and certified mail. The U.S. Post Office attempted to deliver the certified mail on December 12, 17, and 27, 2014, but an authorized recipient was not available to accept service. The post office left a notice at the address. The Post Office returned the certified letter to me as "unclaimed". To date, the letter that I sent to Mr. Steltz via first-class mail has not been returned to me as undeliverable.

On December 11, 2014, Mr. Poberezhsky wrote the following letter to me:

> Please accept the instant correspondence as a request to withdraw as counsel of record, representing Respondent Carson Steltz, in the above-captioned matter. This request is made on the basis of Mr. Steltz's lack of communication and cooperation with our office. Despite our best efforts, we have not been able to reach him since we

> appeared for the hearing on November 12, 2014. His lack of cooperation has simply made it impossible for us to effectively represent him in this proceeding.
>
> For the record, I advised Mr. Steltz, through notice issued to him by certified mail, that the hearing was rescheduled for December 17, 2014, at 10:00 a.m. at the law office of Schwartz, Simon, Edelstein & Celso, LLP. I notified him that if he fails to appear at the hearing, Petitioner intends, and is entitled to, conduct the hearing *ex parte*. I also advised him of the potential ramifications in the event that the tenure charges are sustained.
>
> Please provide our office with a response to this request at your earliest convenience. Thank you for your time and consideration in this regard.

I granted Mr. Poberezhsky's request based upon the representations he made in his letter.

The hearing continued on December 17, 2014. A stenographic recording of the proceedings was taken. The Petitioner appeared with Counsel. The Respondent did not appear.

Tenure hearings are subject to the American Arbitration Association's Labor Arbitration Rules. Rule 26 provides:

> Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the other party

to submit such evidence as may be required for the making of an award.

During the proceedings, the parties were given the opportunity to argue orally, examine and cross-examine witnesses and submit documentary evidence into the record. Sworn testimony was received from Bartolomeo Candelino – Principal at Joseph Battin School No. 4; Belinda Abruzzese – Principal at Madison Monroe School No. 16; and Arlene Frances Campbell – Principal at Ronald Reagan Academy School. The Petitioner submitted a post-hearing brief on December 23, 2014. Director Duncan granted an extension of time until February 2, 2015 to issue this Decision.

RELEVANT PROVISIONS OF THE NEW JERSEY STATUTES

N.J.S.A. 18A:6-10. **Dismissal and reduction in compensation of persons under tenure in public school system**

No person shall be dismissed or reduced in compensation,

(a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or

(b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner;

except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

BACKGROUND

The Board filed tenure charges against the Respondent. The written charges were sworn to under oath by School Superintendent Olga Hugelmeyer on July 28, 2014:

> I, Olga Hugelmeyer, of full age and capacity, having been duly sworn by the undersigned authority, depose and say as follows:
>
> I am employed by the Elizabeth Board of Education (the "Board") as its Superintendent. The Board maintains administrative offices at 500 North Broad Street, Elizabeth, New Jersey 07028. I am charged with the general oversight of the school district and all employees serving therein. During all times relevant herein, Carson Steltz ("Mr. Steltz" or "Respondent") has been employed by the Board as a teacher. Mr. Steltz is currently tenured pursuant to N.J.S.A. 18A:28-5.
>
> I am fully familiar with all of the facts and circumstances regarding the Sworn Tenure Charges against Mr. Steltz. I have personally reviewed the accompanying Sworn Statement of Evidence. I hereby charge Carson Steltz with *incapacity and/or other just cause, including, but not limited to, chronic absenteeism, constituting cause for dismissal and/or reduction in salary*, pursuant to N.J.S.A. 18A:28-5 and 18A:6-10 et seq., as follows:

BACKGROUND INFORMATION COMMON TO ALL CHARGES

> Mr. Steltz was hired by the Board on September 10, 2004 as a teacher. Mr. Steltz subsequently attained tenured in his position.

During the ensuing years, Mr. Steltz has received numerous warnings about his poor attendance and the potential consequences:

On March 19, 2010, George Washington School Principal Belinda Abruzzese recommended that Mr. Steltz's increment and salary adjustment be withheld for the 2010-2011 school year due to poor attendance.

On March 23, 2011, Ronald Reagan Academy School Principal Arlene Campbell wrote to Mr. Steltz informing him that he had exhausted his sick day allotment for the year and any further absence would be subject to payroll deduction.

On February 29, 2012, Battin School Principal Ben Candelino wrote to Mr. Steltz reminding him that he had already been absent for 23 days during that school year and urging Steltz to improve his attendance.

On June 28, 2012, the Board of Education passed a Resolution to withhold Mr. Steltz's increment and salary adjustment for the 2012-2013 school year for reasons of poor attendance.

On October 2, 2012, then Assistant Superintendent, Olga Hugelmeyer, wrote to Mr. Steltz confirming that his increment and salary adjustment would be withheld for the 2012-2013 school year due to poopr attendance.

In each year of his employment, through the present date, Mr. Steltz entered contracts of employment with the District by which, among other things, he ageed to "faithfully do and perform (his/her) duties . . . and to observe and enforce the rules prescribed for governance of the schools by the Elizabeth Board of Education."

Elizabeth Board of Education Policy No. 4151/4251, *Attendance Patterns*, expressly states, among other things, "that the regular presence of assigned certified and non-certified personnel is vital to the success of the district's educational program. Consistent absenteeism or tardiness is subject to disciplinary action."

Elizabeth Board of Education Regulation No. 4151/4251, *Staff Attendance Improvement Plan*, expressly states, among other things, "Daily attendance is essential in contributing to the success of our District's Mission Statement. . . . The absence of any Elizabeth Public School employee adversely affects the sequence of instruction, as well as disrupts the daily work schedules of all District operations."

Elizabeth Board of Education Policy No. 4119.3, *Duties*, expressly states, among other things, "Each employee shall comply with all requirements of the law, and shall perform all duties commonly performed in his/her position." Elizabeth Board of Education Regulation No. 4119.3, *Duties*, expressly states, among other things, "All teachers shall be in their classrooms and prepared for work at the start of the work day."

The job description for Respondent's position, Teacher, expressly states, among other things, "the teacher is responsible for the effective performance" of her assigned duties and responsibilities (emphasis supplied).

CHARGE I
(CHRONIC ABSENTEEISM)

Carson Steltz has displayed chronically poor attendance during the past seven (7) years of his employment and has been absent 560.55 days, which has adversely affected the proper operation of the school. These acts and omissions, more specifically set forth below, constitute just cause for immediate dismissal due to chronic absenteeism:

Count 1

During the time period from July 1, 2007 through June 30, 2008, Mr. Steltz was absent from his post on at least 28 days: 1-family illness; 2-personal; 1-funeral and 24-sick, not including vacation days.

Count 2

During the time period from July 1, 2008 through June 30, 2009, Mr. Steltz was absent from his post on at least 11.5 days: 1-personal; and 10.5-sick, not including vacation days.

Count 3

During the time period from July 1, 2009 through June 30, 2010, Mr. Steltz was absent from his post on at least 34.05 days: 1-family illness; 2-personal; 1 funeral, 29.25-sick; 0.5-other and 0.3 tardy, not including vacation days.

Count 4

During the time period from July 1, 2010 through June 30, 2011, Mr. Steltz was absent from his post on at least 33 days: 1-family illness; 2-personal; 1-funeral; 12.25-sick and 16.75-other, not including vacation days.

Count 5

During the time period from July 1, 2011 through June 30, 2012, Mr. Steltz was absent from his post on at least 85 days: 1-family illness; 2-personal; 1-funeral 12-sick; and 69-other, not including vacation days.

Count 6

During the time period from July 1, 2012 through June 30, 2013, Mr. Steltz was absent from his post on at least 186 days: 186-other, not including vacation days.

Count 7

During the time period from July 1, 2013 through June 30, 2014, Mr. Steltz was absent from his post on at least 183 days: 183-other, not including vacation days.

The foregoing acts and omissions by Carson Steltz, individually and cumulatively, constitute chronic absenteeism. Over the last seven (7) years, Mr. Steltz has been absent from his post for a total of 560.55 days; not including any bereavement or vacation days. His ongoing failure to fulfill his assigned duties on these days has adversely affected the operation of the school district, and shows no signs of abating. The Board, as a public employer charged with serving the community should no longer have to be burdened by such misfeasance. Immediate dismissal is fully warranted.

CHARGE II
(INCAPACITY)

> The foregoing Background Information, Charge, specific counts and the facts alleged therein are incorporated by reference as if fully set forth herein. The acts and omissions set forth therein, constitute incapacity. By virtue of the condition or conditions causing and/or associated with Respondent's absences, he has been effectively rendered incapable of performing his assigned duties, therefore requiring immediate termination from his tenured position. There is simply no meaningful accommodation to be made for an employee who persistently is unable to report to work over a protracted period of time. Immediate dismissal is the only meaningful remedy and is fully warranted here.

On September 18, 2014, the Board determined by a unanimous vote during "that there was probable cause to credit the evidence in support of the charges and that the Sworn Tenure Charges are sufficient, if credited, to warrant dismissal and/or reduction of salary of Carson Steltz." The Board served the information upon the Respondent.

On September 22, 2014, the Board filed with the Commissioner of the Department of Education the written tenure charges and supporting evidence against the Respondent. On October 7, 2014, the Respondent, through his attorney, submitted an Answer to the charges.

On November 5, 2012, the matter was referred to me pursuant to *N.J.S.A.* 18A:6-16 as amended by *P.L. 2012, c. 26*. The arbitration proceedings ensued.

The Board established the following facts during the arbitration proceedings.[1]

The Respondent is a tenured employee of the Petitioner. The Respondent has been continuously employed by Petitioner since the 2004-2005 school year. His most recent assignment was as a Math teacher at the Joseph Battin School No. 4 during the 2011-2012 school year. The Respondent did not report for duty for the entirety of the 2012-2013 and 2013-2014 school years; and has not reported for duty up through the current date during the 2014-2015 school year.

The Board has established policies and procedures in place that require specific competencies and behaviors of teachers with respect to attendance:

1. Board Policy No. 4119.3, *Duties*, expressly states, among other things, "Each employee shall comply with all requirements of the law, and shall perform all duties commonly performed in his/her position." Elizabeth Board of Education Regulation No. 4119.3, *Duties*, expressly states, among other things, "All teachers shall be in their classrooms and prepared for work at the start of the work day." [Exs. P-16 & 17].

2. Board Policy No. 4151/4251, *Attendance Patterns*, expressly states, among other things, "that the regular presence of assigned certified and non-certified personnel is vital to the success of the district's educational program. Consistent absenteeism or tardiness is subject to disciplinary action." [Ex. P.14].

[1] The Petitioner submitted proposed findings of fact as part of its post-hearing brief. I have adopted the proposed findings as modified herein.

3. Board Regulation No. 4151/4251, *Staff Attendance Improvement Plan*, expressly states, among other things, "Daily attendance is essential in contributing to the success of our District's Mission Statement. . . . The absence of any Elizabeth Public School employee adversely affects the sequence of instruction, as well as disrupts the daily work schedules of all District operations." [Ex. P-15].

The collective bargaining agreement between the Board and the Elizabeth Education Association, the agreement that governs the relationship between Respondent and the Board, provides, in pertinent part, that the absence of any employee adversely affects the sequence of instruction, as well as disrupts the daily work schedule of all District operations. [Ex. P-19].

Each year the Board and Respondent entered into an Employment Contract, which was in effect from September 1st through June 30th for each school year. In each employment contract, Respondent agreed to "faithfully do and perform (his/her) duties...and to observe and enforce the rules prescribed for governance of the schools by the Elizabeth Board of Education." [Ex. P-21].

The Respondent has been absent from his teaching duties for 560.55 days since the 2007-2008 school year:

1. From July 1, 2007 through June 30, 2008, the Respondent was absent from his post for 28 days: 1-family illness; 2-

personal; 1-funeral and 24-sick, not including vacation days. [Ex. P-1].

2. From July 1, 2008 through June 30, 2009, the Respondent was absent for 11.5 days: 1-personal; and 10.5-sick, not including vacation days. [Ex. P- 2].

3. From July 1, 2009 through June 30, 2010, the Respondent was absent 34.05 days: 1-family illness; 2-personal; 1 funeral, 29.25-sick; 0.5-other and 0.3 tardy, not including vacation days. [Ex. P-3].

4. During the time period from July 1, 2010 through June 30, 2011, the Respondent was absent 33 days: 1-family illness; 2-personal; 1-funeral; 12.25-sick and 16.75-other, not including vacation days. [Ex. P-4].

5. During the time period from July 1, 2011 through June 30, 2012, the Respondent was absent 85 days: 1-family illness; 2-personal; 1-funeral 12-sick; and 69-other, not including vacation days. [Ex. P-5].

6. During the time period from July 1, 2012 through June 30, 2013, the Respondent was absent 186 days: 186-other, not including vacation days. [Ex. P-6].

7. During the time period from July 1, 2013 through June 30, 2014 the Respondent was absent 183 days: 183-other, not including vacation days. [Ex. P-7].

The Board progressively disciplined the Respondent as a result of his absences. The Respondent received multiple written warnings regarding his excessive absenteeism. These included, but were not limited to:

1. A March 19, 2010 memorandum from Belinda Abruzzese, Principal of George Washington School No. 1. [Ex. P-8].

2. A March 23, 2011 memorandum from Arlene Campbell, Principal of Ronald Reagan Academy School No. 30 (Respondent was specifically advised that he had used his full allotment of sick days and would be subject to payroll deduction.) [Ex. P-9].

During the 2011-2012 school year, Bartolomeo Candelino, then-Principal of the Joseph Battin School No. 4, advised the Respondent that, as of February 29, 2012, he had been absent for twenty three (23) days and that "Joseph Battin School #4 relies on all faculty/staff members to come to work each day in order to provide/support meaningful learning experiences that our students deserve. While we can hire substitutes or utilize teacher coverage, in your absence, your particular contributions are missed by ours students." [Ex. P-10]. Despite said warning, the Respondent was subsequently absent for sixty-two (62) days during that school year.

As a result of the Respondent's absences, both Principal Abbruzese and Principal Candelino recommended that the Respondent be subject to an increment withholding. [Exs. P-8 & P-9]. On June 28, 2012, the Board voted in favor of withholding the Respondent's increment and salary adjustment for the 2012-2013 school year. [Ex. P-12].

Sworn testimony was received from Bartolomeo Candelino – Principal at Joseph Battin School No. 4; Belinda Abruzzese – Principal at Madison Monroe School No. 16; and Arlene Frances Campbell – Principal at Ronald Reagan Academy School.[2] These individuals testified to the Respondent's absences at the time that the Respondent taught at their respective school buildings. They testified to the progressive discipline described above. They also testified that the Respondent's excessive absences had a negative impact upon the continuity of instruction, the Board's budget due to the cost of hiring substitutes at $119 per diem, the overall running of the schools, and the morale of the other teachers who must cover the Respondent's classes when substitutes cannot be obtained. [T:20-21, 25-27, 37-40, 42, 47-48]. Candelino testified that the Respondent's absences since the 2007-2008 school year has cost the Board approximately $67,000 for substitute teachers. [Ex. P-20]. He indicated that based upon the Respondent's attendance records that he has "never seen anything as poor or showing a lack of respect for himself and for the people he works for, and the students." [T:33].

[2] Candelino's testimony is located from T.12-35. Abruzzese's from T.35-40 and Campbell's from T.40-48

The Board's Position

The Board provides the following legal arguments in its post-hearing brief:

THE BOARD HAS PROVEN BY THE PREPONDERANCE OF CREDIBLE EVIDENCE THAT RESPONDENT IS GUILTY OF CHRONIC ABSENTEEISM, INCAPACITY AND/OR OTHER JUST CAUSE WARRANTING HIS DISMISSAL FROM HIS TENURED POSITION

This case is a clear one: it is clear that Respondent was absent for 560.55 days over the last seven school years. The record confirms that the Board has proven by a preponderance of the credible evidence that Respondent's attendance, or lack thereof; constitutes sufficient cause for dismissal. The relevant statute states:

> No person shall be dismissed or reduced in compensation . . .if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state . . . except for inefficiency, incapacity, unbecoming conduct, or other just cause. N.J.S.A. 18A:6-10.

Despite multiple written warnings, spanning three school years, and clearly established procedures, Respondent was chronically/excessively absent.

Burden of Proof

In tenure proceedings, the Board has the burden of establishing the allegations supporting the charges by a preponderance of the credible evidence. See In re Polk License Revocation, 90 N.J. 550, 560 (1982); I/M/O Tenure Hearing of Marrero, 97 N.J.A.R.2d (EDU) 104, 106 (1996); I/M/O Tenure Hearing of Graceffo, 2000 N.J. AGEN LEXIS 365, *5 (2000), aff'd and modified 2001 N.J. AGEN LEXIS 805 (St. Bd.). "Preponderance is the greater weight of credible evidence in the case, not necessarily dependent on the number of

witnesses, but having the greater convincing power." Id. at *35 citing State v. Lewis, 67 N.J. 47, 49 (1975).

The New Jersey Model Civil Jury Charge 1.12I states, "To sustain the burden, the evidence supporting the claim must weigh heavier and be more persuasive...than the contrary evidence. It makes no difference if the heavier weight is small in amount." In other words, if the evidence in support of and against the charges is equally balanced on the scales of justice, where the Board adds so much as the weight of a feather to its proofs, the Board has carried its burden by a preponderance of the evidence. Proof "need not have the attribute of certainty, but it must be well founded in reason and logic..." Lesniewski v. W.B. Furze Corp., 308 N.J.Super. 270, 279 (App.Div. 1998) quoting Lister v. J.B. Eurell Co., 234 N.J.Super. 64, 72 (App. Div. 1989). An agency's finding of fact will be accepted if supported by substantial credible evidence. See Quinlan v. Bd. of Ed. of No. Bergen Twp., 73 N.J.Super. 40, 46-47 (App. Div. 1962); Lesniewski v. W.B. Furze Corp., supra, 308 N.J.Super. at 279. Thus, findings are "considered binding on appeal when supported by adequate, substantial and credible evidence." Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 484 (1974).

General Legal Precedent on Excessive Absenteeism

In his Answer to the Tenure Charges, Respondent avers that his absenteeism has been due to chronic medical issues, particularly, several surgeries on his left knee. A review of the medical records confirms that Respondent did indeed suffer some maladies. Respondent essentially asks the tribunal to ignore the absences because of their alleged "legitimacy". However, the weight of legal precedent militates against such an outcome.

Chronic or excessive absenteeism may warrant removal even when the absences have been excused or caused by legitimate medical reasons such as long-term poor health, or work related injuries. See State-Operated School District of Jersey City v. Pellechio, 92 N.J.A.R.2d (EDU) 267 (1992). This may be the case even when legitimate reasons, such as long-term health issues, caused the absences. Ibid. (Much like the Respondent herein, Pellechio received multiple warnings about his attendance over several years, including

a threat to have his increment withheld, yet his attendance did not improve.) Also see I/M/O Tenure Hearing of Marsden, OAL Docket No. EDU 1188-84, Initial Decision (1985), adopted Comm'r (October 10, 1985); Kelsey v. Bd. of Educ. of the City of Trenton, 1989 S.L.D. 1622; State-Operated School District of Newark v. Gillespie, OAL Docket No. EDU 3399-03 (2011)(stating "[c]learly, the mere fact that the absences were excused does not obviate the possibility that the teacher may be dismissed for excessive absenteeism"); I/M/O Tenure Hearing of Castro, 2012 N.J. Super. Unpub. LEXIS 923, *13 (App. Div. 2012); In the Matter of the Tenure Hearing of Randi True, Willingboro Board of Education, 2011 N.J. AGEN LEXIS 839 (Commissioner's Decision). Randi True, like the Respondent herein, was granted multiple leaves of absence for extended periods of time. Yet, both an Administrative Law Judge and the Commissioner sustained tenure charges for chronic absenteeism, among other infractions.

The point at which absenteeism is so chronic as to warrant dismissal falls within the prerogative and discretionary authority of the local board of education. See I/M/O Tenure Hearing of Sheets, 1980 S.L.D. 1536, rev'g 1979 S.L.D. 790; Pellechio, supra.

The underlying rationale for the dismissal of teachers for absenteeism is that teachers must be in the classroom for purposes of instructional continuity, even in the face of medical problems:

> The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra effort, when the regular teacher returns to the classroom. Consequently, many pupils who do not have the benefit of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of schooling. . . . The entire process of education requires a regular continuity of instruction with a teacher directing the classroom activities and learning experiences in order to reach the goal of maximum educational benefit for each individual pupil. The regular contact of the pupils with their assigned teacher is vital to this process.

In Re Reilly, 1977 S.L.D. 403, 414.

Respondent has cited his teacher observation reports, in an effort to establish that satisfactory performance outweighs excessive absenteeism, and therefore he should retain his position. **(P-28, P-30, P-31)** However, legal precedent clearly establishes that "[E]ven if a teacher's performance in the classroom is sufficient . . . the absences may nevertheless be considered as material to the issue and can justify removal of the teacher." In the Matter of the Tenure Hearing of Jeanne Cook, Old Bridge Board of Education, OAL DKT. NO. EDU 8568-02 AGENCY DKT. NO. 374 11/02; citing Trautwein v. Bd. of Educ. of Bound Brook, 1980 S.L.D. 1539, certif. denied, 84 N.J. 469 (1980); In Re the Tenure Hearing of Sheets, *supra*.

Arbitration Decisions

Arbitrators have repeatedly taken the same position as Administrative Law Judges and the Commissioner that excessive absenteeism is actionable even if the absences are "justified." As stated by Elkouri and Elkouri: "The right to terminate employees for excessive absences, even where they are caused by illness, is generally recognized by arbitrators." *How Arbitration Works*, 822 (6th Ed.). That is because:

> [a]t some point the employer must be able to terminate the services of an employee who is unable to work more than part time, for whatever reason. Efficiency and the ability to compete can hardly be maintained if employees cannot be depended upon to report for work with reasonable regularity. Numerous other arbitrators have also upheld terminations involving frequent and extended absences due to illness.

Elkouri at 822 citing Cleveland Trencher Co., 48 LA 615 (Teple, 1967).

Thus, "if an employee has demonstrated over a long period of time an inability due to chronic bad health or proneness to injury to maintain an acceptable attendance record, an employer is justified in terminating the relationship.

particularly where it has sought through counseling and warnings to obtain an improvement in attendance." Elkouri at 823 citing Louisville Water Co., 77 LA 1049 (Volz, 1981).

Based upon this well-established precedent, Respondent should be dismissed from his position.

Substantive Standards of Proof

In order to terminate a tenured employee for chronic absenteeism, the Board must demonstrate that there was consideration of:

> (1) the particular circumstances of the absences and not merely the number of the absences;
>
> (2) the impact that the absences had on the continuity of instruction during the period of time the absences occurred, not merely after the fact; and
>
> (3) that there be some warning given to the employee that his or supervisors were dissatisfied with the pattern of absences.

I/M/O Tenure Hearing of Velez, School District of Hudson County Schools of Technology, OAL Dkt. No. EDU 3255-05 (2006), aff'd C.D. (April 27, 2006); In Re White, 92 NJAR 2d (EDU) 157, 161. A review of these factors based upon the numerous documents presented at trial reveals that the Board has satisfied its burden in this regard.

1. *The Board has considered the circumstances of Respondent's absences.*

The Respondent was issued a memorandum on March 23, 2011 from Ronald Reagan Academy Principal Arlene Campbell in which Respondent was notified that he had exceeded his annual allotment of sick days and would be subject to payroll deduction. **(P-9)**. In that Memorandum, Campbell specifically reminded Respondent that she understood that all of Respondent's absences "may be due to injury or sickness."

The Respondent was issued a memorandum on February 29, 2012 in which Joseph Battin School Principal Ben

Candelino warned Respondent about his poor attendance. Candelino, like Campbell before him, understood that all of Respondent's absences "may be due to injury or sickness." Moreover, Candelino expressed his optimism that Respondent would improve his attendance. **(P-10)**

As was the case in Randi True, *supra*, the Petitioner herein repeatedly granted several leaves of absence in an effort to accommodate the Respondent as he attended to his medical problems. **(P-25)**

A tenured employee may be dismissed when the underlying reasons for the absenteeism indicate there is a likelihood that the conduct will continue in the future. See Velez, supra, citing State-Operated School District of Jersey City v. Pellecchio, supra. Given that Respondent's attendance has not improved over the course of his employment (i.e., the last seven school years), despite repeated warnings and an increment withholding, it is reasonable for the Board to conclude that this conduct is likely to continue in the future.

2. *The Board has considered the impact of Respondent's absences.*

Respondent's absences have had a negative impact on the efficiency and effectiveness of the operation of those schools to which he has been assigned. Since the commencement of the 2007-2008 school year through the end of the 2013-2014 school year, the Petitioner has been compelled to repeatedly hire substitutes, at a total cost of $67,056.50. **(P-20)** Moreover, Respondent's frequent absences prevent the satisfactory performance of the duties of his position. Board Regulation 4119.3 (Duties) specifically states that "All teachers shall be in their classrooms and prepared for work at the start of the work day." **(P-16)** In the same vein, Board Regulation 4151 (Staff Attendance Improvement Plan), clearly states "The absence of any Elizabeth Public School employee adversely affects the sequence of instruction, as well as disrupts the daily work schedules of all District operations." **(P-15)**

In I/M/O/ Randi True, *supra*, the ALJ noted that the petitioning board need not "point to specific instances or

examples supporting its contention; rather, it need only demonstrate the likely result of the absences." Also, I/M/O Tenure Hearing of Alicia Dugan, Jersey City School District, OAL DKT. No. EDU 12243-11N (2012) (affirmed by Commissioner, June 14, 2012); the mere fact that a teacher was absent for 197 days over a six-year period was sufficient to infer a negative impact on students.

In testimony before the arbitrator, George Washington School Principal Belinda Abruzzese specifically noted the inherent difficulties of hiring substitutes and the negative impact on instructional continuity; and that Respondent should be dismissed.

Also in testimony before the arbitrator, Ronald Reagan Elementary School Principal Arlene Campbell noted the manner in which chronic absenteeism among teaching staff is "academically disruptive" to students; and that Respondent should be dismissed.

Finally, in testimony before the arbitrator, Joseph Battin School Principal Bartolomeo Candelino noted that not only was the Respondent unavailable for observation, but the frequent absenteeism negatively impacted the "continuity of instruction" for students. According to Candelino, the morale of the remaining staff was affected because they had to sacrifice their own preparation periods to cover Respondent's classes. Moreover, Respondent's absenteeism showed a lack of respect for the students; and that Respondent should be dismissed.

3. *Respondent has been repeatedly warned, in writing, of his unacceptable attendance and potential consequences.*

As noted earlier, Respondent has been subject to three written warnings for attendance, the last of which resulted in an increment withholding by the Board of Education for the 2012-2013 school year. **(P-8 through P-10)** Nonetheless, Respondent has not demonstrated any effort to improve his chronic absenteeism; instead the absenteeism worsened as it reached two entire school years (2012-2013 and 2013-2014).

As a member of the Elizabeth Education Association, Respondent is subject to the terms and conditions of a collective bargaining agreement between the Petitioner and the Association. The Agreement clearly warns Respondent, and all other members of the bargaining unit, that poor attendance may subject an employee to disciplinary action. **(P-19)**

> The absence of any Elizabeth Public School employee adversely affects the sequence of instruction, as well as disrupts the daily work schedules of all District operations.

Respondent works under a Job Description that includes the following responsibilities:

> Meets and instructs assigned classes in locations and at times designated.
>
> Continues the educational process by being available to students and parents for education-related purposes.
>
> Performs all other assigned duties deemed necessary and essential by the Superintendent of Schools or his designee. **(P-22)**
>
> Respondent is subject to Board Policy 4117.52 (Dismissal/Suspension), which grants Petitioner the authority to challenge the continued employment of any employee who is "incapable of performing" his or her duties. **(P-18)**

Finally, Board Policy 4151/4251 Attendance Patterns, governs all employees and clearly states "Consistent absenteeism or tardiness is unacceptable and subject to disciplinary action." See also, I/M/O Tenure Hearing of Alicia Dugan, *supra*, where employee was given several warnings regarding where attendance, but continued to exhibit the same behavior.

In the present case, Respondent's more than 500 absences over the course of a 7-year period is far more egregious. Moreover, Respondent has been given numerous

warnings concerning his chronic absences, yet has failed to rectify his pattern of poor attendance. These facts warrant his dismissal.

Incapacity

It is well settled that chronic and excessive absenteeism constitutes not only unbecoming conduct and other just cause, but also incapacity, such as to amount to just cause for removal. In re Tenure Hearing of Kacprowicz, 93 N.J.A.R. 2d (EDU) 147, 151 (citing Trenton Bd. of Educ. v. Williamson, OAL Dkt. EDU 7335-85 (Apr. 14, 1986), aff'd, Comm'r (May 28, 1986); In the Matter of the Tenure Hearing of Frances Metallo, Union City School District, Commissioner, May 12, 2003. (Teacher absent for 650 days in a six year period); Camden City Board of Education v. Florence Rucker, 94 N.J.AR. 2d (EDU) 190, affirmed by State Board of Education, 95 N.J.A.R.2d (EDU) 350 (Teacher absent for 263 days in four-year period.)

Respondent suggested in his Answer that the charge of incapacity is inappropriate because he has established that his absenteeism is justified for medical reasons. However, "[i]ncapacity" as identified in N.J.S.A. 18A:6-10 relates to the inability to perform a position, irrespective of the cause of the inability to work. (at 498). In the Matter of the Tenure Hearing of Phyllis Stanley, Freehold Regional Board of Education, 95 N.J.A.R.2d (EDU) 495, 498.

More recently, arbitrators have had occasion to consider incapacity for chronic absenteeism under the new arbitration system implemented pursuant to the New Jersey TEACH Act, N.J.S.A. 18A:6-117, et. seq. Though the process of adjudication has changed, the end results (dismissal of the employee) are the same. In the Matter of the Tenure Hearing of Jason Levine, Jersey City School District, (Agency No. 286-9/12; Lowitt, 2012), the teacher had chronic medical issues, yet the arbitrator found that a teacher "has a duty to be in the classroom, ready to teach. . .Mr. Levine is culpable of Incapacity, since he was not in the classroom, ready to teach, on even a semi-regular basis."

A similar result was found In the Matter of the Tenure Hearing of Lenore Francis, Jersey City Board of Education, (Agency No. 285-9/12; DeTreux, 2013), where a teacher had

been absent for approximately 350 days in a 10-year period. After reciting the litany of problems faced by Francis, the arbitrator (who ultimately sustained the charge of incapacity) framed the issue thusly:

> "The issue is not whether Francis experienced personal injuries and events that forced her to miss work. The issue is whether the District must continue to employ a teacher who misses significant amounts of work throughout the school year."

See also, In the Matter of the Tenure Hearing of Lakhisha Wheeler, (Agency No. 18-1/14, Lowitt, 2014), for the proposition that "extreme health conditions as well as personal tragedies" will not excuse chronic absenteeism, and dismissal of the employee will still we warranted.

In the instant case, the Petitioner has set a clear standard for its teachers, as expressed in the aforementioned Job Description, Collective Bargaining Agreement and Board Policies. By no measure has Respondent shown that he is capable of performing his duties and responsibilities, particularly when he has not entered a classroom since March 2012, a total of 423 days. As was stated by the ALJ in Rucker, supra:

> ". . . when absences are as numerous as respondent's herein, the principle of *res ipsa loquitir* applies. It is unnecessary to provide testimony of an administrator that the absences have adversely impacted the students. The conclusion is obvious; the situation speaks for itself."

VI. CONCLUSION

Based upon all of the foregoing, it is beyond dispute that Respondent should be dismissed from his tenured position. In this case, Respondent's attendance record was terrible, including 560.55 absences in a seven-year period. Consequently, Respondent received numerous warnings and had his increment and salary adjustment withheld. Despite such progressive discipline, Respondent "has evidenced no growth . . . [and t]here is minimal likelihood that he would do

things differently if he were returned to" his position. I/M/O Tenure Hearing of Levine, *supra*. Over time, the absenteeism worsened, to the point of Respondent missing two full school years in 2012-2013 and 2013-2014. Accordingly, based upon abundant legal precedent, Petitioner respectfully requests the dismissayl of Respondent from his employment as a tenured teacher with the Elizabeth Board of Education. [Board Brief, pp. 8-19].

DISCUSSION

I have carefully reviewed the entire record of this proceeding. The Board must prove the basis for the tenure charges against the Respondent by a preponderance of the credible evidence. If it meets this burden, it must also demonstrate that dismissal is the appropriate penalty.

The record contains undisputed evidence of the Respondent's 560.55 days of absence from his teaching duties since the 2007-2008 school year. It also includes the progressive discipline imposed upon the Respondent during his employment with the Board. Principals Candelino, Abruzzese and Campbell provided unrefuted testimony concerning the negative impact that the Respondent's absences had upon the school, students and teachers. The Respondent did not appear for the December 17, 2014 hearing, but his Answer cites multiple surgeries and medical difficulties as the basis for his absences. The Respondent emphasized that he "always provided the District with appropriate documentation as to his medical conditions, operations, treatments, and absences." He also indicates that his doctor indicated that he "should be able to make a full recovery in the near future as a result of the knee replacement."

I have considered all of the foregoing facts and the applicable law that the Board cited in-depth in its post-hearing brief. The case law cited by the

Board is on point and need not be recited. The Board considered the circumstances surrounding the Respondent's absences, and the impact they had on the school, students and teachers. The Board imposed progressive discipline upon the Respondent prior to the filing of tenure charges. The Respondent's absences show that he has not been in the classroom, even semi-regularly. I conclude that the Board has sustained its tenure charges of "incapacity and/or other just cause, including, but not limited to, chronic absenteeism, constituting cause for dismissal and/or reduction in salary...." I also conclude that the penalty of dismissal was not arbitrary or excessive and instead was justifiable and reasonable under all of the relevant circumstances. The fact that a portion of the Respondent's absences were excused does not preclude a finding of the Board's charges conduct nor does it require a modification of the penalty imposed under the circumstances presented.

DECISION

The Board has sustained its tenure charges of "incapacity and/or other just cause, including, but not limited to, chronic absenteeism, constituting cause for dismissal and/or reduction in salary...." against Respondent Carson Steltz. The Respondent is dismissed from his tenured teaching position with the City of Elizabeth School District.

DECISION

The Board has sustained its tenure charges of "incapacity and/or other just cause, including, but not limited to, chronic absenteeism, constituting cause for dismissal and/or reduction in salary...." against Respondent Carson Steltz. The Respondent is dismissed from his tenured teaching position with the City of Elizabeth School District.

Dated: January 20, 2015
Sea Girt, New Jersey

Robert C. Gifford

State of New Jersey }
County of Monmouth }ss:

On this 20th day of January, 2015, before me personally came and appeared Robert C. Gifford to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Linda L. Gifford
Notary Public
Expires 1-10-16

STATE OF NEW JERSEY
COMMISSIONARE OF EDUCATION

IN THE MATTER OF THE TENURE CHARGES OF:

STATE OPERATED SCHOOL DISTRICT, THE CITY OF NEWARK, NJ.

AND **AWARD AND OPINION**

RATIBA AHMED, RESPONDENT
Agency Docket No. 284-9/14

BEFORE: ERNEST WEISS, ARBITRATOR.

APPEARANCES: FOR THE RESPONDENT: NANCY I. OXFELD, ESQ.
OXFELD COHEN, P.C.

FOR THE DISTRICT: EUGENE LISS, ESQ.
SHANA DON, ESQ.
RAMON E. RIVERA, ESQ.

POSITION OF RESPONDENT ON MOTION TO DISMISS

Ms. Nancy I. Oxfeld, Esq. argued in relevant part on behalf of Respondent, that the instant motion to dismiss the charges of inefficiency herein against Ms. Ratiba Ahmed, who is a tenured elementary education teacher in the Newark public schools, are premature and must be dismissed. It pointed out that "...the arbitrator's area of review is statutorily limited." And shall only be considered whether or not:

(1) the employee's evaluation failed to adhere substantially to the evaluation process, including but not limited to providing a corrective action plan:

(2) there is a mistake of fact in the evaluation:

(3) the charges would not have been brought but for consideration of political affiliation, nepotism, union activity, discrimination as prohibited by state or federal law, or other conduct prohibited by state or federal law: or

(4) the district's actions were arbitrary and capricious. N.J.S.A. 18A:6-17.2a.

The arbitrator's review is limited to the four factors above and,

> The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review. N.J.S.A. 18A:6-17.2c.

Respondent further argued that the Cheatham and Thomas decisions support the herein claim that the tenure charges against Rabita Ahmed are premature and must be dismissed it "cannot be converted into something else." Ms. Oxfeld pointed out that each arbitrator deciding the tenure charges in the School District of the city of Newark decided that the charges were premature and cannot begin until after the start of the 2014-2015 school year. Additionally, each arbitrator also provided a make whole remedy.

As a result, the tenure charges against respondent Ratiba Ahmed should be dismissed for having been filed in violation of TEACHNJ.

THE POSITION OF THE STATE OPERATED SHOOL DISTRICT OF THE CITY OF NEWARK NEW JERSEY. (DISTRICT)

The District argued in relevant part that on October 24, 2014 the District received a letter of clarification from the Department of Education ("DOE") to General Counsel Charlotte Hitchcock. It essentially confirms that the 2012-2013 evaluation can be used to support a tenure charge for inefficiency against a tenured teacher in Newark, NJ. See N.J.S.A. 18A:6-123b.

This Department of Education's clarification was intended to provide additional guidance as to the purpose of the language set forth in the FAQs regarding TEACHNJ that the respondent relied upon in her brief.

"At the time the Commissioners representatives found that the Evaluation Rubric met in the intent of the recently adopted TEACHNJ Act and were directionally aligned with the proposed regulations, which would be effective in March of 2013. "

DISCUSSION AND OPINION

Having recently decided the issue herein in my decision involving respondent Sandra Brienza of the same District, I cannot ignore the argument herein of MS. Oxfeld, regarding the prior decisions with identical issues. She convincingly points out that, the results of the prior arbitrators with essentially identical issues rises to a "collateral estoppel" or "res judicata".

I am reminded that the tenure issues before me herein of Ratiba Ahmed, is relatively identical to the recently decided Sandra Brienza case decided by me on December 30, 2014, as well as a number of prior decisions in the same District.

Courts "have also recognized that the doctrine of res judicata may apply to arbitrations with strict factual identities."

In considering the recent awards by the above distinguished panel members, I also agree with Arbitrator Gregory where he correctly quotes that *"....the precedential value of a prior award between the parties is to be determined by the subsequent arbitrator"* (Elkouri and Elkouri, How Arbitration Works (6th Edition) (at 598.

I have previously observed in the Brienza Award that, in a March 28, 2012 letter, from Chief Talent Officer Peter Shulman, he updated resources for 2012-13 school year, as a "planning and capacity-building year" and prepare for the implementation of the new system in the 2013-14 school year. He further advised that from January 2013 through August 2013, districts should test and refine implementation of

the observation instruments and rubrics and prepare for full implementation in the 2013-14 school year. Also, he advised that "By June 2013, thoroughly train teachers on the teacher practice instruments;"

> *"we have designated 2012-13 as a planning and capacity-building year During this time, districts must engage in one of two options: participate in a second cohort of our pilot program, or build capacity through a defined series of steps for implementing the new system in 2013-14*

I have previously decided that the tenure charges within the same District of Newark were premature and are therefore contrary to the TEACHNJ statute providing for a specific beginning in the school year 2014 and having found that herein also the District prematurely invoked the new inefficiency evaluations prior to the legislated "beginning", I therefore hereby grant the Motion to Dismiss the tenure charges against teacher Ratiba Ahmed Of the State Operated School District of the City of Newark Essex County and I make the following Award.

STATE OF NEW JERSEY
COMMISSIONARE OF EDUCATION

IN THE MATTER OF THE TENURE HEARING
OF RATIBA AHMED,
(RESPONDENT)
-AND- **AWARD**
STATE OPERATED SCHOOL DISTRICT OF
THE CITY OF NEWARK, N.J. COUNTY OF ESSEX
(DISTRICT)
AGENCY DOCKET NO. 284-9/14

The undersigned arbitrator having been randomly assigned pursuant to P.L. 2012 c.26, signed by Governor Christie on August 6, 2012, and was appointed on September 15, 2014, by M. Kathleen Duncan, Director of the Bureau of Controversies and Disputes, to hear and decide the above captioned tenure matter, AWARDS as follows:

For the above stated reasons, the tenure charges against Respondent Ratiba Ahmed are hereby dismissed.

The District is herby directed to reinstate Respondent Ratiba Ahmed to her teaching position and make her whole with respect to her salary and benefits.

ERNEST WEISS, ARBITRATOR.

On this 20th day of January, 2015, before me came and appeared Ernest Weiss to me known and known to be the individual described in and who executed the foregoing instrument and he acknowledged that he executed same.

JILL E. FARKAS
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires May 5, 2019

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

IN THE MATTER OF THE TENURE HEARING OF LESLIE JOHNSON

THE STATE-OPERATED SCHOOL DISTRICT FOR THE CITY OF NEWARK Petitioner	:	Agency Dkt No. 271-9/14
and	:	DECISION ON MOTION TO DISMISS
LESLIE JOHNSON Respondent	:	

Before: Carol F. Laskin, Esquire, Arbitrator

APPEARANCES:

For the Petitioner
Charles I. Auffant, Esquire
Stuart Ball, LLC

For the Respondent
Janelle Edwards-Stewart, Esquire
Associate Counsel
The Newark Public Schools
Office of the General Counsel

PROCEDURAL HISTORY

The State-Operated School District of the City of Newark ("NPS" or "District") served Respondent Leslie Johnson ("Respondent" or "Johnson") a Notice of Inefficiency on or about August 25, 2014. Gemar Mills, Principal at the District's Malcolm X Shabazz High School ("Shabazz") filed the Notice of Tenure Charges - a charge of inefficiency pursuant to the *Teacher*

Effectiveness and Accountability for the Children of New Jersey ("TEACHNJ") Act, P.L. 2012, c.26, N.J.S.A. 18A:6-117 et seq., seeking Mr. Johnson's dismissal. Respondent was rated partially effective in his 2012-2013 and 2013-2014 annual summative evaluations. On September 18, 2014, State District Superintendent Cami Anderson determined, *inter alia*:

> "1. The School District has complied with the required evaluation process in all respects with respect to the Employee's evaluation in the 2012-13 and 2013-14 school years;"

Respondent was suspended without pay, effective September 19, 2014 when the charges were certified to the Commissioner of Education. On October 9, 2014, M. Kathleen Duncan, Director of the Bureau of Controversies and Disputes of the Department of Education ("DOE") advised the parties, upon review of the charges and Respondent's answer, "The Commissioner is unable to determine that the evaluation process has not been followed," referring the matter to the undersigned as Arbitrator.

After communications with the parties, on November 1, 2014, Respondent filed a Brief and exhibits in support of his Motion to Dismiss tenure charges for alleged "inefficiency." On November 10, 2014, the District filed its Brief in opposition to the Motion to Dismiss, along with Certifications and attachments. On November 28, 2014, Respondent's Reply Brief with exhibits was submitted.

Moreover, upon request of the undersigned, the District

proposed and Respondent executed, on December 10, 2014, a Statement of Facts reflecting the employment history of Leslie Johnson with the District.

In early December 2014, a flurry of correspondence and emails were forwarded wherein, *inter alia*, suppression of the Motion and discovery issues were raised. By letter on December 15, 2014, the undersigned provided the parties an additional opportunity to orally argue or proffer a written submission, no later than noon on December 17, 2014 regarding, *inter alia*, the December 7, 2014, Decision in The Matter of the Tenure Hearing of Elena Brady, State-Operated School District of the City of Newark, Essex County, Agency Docket 270-914, ("Brady")[1] Therein, the record on the instant Motion closed.

UNDISPUTED FACTS

Upon review of this record in its entirety, including the Stipulation of Facts, Certifications of Larisa Shambaugh, Executive Director of Strategic Initiative in the Talent Office of NPS and Certifications of Gemar Mills, Principal at Shabazz, I ***find*** the following undisputed ***facts*** relevant to this Motion:

Respondent, Leslie Johnson received Provisional and Standard

[1]On October 16, 2014, Arbitrator Stephen Bluth issued a Decision on a similar Motion in the Matter of the Tenure Hearing of Sandra Cheatham, State-operated School District of the City of Newark, Essex County, Dkt No. 420-14, ("Cheatham"). On November 19, 2014 Arbitrator Robert T. Simmelkjaer issued a Decision on a similar Motion in the Matter of the Tenure Hearing of Neil Thomas, in the State-Operated School District of the City of Newark, Essex County, Dkt No. 244-9/14, ("Thomas".The parties' arguments herein referenced these decisions and awards issued.

Certificates as a "Teacher of Technical Occupations: Television Production Technology." He commenced employment with the District on or about October 25, 2004 under the title "Video Teacher." He was assigned to Malcolm X Shabazz High School upon his hire and remained at Shabazz until the end of the 2013-2014 school year. Mr. Robinson obtained tenure in 2007. Respondent's title changed from "Video Teacher" to "Teacher Video" on or about September 1, 2012. This was Respondent's sole title change from his date of hire until the end of the 2013-14 school year. The only courses taught by Respondent were "Video Production" levels, I, II and III.

2012-2013 Evaluations

Gemar Mills became Principal of Shabazz in August 2011. During the school year 2011-2012, seven NPS schools participated in the new Teacher Evaluation System, Department of Education's Excellent Educators for New Jersey - a teacher evaluation pilot in which eleven (11) school districts participated. Shabazz was not one of the seven NPS schools participating in this program.

During the 2012-2013 school year, Mr. Robinson was evaluated solely by the Department Chair, Michael A. Van Allen, as follows:

1. Formative observation dated November 15, 2012: effective (12 points earned).

2. 2012-13 Mid-Year Summative Evaluation dated February 22, 2013: partially effective (10 points earned).

3. Formative observation dated March 22, 2013: partially effective (9 points earned).

4. Formative observation dated May 9, 2014: partially effective (8 points earned).

5. 2012-13 Annual Summative Evaluation dated June 11, 2013: partially effective (10 points earned).

Respondent's 2012-2013 year Annual Evaluation, ten points earned, is the highest point level of "partially effective." An "effective" teacher is evaluated earning 11 to 14 points.

On March 4, 2013, the State Board of Education adopted administrative code regulations containing, *inter alia*, amendments to evaluations to *N.J.A.C. 6A:10-2.3 Evaluation of Tenure Teaching Staff Members*. In October 2013, the State Board of Education adopted additional required specifications in the evaluation procedures for teaching staff members under TEACHNJ. The evaluation process and evaluations of Respondent in the 2012-13 school year did not comply with the regulations effective in March 2013 or October 2013.

ARGUMENTS OF THE PARTIES

The parties presented extensive, comprehensive arguments; the essence of each is as follows:

Initial Brief

A. Respondent

Johnson avers the 2012-2013 annual summative evaluation cannot be considered in connection with tenure charges pursuant to *N.J.S.A. 18A:6-17.3*. The applicable regulations establishing guidelines and procedures regarding teacher evaluations and

observations pursuant to TEACHNJ and ACHIEVENJ did not go into effect until October 2013.

Moreover, Respondent maintains the Shabazz school did not have a School Improvement Panel as required by *N.J.S.A. 18:A:6-120* in the 2012-2013 school year. It meet for the "first time" on May 23, 2014. Clearly, during the 2012-2013 school year, evaluation procedures were being piloted - not implemented. Accordingly, Respondent maintains the charge is legally deficient and should be dismissed.

B. District

The District avers it has met all applicable requirements for evaluating Respondent's performance during the 2012-2013 school year. The 2011-2012 school year was the "pilot" year. Pursuant to TEACHNJ, the NPS obtained approval for its evaluation rubric from the DOE prior to December 2012. Moreover, the District and Newark Teachers Union entered into a Memorandum of Agreement on October 18, 2012, providing, in pertinent part:

> NPS will implement a new evaluation system beginning SY 2012-13. In accordance with the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), N.J.S.A. 18A:6-117 *et seq.*, teachers will receive an annual summative evaluation rating that designated them as highly effective, partially effective or ineffective."

And, after the October 20, 2013 adopted regulations, the District updated its guidebook. Counsel contends,

> "Thus, in 2012-2013 and in 2013-14, different legal requirements were in effect with respect to the required number of teacher observations and with respect to whether

> those observations were required to be announced or unannounced and accompanied by pre- or post-observation conferences. However, while these procedural requirements changed from 2012-13 to 2013-14, the same Department-approved teacher performance evaluation rubric was in effect and implemented in both school years. And, both of those school years followed the District's "pilot" year, 2011-12." (Opposition Brief at page 7)

In support of this position, Petitioner relied upon the October 24, 2014 clarification requested by NPS following the Cheatham decision. Therein, Assistant Commissioner Peter Shulman deviated from the DOE's earlier guidance articulating prior comments on evaluation outcomes in the 2012-2013 school year would impact only earning tenure, finding no prohibition against utilizing the 2012-2013 evaluation data "to bring a tenure charge of inefficiency against a tenured teacher."

Referencing the 2012-2013 school year evaluation rubric, Assistant Commissioner Shulman clarified the Department's position,

> "In regards to the status of Newark's evaluation rubrics during the 2012-2013 school year, please note that, on October 26, 2012, members of the Department met with Newark representatives to review and discuss the Newark Evaluation Rubric and the associated policies that would be put into place for the 2012-2013 school year. At that time, the Commissioner's representatives found that the Evaluation Rubric met the intent of the recently adopted TEACHNJ Act and were directionally aligned with the proposed regulations, which would be effective in March of 2013."

School Improvement Panel

Petitioner maintains a School Improvement Panel ("SIP") was in place at Shabazz during the 2012-2013 school year. Informal meetings were conducted, and Mr. Johnson benefitted from the SIP.

The District does concede, however, the SIP in existence in the 2012-2013 school year, was informal. Counsel reasons,

> "Even assuming, without admitting, that the statute had not been fully complied with in 2012-13 due to the informal nature of the phase one SIP, this fact alone certainly would be insufficient to warrant dismissal of the tenure charge against Respondent. See N.J.S.A. 18A:6-17.2(a)(1). In order to dismiss a tenure charge on the basis of such a procedural error, the arbitrator would be required to determine that the error "materially affected the outcome of the evaluation" in the relevant school year. N.J.S.A. 18A:6-17.2(b). That determination cannot be made without considering all evidence presented at the hearing. Given the voluminous evidence of Respondent's inefficiency, the supposed "error" of an informal SIP's holding its first formal meeting at a later date cannot, in itself, support dismissal of the charge prior to hearing." (Opposition Brief at pages 11-12)

Finally, the District suggests in the event the requirements of TEACHNJ Section 25 have not been met, the charge should still proceed to hearing under Inefficiency in non-mandatory Section 8 cases. To do otherwise, would give a poor performing teacher a free ride during the full implementation of the DOE's procedural requirements adopted for TEACHNJ.

Respondent's Reply Brief

Johnson maintains the arguments presented by NPS were likely presented to the Arbitrators in the Cheatham and Thomas matters. In both those cases, the inefficiency charges were found to be without adequate foundation and dismissed. Respondent seeks due deference and adoption of these decisions as precedent in the instant matter.

Johnson asserts whatever the actions of NPS in 2011-2012 school year did not transform the 2012-2013 school year into the

first official year of the requisite two consecutive years to support formal charges, as found in Thomas.

Respondent also views Assistant Commissioner Shulman's October 24, 2014 clarification in response to a request by NPS General Counsel as "extraordinarily suspicious." Mr. Johnson does not question the rubric. Rather, he argues the specific requirements for implementation of the actual observation/evaluation regulatory process was not available for the 2012-2013 school year. Counsel concludes,

> "Mr. Shulman's letter appears, on its face, to be the result of improper collusion with the District written in a desperate effort to invent some rationale for the District's blatant disregard of the legal requirements of TEACHNJ and AchieveNJ. It stands as an attempt to throw a life preserver to a drowning party that, alas, does not float. It cannot stand above the law, the regulations, or his own Department's previous administrative guidance."

Moreover, Petitioner maintains the District cannot now, after failing to proffer the evaluations in compliance with *Section 25* of the TEACHNJ Act, pursue the case under *Section* 8, *N.J.S.A. 18A:6-16.* Finally, Petitioner observes that as the SIP was not in place in the 2012-2013 school year, Mr. Johnson could not have received this critical benefit.

December 2014 <u>Brady</u> Decision

On December 7, 2014, Arbitrator Joyce Klein issued the third decision regarding the State-Operated School District for the City of Newark's referral of a tenure case for arbitration relying upon evaluations conducted in the 2012-2013 school year. Both

Respondent and the District raised arguments similar to those presented before the undersigned.

Upon review of the record before her, Arbitrator Klein determined, *inter alia*, the statute provided authority for an arbitrator to determine a motion prior to a hearing and the District's participation in a "pilot" program during the 2011-2012 school year did not obviate the District's obligation to implement the full panoply of procedures required by the statute for 2012-2013 school year. Arbitrator Klein reasoned,

> "Because the implementing regulations were not effective until March of 2013, the District could not and did not fully implement the evaluation rubric and procedures required for the 2012-2013 school year. Accordingly, Respondent's 2012-2013 summative evaluation cannot properly be considered in support of the District's tenure charges pursuant to N.J.S.A. 18A:6-17.3...
>
> In order to consider tenure revocation under N.J.S.A. 18A:6-17.3, the procedures for providing the requisite observations, corrective action plans and School Improvement Panels must be in place to allow the teacher full opportunity for improvement prior to tenure charges. Since neither the rules nor the procedures pursuant to those rules governing observations, corrective action plans and School Improvement Plans were in place, teachers cannot be charged under N.J.S.A 18A:6-17.3 based upon their 2012-2013 school year summative evaluations." (Decision at Page 20)

And, consistent with the decision in Cheatham, Arbitrator Klein determined the charges, based upon inefficiency under TEACHNJ, *Section 25*, cannot be evaluated under *Section 8*.

Position of Respondent Leslie Johnson

Respondent contends the issues presented in Cheatham, Thomas and Brady were identical to the issues before the undersigned. As

the arbitrators therein determined the District could not rely upon the evaluations as a matter of law from 2012-2013 school year, the formal charges of inefficiency herein should likewise be dismissed. As the Brady decision considered each and every argument raised by the District and rejected them, Respondent "urges" the undersigned to follow the analysis in the three previous decisions and grant Mr. Johnson's Motion to Dismiss.

Position of the NPS

The District argues TEACHNJ arbitration decisions have no precedential value; the doctrine of collateral estoppel is inapplicable. The "short answer" argues NPS is that the Brady decision was decided incorrectly and the undersigned should decline to follow it.

The District maintains an arbitrator is required by *N.J.S.A. 18A:6-17(2)(b)* to determine whether an asserted procedural defense "materially affected the outcome" of the Respondent's evaluation - Brady was devoid this analysis.

Counsel reasons this arbitrator's authority is limited,

> "When Respondent's motion here is considered in these terms - in accordance with the arbitrator's statutory authority - it is clear that the motion cannot be granted. The Motion seeks dismissal on the ground, essentially, that Respondent's 2012-2013 summative evaluation somehow did not "count" because the School District supposedly was required to conduct a "pilot" program in that school year. To decide whether to dismiss the charge on this basis, the arbitrator must determine not only whether a "pilot" in that year was required, but whether the lack thereof - and the School District's implementation of a "pilot" the year before, instead - "materially affected the outcome of the evaluation," pursuant to N.J.S.A. 18A:6-17.2.b. As this issue cannot be decided without considering

the evidence in the record, the arbitrator must conduct a hearing. In short, in order to perform the duty required of her by TEACHNJ, she must deny the motion." (Brief at 8)

Counsel concludes,

"In sum, the *Brady* decision is significant only as an example of what the arbitrator here should *not* do. The arbitrator should not re-decide the referral to arbitration or consider its adequacy. She should not shirk her duty to analyze the defenses provided in N.J.S.A. 18A:6-17.2(a), and render a determination of whether any of those defenses, if proven, materially affected the respondent's evaluation. N.J.S.A. 18A:6-17.2(b). And she should not ignore the plain language of the Act, or the Department of Education's recent interpretation of the Act, to rule that the 2012-2013 school year must be treated as a "pilot" year for the School District's evaluation rubric, or that TEACHNJ went into effect on a different date than provided by the Legislature. In short, the arbitrator should adopt a straightforward interpretation of TEACHNJ, and proceed to a hearing to consider the voluminous evidence of Respondent's inefficiency."

ANALYSIS

Upon review of this record including the charges referred, the parties' arguments and exhibits, review of TEACHNJ, Administrative Code Provisions and guidance from the Department of Education, I ***find*** the District's position that prior TEACHNJ decisions on Motions are not precedent to be persuasive. Each Motion decision must be based upon review of the evidence submitted to the Commissioner upon "referral" "by the employing board of education." *N.J.S.A.18A:6-17.1(b)(3)*

TEACHNJ and administrative code rules found in *Chapter 10. Educator Effectiveness* allow for review, upon motion, of the referral to arbitration to determine whether the minimum

requirements to ensure compliance with the evaluation procedures have been met.

TEACHNJ, Administrative Code Provisions and Department of Education guidance.

Prior to the enactment of TEACHNJ, tenure revocation proceedings were often lengthy and costly for all concerned. In the early 1990s, this arbitrator had the privilege of serving as an Administrative Law Judge, Temporarily Assigned and witnessed the effect of the lengthy process on a District, the teacher, and their representatives. TEACHNJ limits the evidence the Board of Education and Respondent can present at hearing, establishes specific time lines, and dictates what the arbitrator can consider when reviewing the record evidence to render her decision. The statute does maintain important due process protections for teaching staff members.

In March 2014, the Department of Education issued the initial *Summary of Legal Requirements for Evaluation and Tenure Cases* ("Summary") to assist districts in complying with the new statute and administrative code provisions. The DOE also provides a *Guide to the TEACHNJ Act,* which is consistent with the Summary.

Introducing the Summary, the DOE explains,

"The TEACHNJ ACT outlines a new process for filing inefficiency charges under the new evaluation system (AchieveNJ). This guide outlines the actions required in law before bringing an inefficiency tenure charge based on the new tenure revocation process, including the following elements:

A. Minimum Requirements to Ensure Complaince with Evaluation Procedures

I. Observation Requirements
II. Student Achievement Requirements
III. Summative Evaluation Requirements
IV. Corrective Action Plan (CAP) Requirements
V. Additional Requirements"

The DOE, under "V. Additional Requirements", identifies the School Improvement Panel as follows:

> "☐ School Improvement Panel (ScIP)(N.J.A.C. 6A:10-3):
>
> *Must be established by August 31 of each year
>
> * The precise way in which the ScIP supports teacher mentoring, evaluation and professional development may vary among schools, but the district must ensure the minimum membership requirements and procedures for forming the ScIP as described in N.J.A.C. 6A:10-3 are followed."

Following two years of rating that trigger a charge of inefficiency, the tenure revocation process time line is compressed.

At the conclusion of the Summary, the DOE cautions districts in bold letters,

> **"At all levels of review, the deciding entity must determine whether the district followed the proper procedural requirements as established by the district, the TEACHNJ Act, and subsequent regulations."**

In light of the statute, Administrative Code, and guidance of the Department of Education, I ***find*** a panel arbitrator has authority to review inefficiency charges referred for arbitration, upon motion, to determine whether the minimal requirements to ensure compliance with the evaluation procedures have been met.

Failure to met the minimum procedural requirements materially affects the evaluation process

NPS's contention, even assuming its failure to meet the minimum requirements to ensure compliance with evaluation procedures, that this arbitrator is not permitted to evaluate the referral, that she would "shirk her duty" if she did not allow an evidentiary hearing to determine if the district's failure materially affected the outcome, is inconsistent with statutory and regulatory provisions of TEACHNJ.

N.J.A.C. 18A:6-17.1(b)(3) addresses the referral of the case for arbitration by a district as follows,

> "(3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses."

In the instant matter, the referral consists of the Certification of Determination to certify tenure charges against Leslie Johnson along with the Statement of Charges, Statement of Evidence, Appendix of Exhibits and supporting documentation as provided by the District on September 19, 2014 to the Commissioner of Education, David C. Hespe.

An Arbitrator is not permitted to allow depositions. Discovery is limited to twenty-five (25) interrogatories without sub-parts. Thus, a Respondent would be denied procedural due process if s/he were required to utilize limited discovery to

ascertain additional evidence a district would provide at hearing.

Consistent with precluding a district from presenting additional evidence, the statute continues,

> "At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses."

The preclusion of evidence is supported by the time line required to be "strictly followed" by an arbitrator.

Moreover, the issues raised by Respondent in the instant motion involve statute and code provisions that do not permit arbitrator discretion. The School Improvement Panel provisions, at issue herein, utilize the word "shall". *N.J.S.A 18A:6-120 School improvement panel; N.J.A.C.6A:10-3.1 School Improvement Panel membership;* N.J.A.C.6A:10-3.2 *School Improvement Panel responsibilities.* Likewise, *N.J.A.C.6A:10-4.4 Teacher observations* mandates observation requirements for tenured teachers utilizing the word "shall".

Teacher observations and the School Improvement Panel must meet the minimum requirements. To interpret the statute requiring the hearing to proceed, even if the evidentiary submission at referral does not meet the Minimum Requirements to Ensure Complaince with Evaluation Procedures, as outlined in the DOE Summary, would negatively affect the rationale for implementing

TEACHNJ. Tenure cases could again be lengthy and costly to all parties. Allowing arbitrator's discretion to change the mandates of "shall" into "may" with respect to statute and administrative code provisions would assure divergent findings and invite Appellate review.

Moreover, the strict time line required of panel arbitrators by TEACHNJ envisioned the tenure revocation proceeding (including pre-hearing discussions, discovery issues, motion review, evidentiary hearing and issuing the decision), to be completed in no more than six (6) days. *N.J.S.A.18A:6-17.1(b)(2)*

Finally, as the instant Notice of Tenure Charges was based upon inefficiency filed under *Section 25, N.J.S.A.18A:6-17* it can not proceed under *Section 8, N.J.S.A.18A:6-16.*

Accordingly, TEACHNJ grants a panel arbitrator the authority to review, upon motion, whether the referral evidence meets minimum requirements to ensure compliance with evaluation procedures. Upon determination the referral does not, the motion to dismiss should be granted.

Review of Tenure Charge: Inefficiency

On September 19, 2014, NPS referred the tenure charge of inefficiency based upon Leslie Johnson's 2012-2013 and 2013-2014 annual summative evaluations ratings of partially effective. While the statute provides a Superintendent with discretion to file the charge of inefficiency, if the consecutive summative

ratings are "partially effective", this record review revealed NPS filed the instant charge with knowledge that the minimal requirements to ensure compliance with evaluation procedures were not met.

2012-2013 School Year

The Statement of Evidence was submitted by Principal Mills. The Teacher observations of Leslie Johnson in the 2012-2013 school year did not comply with the requirements of *N.J.A.C. 6A10-4.4.* (Exhibits 2, 4, 5, 6, 8) Indeed, NPS admitted the required number of teacher observations, the required notification, and pre/post observation conferences, mandated by Administrative Code, were not complied with by the District in the 2012-2013 school year.

Assistant Commissioner Shulman's October 24, 2014 clarification expressed the evaluation rubric utilized by the District in the 2012-2013 school year was "directionally aligned" with the proposed March 2013 regulations. This clarification did not grant NPS a waiver from complying with all administrative code regulations in *Chapter 10. Education Effectiveness.*

School Improvement Panel

With Exhibit 45, NPS acknowledged the School Improvement Panel at Shabazz was not established during the 2012-2013 year pursuant to *N.J.S.A.18A:6-120* and *N.J.A.C. 6A:10-3.1.* The first meeting of the Shabazz School Improvement Panel, compliant with administrative code, was not conducted until May 23, 2014.

Clearly, the SIP could not have performed the functions and responsibilities, outlined in *N.J.A.C. 6A:10-3.2.*, in either the 2012-2013 or the 2013-2014 school year. [2]

In light of the above review, I ***find*** the District's referral for arbitration did not meet the minimum requirements to ensure compliance with evaluation procedures mandated by TEACHNJ and administrative code, *Chapter 10. Educators Effectiveness.* Respondent Leslie Johnson's Motion to dismiss the tenure charge for alleged "inefficiency" filed by the State-Operated School District of the City of Newark is, hereby, ***granted.*** Accordingly, I issue the attached ***Award.***

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[2] *N.J.A.C. 6A:10-3.2(a)(3)* requires the School Improvement Panel to conduct a mid-year evaluation for teachers on a corrective action plan. Shabazz did not have a functioning SIP at the time Mr. Robinson's 2013-2014 mid-year evaluation was conducted.(Exhibit 12)

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

IN THE MATTER OF THE TENURE HEARING OF LESLIE JOHNSON

THE STATE-OPERATED SCHOOL DISTRICT FOR THE CITY OF NEWARK Petitioner	:	Agency Dkt No. 271-9/14
and	:	DECISION ON MOTION TO [illegible]
LESLIE JOHNSON Respondent	:	

AWARD

The tenure charge of inefficiency against Respondent Leslie Johnson is dismissed in accordance with *N.J.S.A. 18A:6-17.3(c)* and *N.J.A.C. 6A:3-5.1(c)*. Respondent Leslie Johnson shall be reinstated to his teaching position with the State-Operated School District of the City of Newark with appropriate back pay, seniority and emoluments commensurate with his employment.

DATED: Carol F. Laskin
CAROL F. LASKIN, ESQUIRE

STATE OF NEW JERSEY :

COUNTY OF CAMDEN :

I CERTIFY that on January 14, 2015

I, CAROL F. LASKIN, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Decision and Award.

DATED: January 14, 2015 Lynda A Green
NOTARY PUBLIC OF THE
STATE OF NEW JERSEY

LYNDA A GREEN
ID # 2316329
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires June 28, 2019

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

BUREAU OF CONTROVERSIES AND DISPUTES

TENURE HEARING

In the Matter of the Arbitration Between **STATE-OPERATED SCHOOL DISTRICT CITY OF NEWARK, NJ**	)	
PETITIONER	)	**DECISION ON**
And	)	**MOTION TO**
TONI LENZ	)	**DISMISS AND STAY**
RESPONDENT	)	**PROCEEDINGS**
Agency Docket 289-9/14	)	

ARBITRATOR — GERARD G. RESTAINO, ASSIGNED BY NEW JERSEY DEPARTMENT OF EDUCATION IN ACCORDANCE WITH CHAPTER 26, P.L. 2012, AND 18A:6-17.1

APPEARANCES:

FOR THE PETITIONER

RAMON RIVERA, ESQ.	COUNSEL FOR PETITIONER
SEAN DIAS, ESQ.	COUNSEL FOR PETITIONER
CHRISTINA MICHELSON, ESQ.	COUNSEL FOR PETITIONER
ANGELO AUTERI, ESQ.	COUNSEL FOR PETITIONER

FOR THE RESPONDENT

NANCY OXFELD, ESQ.	COUNSEL FOR RESPONDENT

PROCEDURAL BACKGROUND

On August 27, 2014, Lynn Irby-Jackson, Principal of Arts High School, in the State-Operated School District of the City of Newark, filed a Notice of Inefficiency, (tenure charges) against the Respondent. That Notice of Inefficiency included twenty-one (21) separate counts of an inability of the Respondent to "completely and responsibly execute her duties as a teacher" for the period of August 12, 201 to the present. Those charges were filed pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-17.3, and N.J.A.C. 6A:3-5.1. On August 29, 2014, the above charges were served on the Respondent.

On September 16, 2014, the Respondent filed an answer to the Notice of Inefficiency Charges. On September 23, 2014, Cami Anderson, Superintendent of the State-Operated School District of the City of Newark, filed a Certification of Determination in support of the Tenure Charges filed by Principal Lynn Irby-Jackson. That Certification was filed in accordance with N.J.S.A. 18A:6-11. Superintendent Anderson also determined that, in accordance with N.J.S.A. 18A:7A-39 and N.J.S.A. 18A:6-14, the Respondent is to be suspended without pay for one hundred-twenty (120) days effective September 26, 2014.

On September 25, 2014, Ramon Rivera, counsel for the Petitioner, filed the tenure charges with David Hespe, then Acting Commissioner of Education. That filing included Notice of Charges, Statement of Evidence in Support of Charges, Supporting Documents, Certification of Determination and Proof of Service.

On October 6, 2014, the Respondent filed an answer to the tenure charges. On October, 14, 2014, M. Kathleen Duncan, Director of New Jersey Department of Education's Bureau of Controversies and Disputes, sent a letter to Mr. Rivera and Ms.

Oxfeld in which she indicated that the tenure charges and Respondent's answer were reviewed pursuant to N.J.S.A. 18A:6-17.3, and upon review *"the Commissioner is unable to determine that the evaluation process has not been followed, and accordingly, on this date, the case is being referred to Arbitrator Gerard G. Restaino as required by statute"*

On November 24, 2014, a preliminary hearing was held to establish a briefing schedule. On December 3, 2014, Respondent, with supporting letter memoranda, submitted a motion to the arbitrator seeking to have the tenure charges dismissed because they were brought prematurely. Additionally, under separate cover Ms. Oxfeld was sending to the undersigned copies of the following TEACHNJ, State-Operated School District of the City of Newark, arbitration decisions:

Agency Docket	Respondent	Arbitrator
272-9/12	Felicia Pugliese	Daniel Brent
269-9/12	Edgard Chavez	Timothy Brown
243-10/13	Lawrence Hawkins	Carol Laskin

The Carter award is for the City of Camden:

369-12/12	Gerald Carter	Robert Simmelkjaer

On December 18, 2014, the Petitioner submitted a thirty-four (34) page brief in Opposition to the Respondent's Motion to Dismiss accompanied with one hundred seventy-nine (179) pages of supporting exhibits.

Respondent requested an extension until January 9, 2015, to submit a response to the Petitioner's brief. The extension was granted. On January 9, 2015, Respondent sent a letter to the arbitrator indicating that all of her arguments were *"thoroughly*

addressed in the brief to Dismiss as well as the arbitration decisions provided".

Therefore, Respondent will not submit a reply to the Petitioner's brief.

POSITIONS OF THE PARTIES

For the Petitioner

Petitioner argues that the Commissioner of Education has determined that the District followed the evaluation process in accordance with N.J.S.A. 18A:6-17.3, and the arbitrator has no statutory authority to consider Respondent's motion to dismiss.

Furthermore, Petitioner asserts that *"the role of an arbitrator in a tenure proceeding is set forth in N.J.S.A. 18A:6-17.1."* The practical imperative of the Respondent's Motion to Dismiss is that to take such an action the arbitrator is required to hear evidence and then determine if the evaluation procedure was properly implemented or if it was flawed.

Most importantly, Respondent's Motion to Dismiss fails to cite any authority under which it was made. Moreover, the Respondent did not file the Motion to Dismiss in lieu of an answer. Petitioner also contends the evaluations of Respondent for the 2012-10213 school year are valid as TEACHNJ was in effect and in full force in the 2012-2013 school year, and the collateral estoppel doctrine does not bar the arbitrator from considering Petitioner's arguments in this regard. In fact, collateral estoppel is inapplicable in the matter at bar because there has been no final judgment on the following State-Operated School District of the City of Newark, arbitration decisions:

Agency Docket	Respondent	Arbitrator
226-8/14	Sandra Cheatham	Stephen Bluth
244-9/14	Neil Thomas	Robert Simmelkjaer

The Petitioner strongly argues that arbitration decisions are not binding and the Respondent's reliance on the Cheatham and Thomas awards is misplaced,

In support of that argument the Petitioner contends that the time has not yet passed for it to appeal the Cheatham and Thomas awards. If those decisions are appealed, there exists the possibility that the awards will be vacated on one (1) of more of the bases set forth in N.J.S.A. 2A:24-8.

Finally, the Petitioner contends that *"even if the arbitrator here concludes, notwithstanding the facts and arguments presented herein, that the requirements for inefficiency tenure charges under N.J.S.A. 18A:6-17.3 have not been met, the inefficiency charges against Respondent should not be dismissed. Instead, the charge must be evaluated under N.J.S.A. 18A:6-16, and the case should proceed to hearing."*

For the Respondent

The Respondent strenuously argues that the tenure charges are premature and must be dismissed. Moreover, the *"issue of whether tenure charges of inefficiency brought pursuant to TEACHNJ can be brought after the conclusion of the 2013-2014 school year has already been decided against the State-Operated school District of the City of Newark by two arbitrators.[1]"*

The Cheatham and Thomas awards establish that *"tenure charges of inefficiency brought pursuant to the provisions of TEACHNJ cannot be brought until after the conclusion of the 2014-2015 school year."* Each arbitrator dismissed the tenure charge and ordered the Respondent reinstated with all lost pay and benefits.

[1] Since receipt of Respondent's brief, there have been at least four (4) arbitration awards in the State-Operated School district, City of Newark, support of Cheatham and Thomas.

The Respondent contends that the Cheatham and Thomas decisions support its position that the tenure charges against her are premature and must be dismissed.

Furthermore, the Respondent argues that the tenure charges cannot be converted into something else. The decisions in *"Pugliese and Chavaz deal with charges that were filed after the effective date of TEACHNJ, but prior to the commencement of the 2012-2013 school year"* Arbitrator Simmelkjaer determined that those two (2) awards have no applicability in Thomas, because the tenure charges in Thomas were filed at the start of the 2014-2015 school year. The Respondent contends the same must apply here.

Additionally, the Respondent asserts that the decisions in Hawkins and Carter *"make it clear that the charges of inefficiency can be brought against a teaching staff member prior to the conclusion of the 2014-2015 school year by bringing those charges under the tenure statute, without specifying that they are inefficiency as set forth in N.J.S.A. 18a:6-17.2."*

Also in Thomas, Arbitrator Simmelkjaer determined that the State-Operated School District, City of Newark, could not *"pursue two (2) types of inefficiency charges at the same time."* Moreover, he determined that the New Jersey Legislature did not provide the appropriate statutory language to allow the District the authority to file charges under Section 8 and, if not successful, file those same charges under Section 25.

Most importantly, the respondent contends that collateral estoppel is controlling in the matter at bar and the *"Petitioner has to accept the Cheatham and Thomas awards, or in the alternative, file a motion in court to have those awards set aside."* The

Respondent asks that the Motion to Dismiss be upheld and she be returned to work with full back pay and benefits.

DISCUSSION AND OPINION

As previously indicated, since the submission of the Respondent's Motion to Dismiss, there have been four (4) more TEACHNJ awards in the State-Operated School District, City of Newark as set forth below:

Agency Docket	Respondent	Arbitrator
270-9/14	Elena Brady	Joyce Klein
255-9/14	Lorraine Williams	David Gregory
268-9/14	Leonard Yarborough	Edmund Gerber
235-8/14	Sandra Brienza	Ernest Weiss

Arbitrators Greggory, Gerber and Weiss sustained the Respondent's position and returned them to work with full back pay and benefits. Their decisions were based upon the Cheatham, Thomas and Brady determinations.

Nothing has been presented to me that would require me to set aside those decisions. Collateral estoppel is alive and controlling in the matter before me and as such must be given its full weight and authority. Olivieri v. Y.M.F.Carpet, Inc., 186, N.J. 511, 521, 897 A.2d 1003 (2006)

There is no question that the issues before me have already been addressed, and I might add quite extensively, by arbitrators Simmelkjaer and Klein.

Having reviewed all of the voluminous documents submitted in post hearing briefs, as well as the TEACHNJ awards referenced previously, I Award the following:

AWARD

The Respondent's Motion to Dismiss the tenure charges in their entirety is granted in accordance with N.J.S.A. 18A:6-17.3 (c) and N.J.A.C. 6a:3-5.1(c). The Respondent, Toni Lenz, shall be reinstated to her teaching position with full back pay and benefits.

Dated: January 17, 2015

Gerard G. Restaino

State of Pennsylvania)

County of Wayne) ss:

On this 17th day of January, 2015, before me personally came and appeared GERARD G. RESTAINO to me known to be the person who executed the foregoing document and he duly acknowledged to me that he executed the same.

Judith K. Restaino

Notary Public

Lake Twp., Wayne County

My Commission expires on November 10, 2017

In the Matter of the TENURE hearing of

BETH GREEN :

and :

SCHOOL DISTRICT OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY :

AGENCY DOCKET NO. 295-10/14 :

The School District of the Township of Irvington filed tenure charges alleging behavior unbecoming a professional against Beth Green. At the arbitration hearing, the parties agreed to enter into a settlement agreement. I have determined that this settlement agreement conforms to the standards established by the State Board of Education in the matter entitled In re Cardonick, State Board decision of April 6, 1983 (1990 School Law Decisions 842, 846). I therefore approve it and enter that settlement agreement as a CONSENT AWARD.

Signed this 22nd day of January, 2015.

SCOTT E. BUCHHEIT, ARBITRATOR

State of New Jersey
County of Camden
Martha R. Kapelis
My Commission Expires
February 5, 2019

Cerino, Smith, Pisini, P.C.
60 Route 46 East
Fairfield, NJ 07004
Attorneys for Respondent Beth Green

SCHOOL DISTRICT OF THE TOWNSHIP OF IRVINGTON, Petitioner v. BETH GREEN, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION Agency Ref. No.: 295-10/14 STIPULATION OF SETTLEMENT

Petitioner School District of the Township of Irvington (hereinafter "Petitioner") and Respondent Beth Green (hereinafter "Respondent") (collectively referred to as the "Parties") in the above-captioned matter hereby agree to resolve all outstanding issues with respect to the Tenure Charges filed by Petitioner against Respondent pursuant to the following terms:

1. As a resolution of all issues relative to the instant tenure proceeding, the Parties hereby agree as follows:

   A. Petitioner agrees to withdraw the tenure charges filed against Respondent and to reinstate her to active teaching status, with full pay and benefits, effective December 11, 2014;

   B. Upon reinstatement, Respondent agrees to a transfer to a teaching position at Chancellor Avenue Elementary School;

   C. Petitioner agrees to reimburse Respondent for one-third (1/3) of the back-pay it withheld from her since certifying the instant tenure charges, in an amount equivalent to two (2) regular salary payments (out of six (6)

payments withheld from her), minus any unemployment benefits received by Respondent during the corresponding two (2) pay periods, which she will be receiving during the month of January, 2015;

D. Respondent agrees to reimburse Petitioner for medical insurance coverage afforded to her from September 28, 2014, through December 11, 2014, via deductions from her bi-weekly salary payments, in equal installments, from January 15, 2015, through June 30, 2015;

E. Petitioner will place a written memorandum drafted by Superintendent Dr. Nealy Hackett, enclosed herewith as *Exhibit A*, in her employee personnel file and Respondent agrees to waive all appeals or challenges to the memorandum, which shall serve as documentation as to the nature of the charges, as required by *N.J.A.C.* 6A:3-5.6(a)1;

F. Respondent agrees to participate in an accredited developmental or counseling program as directed by and at the expense of Petitioner, for a reasonable period of time.

2. It is agreed that no further disciplinary action, beyond what is specified in the foregoing, will be taken by Petitioner against Respondent regarding the underlying incident(s) which formed the basis of the instant tenure charges.

3. It is agreed and understood that Respondent expressly waives any claim for back pay and/or benefits withheld from her during her suspension without pay, except as explicitly provided in this Stipulation of Settlement.

4. The Parties agree that the terms of this Stipulation of Settlement were made in the best interests of both the Parties and the public. This Stipulation of Settlement represents an

acknowledgment of the seriousness of the instant tenure charges. However, it does not constitute an admission of wrongdoing by either of the Parties. Respondent agrees to accept responsibility for any conduct that was improper on her part, and, in return, Petitioner agrees to permit her to continue her employment as a teacher for the School District of the Township of Irvington. Finally, the Parties agree that this Stipulation of Settlement was entered into with the understanding that it will help save both sides considerable costs and time required to fully adjudicate this matter.

5. The Parties hereby agree that they have entered into this Stipulation of Settlement voluntarily and willingly, and without being under any duress. The Parties agree that they fully understand the terms of this Stipulation of Settlement. They further aver that they had the opportunity to consult with their respective attorneys regarding the terms and provisions of this Stipulation of Settlement, and they acknowledge by their signatures below that they are satisfied with the representation provided to them by their attorneys.

6. In accordance with *N.J.A.C.* 6A:3-5.6(a)6, Respondent acknowledges that she was advised of the Commissioner of Education's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of teaching certificate(s).

ON BEHALF OF PETITIONER SCHOOL DISTRICT OF THE TOWNSHIP OF IRVINGTON

By: _____
Dr. Nasly Hackett, Superintendent

Dated: 1/20/15

LAW FIRM OF HUNT, HAMLIN & RIDLEY

By: _____
Stephanie Paloyln, Esq.

Dated: 1/20/15

ON BEHALF OF RESPONDENT BETH GREEN

By: _____

Beth Green

Dated: Jan 15, 2016

CARUSO, SMITH PICINI, P.C.

By: _____
Nicholas Pobierutsky, Esq.

Dated: 1/15/15

37-15

38-15

OAL DKT. NO. EDU 12808-14
AGENCY DKT. NO. 248-9/14

J.M. and C.M., on behalf of minor child, C.M.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAINESPORT, BURLINGTON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In so doing, however, the Commissioner notes with respect to paragraph 5.d. of the Agreement that the Board must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.*, with respect to information concerning this matter – notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential.

Accordingly, this matter is hereby dismissed, subject to compliance with the terms of the settlement consistent with applicable public records law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/28/15
Date of Mailing: 1/28/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12808-14

AGENCY DKT. NO. 248-9/14

J.M. AND C.M. ON BEHALF OF MINOR CHILD, C.M.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAINESPORT, BURLINGTON COUNTY,

Respondent.

J.M. and C.M., petitioners, pro se

Sanmathi Dev., Esq., for respondent (Capehart & Scatchard, P.A., attorneys)

Record Closed: December 9, 2014 Decided: December 16, 2014

BEFORE **PATRICIA M. KERINS**, ALJ:

The matter was transmitted to the Office of Administrative Law for determination as a contested case on October 3, 2014, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

December 16, 2014
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

12-22-14
Date Received at Agency:

Date Mailed to Parties: 12-19-2014

cmo

Hainesport Township School District

Mr. Nicholas Bice
School Business Administrator/Board Secretary
Bice@hainesport.k12.nj.us

November 21, 2014

I, Nicholas Bice, Business Administrator/Board Secretary of the Hainesport Township School District, County of Burlington, State of New Jersey, hereby certify that the following excerpt from the minutes of the Board of Education meeting of said school district, held on November 20, 2014 and officially recorded in the minute book of said Board of Education, is a true, complete, and correct copy thereof so far as the same relates to the subject matter referred to in said extract;

Approve the settlement agreement regarding student # 11744 pertaining to NJDOE petition reference number 248-9/14 and OAL docket number EDU-12808-2014 S.

Nicholas Bice
School Business Administrator/
Board Secretary

SETTLEMENT AGREEMENT

J.M. & C.M. o/b/o C.M. v. HAINESPORT TOWNSHIP BOARD OF EDUCATION

AGENCY REFERENCE NO. 248-9/14
OAK DOCKET NO. EDU-12808-2014 S

This Settlement Agreement ("Agreement") is entered into by and between John McCord and Colleen McCord on behalf of Chase McCord (collectively referred to as "Petitioners") and the Hainesport Township Board of Education ("Board") to resolve and settle all outstanding issues involved in this matter between Petitioners and the Board (the "Parties").

WHEREAS, the Hainesport Township Board of Education ("Board") is a local public school board of education organized under Title 18A of the New Jersey Statutes with its principal offices located at 211 Broad Street, Hainesport, New Jersey 08036 in Burlington County; and

WHEREAS, Chase McCord was born on August 31, 2007 and resides at 34 Lenox Drive, Hainesport, New Jersey 08036 in Hainesport Township, Burlington County; and

WHEREAS, Chase McCord's parents are John McCord and Colleen McCord; and

WHEREAS, on or about June 10, 2014, the Board determined that Chase had committed an act of harassment, intimidation, and bullying ("HIB"); and

WHEREAS, on or about September 5, 2014, Petitioners filed the instant Petition of Appeal (Agency Reference No. 248-9/14, OAL Docket No. EDU-12808-2014 S) challenging the Board's finding of HIB; and

WHEREAS, on or about September 30, 2014, the Board filed an Answer to the Petition of Appeal; and

WHEREAS, in order to resolve any and all disputes between the Parties without resorting to time-consuming and costly litigation, the Petitioners and the Board have agreed to a full and final settlement of all claims and matters asserted in the aforementioned Petition of

Appeal and any claims that could have been asserted in a state or federal court proceeding that relate directly or indirectly to the Petition of Appeal; and

WHEREAS, this Agreement, and the execution and implementation of same, shall not be construed or considered an admission of liability by the Board, its present and former Board of Education members, officers, employees, agents and servants, said liability being expressly denied.

NOW, THEREFORE, in consideration of the mutual promises and agreements contained herein, the Petitioners and the Board **AGREE AS FOLLOWS:**

1. The Board agrees to rescind the finding of HIB against Chase and remove any record of same from Chase's student file. Such incident shall in no way be considered or used in the future to penalize Chase or enhance any penalty against Chase.
2. Petitioners understand that the Board's rescission set forth in Paragraph 1 does not condone Chase's behavior which led to the initial finding of HIB.
3. The Parties agree that this Agreement resolves any and all claims arising from or directly or indirectly relating to the Petition of Appeal.
4. Within five (5) days of full execution of this Agreement, Petitioners agree to submit said Agreement to the New Jersey Office of Administrative Law and/or the Bureau of Controversies and Disputes for dismissal of the Petition of Appeal.
5. **Miscellaneous:**
    a. The Parties agree to refrain from taking any actions or making any statements, oral or written, critical or otherwise, in any medium whatsoever, relating to or concerning this dispute, which have the purpose of injuring each others' reputations or causing any person or entity to refrain from or cease any employment or business relationship with each other.

b. The Parties hereby verify, affirm and represent that they have each had the opportunity to discuss the terms of this Agreement with counsel, that they understand its contents and are entering into this Agreement voluntarily and with a full understanding of its meaning.

c. John McCord and Colleen McCord each represent that they have the sole authority to enter into this Agreement, and that it shall be binding as if entered into by any other parent and/or guardian of Chase McCord not a party hereto.

d. The terms and conditions of this Agreement shall be kept strictly confidential and will not be disclosed to any individual that is not acting directly on behalf of any party.

e. The provisions of this Settlement Agreement are severable and, if any part is found to be unenforceable, the other portion shall remain fully valid and enforceable.

f. This Agreement shall be governed and construed under the laws of the State of New Jersey.

g. This Agreement constitutes the full and complete agreement of the Parties and may not be changed or modified absent mutual written agreement of the Parties. This Agreement is binding upon the Parties and their respective heirs, assigns or successors in interest.

11-20-2014

John McCord, individually and on behalf of Chase McCord, Father — Date

11/20/14

Colleen McCord, individually and on behalf of Chase McCord, Mother — Date

11/20/14

Mary-Jean Kneringer, Hainesport Township Board of Education, Vice President — Date

58-15

IN THE MATTER OF THE TENURE HEARING :

OF ELYSE CROMWELL, : COMMISSIONER OF EDUCATION

STATE-OPERATED SCHOOL DISTRICT : DECISION

OF THE CITY OF NEWARK, ESSEX COUNTY. :

SYNOPSIS

Petitioning Board certified tenure charges of unbecoming conduct against respondent – a tenured high school English teacher – and sought to terminate her employment with the district. Neither respondent nor any attorney acting on her behalf filed an answer to the petition following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.4(h), the allegations – which respondent has chosen not to deny – may be deemed admitted and overwhelmingly warrant the termination of the respondent from her tenured position. Accordingly, the Commissioner granted summary decision to the petitioner, dismissed the respondent from her tenured position in petitioner's school district, and forwarded a copy of this decision to the State Board of Examiners for review and action as that body deems appropriate.

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

January 28, 2015

AGENCY DKT NO. 367-12/14

IN THE MATTER OF THE TENURE HEARING	:	
OF ELYSE CROMWELL,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX COUNTY.	:	

For the Petitioner, Rita F. Barone, Esq.
No appearance by or on behalf of Respondent, Elyse Cromwell

This matter was opened before the Commissioner of Education on December 19, 2014, through tenure charges of conduct unbecoming certified by Cami Anderson, State District Superintendent of the State-Operated School District of the City of Newark, together with supporting evidence against Elyse Cromwell, a tenured teacher in the petitioner's employ. The petitioner provided respondent with written notice of such certification at the respondent's last known address, via Federal Express on December 18, 2014. The petitioner also served a copy of the tenure charges on the respondent's union representative.

On December 29, 2014, the Commissioner directed the respondent – via both certified and regular mail – to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*" and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. No reply to the tenure charges was received from or on behalf of respondent.

The certified tenure charges and statement of supporting evidence filed by the petitioner in this matter indicate that respondent had sex with her 15-year-old student on multiple occasions. The charges also contend that the respondent dispensed marijuana to three of her students, and – on more than one occasion – engaged in the use of marijuana with these students. Additionally, the Department of Children and Families, Institutional Abuse Investigation Unit found that the allegations of Sexual Abuse/Sexual Penetration and Neglect/Substantial Risk of Physical Injury/Environment Injurious to Health and Welfare against the respondent were substantiated.

Deeming the allegations to be admitted and noting that respondent has failed to respond to the charges certified against her, the Commissioner finds that petitioner's charges of conduct unbecoming a teaching staff member have been proven and overwhelmingly warrant the respondent's dismissal. Accordingly, summary decision is hereby granted to the petitioner, and the respondent is dismissed from her tenured position with the District. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/28/15

Date of Mailing: 1/28/15

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

40-15

Pursuant to Referral By the Commissioner of Education
State of New Jersey
Before Timothy J. Brown, Esquire

In the matter of:

The Tenure Hearing of	:	
LaRhonda Ragland	:	
	:	**Agency Docket No. 285-9/14**
State Operated School District of the	:	
City of Newark, Essex County	:	

Decision and Award

Appearances:

On behalf of the State Operated School District of the City of Newark, Essex County:
Ramon Rivera, Esquire
Shana Don, Esquire
Scarinci Hollenbeck
1100 Valley Brook Ave.
P.O. Box 790
Lyndhurst, NJ 07071

On behalf of LaRhonada Ragland:
Robert Pickett, Esquire
Pickett & Craig
80 Main Street, Suite 430
West Orange, NJ 07052

Introduction

This matter arises from tenure charges submitted on September 26, 2014 by the State Operated School District of the City of Newark (the School District or the District) based upon inefficiency pursuant to N.J.S.A. 18A:6-10. N.J.S.A.18A:6-11, N.J.S.A. 18A6-17.3 and N.J.S.A. 6A:3-5.1 against LaRhonda Ragland (Respondent) and an October 6, 2014 referral of the tenure charges to the undersigned by the New Jersey Department of Education, Bureau of Controversies and Disputes pursuant to N.J.S.A. 18A:6-17.3c. At the time of the referral of the tenure charges, the Commissioner also referred a Motion filed with the Commissioner by the District seeking an order that the Tenure Charges be deemed admitted pursuant to N.J.A.C. 6A:3-5.3, that the Answer and Defenses stated in Respondent's answer be stricken from the record as being untimely, and that Respondent should be dismissed as a matter of law. By Order dated November 24, 2014 the undersigned denied the District's Motion. No further dispositive motions were filed by the deadline for such established by the undersigned[1], and the hearing in the matter was conducted on December 4 and 17, 2014 and January 13 and 14, 2015 in Newark, New Jersey. At the hearing all parties were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. Respondent LaRhonda Ragland was present for the entire hearing and testified on her own behalf. At the close of the hearing on January 14, 2015 the parties

[1] The originally established date for such motions was extended by the undersigned at the request of Counsel for Respondent, however no motion was filed by Respondent by the established-and-extended deadline. Thereafter, Respondent filed a Notice of Motion to Dismiss and the undersigned informed the parties that the motion was denied as untimely but that such denial did not preclude Respondent from presenting any defense(s). Respondent's post-hearing argument includes much of the argument previously presented to support her late-filed, Motion to Dismiss.

elected to submit written closing argument, upon the receipt of which by the arbitrator on January 27, 2015 the matter was deemed submitted.

This Award is made following my careful consideration of the entire record in the matter, including the under-sign's observations of the demeanor of all witnesses.

Issues

The issues on the merits presented in this matter may be accurately stated as follows:

> Has the District met its burden of establishing the truth of its tenure charges against Respondent, and if not, what is the appropriate remedy?

Additionally, the Respondent raises an issue as to the arbitrability of the matter, arguing that the tenure charges should be dismissed on summary basis as they are insufficient on their face.

The Tenure Charge

The tenure charges in this matter are based upon inefficiency pursuant to N.J.S.A. 18A:6-10. N.J.S.A.18A:6-11, N.J.S.A. 18A6-17.3 and N.J.S.A. 6A:3-5.1 and states:

> CHARGE ONE: INEFFICIENY
>
> During the period from January 24, 2013 to the present, Respondent has demonstrated an inability to completely and responsibly execute her duties as a teacher in the following manner:
>
> a. The Respondent has failed to implement curricular goals and objective(s).
> b. The Respondent has failed to design coherent instruction.

c. The Respondent has failed to assess student learning.
d. The Respondent has failed to create an environment of respect and rapport.
e. The Respondent has failed to manage student behavior.
f. The Respondent has failed to establish a culture of learning.
g. The Respondent has failed to communicate clearly and accurately.
h. The Respondent has failed to use questioning and discussion techniques with flexibility and responsiveness.
i. The Respondent has failed to reflect on teaching.
j. The Respondent has failed to contribute to the school district.
k. The Respondent has failed to grow and develop professionally.
l. The Respondent has failed to demonstrate promptness and attendance.
m. The Respondent received an overall rating of Ineffective in an Annual Summative Evaluation for School Year 2012-2013.
n. The Respondent received an overall rating of Partially Effective in an Annual Summative Evaluation for School Year 2013-2014.

Respondent

Respondent is certified by the State of New Jersey to teach dance. She taught dance in the District for 9 years; initially teaching dance at the elementary level at the Dayton Street School and more recently at the Maple Avenue School. During her years as a dance teacher Respondent received annual evaluations of "proficient" for at least five years and "basic" for the 2011-2012 school year. For the 2012-2013 school year, the District's record reflect that Respondent was rated "Ineffective," however, both Respondent and the Maple Avenue School Principal (at the time) who evaluated Respondent and gave the teacher her rating testified that the rating pas "Partially Effective."

In 2013 Respondent's permanent assignment at the Maple Avenue School was eliminated for budgetary reasons and she was transferred to Arts High School in an "employee without placement" (EWP) status. As an EWP teacher at Arts High School Respondent was not given a permanent classroom teaching assignment and was required to wait in the school principal's office each morning until assigned work by the principal. During the 2013-2014 school year the only full dance class periods she taught as a lead teacher were the three for which she was subject to observation and perhaps a few others. Respondent's other assignments during the 2013-2014 school year included clerical work, attendance, housekeeping, monitoring tardy students and substitute teaching in various academic subjects, as well as a one or two week period during which she was to observe dance classes taught by other teachers.

Respondent received an annual evaluation of Partially Effective for the 2013-2014 school year.

Testimony

The 2012-2013 School Year

Former Principal of the Maple Avenue School Deneen Washington testified that the Maple Avenue School was one of the schools selected to participate in the teacher evaluation pilot program established by the District pursuant to TEACHNJ. According to Washington, Respondent taught dance at the elementary school for a number of years during which Washington evaluated Respondent, including the 2012-2013 school year. Washington identified an unsigned 2012-2013 evaluation of Respondent from the District's records giving Respondent an Ineffective rating. Washington maintained that she recalled that she later changed the annual rating to "Partially Effective." Washington

testified that Respondent would email her lesson plans to the principal and that although there were some grammatical errors in the emails, Washington understood the meaning of the emails.

Washington also admitted that she has a pending legal action against the District and that she is represented in that pending action by counsel for Respondent in the instant matter.

Hillary Dow was the Vice Principal of Maple Avenue School during the 2012-2013 school year. Teachers that school year, Dow testified, were evaluated based upon the District's 2012-2013 Framework for Effective Teaching which Dow understood was part of a pilot program for teacher evaluations. Dow did not personally perform any formal evaluation of Respondent but did informally observe Respondent teach on occasion throughout the year.

Dow testified that she issued written discipline to Respondent during the school year, including a write-up for conduct unbecoming dated January 1, 2013 for comments Respondent made to another teacher. According to Dow, Respondent often displayed this type of behavior with the staff and the administration often had to mediate between Respondent and other members of the staff. Dow also issued Respondent two warnings for inappropriate comments to students: one addressing Respondent's comments to a male dancer to hold his arms "like a male" and another addressing Respondent's conduct of tapping a female student to get the student's attention and then stating; "Oh, I thought you were someone I liked." In the view of Dow, such conduct by Respondent goes to the teacher's efficiency because it in the first instance relating to a coworker, the performing

arts faculty is a team and Respondent's conduct could impact negatively upon the team, and the comments to students impact the students directly.

Dow explained that Respondent had issues with written communication. Respondent's writings were grammatically incorrect and had no fluency of thought, Dow asserted, and Respondent was required to have her written material reviewed before she sent them to parents. Basically, Dow testified, Respondent would have to orally tell the office clerk what she wanted to say to the parents and the clerk would do the writing.

The 2013-2014 School Year

Lynn Irby-Jackson is the Principal of Arts High School and testified that when Respondent was assigned to the High School in the autumn of 2013 Irby-Jackson was aware that Respondent had received a 2012-2013 school year performance evaluation rating of "Ineffective." According to Irby-Jackson, she recommended the instant tenure charge of inefficiency based upon what the principal and school administration observed of Respondent during the 2013-2014 school year. Respondent's 2012-2013 rating was taken into account by the High School Administration, Principal Irby-Jackson explained, for purposes of establishing a Corrective Action plan (CAP) for Respondent for the 2013-2014 school year.

The District's Evaluation Tool

Principal Irby-Jackson testified that in evaluating Respondent the school applied the 2013-2014 "Framework for Effective Teaching, Newark Public Schools Teacher Evaluation" guidebook adopted by the District. The Framework includes five "competencies" for which teachers are evaluated: (1) Lesson Design and Focus; (2) Rigor

and Inclusiveness; (3) Culture of Achievement; (4) Student Progress Toward mastery and (5) Commitment to Personal and Collective Excellence. The Framework contemplates that teachers will be evaluated through evidence; evidence of three general types; (a) what can be observed, (b) what cane be seen in artifacts and (c) what can be seen in quantitative data. Teachers may receive ratings at four levels in each competency: Highly Effective, Effective, Partially Effective and Ineffective. Both administrators and teachers received significant and continuing training on the evaluation tool, according to Irby-Jackson.

The Framework provides that any teacher who received an annual evaluation rating of Partially Effective or Ineffective in the 2012-2013 school year must receive a Corrective Action Plan (or CAP) in the 2013-2014 school year. The Framework specifies that a Corrective Action Plan should be developed in the beginning of a school year through a collaborative process between the teacher and supervisor. The "Frequently Asked Questions" portions of the Framework discusses the CAP process. There, the Framework poses, among others, the following questions and provides the following answers:

> *How is the CAP used throughout the year?*
> The CAP is a living document and should be referenced and updated throughout the year. At each post-observation conference and the mid-year review, the teacher and principal should review the goals outlined in the CAP and assess the teacher's progress toward meeting those goals. The CAP is the main format by which the teacher and the principal collect and report evidence of the teacher's growth and improvement.
>
> *What is the responsibility of a teacher on a CAP?*
> A teacher on a CAP is responsible for the development goals outlined in his or her CAP with the principal. These development goals should be specific and time-based; the teacher should use these goals to guide his or her activities and efforts to develop. In addition to being responsible for implementing these goals and actions in order to improve, the teacher will also participate in professional

growth opportunities, reflect on his/her growth areas and request additional support when needed.

What is the administrator's responsibility to support a teacher on a CAP?
An administrator with a teacher on a CAP is responsible for reviewing and co-developing the CAP with the teacher and then supporting the teacher in meeting the development goals outlined in the CAP. The CAP should explicitly articulate actions the administrator will take to directly support the teacher. The administrator is also responsible for conducting classroom observations to collect evidence of progress towards goals, ensuring the teacher has opportunities and guidance on how to access and participate in professional learning opportunities throughout the year, and for sharing clear, regular feedback with the teacher about his or her development.

Irby-Jackson testified that at the end of the summer of 2013 her school received five or six Employees Without Placement (EWP) employees, including Respondent. As a recipient of EWP teachers, her school was charged with getting those teachers into the classroom so they could be evaluated. Irby-Jackson explained that she conducted Respondent's first observation during the 2013-2014 school year. According to Irby-Jackson, prior to that observation she held a pre-observation conference with Respondent, informed Respondent ahead-of-time of the date of her observation and conducted a post observation conference with Respondent. The "Long Observation – Observation Summary Form" relating to that observation is signed by Irby-Jackson on November 15, 2013. The witness signature on the document is dated November 20, 2013. Respondent's signature does not appear on the document. The record establishes that the observation took place in or about the first week of November 2013. The form reflects that the Observation was "announced" and the grade level was "12th." In the "Lesson Summary" portion of the form, Irby-Jackson wrote:

> The objective on the lesson plan was different than what was stated in the pre observation conference which was different from the written and posted lesson plan at the time of

the lesson. The teacher was ready at the start of the lesson and began by reviewing vocabulary words that were written on wrinkled Kraft paper and posted on the wall. She called on the students to read the word and then demonstrated the movement. At one point she asked a student to "parmesan" around and the student corrected her by stating the proper term was 'promenade'. The students were then directed to go to the barre to start the class at 1:30pm. By 2:00pm they had only completed 3 exercises. This was due to the teacher not having panned the combinations. The students were noticed standing in idle with no clear understanding of what to do. She did not use proper terminology when explaining the combination, Teacher articulated the next combination of dance steps and when the students questioned the order of the of the combination steps she repeated it differently numerous times. The students indicated that they were confused. The teacher was not prepared with the selection of music for each exercises and time was spent waiting while she figured it out. When the students did the exercises no verbal response was given to either correct or clarify misconceptions. This continued for the entire barre exercises. The students then moved directly to grand allegro which is out of sequence for a proper ballet class in order to prevent injury.

At this point the teacher no longer gave verbal directions but while attempting to choreograph the combinations, the students made attempts to understand what she was doing. Again the combination changed each time she showed it and when the students asked clarifying questions the teacher responded 'yes'. Each pair of students did the combination differently yet no directions were given to correct the student's mistakes before moving on to the next side.

The teacher then noticed the time and ended the class.

In her "Summary Comments" Irby-Jackson wrote:

Based on the evidence collected the teacher demonstrated not only a lack of pedagogy in her certified area but a basic knowledge of instructional best practices. The regular misuse and mispronunciation of dance terminology by the teacher in a level IV class resulted in confusion among students as they themselves questioned their prior knowledge and understanding of previously learned movement and vocabulary.

Respondent received an overall rating for the long observation of "Ineffective."

Irby–Jackson held a mid-year review with Respondent on February 14, 2014. The related Mid Year Review Summary Form completed by Irby–Jackson provides the following "Summary of Performance":

> Ms. Ragland has a limited knowledge of classical ballet and modern dance techniques which limit her ability to have a productive class. The students are constantly providing corrections to the teacher and when seeking clarity none is offered or incorrect information is given. This leads to confusion and therefore disruption in the class.

In the space on the Form reserved for teachers on a CAP, and asking "[w]hat specific actions have been taken by administrators to support the teacher in these growth areas? What actions will administrators provide for the remainder of the year?" Irby–Jackson wrote:

> The administrators have provided opportunities for classroom observations, followed by discussions with 2 high school dance educators of the existing dance classes specifically in ballet and modern. A class observation form was suggested for reflection to guide post observation discussions which are not utilized. In the discussions Ms. Ragland had no questions nor did she offer ideas as to what she observed.
> An opportunity to change or update the professional growth goals on the CAP was given to Ms. Ragland who declined. In an effort to provide additional support and opportunity for growth the following plan will be implemented: Ms. Ragland will immerse herself in the Level A classes. She will observe the teaching of these students on a daily basis for one week with an opportunity to engage in conversation with the teacher, review plans, and get to know the students. She will then write a one week unit plan with five daily lesson plans. She may consult with the teacher if she chooses. Ms.

> Ragland will then teach the Level A class for 3 class periods, during which time she will have an unannounced observation. Ms. Ragland will be provided with several articles for her review.

The record evidence does not establish whether or not the plan for Respondent to observe classes, write a one-week lesson plan and teach three class periods was implemented. In April 2014 Irby-Jackson again performed a long observation of Respondent, this time teaching an A-level 9th & 10th grade ballet class, and rated the teacher as "Partially Effective."

James Manno, Arts High School Vice-Principal for Curriculum and Instruction was assigned by Principal Irby-Jackson to be the administrator on Respondent's CAP plan. According to Manno he was not informed of the details of Respondent's former evaluations but is aware that the 2013-2014 Framework provides that teachers who received a Partially Effective or Ineffective rating for the 2012-2013 school year were required to have a CAP for the 2013-2014 school year. He recalled that he met with Respondent and went over the CAP form with her, but that Respondent never completed her portion of the form; a first such failure by a teacher in the experience of Manno. The Corrective Action Plan "Official Form" provides in its introductory statement that:

> At the beginning of the year, the teacher and supervisor sit down to reflect on last year's performance and goals for the current year. This is an opportunity to map out (1) goals and focus areas for the students; and (2) development areas and opportunities for the teacher. Once this form is completed it must be uploaded by the teacher into BloomBoard and a paper copy must be signed and added to the teacher's file.

According to Manno, he never saw Respondent's 2012-13 evaluations and there was never a complete Corrective Action Plan for Respondent to perform for the 2013-2014 school year, as the teacher did not complete the plan.

Manno testified that he also conducted a short observation of Respondent in February 2014 in which he rated Respondent Partially Effective. He did not conduct a pre-conference with Respondent as such are not required for short observations. According to Manno, the ninth grade students in the dance class taught by Respondent and observed by Manno were not new to Respondent. In this regard, Manno maintained, Respondent had observed the students in the class and had taught them for other observations. The "Summary Comments" by Manno of the short observation state:

> It is imperative that Ms. Ragland become engaged in intensive professional development in the area of modern dance specifically Graham/Horton in an effort to increase her pedagogical skill level. She also must review best practices in effective teaching methods emphasizing lesson planning and standard alignment, engagement, questioning techniques, and increasing rigor in the classroom. It is further suggested that she research national and state standards in the area of dance. It is recommended that the observation form provided to Ms. Ragland when observing classes be utilized to engage in discussions regarding lesson design, and teaching methods.

Manno testified that he did not informally observe Respondent at any time during the school year. He testified that Respondent attended three to five of the ten mandatory Dance Department monthly meetings during the 2013-2014 school year. According to Manno, based upon written communication received from Respondent, he is of the view that Respondent's poor writing abilities had a significant impact upon her ability to teach.

Respondent was given one more formal observation during the school year, her third; a long observation in April 2014 conducted by Irby-Jackson. Again, Irby-Jackson testified, she met with Respondent prior to the observation. Irby-Jackson gave Respondent a Partially Effective rating for this observation.

In addition to the two formal observations she conducted of Respondent, Irby-Jackson testified that she attempted to informally observe Respondent. In this regard, the Principal explained, several times she went to the classes the administration had given Respondent to observe the teacher and found that Respondent was not present. Irby-Jackson acknowledged that under the District's Framework for the 2013-2014 school year, teachers on a CAP were required to have four observations during the year and that Respondent was given only three. Irby-Jackson asserted that a fourth observation was not provided Respondent because, in the view of the principal, too much damage was being done each time Respondent taught and Irby-Jackson could not further subject the children of the school to the dangers of Respondent's teaching.

Respondent's Annual Evaluation and Tenure Charges

Irby-Jackson completed Respondent's Annual Evaluation dated May 12, 2014 and gave Respondent a Partially Effective rating. Irby-Jackson also testified that she recommended tenure charges against Respondent. Teachers are required to write. They must write in the classroom for students, they must write lesson plans, they must write student evaluations, they must be able to communicate with other teachers, etc. Respondent cannot write, Irby-Jackson testified, and consequently could not meet competency I; Lesson Design and Focus.

Counseling and Discipline of Respondent and Complaints by Irby-Jackson about Respondent during the 2013-14 School Year

October 7, 2013

By memorandum of October 7, 2013 Irby-Jackson notified Respondent that the teacher had been assigned as Hall Monitor for the HSPA administration held on October 1-3. 2013 and was not at her post at the assigned time. The memorandum to Respondent concludes:

> Please understand it is the expectation of Arts high School administration that when a directive is given under any circumstances it must be followed…Should this occur again, you will be written up for insubordination and further disciplinary action will follow.

October 24, 2013

By memorandum of October 24, 2013 from Irby-Jackson Respondent received a "Second Notice" providing:

> On Wednesday October 23, 2013 at approximately 8:50am you were assigned by me to report to the main office every morning and wait for your daily assignment. You were then informed that you will be stationed at the front door signing in students who were late for school. I clearly articulated to you in the presence of Vice Principal Ricardo Pedro, Vice Principal Jim Waldron, and Head security guard Nancy Johnson that you must be on that post by 8:30-9:15am, and provided you with materials and instructions on the procedure.
>
> Today, Thursday, October 24, 2013 you were not in the main office waiting for your daily assignment, nor did you report to your assigned post i.e., the late door at 8:30. Mr. Pedro found you in the dance studio at 9:05 where you indicated that you were only assigned the late door for the previous day.

> Since being assigned to Arts High School in September 2013, this is you second notice in writing notice (sic) of 'failure to follow directive' and 'neglect of duty'. As a result labor relations will be contacted.
>
> Ms. Ragland you are an EWPS teacher assigned to Arts high School for additional support, you are not an Arts High School dance teacher. Therefor you are directed NOT to go to the dance studios unless you are specifically assigned by me, and report to the main office every day and wait for an assignment. Failure to do this will result in additional disciplinary action.

November 1, 2013

Irby-Jackson asserted that based upon the written materials she read authored by Respondent, the Principal believes Respondent is a "functional illiterate." She opined such to her Assistant Superintendent of Schools, Brad Hagerty, on November 1, 2013, where she wrote:

> I know that we have spoken may times regarding my concern over the ability of assigned EWPS dance teacher [Respondent]. Not only does she not have the technical or artistic ability to teacher (sic) any of my dance classes including the middle school, but we have discovered that she is functionally illiterate. I have sent you several copies of correspondence she has had with.... To say that I am outraged that such a person has survived in the Newark Public Schools and been allowed to teach children is an understatement, but now that this atrocity has been made known to the arts world that supports Arts High School I must take additional steps to ensure that children are no longer damaged...
>
> I know that we have been searching for an alternative placement for her but I cannot pass her on to another school as she was passed on to me. As a former dancer, I am the only administrator who can successfully observe her in the dance studio and have the knowledge to effectively point out her deficiencies. Let me state that she does have the capacity to effectively teach Hip-Hop and Tap but that is not the discipline that is taught at Arts High School.

I have asked her to write a lesson plan for next week when I conduct a formal observation of her teaching. I must inform you that she has been written up on 3 different occasions for failure to follow a directive which today left 25 7th grade students unattended and without instruction. I must also bring to your attention that upon checking with certification she carries a Vocational certification that she received based on her professional experience as a Nets cheerleader. She does not have a college degree.

Something must be done, as I cannot allow this to continue, my children and all children of Newark Public Schools deserve better.

January 6, 2014

Irby Jackson also testified that following her first observation of Respondent in November 2013 she and NTU local president Mike Jackson met to discuss a plan to assist Respondent's development. Relating thereto Irby-Jackson issued Respondent a January 6, 2014 memorandum relating to "Insubordination." In part, the memorandum provides:

> ...Prior to the Winter break we discussed this plan for implementation beginning January 2014. You responded favorably to the plan stating: "I want and am willing to learn." Today, January 6, 2014 at approximately 8:25am, you received an administrative request to observe a dance class, and you refused to do so stating: "I do not feel comfortable doing that." I responded by stating: "you do not feel comfortable teaching a class"? To which you replied "NO". You made a verbal request to transfer you, and I replied that I do not have the authority to do so.
> ....Be advised:
> - Failure to follow an administrative directly especially those pertaining to your duties and responsibilities as a teacher constitutes insubordination. You are hereby directed to follow the attached schedule of observations and teaching schedule. Failure to comply with this directive will result in appropriate disciplinary action.
> - Your refusal to participate in this action plan agreed upon between you and your selected representation, demonstrates a lack of commitment to education and growth.
>
> This serves as a reminder that in the future, you are expected to adhere to and follow all directives in a timely manner. Your fullest cooperation is expected.

Respondent's Testimony

Respondent testified that she received her teaching certification through alternate route and that hers is a standard certification. Prior to being transferred to Arts High School as an EWP she taught at the elementary level and had up to eight classes a day. She recalled that her first evaluation for the 2012-2013 school year was conducted in January 2013, that her second and final evaluation for that school year was conducted in July 2013, and that she had no announced evaluations and no pre-observation conferences during that year. She testified that after her transfer as an EWP to Arts High School she had no expectation of teaching under her certification, and that the few times she taught dance class there was for purposes of observation. Contrary to Irby-Jackson, Respondent testified that she and the principal did not have a formal pre-observation meeting. Rather, Respondent asserted, the principal communicated to her by email and instructed Respondent to draft a lesson plan and that she would be observed on November 6, 2013. The November 6, 2013 observation was her first at Art High School, Respondent testified.

As for the CAP, Respondent maintained that Manno met with her and told her this was something Respondent had to do because that is what they do at Arts High School. Respondent asserted that Manno did not tell her the purpose of the CAP.

Respondent testified that Irby-Jackson wrote she was a functional illiterate not because it is a true statement but rather because the principal does not like Respondent. Respondent explained that in her experience Irby-Jackson was very distant and did not

communicate directly with Respondent. Respondent testified that she felt bullied and harassed by the Principal.

Positions of the Parties

Petitioner / District

The District argues - as it has unsuccessfully in many recent cases involving motion to dismiss tenure charges of inefficiency filed by the District - that it is appropriate under TEACHNJ for it to consider Respondent's 2012-2013 evaluation as well as her 2013-2013 evaluations as they were performed pursuant to an evaluation rubric established consistently with the statute and NJ Department of Education (Department) guidance. In this regard, the District asserts, the District was one of eleven school districts approved to participate in the Department's 2011-2012 teacher evaluation pilot program. As a result, the Department of Education allowed the District to begin using a new "framework" and new rating system on a "pilot" basis to evaluate teacher performance in the 2011-2012 school year. During that school year Respondent taught at one of the eleven schools in the District participating in the pilot program and her evaluations during that year have not been proffered by the District to support its inefficiency charges. The framework and new rating system was then used throughout the entire district in the 2012-2013 school following the adoption of a related Memorandum Of Agreement (MOA) between the District and Teacher Union and passage of TEACHNJ. The District made a few minor modifications to its framework to comply with Department of Education requirements and again applied the framework to teachers

in the 2013-2014 school year. As a result, Respondent was subject to evaluation under the 2011-2012 pilot, the 2012-2013 framework and the 2013-2014 framework.

Contrary to the assertion of Respondent, the District argued, it implemented its 2012-2013 evaluation rubric in a timely manner to be effective under governing law. In this regard, TEACHNJ establishes "deadlines" by which certain requirements must met. Thus, the statue required school districts to institute pilot programs to test their new evaluation rubrics by January 31, 2013, **at the latest**. N.J.S.A. 18A:6-123(d) ("Beginning **no later than** January 31, 2013, a board of education shall implement a pilot program..."). (Emphasis added). Here, the District did just that; it implemented a pilot program with Department of Education approval in the 2011-2012 school year – thereby complying with the requirement that its pilot program be instituted "no later" than January 31, 2013.

Similarly, the District continued, TEACHNJ required all New Jersey public school districts to develop "evaluation rubrics" to assess the performance of their teachers, and established a deadline to obtain approval for their "rubrics" from NJDOE by December 31, 2012. The District complied with that mandate. The District adopted an evaluation rubric – a rubric approved by the Department - as part of a performance evaluation system known as the Newark Public Schools Framework for Effective Teaching to be implemented beginning in the 2012-13 school year. To inform its teachers and school administrators of the new Framework and to provide guidance on its implementation, the District conducted training and published a Guidebook to the Framework for use in 2012-2013. The Framework clearly describes the new "levels of performance" as highly effective, effective, partially effective and ineffective.

The District further argued that it complied with the deadline established by the Act that school districts implement their evaluation rubrics by the beginning of the 2013-2014 school year **at the latest**, citing N.J.S.A. 18A:6-123(e) ("[b]eginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric"). Again, the District asserted, the District complied with the statute and implemented its framework containing the evaluation rubric for the 2012-2013 school-year; an implementation date that predated the 2013-2014 deadline set by statute. Nothing in TEACHNJ nor any regulations, the District maintained, provides that evaluations performed in 2012-2013 in accordance with an adopted, approved rubric are to be treated differently from those performed in 2013-2014, for purposes of triggering tenure charges under N.J.S.A. 18A:6-17.3.

Considering the plain meaning of the statute's language and the guidance and actions of the Department of Education, the District argued, neither the statue nor the DOE required school districts to; (a) treat the 2012-2013 school year, and only 2012-2013, as a "pilot" year and (b) wait a year to implement their evaluation rubrics if the rubrics had been adopted and approved earlier.

Consequently, the District asserted, its efficiency charges against Respondent are appropriately considered by the arbitrator under TEACHNJ.

Respondent's attempt to have the charges dismissed on procedural grounds is inappropriate, the District maintained. In this regard, the District argued, it is the Commissioner of Education who is solely authorized to determine the sufficiency of the evaluation process and resulting tenure charges. N.J.S.A. 18A:6-16. Thus, a dispositive motion by a teacher subject to tenure charges based upon the failure of a board of

education to follow the evaluation process may only be made to the Commissioner prior to the referral to an arbitrator.

Once it is found that the tenure charges are sufficient, based upon appropriate criteria and a referral is made to an arbitrator, an arbitrator's authority is confined to a determination of the following: (a) whether or not the employee's evaluation failed to adhere substantially to the evaluation process; (b) whether there was a mistake of fact in the evaluation; (c) whether the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, or discrimination, or; (d) whether the board of education's actions were arbitrary and capricious. N.J.S.A. 18A:6-17.2. Therefore, whether the District acted in compliance with law in filing charges based upon the 2012-2103 school year has been answered in the affirmative by the Commissioner of Education and is outside the scope of the arbitrator's authority.

Moreover, the District asserted, the statute does not contemplate that arbitrators will have the authority to interpret the statute or to evaluate the legislative intent of the Act. That authority is the courts.

Considering all of the evidence presented at the hearing, the District argued, it has met its burden of supporting the charge. The teacher evaluations conducted within the District in 2012-2013 were valid, effective, and "counted" for all purposes, including to support tenure charges such as those presented here, as were the evaluation conducted in the 2013-2014 school year. Respondent's contention to the contrary should be rejected.

The arbitrator's authority under TEACHNJ is limited to a determination of whether the approved evaluation system contained in the District's Framework was "substantially" adhered to when applied to Respondent. In this regard, the relevant

evidence offered at hearing by the District including the total number of observations conducted each school year, and voluminous other evidence and testimony of witnesses establishes the Respondent's inefficiency as a tenured teacher to children. Even though the District did not conduct a fourth "short" observation of the Respondent during the 2013 – 2014 School Year, the Decision could not have "materially affected" the outcome of the Annual Summative Evaluation as Principal Irby-Jackson testified that performing the exercise of assigning the Respondent a class had proven futile thrice, and it was inconceivable to waste further instructional time and potentially injure students by placing her in the classroom. Ms. Dow, Ms. Washington, Ms. Irby-Jackson and Mr. Manno all evaluated the Respondent in accordance with the TEACH NJ Act and in substantial compliance with District policy. The Respondent was offered a collaborative CAP Process and extensive professional development opportunities and recommendations

Alternatively the District continued, should the rubric of N.J.S.A. 18A:6-17.2 be found not to be the appropriate criteria under which to judge the evidence in this matter, the District has met its burden under the long-established efficiency standard of the preponderance of credible evidence. That standard requires that the District offer evidence that would lead a reasonably prudent person to conclude that the Respondent is an ineffective educator. Considering the totality of the circumstances here, including the testimony of Ms. Dow, Ms. Washington, Ms. Irby-Jackson and Mr. Manno and the numerous memoranda addressing the Respondent's unbecoming conduct and neglect of duty, along with the statements of her own Union Representative and her own testimony,

a reasonable person could concluded that the ineffectiveness of Respondent as an educator sufficient to revoke her tenure protections.

The tenure charges are appropriately before the arbitrator and the District has met its burden of supporting its charges and Respondent has failed to rebut the District's case by establishing that; (a) the employee's evaluation failed to adhere substantially to the evaluation process, (b) there was a mistake of fact in the evaluation, (c) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, or discrimination or (d) that the board of education's actions were arbitrary and capricious. Under such circumstances, the District concluded, Respondent's employment as a tenured teacher within the District should be terminated.

Respondent

The tenure charges against Respondent must be dismissed, Respondent argued, as they unlawfully rely upon evaluations performed during the 2012-2013 school year. In enacting TEACHNJ the Legislature clearly intended the 2012-2013 school year to serve as a "pilot year" for all administrators and teaching staff members in assessing teaching effectiveness. See N.J.S.A. 18A:6-123. Under TEACH NJ, it was not until the 2013-2014 school year that the statute was deemed to be in full force and effect and was the first year that evaluations would count for purposes of tenure charges. Try as it might, Respondent maintained, the District cannot avoid that simple and obvious reality and fact. The purpose of 2012-2013 pilot-year was to train certified teaching staff members and evaluators on the District's evaluation instruments and procedures, and for the Department of Education ("DOE") to prepare and finalize its regulations, which later

became known as Achieve NJ and which did not become effective until October 2013. The pilot nature of the 2012-2013 school year is further supported by the obvious fact, Respondent asserted that the implementing regulations were not even promulgated until after the 2012-2013 school year had concluded. Additionally, such a conclusion is further supported by the Department of Education's own guidance on the questions. Thus, in its "Educator Evaluation Frequently Asked Questions (FAQ)" previously published on its web-site in answer to the question "Will summative ratings "count" this year (2012-13) toward tenure decisions?" the Department of Education stated:

> A: No- the only item "on the clock" is the mentorship year for new teachers. No evaluation outcomes in the 2012-13 school year will impact tenure decisions. 2013-14 is the first year where the statewide system will be in place, and the first year when summative rating "clock" (for teachers needing to be rated at least effective for two of three years) will start.

Although the Department FAQ statements were informal in nature and may not rise to the status of regulation, the Respondent argued, the Department's statements nevertheless represent the practical interpretation of the statute by the agency charged with instructing local governmental units on how they were to comply with the new law. As such, Respondent maintained, there is judicial precedent to support Respondent's assertion that the DOE FAQ guidelines should be given substantial deference.

Respondent further argued that numerous recent decisions of arbitrators relating to motions to dismiss efficiency charges filed by the District[2] support its position that the evaluations performed by the District on Respondent during the 2012-2013 year are not

[2] In the Matter of Sandra Cheatham; In the Matter of Neil Thomas; In the Matter of Elena Brady; In the Matter of Charles Coleman; In the Matter of Lorraine Williams; In the Matter of Sandra Brienza; In the Matter of Leonard Yarborough; In the Matter of Ursula Whitehurst; In the Matter of Ratiba Ahmed; In the Matter of Toni Lenzand In the Matter of Leslie Johnson.

appropriately considered for purposes of efficiency tenure charges. In those cases Respondent asserted, arbitrators held that the charge affecting their respective Respondent alleging inefficiency pursuant to N.J.S.A.18A:17.3 was insufficient and/or premature because the TEACH NJ Act was not enacted until August 2012 and not implemented until October 2013, and further because the District presented no evidence that it was somehow exonerated from the requirements of Act.

The inapplicability of the 2012-2013 evaluations to charges of inefficiency are further established by the absence of a School Improvement Panel (SIP) during the 2012-2013 school year. Again, Respondent maintained, the District must be in compliance with all requirements of TEACH NJ as established by the Commissioner of Education and/or Department of Education as a precondition for considering annual summative evaluations as a basis for filing efficiency tenure charges. As the schools in which Respondent was assigned in the 2012-13 and 2013-14 school years did not have SIPs for those entire years, Respondent asserted, the District was out of compliance with TEACH NJ and, consequently, her 2012-13 and 2013-24 evaluations may not be used as a basis to file tenure charges.

Respondent argued that considering N.J.S.A. 18A: 6-17-3(c) provides:

> Notwithstanding the provisions of N.J.S.A. 18A: 6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a of this section, the commissioner shall examine the charge. The individual against whom the charges are filed shall have 10 days to submit a written response to the charge to the commissioner. The commissioner shall, within five days immediately following the period provided for a written response to the charges, refer the case to an arbitrator and appoint an arbitrator to hear the case, unless he determines that the evaluation process has not been followed.

And that where a District has filed tenure charges alleging inefficiency premised upon teacher evaluations, but has failed to follow the evaluation development process required by TEACH NJ, the Commissioner may dismiss the tenure charges or simply forward to an assigned Arbitrator for further assessment of a District's compliance with the evaluation requirements of the TEACHNJ Act. As a result, Respondent asserted, if a matter has been referred to an assigned Arbitrator, then the Arbitrator is charged with the responsibility to assess a District's compliance with the evaluation and assessment requirements of the TEACHNJ ACT. If the assigned Arbitrator finds that the Petitioner District has failed to follow the evaluation requirements or is deficient for any reason, the Arbitrator is obliged to dismiss the tenure charges. Here, it is undisputed that the District failed to abide by the evaluation process set forth in the TEACHNJ ACT and accordingly, the tenure charges against Respondent Ragland must be dismissed.

In conclusion, Respondent argued, the Petitioner School District is unable to cite any legal authority and evidence that would permit the Arbitrator to simply ignore the plain and unambiguous language of the relevant statute and regulation. The District's compliance with the portions of TEACHNJ relating to the establishment and approval of evaluation procedures is a prerequisite to proceeding with Inefficiency Charges and any finding to sustain those charges, Respondent asserted. Accordingly, Respondent's 2012-2013 summative evaluation is not properly the subject of consideration by either the Commissioner or the Arbitrator in this case. Moreover, Respondent argued, if said evaluation is not subject to consideration, then the District's tenure charges are facially deficient in that it includes only one (1) deficient summative evaluation for the 2013-2014 school year, as opposed to the two consecutive deficient annual evaluations

required by TEACH NJ. Likewise the evidence is clear that (1) the Petitioner District failed to provide Respondent with the required minimum three (3) observations during the 2012-2013 school year even assuming that year was not a "pilot" year for the District and (2) that the Petitioner District failed to provide the Respondent with the required fourth observations in the 2013-2014 school year based on her CAP status. As such, the tenure charges at issue should be dismissed consistent with the procedural defects identified and with other arbitration rulings involving this Petitioner School District.

Discussion

The Referral of the Matter to the Arbitrator

By letter dated October 17, 2014 from the State of New Jersey Department of Education the parties were notified that:

> ...following receipt of Respondent's answer on October 10, 2014, the above-captioned tenure charges have been reviewed pursuant to **N.J.S.A. 18A:6-17.3c**; upon review the Commissioner is unable to determine that the evaluation process has not been followed, and accordingly, on this date, the case is being referred to Arbitrator Timothy J Brown, Esq. as required by statute.

(Emphasis added)

Respondent's Argument Relating to the Arbitrator's Authority

Respondent asserts that the arbitrator is without authority to hear and consider the instant matter and must dismiss the tenure charge against Respondent. In this regard, Respondent argues that the instant efficiency tenure charges, in the first instance, as a matter of law should not be considered by the arbitrator at all, and in the alternative should be dismissed, because the District has not complied with certain requirements of

TEACH NJ relating to the promulgation, approval and implementation of the District's evaluation process; requirements including piloting/testing, approval and establishment of an evaluation rubric, teacher improvement processes and SIPs; and the application of such for a minimum of two school years - none of which school years may have occurred prior to the 2013-14 school year. As part of her argument, Respondent asserts that at least two post-2012-13 school year evaluations are a "prerequisite" for; (a) the Commissioner of Education to refer an efficiency case to an arbitrator for hearing and (b) the jurisdiction of an arbitrator to hear and consider tenure charges alleging inefficiency. In support of her argument Respondent relies upon:

(i) The language of N.J.S.A. 18A: 6-17-3(c),

(ii) Arbitration decisions finding that a referral of a charge by the Commissioner of Education alleging teacher inefficiency where the Commissioner has not found that an "evaluation process has not been followed" necessarily amounts to a referral of authority to determine whether the District has complied with all provisions of the statute relating to the promulgation and institution of its teacher evaluation process, and

(iii) Recent arbitral decisions in other cases involving motions to dismiss of similar inefficiency charges by the District finding either that the District did not comply with TEACHNJ in its promulgation and implementation of its evaluation process or that a determination by the arbitrator that the District has complied with all provisions of the statute relating to the promulgation and institution of its teacher evaluation process is a legal prerequisite to an arbitrator proceeding to hearing on the charges.

Sections 23 and 25 of TEACHNJ

Sections 23 of TEACHNJ, among other things, establishes the extent of the authority of arbitrators relating to their consideration of, and rendering decisions upon, charges of teacher inefficiency. In this regard, Section 23 provides:

> 23. a. In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:
> (1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
> (2) there is a mistake of fact in the evaluation;
> (3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or
> (4) the district's actions were arbitrary and capricious.
>
> b. In the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.
>
> c. The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review.
>
> d. The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.
>
> e. The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case. The arbitrator shall render a written decision within 45 days of the start of the hearing.

Sections 25 of TEACHNJ, concerns the responsibilities of superintendents, boards of education and the Commissioner of Education in evaluating and processing charges of inefficiency. Section 25 of the Act provides:

> C.18A:6-17.3 Evaluation process, determination of charges.
> 25. a. Notwithstanding the provisions of N.J.S.18A:6-11 or any other section of law to the contrary, in the case of a teacher,

principal, assistant principal, and vice-principal:
(1) the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency whenever the employee is rated ineffective or partially effective in an annual summative evaluation and the following year is rated ineffective in the annual summative evaluation;
(2) if the employee is rated partially effective in two consecutive annual summative evaluations or is rated ineffective in an annual summative evaluation and the following year is rated partially effective in the annual summative evaluation, the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency, except that the superintendent upon a written finding of exceptional circumstances may defer the filing of tenure charges until after the next annual summative evaluation. If the employee is not rated effective or highly effective on this annual summative evaluation, the superintendent shall promptly file a charge of inefficiency.

b. Within 30 days of the filing, the board of education shall forward a written charge to the commissioner, unless the board determines that the evaluation process has not been followed.

c. Notwithstanding the provisions of N.J.S.18A:6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a. of this section, the commissioner shall, within five days immediately following the period provided for a written response to the charges, refer the case to an arbitrator and appoint an arbitrator to hear the case, unless he determines that the evaluation process has not been followed.

d. The only evaluations which may be used for purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L.2012, c.26 (C.18A:6-117 et al.).

TEACHNJ Grants Only Narrow Authority to Arbitrators in Inefficiency Cases

Considering the above-quoted language of TEACHNJ, I am not persuaded by Respondent's argument. Section 23 of TEACHNJ establishes the authority of arbitrators in cases presenting questions of efficiency. Section 25 establishes the authority of the

Commissioner of Education in cases presenting questions of efficiency. Section 25 c. (18A: 6-17-3(c), (ii)) grants the Commissioner of Education authority to make one of three determinations upon receipt of a charge of inefficiency filed under Section 25 a.; the Commissioner may (1) determine the evaluation process has been followed and refer the case to an arbitrator, (2) determine the evaluation process has not been followed and dismiss the charges, or (3) determine that based upon the submissions of the parties the Commissioner cannot conclusively determine one way or the other whether the evaluation process has been followed and consequently cannot determine that the evaluation process "has not been followed." Where the Commissioner refers a matter to an arbitrator, as the Commissioner has done here, after concluding that he cannot determine that the evaluation process has not been followed, I am of the view that the statute affirmatively directs the arbitrator to "hear the case" pursuant to Section 23 of the Act. Section 25 is focused upon the authority of superintendents, boards of education and the Commissioner and with perhaps the exception of the assignment of a case to an arbitrator to "hear the case" nothing in Section 25 grants authority to arbitrators.

Considering the specifically described authority of arbitrators contained in Section 23 of the Act and the absence of any similarly enabling language in Section 25, I am persuaded that Section 25 does not confer authority upon the arbitrator to either; (a) rule upon a motion to dismiss based upon the evidence already considered by the Commissioner and found to be insufficient basis upon which to make a determination, or (b) grant authority upon the arbitrator to step into the shoes of the Commissioner and

determine whether the District has complied with statutory requirements in the promulgation and implementation of the District's evaluation process.[3]

It is widely recognized that an arbitrator's authority is defined by the mutual grant of authority by the parties or, as in this matter, by statute. In either event the authority of an arbitrator is only as broad as the authority granted. In the instant matter, I am of the view that the authority grant to me by statute as arbitrator in this matter is a very tightly fitting suit. Considering the pointed and narrow grant of authority to me in Section 23 of the ACT, the statute leaves me little, if any, wiggle room to wander into matters of legislative intent and/or District compliance with provisions of the statute governing the promulgation and establishment of evaluation rubrics, SICs, CAPs, mentorship programs, etc. The Act assigns such tasks to the Commissioner.

The Commissioner's referral of this matter to me was specifically pursuant to TEACHNJ Section 25 (N.J.S.A. 18A:6-17.3c) and no other Section of the Act, and grants me the narrow authority to determine the case under the provisions of Section 23 and no other.[4]

The District Failed to Meet Its Burden Under Section 23 of TACHNJ

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[3] In this latter regard, I note that the reference in Section 25 d. to the portions of the Act concerned with the promulgation and establishment of evaluation rubrics, like the other portions of the section, is addressed to the activities of superintendents, boards of education and/or the Commissioner, not arbitrators.

[4] In contrast, in the case of *The Tenure Hearing of Edgard Chavez, State Operated School District of The City of Newark, Essex County Agency*, Docket No. 269-9/12, (February 6, 2013), the assignment of the case to the undersigned by the Department of Education was made pursuant to *N.J.S.A. 18A:6-16* as amended by *P.L. 2112, c. 26.*

I find that the District has failed to meet its burden of establishing the truth of its efficiency tenure charges. Even setting aside the question of whether or not Respondent's 2012-13 annual evaluation may be considered under the TEACH NJ standard, the District failed to show that it met the standard for the 2013-14 school year. In this regard, I find (1) that Respondent's 2013-14 evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan, (2) that the District's actions toward Respondent throughout the 2013-14 school year were arbitrary and capricious and (3) and that such failures by the District materially affected the outcome of the Respondent's 2013-14 annual evaluation.

The District's 2013-14 Evaluation Failed to Substantially Adhere to the District's Framework – the District's Evaluation Process

The District's 2013-14 Framework for evaluating Teachers requires that a teacher, such a Respondent, who has received either an Ineffective or Partially Effective on his or her annual summative rating for the 2012-13 school year must have a Corrective Action Plan (CAP) and that such teachers must have a minimum of four observations throughout the school year with at least one observation in each semester and at least one pre-observation conference. Tenured teachers on a CAP may not have all of their observations performed by the same observer. The Framework recommends that for teachers on a CAP the pre-observation conference take place prior to a long observation and that the "most important questions to answer" in a pre-observation conference are:

-Is the teacher clear on what students should know and be able to do by the end of the class?
-Are the strategies and objective aligned to the standards?
-Are the strategies the teacher is planning to use likely to ensure mastery?
-How will the teacher know whether the students mastered the content?
-Has the teacher considered all students in the planning?
-Is there anything in particular the teacher would like feedback on as part of the observation?

Although principal Irby-Jackson testified that she held a pre-observation conference with Respondent prior to the early November 2013 long observation, she did not offer details about the conference or whether or not she attempted to address the important questions for such a conference outlined in the Framework. Respondent testified that her pre-observation conference consisted of an email notice that she would be observed on November 6 and the she should have her lesson plan submitted on "BloomBoard" by November 3, 2013.

Whether the principal and Respondent met for a pre-observation conference, I find that any such meeting that may have occurred consistent primarily of principal Irby-Jackson merely giving Respondent notice of the observation and establishing a deadline for the teacher to submit a lesson plan. I find that there was no pre-observation conference between Irby-Jackson and Respondent during which the parties engaged in a substantive exploration of the questions to be answered in such a conference as contemplated by the District's Framework. Nor was there sufficient evidence offered to establish that any other pre-observation conference offered Respondent during the 2013-14 school year. I find that the District did not satisfy the requirements of such a conference contained in the District's Framework.

The Framework also required that Respondent, as a teacher on a CAP, have at least four observations during the school year. It is undisputed that Respondent was given only three observations and I am not persuaded by the District's claim that it was excused from conducting a fourth observation because a fourth observation would have harmed students. The Framework does not provide for such exception. Rather it specifically provides that "teachers on a CAP **must have** one additional observation for a total of four observations." (Emphasis added). In addition to establishing that four observations are a minimum, the Framework encourages school administrators to conduct more than the minimum. The District failed to satisfy the Framework's requirements of four observations of Respondent; the District failed to do the "minimum" required in this regard.

The District also admits that there was never a complete Corrective Action Plan (CAP) established for Respondent during the 2013-14 school year, but placed the responsibility and blame for the lack of such a plan upon Respondent. It is true that Respondent did not submit some parts of the CAP. However, the District also failed to satisfy their obligation. In this regard, I find insufficient evidence to establish that the administration attempted to follow-up on the CAP with Respondent or work collaboratively with the teacher to assure that the CAP was completed. Nor did the administration of Arts High School review Respondent's 2012-13 annual evaluation as required by the Framework to develop a CAP. The Framework does not contemplate that school administrators can simply sit on their hands and shift the burden of establishing a CAP onto the struggling teacher. Rather the Framework contemplates that the CAP is a "living document;" and that the development of a CAP is an ongoing and dynamic

process between the teacher and responsible administrator. Again, the Framework provides:

> An administrator with a teacher on a CAP is responsible for reviewing and co-developing the CAP with the teacher and then supporting the teacher in meeting the development goals outlined in the CAP. The CAP should explicitly articulate actions the administrator will take to directly support the teacher. The administrator is also responsible for conducting classroom observations to collect evidence of progress towards goals, ensuring the teacher has opportunities and guidance on how to access and participate in professional learning opportunities throughout the year, and for sharing clear, regular feedback with the teacher about his or her development.

I find that the District failed to satisfy the requirements relating to Respondent's CAP contained in the District's Framework.

I do not question the evaluator's determinations as to the quality of Respondent's classroom performance as reflected in the three observations made of Respondent in the 2013-14 school year. However, when the District's failures to comply with the provisions of the District's Framework are weighed in full along with the considerations I rely upon below for finding arbitrary conduct by the District, I find that Respondent's 2013-14 evaluation "failed to adhere substantially to the [District's] evaluation process, including, but not limited to providing a corrective action plan."

The District's Actions Toward Respondent were Arbitrary and Capricious

The District's Actions toward Respondent relating to her evaluation and attempts to correct her deficiencies were arbitrary and capricious. In this regard, I find that rather than making a real effort to mentor and assist Respondent in developing and improving her teaching ability and skills during the 2013-14 school year, the administration of Arts

High School predetermined that Respondent was a lost cause, undertook a "warehousing" of Respondent and placed form over function by going through the motions of observing Respondent rather than exercising the time and energy contemplated by both TEACHNJ and the District's Framework in evaluating and helping Respondent develop. The District set Respondent up to fail and simply marked time until it could file tenure charges against the teacher. In reaching this conclusion I rely upon the following considerations:

1) It is fiction to believe that Respondent would succeed in observations of her teaching high school students at a high school devoted to the arts when Respondent had previously taught dance only at the elementary school level and had been assigned hall monitoring and substitute teaching in non-dance subjects at the arts high school.

2) On October 24, 2013, only a week or two before her first observation, Respondent was unambiguously advised in a disciplinary write-up from principal Kirby-Jackson that "...you are a EWPS teacher...**you are not an Arts High School dance teacher**..." (Emphasis added) Such reflects Respondent's status as an outsider at the school and the Principal's view that Respondent was not at the High School for purposes of teaching dance.

3) Four or five days prior to her first observation for which the principal rated Respondent "Ineffective," Irby-Jackson expressed her firm predisposition toward finding Respondent unable to teach when the principal wrote her assistant superintendent that Respondent is "functional illiterate," that Irby-Jackson was "outraged" that

Respondent had been allowed to teach students in the District's schools, that Irby-Jackson is the "only administrator who can successfully observe her in the dance studio and have the knowledge to effectively point out her deficiencies," and that "[s]omething must be done, I cannot allow this to continue, my children and all the children of the Newark Public Schools deserve better."

4) As discussed above, The District failed to perform even the minimum number of observations of Respondent and failed to complete Respondent's Corrective Action Plan.

5) Respondent taught only a very few days throughout the 2013-14 school year.[5] Respondent was not permitted to develop relationships with students; she was not given the opportunity to get to know students and students the opportunity to get to know her within the context of a teacher-student relationship. The three classes for which Respondent was observed were not even the same students; the first being 12th graders, the second 9th and 10th graders and the third 9th graders, and

6) Most importantly, it is arbitrary to require Respondent to be assessed as to her ability to teach effectively for an entire school year – the period of time contemplated by the District's Framework and TEACHNJ, when she was given the opportunity to teach for only a handful of class periods.

[5] The record establishes that Respondent actually taught at least three classes during the year and may have taught no more than a few more.

The District's Failure to Adhere Substantially to the Evaluation Process, and the District's Arbitrary and Capricious Conduct Toward Respondent Materially Affected the Outcome of Respondent's 2013-14 Evaluation

TEACHNJ contemplates that before he or she may be terminated from a teaching positions, to improve the performance of the struggling teacher, such a teacher will receive a real – rather than feigned – prolonged effort to provide guidance and mentorship from the most advanced and knowledgeable educators in the teacher's school; the principal and high-level administrators. Here, the District, through its administrators at Arts High School, predetermined that Respondent would never improve and could not be successfully reformed and arbitrarily withheld such efforts from Respondent.

By its actions and inactions described above, the District pursued a course of conduct that assured that rather than conduct observations of a dance teacher teaching a dance class of the teacher's students, the District could conduct observations of a substitute teacher/hall-monitor attempting to teach students for whom the teacher had no teacher-student relationship. The outcome of such observations were effectively determined before they began and, consequently, I find that the failure of the District to adhere substantially to the evaluation process, and the District's arbitrary and capricious conduct toward Respondent materially affected the outcome of Respondent's 2013-14 evaluation.

Conclusion

The 2013-14 school year annual evaluation of Respondent by the District may not be relied upon to support the termination of a tenured teacher. The District has failed to meet its burden of establishing the truth of its tenure charges against Respondent.

AWARD

The subject tenure charge against Respondent, LaRhonda Ragland is dismissed.

The District is ordered to:

1. Promptly offer Respondent reinstatement to a dance teaching position.

2. Make Respondent whole for any and all losses of pay, seniority and other benefits she may have suffered as a result of her termination from the date of her termination to the date of her reinstatement by the District.

Dated: February 2, 2015

Timothy J Brown, Esquire
Arbitrator

I, Timothy J Brown, affirm that I have executed this document as my Award in Agency Docket case No. 285-9/14 relating to tenure charges against LaRhonda Ragland on Monday, February 2, 2015.

Timothy J Brown

44-15

In the Matter of the Tenure Hearing of

Rinita Williams,
State-Operated School District
of the City of Newark
in the County of Essex, NJ

Re: Tenure Charge of Inefficiency
Agency Docket No. 241-8/14

Interim Award of Arbitrator

The undersigned arbitrator, having been appointed, pursuant to P.L 2012, c 26, to hear and decide the above-captioned matter, rules as follows:

The petitioner's request to hold this matter in abeyance is denied. The arbitrator retains jurisdiction for the purposes of resolving any and all disputes regarding the tenure charges brought against respondent by SOSD of Newark for school years 2012-2013 and 2013-2014.

Tia Schneider Denenberg
Arbitrator

DATED: January 31, 2015

I, Tia Schneider Denenberg, do hereby affirm that I am the individual described in and who executed this instrument, which is my award.

Tia Schneider Denenberg
Arbitrator

State of New York
County of Columbia

On this 31th day of January, 2015, before me personally came and appeared TIA SCHNEIDER DENENBERG, to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed the same.

Ralph Peters Hubbell, Jr.
Notary Public State of New York
No. 4793303
Qualified in Dutchess County
Commission Expires October 31, 2015

45-15

K.G., on behalf of minor child, G.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WATCHUNG, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the respondent Board's determination that her daughter, G.R., was not entitled to a free public education in the Borough of Watchung schools for the 2013-2014 school year. Petitioner asserted that she is domiciled in respondent's school district, but had not provided the district with an address for G.R. out of security and privacy concerns for herself and her daughter. Petitioner had submitted two letters from her landlord confirming that she resided in Watchung, but this documentation was rejected by the respondent Board as insufficient to prove residency. The Board contended that petitioner did not reside in the school district, and requested tuition reimbursement for the 2013-2014 school year in the amount of $13,863.

The ALJ found that, based on the documentation submitted by the petitioner and her credible testimony at hearing, K.G. resided within the Watchung Borough school district during the period at issue here. Accordingly, the ALJ concluded that petitioner's child is entitled to a free public education in the Watchung Borough schools, and that K.G. is not liable for tuition to the school district.

Upon review of the record and the Initial Decision, the Commissioner concurred with the ALJ's findings and conclusions. Accordingly, the Initial Decision was adopted as the final decision in this matter.

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

Issued 2/03/15

OAL DKT. NO. EDU 3712-14
AGENCY DKT. NO. 53-3/14

K.G., on behalf of minor child, G.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WATCHUNG, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the petitioner established that her child was entitled to attend school in the Watchung Borough District for the 2013-2014 school year. Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/03/15
Date of Mailing: 2/03/25

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 03712-14
AGENCY DKT. NO. 53-3/14

K.G. O/B/O MINOR CHILD, G.R,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF WATCHUNG, SOMERSET COUNTY,
Respondent.

Paul E. Griggs, Esq., for petitioner (Lindabury, McCormick, Estabrook & Cooper attorneys)

W. Thomas Howes, Esq., for respondent (Howes & Howes attorneys)

Record Closed: September 29, 2014 Decided: December 24, 2014

BEFORE **JOSEPH A. ASCIONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, K.G., the mother of the minor child G.R., appeals the determination of the Borough of Watchung (Somerset County) Board of Education (district) that G.R. did not reside within the district and is ineligible to attend Valley View School. The district

alleges that the minor child G.R. was not residing within the Borough of Watchung. K.G. for personal security reasons of K.G. and G.R. did not provided the district an address for G.R. within Watchung; the district seeks repayment of tuition. At issue is whether G.R. is entitled to be enrolled in the district for purposes of receiving a thorough and efficient public education free of charge pursuant to N.J.S.A. 18A:38-1. Petitioner provided two letters from her landlord confirming that she resided in the Borough of Watchung. See J-4 and J-5. A lease existed for this rental unit, however, now petitioner and her daughter reside at the location pursuant to a month to month tenancy.

On December 12, 2013, the district by correspondence (R-6) through counsel notified K.G., through her counsel, that G.R. was ineligible to continue to attend school within the district for the 2013/2014 school year. The correspondence further afforded K.G. time to appeal the decision for twenty-one days. The petitioner, through counsel, filed a notice of appeal on or about January 2, 2013. Deficiencies in the notice led petitioner to file an amended petitioner of appeal on March 3, 2014. The Department of Education accepted the amended petition of appeal. The district filed an Answer and Cross-Petition seeking reimbursement of per diem for the 2013/2014 school year on March 27, 2014. On March 27, 2014, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. On September 19, 2014, the undersigned issued an Order to Seal the record in the within matter to protect the apartment number and street address of the petitioner. A hearing was held on September 29, 2014, and the record closed that date. On November 12, 2014, the Office of Administrative law requested an extension of time to file the Initial Decision to December 29, 2014.

TESTIMONY

K.G.

K.G. is the mother of G.R., she testified to living with G.R. K.G. testified that her address is xxx xxx xxx xxx, a residence within the Borough of Watchung. K.G. identified a lease agreement (A-3) with Avalon Bay Communities dated November 21, 2012, reflecting the above address. The lease by its terms ran from November 28, 2012 to

November 27, 2013, at which time the lease expired. K.G. testified that she is now on a month to month tenancy at the same location. She identified electronic fund transfers to Avalon Access's web site (A-4). Those transfers reflect payments for the months of February, April, May, June, and September 2014. The amounts vary but exceed the monthly rental amount of the lease attached at A-3. K.G. also identified A-2 as a Google Maps© of the location of her residence, and A-1 as the Tax Map of the Borough of Watchung Tax Map, Sheet 16. K.G. further testified that since 1993, she owns property in the Borough of Watchung at 59 Brookdale Road.

This tribunal also considered the March 3, 2014, Petition of Appeal amended (J-10) executed by K.G.

FACTUAL DISCUSSION

The Order to Seal issued in this matter with the hope counsel could resolve the matter between themselves. The Order issued based upon representations that appellant had security and privacy concerns for herself and her daughter. This tribunal made no inquiry into the factual basis of the validity of the security concerns, however, the raising of those concerns, dictated the de minimus inconvenience to maintain the records as sealed. The sole issue to be considered is G.R.'s residency in the district.

The issue of the propriety of the district's action raised in petitioner's counsel's earlier submission and the petition is not addressed, as the decision on the merits eliminates the necessity to address that issue.

Petitioner initially submitted to the district documentation from her landlord advising that petitioner resided in the Borough of Watchung. See J-5 and J-6. The district rejected the submission as insufficient to prove the residency within the Borough of Watchung and found that the petitioner did not reside within the district. See J-2.

Petitioner submitted a tax map of the Borough of Watchung from 1939 (A-1) and a Google Maps© overview of the area in which her building is located (A-2). Comparing the maps provides some indication that property where petitioner resides lies within the border of the Borough of Watchung. I cannot conclusive find on the maps presented, that the property lies in the Borough of Watchung.

Petitioner submitted in camera the lease agreement (A-3). It reflects the rental of property with an address within the district of the Borough of Watchung. Petitioner testified that she regularly drives her daughter to school from that address. The electronic fund transfers (A-4) reflects payments of the rental obligations for various months in 2014. The payments include most of the 2012/2013 school year as well as September 2014. Petitioner also provided her testimony that she changed to a month to month tenancy at the end of the 2013 lease term but continues to live at the location in the Borough of Watchung and has paid all rents due.

A-4 reflects on-line rental payments for February, April, May, June, and September 2014. The payment amounts are nominally in excess of the rental terms of the lease. Payments consistent with petitioner's testimony of a rental increase.

In 1993, petitioner owned and did reside at property known as 59 Brookdale Road, Watchung, NJ, she still owns that property at the time of the hearing, but has not resided there for privacy and safety reasons.

The undersigned did not compute the district's cross-petition for tuition reimbursement for school year 2013/2014, based upon the initial decision in favor of petitioner. The parties did not dispute the annual amount of $13,863.

The district instituted a challenge to petitioner's domicile but did not provide any investigation, or witness to support their underlying determination that petitioner no longer resided within the district. Petitioner offered her certification to the petitioner, her testimony that she resides in Watchung, and letters from her landlord claiming she resides in Watchung.

I observed petitioner's testimony and concern over the privacy of her personal information. I found no inconsistencies in her testimony. Petitioner's testimony is accepted as credible.

FINDINGS OF FACT

Based on the agreement of the parties, the testimony presented, and the documentary evidence submitted, and having had an opportunity to observe the witness and to assess her credibility, I **FIND** the following **FACTS**:

1. Petitioner, K.G., is the mother of the minor child G.R.; G.R. has attended school in the Borough of Watchung since 2007.

2. Petitioner's lease with Avalon Bay Communities, Inc., is for property within the district of the Borough of Watchung. It initially ran from November 28, 2012, to November 27, 2013.

3. Petitioner has remained in the same premises as a month to month tenant, and continues to pay rent for the property leased from Avalon Bay Communities, Inc. See A-4.

4. K.G. regularly drives her daughter to school from the residence in the Borough of Watchung.

5. The joint stipulation of procedural history and facts are incorporated herein by reference and attached to the initial decision as J-13.

LEGAL DISCUSSION

Residency

The issue in this matter is whether G.R. was entitled to a free education under N.J.S.A. 18A:38-1(a), which provides that public schools shall be free to persons over

five and under twenty years of age who are "domiciled within the school district." See V.R. ex rel A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (1980), aff'd, State Bd., 1981 S.L.D. 1533, rev'd on other grounds sub nom. Rabinowitz v. N.J. State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, in order for a student to receive a free education). A student may attend school in a district in which he is a non-resident, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2.

The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374–76 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed.2d 518 (1999). A person may have many residences but only one domicile. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001).

N.J.A.C. 6A:22-3.1(a) provides that a student is considered eligible to attend a school district if he or she is domiciled within the school district. A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district.

The acts, statements and conduct of the individual, as viewed in light of all circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959). The parent/petitioner has the burden of proving domicile by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)(2). Here, petitioner rents an apartment in the Borough of Watchung and regularly drives her daughter to school from that location.

Where a person has more than one residence, the following factors are useful in determining one's domicile: the physical characteristics of each place, the time spent and the things done in each place, the other persons found there, the person's mental attitude towards each place, and whether there is or is not an intention, when absent, to

return. Mercadante v. City of Paterson, 111 N.J. Super. 35, 39–40 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). "[A] choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile." In re Unanue, supra, 255 N.J. Super. at 374.

CONCLUSION

Based on all of the foregoing, I **CONCLUDE** that K.G. has met her burden of proof that she and G.R.'s domicile and residence is in the Borough of Watchung for the 2013/2014 school year.

ORDER

I hereby **ORDER** that K.G.'s petition on behalf of G.R. is **GRANTED** in all respects and G.R. will continue to be enrolled in the district.

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

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

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

December 24, 2014
DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 12/24/14

Date Mailed to Parties: 12/24/14

/lam/cad

APPENDIX
LIST OF WITNESSES

For Petitioner:

K. G.

For Respondent:

None

LIST OF EXHIBITS

Joint

J-1 Letter dated December 9, 2013, from Athina Lekas Cornell, Esq. to W. Timothy Howes, Esq.

J-2 Watchung Borough Board of Education Special Meeting Minutes - December 11, 2014.

J-3 Watchung Borough Board of Education Closed Session Minutes - December 11, 2014.

J-4 Letter dated September 5, 2013, from Kari Niedrich to Dr. B.A. Resko, Superintendent

J-5 Letter dated December 10, 2013, from Kari Niedrich to Watchung Borough Board of Education.

J-6 Letter dated December 12, 2013, from Paul E. Griggs, Esq. to W. Timothy Howes, Esq.

J-7 Letter dated January 2, 2014, from W. Timothy Howes, Esq. to Christopher Cerf, Commissioner, New Jersey Department of Education.

J-8 Letter dated January 8, 2014, from M. Kathleen Duncan, Director, Bureau of Controversies and Disputes, New Jersey Department of Education to W. Timothy Howes, Esq.

J-9 Letter dated March 3, 2014, from W. Timothy Howes, Esq. to Paul E. Griggs, Esq.

J-10 Petition of Appeal (Amended) dated March 3, 2014.

J-11 Answer and Cross-Petition

J-12 Order to Seal dated September 19, 2014.

J-13 Joint Stipulation of Procedural History and Facts

For Petitioner:

A-1 Tax Map, Sheet 16, Borough of Watchung

A-2 Street Map

A-3 Lease Agreement

A-4 Rent: Electronic Receipt

For Respondent:

See Joint Exhibits

4.-15

OAL DKT. NO. EDU 11681-13
AGENCY DKT. NO. 181-8/13

D.L. on behalf of minor child, J.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY,	:	ORDER
RESPONDENT.	:	

On September 25, 2014, a final agency decision was rendered in this matter, wherein the Commissioner adopted the Initial Decision of the Office of Administrative Law (OAL) approving the parties' settlement, which assessed petitioner Dorothy Lavdas tuition in the amount of $22,967.00 to compensate the respondent Burlington Township Board of Education for her child's period of ineligible attendance in the public schools of the district. The Board subsequently notified the Commissioner that petitioner has failed to make any payments toward said assessment, and requested that the Commissioner seek entry of the unsatisfied assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. Petitioner has offered no reasons why the judgment against her should not be so docketed, although given an opportunity by this agency to do so.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Dorothy Lavdas is now subject to entry of a judgment by the court in the amount of $22,967.00, which represents the payment ordered at the conclusion of the contested case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/03/15
Date of Mailing: 2/03/15

47-15

AGENCY DKT. NO. 78-4/09

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN SAMMONS, JR.,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
VINELAND, CUMBERLAND COUNTY.	:	

The record of this matter, the parties' proposed Settlement Agreement and General Release, and the Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. The Agreement – a term of which is respondent's resignation from employment in petitioner's district – appears to be in compliance with *N.J.A.C.* 6A:3-5.6, which reiterates the standards set forth in *In re Cardonick,* 1990 *S.L.D.* 842 (1990) for the settlement of tenure cases. Although paragraph 14 of the Agreement provides for strict confidentiality, the parties are reminded that the Agreement may be subject to disclosure pursuant to the provisions of the Open Public Records Act, *N.J.S.A.* 47:1A-1, et seq.

Subject to the foregoing, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the Agreement. A copy of this decision and its underlying record shall be forwarded to the State Board of Examiners for review and action as that body deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/03/15

Date of Mailing: 2/03/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7987-10
AGENCY DKT. NO. 78-4/09

IN THE MATTER OF
JOHN J. SAMMONS, JR.,
TENURE HEARING
VINELAND BOARD OF EDUCATION
CUMBERLAND COUNTY.

William Nossen, Esq., for petitioner (New Jersey Principals and Supervisors Association, attorneys)

Frank DiDomenico, Esq., for respondent, Vineland Board of Education,

Record Closed: December 19, 2014 Decided: January 2, 2015

BEFORE **BRUCE M. GORMAN**, ALJ:

This matter was filed at the Office of Administrative Law on July 27, 2010, for determination as a contested case, pursuant to N.J.S.A. 40A:14-202d.

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

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, which by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

January 2, 2015
DATE

Bruce M. Gorman
BRUCE M. GORMAN, ALJ

Date Received at Agency: January 2, 2015

Date Mailed to Parties: January 8, 2015

/jb

FRANK DiDOMENICO, ESQUIRE - ATTORNEY ID #020571985
ATTORNEY AT LAW
P.O. Box 1356
Vineland, NJ 08360-1356
856-794-8155
Attorney for Vineland Board of Education

In the Matter of the Tenure Hearing of JOHN SAMMONS, JR., School District of City of Vineland, Cumberland County	STATE OF NEW JERSEY COMMISSIONER OF EDUCATION
	AGENCY DOCKET NO.: 78-4/09
	OAL DOCKET NO.: EDU 7987-10

SETTLEMENT AGREEMENT

The above-captioned matter having been filed with the Commissioner of Education and transmitted to the Office of Administrative Law on July 27, 2010, for a hearing pursuant to NJSA 52:14B-1 et seq; relating to tenure charges filed by Petitioner, the City of Vineland Board of Education, represented by Frank DiDomenico, Esquire; against the respondent, John Sammons, Jr., being represented by William Nossen, Esquire; and the parties having agreed to the terms of an amicable settlement relating to the tenure charges as well as related litigation, the parties hereby agree as follows:

1. Respondent has been suspended without pay commencing April 23, 2009 and said suspension without pay continues to the present.

2. Respondent requested continuances of the scheduled tenure hearing asserting his Fifth Amendment privilege while awaiting disposition of criminal charges as set forth in the tenure charges.

3. The criminal trial was concluded on March 21, 2014. A Cumberland County jury returned a verdict of not guilty on all thirty-three (33) counts of the criminal indictment.

4. Respondent has made a claim for unpaid salary in the approximate amount of SIX HUNDRED THIRTEEN THOUSAND DOLLARS ($613,000.00).

5. Petitioner shall withdraw and dismiss, with prejudice, the tenure charges pending before the Commissioner of Education and scheduled for hearing before the Office of Administrative Law, subject to approval by the Commissioner of Education.

6. The parties have agreed that in order to avoid the risk and expense of litigating Respondent's claim as set forth in paragraph 4 of this agreement, Petitioner has agreed to settle this claim and provide to Respondent payment in the amount of ONE HUNDRED THOUSAND DOLLARS ($100,000.00). By signing this Agreement, Respondent acknowledges that the consideration set forth in this paragraph is the entirety of the consideration that Petitioner will provide him to resolve his claim as set forth in paragraph 4. Petitioner's payment to Respondent shall not be deemed an admission by Petitioner that Respondent is entitled to any back pay monies, nor an admission by Respondent that the extent of his back pay is limited to the amount paid. Payment is simply a means of settling this disputed claim.

7. The $100,000.00 shall be paid in three (3) equal installments. The first installment shall be paid on the first day of the first month following the Commissioner of Education's approval of this Agreement. The second installment shall be paid on the first day of the month three (3) months thereafter. The third and final installment shall be paid on the first day of the month five (5) months after the second payment.

8. Respondent agrees to resign immediately from his employment with the Petitioner for purposes of retirement, and agrees that he will not, in the future, seek employment with the Petitioner in any capacity whatsoever, and will execute an irrevocable letter of resignation simultaneous with the execution of this agreement. The resignation shall only be effective pending approval of this agreement by the Commissioner of Education.

9. Respondent has filed various claims against the Vineland Board of Education related to the tenure charges. Respondent has filed an ethics charge against Vineland

Board of Education member, Thomas Ulrich, captioned John L. Sammons, Jr. v. Thomas Ulrich pending before the Office of Administrative Law, Docket No.: C-42-09; a petition before the New Jersey Division of Civil Rights, pending in the Office of Administrative Law, Docket No.: CRT 13809-2013S, captioned: John L. Sammons, Jr. v. Vineland Board of Education, alleging Respondent was denied a promotion to School Principal based upon his age and race and a Complaint in the Superior Court of New Jersey, Law Division, Cumberland County, Docket No.: CUM-L-748-10 captioned John Sammons v. Vineland Board of Education alleging a violation of New Jersey's Law Against Discrimination and alleging that Respondent was discharged in retaliation for engaging in protected activity and asserting a claim for intentional infliction of emotional distress.

10. Respondent agrees to dismiss all of the above matters and additionally both Petitioner and Respondent agree to waive any and all other claims, in any form whatsoever, arising out of or related to this matter or Respondent's employment with Petitioner including but not limited to Respondent's suspension, reinstatement, certification of tenure charges against him and any other tenure related claim and any and all other claims arising from Respondent's employment by the Petitioner. This waiver is intended to be given the broadest possible interpretation and includes any claim which either party has, had, or could have had, against the other party, its employees, officers and agents.

11. Respondent does not dismiss his claim for counsel fees and costs relating to his criminal matter pursuant to NJSA 18A:16-6.1. The parties agree that Respondent's claim for counsel fees and costs shall be the subject of separate negotiations.

12. Respondent shall be paid an additional ONE HUNDRED THOUSAND DOLLARS ($100,000.00) as and for dismissal of all additional claims as set forth in the attached Settlement Agreement and General Release (Exhibit A) which is attached hereto and incorporated by reference.

13. Respondent waives any claim for compensation for any remaining accrued sick, vacation or personal days or any other emoluments he may possess as a result of his employment by the Petitioner pursuant to the terms of the

Collective Negotiations Agreement between the Vineland Board of Education and the Vineland Administrators and Supervisors Association.

14. Petitioner and Respondent agree to maintain the confidentiality of this agreement as set forth more specifically at Paragraph 7 of Exhibit A.

15. The terms set forth herein and in Exhibit A constitute the parties entire agreement with regards to this matter. No other terms shall be implied or included.

16. The parties acknowledge that all terms of this agreement are subject to review and approval by the assigned Administrative Law Judge, Honorable Bruce M. Gorman, and subject to final approval by the Commissioner of Education.

17. As set forth in NJAC 6A:3-5.6, which sets forth the standards of In re Cardonick, State Board decision of April 6, 1983 (1990 School Law Decision SLD 842, 46), the parties submit and agree to the following:

a) The tenure charges allege that during Respondent's tenure as an Assistant Principal at Cunningham School, Respondent engaged in a course of criminal activity, specifically theft by knowingly billing the Vineland Board of Education and receiving payment for student tutoring which did not take place. Petitioner alleges such conduct was to the detriment of the students in need of additional educational services as well as a detriment to the Board and constituted criminal conduct and conduct unbecoming. The Respondent denied the charges as set forth.

b) A Cumberland County Grand Jury returned a thirty-three (33) count criminal indictment alleging criminal conduct by the Respondent. Following a criminal trial, a Cumberland County jury returned a verdict of not guilty on all thirty-three (33) criminal counts on March 21, 2014.

c) The parties, through counsel and with the assistance of Administrative Law Judge, Honorable William T. Miller, conducted a settlement conference which resulted in terms of settlement as set forth herein, and which will amicably resolve the matter to the

benefit of both parties and will allow both parties to resolve this matter without the allocation of further time, expense and uncertainty involved in this tenure litigation.

d) Both parties have had the opportunity to review this matter and the terms of settlement with their legal counsel and consent to this agreement voluntarily and with the mutual interest of closure and resolution of all claims.

e) Respondent, in entering into this agreement, represents that he does so with the advice and consent of his legal counsel and with the full understanding of his rights and the effect and implications of all terms set forth in this agreement and that he does so having thoroughly reviewed this matter with legal counsel. The parties represent this Settlement Agreement is in the public interest as it resolves the tenure matter as well as the related claims filed by the Respondent against the Petitioner. The Petitioner considers the fact that a jury, after a lengthy trial, returned a verdict of not guilty on all thirty-three (33) criminal counts and therefore believes that further expenditure of public funds for discovery, a tenure hearing, review and possible Appellate Court appeals is not warranted.

f) Respondent, in entering into this agreement, acknowledges that he has been advised that the Commissioner of Education has a duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of Certificate.

g) Respondent further acknowledges that he has been advised that the Commissioner of Education may refer this matter to the State Board of Examiners for action against Respondent's Certificate as it may deem appropriate.

WHEREFORE, the parties to this matter have agreed to the above terms and have set their signatures as dated below.

William Nosser, Esq. 11-19-14 John Sammons Jr.

WITNESS DATE JOHN SAMMONS, JR.

William Nosser, Esq.
Attorney At Law

WITNESS 12/10/14 DATE

SCOTT ENGLISH
VICE-PRESIDENT, VINELAND
BOARD OF EDUCATION

WITNESS 12/10/14 DATE

HELEN HALEY, SECRETARY,
VINELAND BOARD OF
EDUCATION

I certify that the Vineland Board of Education has authorized and consents to the terms of settlement.

FRANK DiDOMENICO,
ATTORNEY FOR THE
VINELAND BOARD OF
EDUCATION

Exhibit A

JOHN L. SAMMONS, JR. Complainant V. THOMAS ULRICH Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW DOCKET NO.: C-42-09
In the matter of the Tenure Hearing Of John Sammons, Jr., Board of Education of City of Vineland, Cumberland County	COMMISSIONER OF EDUCATION AGENCY DOCKET NO.: 78-4/09 OAL DOCKET NO.: EDU 7987-10
JOHN L. SAMMONS, JR. Complainant V. VINELAND BOARD OF EDUCATION Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW DOCKET NO.: CRT 13809-2013 S
JOHN SAMMONS Plaintiff V. VINELAND BOARD OF EDUCATION Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION:CUMBERLAND COUNTY DOCKET NO.: CUM-L-748-10 **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

RECITALS

WHEREAS, John L. Sammons (hereinafter referred to as "Sammons") is employed by Vineland Board of Education (hereinafter referred to as "Defendant") as an Assistant Principal; and

WHEREAS, on or about July 20, 2011, a Cumberland County grand jury returned a 33-count indictment (including charges of Official Misconduct, Theft By Deception, Tampering with Government Records or

Information, Falsifying Government Records, Forgery, Forgery - Uttering, and Conspiracy) against Sammons, who was thereafter tried and found not guilty by a Cumberland County jury on or about March 21, 2014 (hereinafter referred to as "the Criminal Case"); and

WHEREAS, on or about January 15, 2008, Sammons filed an ethics charge with the School Ethics Commission asserting certain claims against Defendant's Board of Education member Thomas Ulrich (hereinafter referred to as "Ulrich"), entitled Sammons v. Ulrich, assigned Docket Number C-42-09 (hereinafter referred to as "the Ethics Charge"); and

WHEREAS, on or about April 22, 2009, Defendant certified tenure charges against Sammons ("the Tenure Charges") as set forth in the accompanying Settlement Agreement; and

WHEREAS, on or about July 16, 2010, Sammons filed an Equal Employment Opportunity Commission Charge of Discrimination, dual-filed with the New Jersey Division on Civil Rights, asserting certain claims against Defendant, entitled Sammons v. Vineland Board of Education, assigned Charge Number 17E 2010 00360 and thereafter investigated by the New Jersey Division on Civil Rights, which on or about August 28, 2014, per Sammons' request, transmitted the matter to the New Jersey Office of Administrative Law, which assigned the matter as Docket Number CRT 13809-2013 S (hereinafter referred to as "the Administrative Charge") and held the matter abeyance pending the resolution of the Criminal Case; and

WHEREAS, on or about July 19, 2010, Sammons filed a lawsuit in New Jersey Superior Court asserting certain claims against Defendant, entitled Sammons v. Vineland Board of Education, assigned Docket Number L748-10 (hereinafter referred to as "the Lawsuit") and held in abeyance pending the resolution of the Criminal Case; and

WHEREAS, Sammons now seeks from Defendant unpaid salary as set forth in Paragraph 4 of the accompanying Settlement Agreement; and

WHEREAS, the Ethics Charge alleged Lt. Thomas Ulrich violated N.J.S.A. 18A:12-24.1(C), (D), (E), (F), (G), (I), and (J); and

WHEREAS, the Tenure Charges made allegations as set forth in Paragraph of Paragraph 17.a) of the accompanying Settlement Agreement; and

WHEREAS, the Administrative Charge alleged that Sammons was denied based on his age and race a principal position for which he was more qualified than the successful younger, Caucasian candidate; and

WHEREAS, the Lawsuit included claims for (1) violation of the New Jersey Law Against Discrimination (hereinafter referred to as "NJLAD"); (2) common law retaliatory discharge; and (3) the intentional infliction of emotional distress; and

WHEREAS, by entering into this Agreement, no party admits any liability whatsoever and specifically denies any and all allegations of wrongdoing; and

WHEREAS, it is understood and agreed by Sammons that Defendant, and its heirs, executors, administrators, officers, employees, successors, and assigns, by reason of the payment, consideration, and any other terms made on behalf of Defendant, do not admit any liability nor have they made any agreement to make any payment or to take any action not reflected in this Agreement. Further, it is understood and agreed by the parties that the allegations set forth in the Ethics Charge, the Administrative Charge, and the Lawsuit remain disputed, inconclusive, and expressly denied. Further still, it is understood and agreed by Sammons that Defendant and its insurer underwent a cost-benefit analysis and determined that it was appropriate to resolve this matter at this stage of the litigation based upon purely financial considerations; and

WHEREAS, it is understood and agreed that in releasing any and all claims he has asserted or could have asserted against Defendant, Sammons intends to release any and all claims he has asserted or could

have asserted against all former and current employees, agents, and elected representatives of Defendant that exist through the date this Agreement is signed; thus, the term "Defendant" shall be understood to include all former and current employees, agents, and elected representatives of Defendant.

NOW, IN CONSIDERATION of the payment to Sammons, as provided for herein, and other good and valuable consideration, and the promises and covenants contained herein, the receipt and sufficiency of which is acknowledged, the parties do hereby agree to:

1. Fully and finally settle any and all of Sammons' claims against Defendant and Ulrich, including those not asserted in the Ethics Charge, the Administrative Charge, or the Lawsuit or those arising out of Sammons' employment by Defendant, as well as all other actions and claims which Sammons has, had, or otherwise may have against Defendant from the beginning of time, through the date on which this Agreement is executed, and

2. Fully and finally settle the Tenure Charges against Sammons, expressly incorporating by reference the accompanying Settlement Agreement;

3. Non-Admission This Agreement is not, and shall not in any way be considered or construed as an admission of liability by Defendant or Ulrich of discrimination, retaliation, tortious conduct, or of any violation of any law, common law, or federal, state, or local statute or regulation, or of any employment policy, practice, contract, or agreement, or of any alleged duty owed by Defendant, or of any unlawful or wrongful acts whatsoever by Defendant. Defendant specifically denies any wrongdoing of any kind.

Sammons declares and represents that the injuries which he has alleged to have sustained are or may be permanent and progressive and that recovery therefrom is uncertain and indefinite and in making this

Agreement, it is understood and agreed that Sammons relies wholly upon his own judgment, belief, and knowledge of the nature, extent, and duration of said alleged injuries and liability therefor and he agrees to this settlement without reliance upon any statement or representation of Defendant or its representatives or by any physician or other provider it so employed.

Sammons further declares and represents that there may be unknown or unanticipated injuries resulting from his employment by Defendant and, in making this Agreement, it is understood and agreed that this Agreement is intended to settle his claims for any and all such injuries.

4. Dismissal of Charges & Lawsuit and Covenant Not to Sue

Sammons understands that the Commissioner of Education will dismiss the Ethics Charge with prejudice, the Office of Administrative Law will dismiss the Administrative Charge with prejudice, and the New Jersey Superior Court will dismiss the Lawsuit with prejudice, and he agrees not to appeal from the dismissal of, re-file, revive, or reopen the Ethics Charge, the Administrative Charge, or the Lawsuit or in any way.

Sammons further agrees that neither he, nor any person, organization, agency, or other entity acting on his behalf, will file, charge, claim or sue, or cause to be filed, charged, claimed or sued, any other lawsuit, legal proceeding, action, grievance, or claim of any nature with any court, agency, or tribunal (including any action for damages, attorneys' fees, injunction, declaratory, monetary, equitable, or other relief) against Defendant, based on any matter, fact, or event occurring prior to the effective date of this Agreement, whether now known or unknown, or involving any continuing effects of any acts or practices which may have arisen or occurred prior to the effective date of this Agreement, whether now known or unknown.

This Agreement does not, however, affect the rights and responsibilities of the EEOC and/or the National Labor Relations Board

("NLRB") and may not be used to justify interfering with the protected rights of Sammons and/or of any employee to file a charge or participate in an investigation or proceeding conducted by the EEOC and/or the NLRB. However, if such a charge is filed, Sammons agrees not to violate the confidentiality provisions of this Agreement to the extent that the confidentiality provisions do not conflict with any rule and/or regulation of either the EEOC and/or the NLRB and is otherwise lawful; and, Sammons further agrees and covenants that should he or any other person, organization, or other entity file, charge, claim, sue, cause, or permit to be filed any charge with the EEOC and/or the NLRB, civil action, suit, or legal proceeding against Defendant involving any matter concerning any incident which predates the execution of this Agreement, Sammons will not seek or accept any personal relief (including but not limited to monetary award, recovery, relief, or settlement) in such charge, civil action, suit, or proceeding.

5. Release General Release and Waiver of all of Sammons' Claims In consideration for the payment and promises described in Paragraph 8 and elsewhere in this Release, Sammons fully releases and forever discharges Defendant and Ulrich of and from any and all claims, actions, causes of action, back pay, front pay, contracts, agreements, promises, charges, judgments, grievances, obligations, rights, demands, debts, physical injury, pain, suffering, emotional distress, compensatory damages, punitive damages, attorneys' fees, expenses, costs, losses, liabilities, damages, or accountings of whatever nature, whether known or unknown, disclosed or undisclosed, asserted or unasserted, in law or equity, contract or tort or otherwise (herein collectively designated "Claims"), through the effective date of this Agreement, including, but not limited to, any and all Claims of harassment, discrimination, retaliation, and any and all tort Claims or contract Claims for general damages, and any and all Claims arising under, made, regarding, or involving: any federal, state, or local laws or under the common law; violations of any

federal, state, or local fair employment practices or civil rights laws or ordinances; Claims for personal injury, defamation, wrongful conduct, or wrongful discharge; the Civil Rights Acts of 1866 and 1871, as amended, 42 U.S.C. §1981; the Civil Rights Act of 1964, as amended, including Title VII; the Age Discrimination in Employment Act, as amended; the Older Workers Benefit Protection Act; the Employee Retirement Income Security Act; the Fair Labor Standards Act; the National Labor Relations Act, as amended; any and all state wage payment and collection laws; the Defendant's policies, practices, collective bargaining agreements, contracts, benefits, or understandings; any Claims arising out of any relationship, including employment relationship, between or among Sammons and Defendant predating the effective date of this Agreement; and all Claims for employment, reemployment, or reinstatement of employment to Defendant; any and all grievances or demands for mediation or arbitration, or Claims or demands under Defendant's policies and procedures; and any and all Claims asserted, or which could have been asserted, in the Lawsuit referenced above, including any Claims against any current or former agents or employees of Defendant.

Sammons hereby specifically acknowledges that Defendant has made no promises or representations regarding his liability for Teachers' Pension and Annuity Fund ("TPAF") contributions or his entitlement to receive retirement benefits from TPAF. It is understood and agreed that Sammons relies wholly upon his own judgment, belief, and knowledge of such liability and/or entitlement and this Agreement is made without reliance upon any statement or representation of Defendant or its representatives.

Sammons understands that, pursuant to the Older Workers Benefit Protection Act of 1990, he is entitled to consult with an attorney and to have twenty-one (21) days within which to fully consider this Agreement. Sammons shall have seven (7) days following his signing of this Agreement to revoke this Agreement, which shall be done in writing.

Sammons may not waive this seven (7) day revocation period, but he may waive the twenty-one (21) period in which to consider the Agreement.

Sammons hereby specifically waives, releases, and gives up all Claims and rights, as described in the preceding paragraph, whether now known or unknown, which he has or may have against Defendant, based on any fact, act, event, or omission, whether now known or unknown, occurring before the Effective Date of this Agreement. Sammons understands that he is waiving, releasing, and giving up all Claims and rights that he knows about and all Claims and rights that he may not know about.

6. Resignation and Promise Not to Seek Reemployment Sammons and Defendant understand and agree that Sammons will resign in good standing by signing the irrevocable letter of resignation annexed hereto as "**Exhibit 1**," which will become effective as set forth in Paragraph 8 of the accompanying Settlement Agreement. Sammons acknowledges that Defendant has no obligation, contractual or otherwise, to hire or employ him in the future.

7. Confidentiality and Non-Disparagement Sammons agrees that the terms, conditions, facts of payments, and underlying facts of the settlement stated herein, but not the fact that the case was settled, shall be held confidential to the extent permissible by law.

The Parties to this Agreement agree to refrain from making negative or disparaging comments or remarks about the other party to this Agreement. Sammons understands that "Defendant," for these purposes, includes Defendant or any of its current or former employees, agents, and elected representatives. Sammons agrees to refrain from issuing any statement regarding Defendant or any of its current or former employees, agents, or elected representative relating to the facts alleged in the Administrative Charge, the Lawsuit, or the Ethics Charge, and related circumstances referenced therein.

8. Consideration In exchange for the terms contained in Paragraphs 1 through 7 above, the Parties agree to the following good and valuable consideration:

a. Sammons will be paid a lump sum amount of one hundred thousand dollars ($100,000.00). This payment shall consist of one payment of thirty thousand dollars ($30,000.00) to John L. Sammons and William Nossen, Esq. from New Jersey Schools Insurance Group, Defendant's liability insurer, and one payment of seventy thousand dollars ($70,000.00) to William Nossen, Esq. from Defendant. This consideration shall be paid within thirty (30) days of the Effective Date of the Agreement.

b. Sammons will be paid an additional one hundred thousand dollars ($100,000.00) as set forth in Paragraphs 6-7 in the accompanying Settlement Agreement.

These payments totaling two hundred thousand dollars ($200,000.00) are on account of all equitable relief and monetary relief sought in unpaid salary, the Ethics Charge, the Administrative Charge, and the Lawsuit, or inclusive of all damages, attorneys' fees, expenses, and all other relief sought.

9. Liens and Indemnification by Sammons It is further understood that as a condition of this settlement, all claims, and/or liens, past, current, and/or future arising out of this settlement or asserted against the proceeds of this settlement are to be satisfied by Sammons and/or his Attorneys, including but not limited to any Medicare or Medicaid claims and/or liens, Worker's Compensation claims and/or liens, Social Security claims and/or liens, hospital/healthcare insurer claims and/or liens, physician or attorney claims and/or liens, or any of the statutory, equitable, common law or judgment claims and/or liens, including but not limited to claim based on subrogation or any other legal or equitable theory. Sammons

therefore agrees, upon prompt presentation of any such claims and/or liens, to defend Defendant and its insurer against any such claims and/or liens, and to indemnify and hold Defendant and its insurer harmless against any judgment entered against Defendant and its insurer based on such claims and/or liens, including the payment of any fines, charges, and attorneys' fees incurred as a result of any such lien.

10. Prevailing Party Status Sammons understands and agrees that he will not be considered a prevailing party under any statute, common law, or otherwise as a result of this Agreement.

11. Neutral Job Reference Defendant agrees that all requests for references for Sammons will be directed to the attention of Dr. Joseph Rossi, and the reference will be limited to the following information, and the reference will be limited to the following information:

(a) Sammons left Defendant's employment in good standing;

(b) date of hire;

(c) date of separation;

(d) position held at time of separation; and

(e) salary at time of separation.

12. Payment Payment to Sammons is subject to Defendant's receipt of Sammons' signed and notarized Agreement, a signed irrevocable letter of resignation (**Exhibit 1**), a child support search report, and a Form W-9 completed by his attorney.

The payment of two hundred thousand dollars ($200,000.00) described at Paragraphs 8.a. and 8.b. will not be subject to any withholding and will be taxed in the manner of a 1099 form.

Sammons represents and warrants that neither Defendant nor its attorneys provided any advice regarding the taxability of the settlement amounts paid pursuant to this paragraph. Sammons acknowledges and agrees that he is solely responsible for payment of any and all federal, state, and local taxes which may be due from the settlement sum in the event that it is determined that any taxes are owed based on the taxation

laws in effect on the date of execution of this Agreement or become due at any time in the future because of a change to the laws governing the taxation of such settlement proceeds. Sammons further acknowledges and agrees to indemnify and hold harmless Defendant and its attorneys harmless in the event that any federal, state, or local taxing authority asserts against any claim for unpaid taxes, failure to withhold taxes, or interest based upon the payment of the settlement sum to Sammons. Sammons further represents and warrants that neither Defendant nor its attorneys provided any advice regarding this Agreement's or the settlement amounts' effect on Sammons' retirement contributions to or payments from TPAF.

13. Effective Date The effective date of this Agreement shall be the day following the date upon which the signed and notarized Agreement is received by the last of Defendant's and Ulrich's attorneys Methfessel & Werbel; Frank DiDomenico, Esq.; or Lenox, Socey, Formidoni, Giordano, Cooley, Lang & Casey.

14. Applicable Law This Agreement shall be governed by and construed in accordance with the laws of New Jersey, except where federal law controls. Should any provision of this Agreement be declared or determined by any Court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term, or provision shall be deemed not to be a part of this Agreement or may be modified as necessary.

15. Entire Agreement This Agreement, together with the accompanying Settlement Agreement, sets forth the entire agreement between the parties and fully supersedes any and all prior agreements or understandings between the parties.

16. Signatures This Agreement may be signed in counterparts. However, this Agreement will not be binding among the parties until it has been executed and delivered by and among the Parties and subject to Defendant's receipt of Sammons' signed and notarized Agreement, a

signed irrevocable letter of resignation (**Exhibit 1**), a child support search report, and a Form W-9 completed by his attorney.

JOHN L. SAMMONS FURTHER CERTIFIES, ACKNOWLEDGES, AND REPRESENTS THAT HE IS ABLE TO READ AND UNDERSTAND ENGLISH, THAT HE UNDERSTANDS ALL OF THE PROVISIONS HEREIN, WITH THE ADVICE AND ASSISTANCE OF HIS ATTORNEY, AND THAT HE MAKES THIS RELEASE KNOWLINGLY AND VOLUNTARILY.

JOHN L. SAMMONS ACKNOWLEDGES THAT HE HAS NO PHYSICAL OR MENTAL PROBLEM, CONDITION, OR IMPAIRMENT OF ANY KIND WHICH HAS INTERFERED WITH HIS ABILITY TO READ AND UNDERSTAND THE MEANING OF THIS RELEASE OR ITS TERMS.

JOHN L. SAMMONS FURTHER REPRESENTS THAT IN SIGNING THIS RELEASE, HE DOES NOT RELY ON ANY PROMISES OR REPRESENTATIONS MADE BY ANYONE OTHER THAN THOSE STATED SPECIFICALLY HEREIN.

Sammons further warrants, represents, and agrees that in signing this Release, he does so with full knowledge of any and all rights which he may have with respect to Defendant and Ulrich, the Ethics Charge, the Administrative Charge, and the Lawsuit.

IN WITNESS WHEREOF, and intending to be legally bound, the Parties have executed this Settlement Agreement and General Release as of the dates set forth below.

By:_____ Dated:_____
JOHN L. SAMMONS

By: Helen A Haley Dated: 11/21/14
HELEN HALEY
Assistant Business Administrator
On behalf of Defendant
Vineland Board of Education

By: Thomas Ulrich Dated: 11/19/14
THOMAS ULRICH
Vineland Board of Education
On behalf of himself

Sammons further warrants, represents, and agrees that in signing this Release, he does so with full knowledge of any and all rights which he may have with respect to Defendant and Ulrich, the Ethics Charge, the Administrative Charge, and the Lawsuit.

IN WITNESS WHEREOF, and intending to be legally bound, the Parties have executed this Settlement Agreement and General Release as of the dates set forth below.

By: John L Sammons Dated: 11-19-14
JOHN L. SAMMONS

By:_____ Dated:_____
HELEN HALEY
Assistant Business Administrator
On behalf of Defendant
Vineland Board of Education

By:_____ Dated:_____
THOMAS ULRICH
Vineland Board of Education
On behalf of himself

STATE OF NEW JERSEY,
COUNTY OF : SS.:

I CERTIFY that on the 19th day of November, 2014

John L. Sammons personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document; and
(b) signed, sealed and delivered this document as his act and deed.

William Nossen, Esq.

Notary Public

[Notary Seal]

William Nossen, Esq.
Attorney At-Law, State of New Jersey

EXHIBIT 1

11-19, 2014

Vineland Public Schools
625 Plum Street
Vineland, NJ 08360-3708

Dear Members of the Vineland Board of Education:

By copy of this letter, I hereby submit my irrevocable resignation in good standing from all employment by or with Vineland Public Schools, effective this date, 11-19, 2014.

DATED: 11-19-14

John L. Sammons

John L. Sammons

CITY OF VINELAND BOARD OF EDUCATION

RESOLUTION NO.: _____-2014

A RESOLUTION APPROVING AND AUTHORIZING THE SETTLEMENT OF TENURE CHARGES IN THE MATTER OF THE TENURE HEARING OF JOHN SAMMONS, JR.

WHEREAS, the City of Vineland Board of Education has filed tenure charges captioned "In the matter of the Tenure Hearing of John Sammons, Jr., School District of the City of Vineland, Cumberland County, before the Commissioner of Education, Agency Docket No. 78-4/09 and OAL Docket No. EDU 7987-10; and

WHEREAS, the basis of the tenure charges were official misconduct, theft by deception and tampering with public records, unbecoming conduct and inefficiency and was further based upon a thirty-three (33) count criminal indictment; and

WHEREAS, following a jury trial, John Sammons, Jr. was found not guilty of all 33 criminal charges on March 21, 2014; and

WHEREAS, John Sammons, Jr. has filed various claims against the Vineland Board of Education including a claim pending in the Office of Administrative Law under Docket No.: CRT 13809-2013S, alleging Sammons was denied a promotion based on age and race and a lawsuit in the Superior Court of New Jersey alleging violations of the New Jersey Law Against Discrimination, Common Law Retaliatory Discharge and Intentional Infliction of Emotional Distress; and

WHEREAS, the Vineland Board of Education and John Sammons, Jr., have entered into a settlement agreement whereby the tenure charges will be dismissed and Sammons dismisses all pending claims against the Vineland Board of Education and Sammons waives a substantial portion of unpaid salary; and

WHEREAS, the Vineland Board of Education has determined that the Settlement Agreement is advantageous to the Board of Education and the taxpayers of the City of Vineland and represents a fair resolution of all claims.

NOW, THEREFORE, BE IT RESOLVED, by the City of Vineland Board of Education, that the settlement agreement with John Sammons, Jr. is approved and the Board president and secretary are authorized to sign the settlement agreement on behalf of the Board of Education subject to final approval by the New Jersey Commissioner of Education.

ATTEST:

Helen G. Haley
HELEN G. HALEY, BOARD SECRETARY

SCOTT ENGLISH, VICE-PRESIDENT

CERTIFICATION

I, HELEN G. HALEY, Secretary to the Vineland Board of Education, do hereby certify that the foregoing is a true and accurate copy of a Resolution adopted by the Vineland Board of Education at a meeting held on the 12th day of November, 2014.

SIGNED: Helen G. Haley
HELEN G. HALEY, SECRETARY

48-15

In the Matter of the Tenure Hearing of

Marie Ebert,
State-Operated School District
of the City of Newark
Essex County

Agency Docket No. 267-9/14

Ruling on Respondent's Motion to Dismiss

Tia Schneider Denenberg, *Arbitrator*

APPEARANCES

FOR THE PETITIONER:

Laura Miller, *Scarinci Hollenbeck*
Sean D. Dias, *Scarinci Hollenbeck*
Ramon E. Rivera, *Scarinci Hollenbeck*

FOR THE RESPONDENT:

Nancy Oxfeld, *Oxfeld Cohen*

BACKGROUND

This matter is before the Arbitrator for a decision on the motion to dismiss filed by Marie Ebert (Respondent) on November 18, 2014. The Respondent filed a letter memorandum in lieu of brief in support of the motion on November 18, 2014, and also filed a supplemental letter memorandum on November 25, 2014.

- On December 5, 2014, the State-Operated School District of the City of Newark, Essex County (Petitioner) filed a brief in opposition to the Respondent's motion to dismiss.

- On December 10, 2014, the Respondent filed a letter memorandum in response to the Petitioner's brief.

• On December 12, 2014, the Petitioner filed a letter brief as a sur-reply to the Respondent's December 10, 2014 letter memorandum.[1]

• On December 22, 2014, the Respondent submitted an arbitration decision that was issued on December 20, 2014.

• On January 2, 2015, the Arbitrator requested an extension to February 19, 2015, from the Bureau of Controversies and Disputes which was granted.

• On January 3, 2015, the Respondent submitted an arbitration decision that was issued on December 29, 2014.

I. Statement of Facts

The Respondent is a teacher in the District. She received a rating of "partially effective" in her 2012-2013 annual summative evaluation and "ineffective" in her 2013-2014 annual summative evaluation.

On August 26, 2014, the District served the Respondent with a "Notice of Tenure Charges" for inefficiency and conduct unbecoming a public school teacher, along with a Statement of Evidence, pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1. The Statement of Evidence included 19 exhibits, consisting of evaluations from the 2012-2013 and 2013-2014 school years, as well as memoranda, e-mails and correspondence regarding the Respondent's performance as a tenured teacher. The State-District Superintendent certified the tenure charges on September 18, 2014, and filed the charges with the New Jersey Department of Education (DOE).

By letter dated October 2, 2014, the Respondent asked the District for complete copies of any files about her that it maintained. On the same day, the Respondent filed an answer to the tenure charges, requesting that they be dismissed and raising 14 defenses.

By letter dated October 10, 2014, the Director of the Bureau of Controversies and Disputes notified the parties as follows:

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[1] The District objected to the submission of Respondent's supplemental brief on the ground that the Arbitrator had not granted permission for the brief. The Respondent's request to file a supplemental brief is hereby granted. Similarly, the District's request to file its sur-reply is also granted.

> Please be advised that, following receipt of respondent's answer on October 3, 2014, the above-captioned tenure charges have been reviewed pursuant to N.J.S.A. 18A:6-17.3c; upon review, the Commissioner [of Education] is unable to determine that the evaluation process has not been followed, and accordingly, on this date, the case is being referred to Arbitrator Tia Schneider Denenberg as required by statute.

In e-mail exchanges beginning on October 7, 2014, the Arbitrator and the parties agreed that three days of hearing would be scheduled for November 20, November 21 and November 25, 2014. In a conference call with the parties on October 17, 2014, the Arbitrator directed them to take careful note of statutory deadlines. The Arbitrator encouraged the parties during those exchanges "to work out the various filing dates."

On October 22, 2014, the Respondent asked the Petitioner for the information required by N.J.S.A. 18A:6-17.1b as soon as possible. Noting that the statutory provision requires the District to supply a list of witnesses "with a complete summary of their testimony," the Respondent "remind[ed]" the District

> that 'a complete summary of their testimony' is not the same as a statement of the subject upon which the individual would testify. Thus, for example, it is not sufficient to state that an individual will testify as to:
>
> > Ms. Ebert's performance and Ms. Ebert's compliance with her CAP [Corrective Action Plan].
>
> You must set forth the specific facts which will be testified to by the witness.

Also on October 22, 2014, the Respondent sent Petitioner 25 Interrogatories regarding the Petitioner's compliance with statutory procedural requirements, the Respondent's attendance record and requests for accommodation, and the allegations in the tenure charges of conduct unbecoming a teacher. On October 30, 2014, the Respondent sent revised Interrogatories; the sole revision corrected one erroneous reference to the Respondent.

On October 31, 2014, the Petitioner forwarded to the Arbitrator a letter of clarification from the DOE Assistant Commissioner, dated October 24, 2014. The letter responded to a request by the District for clarification of the DOE's intent in the "Guide to the TEACHNJ Act,"[2] as well as the status of the District's evaluation rubric during the 2012-2013 school year. The Assistant Commissioner's letter stated in relevant part:

> [S]ince August 2012, the Department has published many resources meant to support school districts in the implementation of the Act. One such document was a response to questions regarding

[2] TEACHNJ is the acronym of the "Teacher Effectiveness and Accountability for the Children of New Jersey" Act, which was approved on August 6, 2012.

> TEACHNJ's new requirement that teachers must demonstrate four years of teaching within a school district, with a rating of effective or highly effective in two annual summative evaluations within the first three years of employment . ... [Many non-tenured teachers requested] the District to clarify how the law applied to their tenure acquisition and the Department responded accordingly:
>
> > No evaluation outcomes in the 2012-13 school year will impact tenure decisions. 2013-14 is the first year where [sic] the statewide system will be in place, and the first year when the summative rating "clock" . . . will start.
>
> [S]uch clarifications did not indicate a prohibition on school districts to use 2012-2013 evaluation data to make personnel decisions, such as the decision to renew or non-renew a nontenured teacher or the decision to bring a tenure charge of inefficiency against a tenured teacher . . . In fact, the Department issued multiple publications notifying pilot school districts that any personnel consequences connected with evaluations were a matter of local decision and applicable State law .... The Department did not perceive any limitations to the use of evaluation rubrics in the 2012-2013 school year for personnel decisions as no such limitation is mentioned in the TEACHNJ Act.

On November 10, 2014, the Petitioner delivered to the Respondent 1,690 pages of documents, with no directory or index, which "the District intends to rely on at the hearing." On November 13, 2014, the Petitioner gave the Respondent a list of ten potential witnesses. According to the Respondent, the list lacks the statutorily required "complete summary of [the witnesses'] testimony." Rather, it merely identifies the subjects covered by the testimony.

On November 18, 2014, the Respondent requested adjournment of the hearings that were scheduled to begin on November 20, because she would be filing a motion to dismiss the charges. The District joined in the request. On November 20 the hearing was opened during a conference call with the Arbitrator. The hearings scheduled for November 21 and November 25 were adjourned.

In a letter memorandum in support of her November 18, 2014, motion to dismiss, the Respondent asserted, among other things, that as

> we have not received any of the files requested (unless they are somehow jumbled into the 1,690 pages of documents, but we have not received any indication as to whether they are or are not), we have not received complete summaries of the testimony of witnesses and we have not received a response to Interrogatories.

On December 5, 2014, the District answered the Respondent's interrogatories, which had been sent on October 22 and revised on October 30. The District also gave the Respondent that day an index to the 1,690 documents which had been provided on November 10.

II. Positions of the Parties

The parties' arguments address two distinct issues: (A) a threshold issue as to whether the Arbitrator has authority to consider the Respondent's motion to dismiss; and (B) if the Arbitrator has such authority, whether the motion to dismiss should be granted. The parties' arguments with respect to the issues are set forth and addressed below.

A. Threshold Issue: Arbitrator's Authority to Consider Motion to Dismiss

1. The District's Position

The District argues that the Arbitrator lacks the statutory authority to consider the Respondent's motion to dismiss because: (1) pursuant to N.J.S.A. 18A:6-17.3, the Commissioner of Education has the sole authority to determine if the District properly followed the evaluation process, and in this case the Commissioner determined that the District did follow the evaluation process; and (2) once a tenure case is referred, the arbitrator may make only factual determinations on matters confined by statute that are based on a full evidentiary hearing.

As to its first contention, the District notes that N.J.S.A. 18A:6-17.3c provides the following:

> Notwithstanding the provisions of N.J.S.A. 18A:6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a. of this section, the commissioner shall examine the charge. The individual against whom the charges are filed shall have 10 days to submit a written response to the charges to the commissioner. The commissioner shall, within five days immediately following the period provided for a written response to the charges, refer the case to an arbitrator and appoint an arbitrator to hear the case, unless he determines that the evaluation process has not been followed.

According to the District, this provision empowers the Commissioner alone to determine whether the evaluation process was followed. In other words, that authority resides exclusively with the Commissioner and not with an arbitrator.

The District contends that its view is supported by the statute's legislative history. The Senate and Assembly Statements associated with the TEACHNJ Act describe the Commissioner's role as follows:

> If the charge is forwarded to the commissioner, the individual against whom the charges are filed will have 10 days to submit a written response to the charges to the commissioner, and the commissioner, unless he determines that the evaluation process has not been followed, is required to forward the case to the arbitrator within five business days following the period provided for the response to the charges.

The description makes clear, the District believes, that the Legislature intended the Commissioner to be the sole decision-maker in the initial phase of the process.

The statute mandates, the District asserts, that a challenge to the evaluation process be brought to the Commissioner, given that the discretion to make a determination lies solely with him. Thus, a dispositive motion by a teacher alleging failure of a district to follow the evaluation process may be made only to the Commissioner prior to the referral of the charges to an arbitrator. The Commissioner's determination cannot be "punted" to an arbitrator, which is evident from the strict limitation of the scope of an arbitrator's review in N.J.S.A. 18A:6-17.2.

Here, the Commissioner exercised his authority pursuant to N.J.S.A. 18A:6-17.3.c when he issued the October 10, 2014, correspondence to the parties. This correspondence constituted a final administrative decision. As such, the proper mechanism to contest it is a judicial appeal lodged in accordance with N.J.S.A. 18A:6-9.1. Since the Respondent did not file her motion to dismiss with the Commissioner prior to referral to the Arbitrator, her motion must be denied.[3]

As its second point, the District argues that once a tenure case is referred, the arbitrator may only make factual determinations, on matters restricted by statute, that are based on a full evidentiary hearing.

Under TEACHNJ, once a tenure charge is transmitted to an arbitrator pursuant to N.J.S.A. 18A:6-17.1, based on an allegation that the employee was inefficient pursuant to N.J.S.A. 18A:6-17.3, the arbitrator's decision is confined to determining whether:

> (1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
>
> (2) there is a mistake of fact in the evaluation;
>
> (3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or
>
> (4) the district's actions were arbitrary and capricious.

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[3] The District asserts that its view is supported by two arbitration decisions. In its sur-reply, the District acknowledges that a third arbitration decision supports the Respondent's argument, but the district insists that the decision is incorrect.

According to the District, the language of subsection (1) predicates an arbitrator's determination of the adequacy of an individual teacher's evaluation on a previous finding of the soundness of the evaluation process itself. In other words, in order to dismiss a tenure charge on the basis of a flawed "evaluation process," the arbitrator would be required to determine that the error "materially affected the outcome of the evaluation" in the relevant school year. N.J.S.A. 18A:6-17.2b. That determination cannot be made without considering all evidence presented at the hearing, including the results of observations and the testimony of witnesses about the inefficiency of the teacher.

2. The Respondent's Position

The Respondent disputes the District's claim that the Commissioner determined that the tenure charges in this matter meet all statutory procedural requirements, and also disputes its contention that the Arbitrator lacks authority to decide a claim that the charges do not meet statutory procedural requirements.

The Respondent relies on a growing list of arbitrators' decisions in support of her position that an arbitrator has the authority to determine whether tenure charges brought by a school district comply with all statutory procedural requirements. According to the Respondent, these decisions support her position that the arbitrator has the authority to decide this motion, and that the Commissioner did not render a decision that all procedural requirements for the tenure charges to proceed to hearing have been met.

3. Holding: Arbitrator's Authority

Consideration of the relevant statutory provisions leads to the conclusion that the Respondent's motion to dismiss is properly before the Arbitrator.[4]

It is clear from the provisions of TEACHNJ, and is undisputed by the parties, that a chief purpose of the legislation was to expedite the processing of teacher tenure cases. To this end, N.J.S.A. 18A:6-17.3 states that upon receipt of a charge of teacher inefficiency, the Commissioner shall examine the charge, and the teacher shall have 10 days to submit a

[4] In addressing the parties' arguments on the issues in this matter, due consideration has been given to the arbitration awards they have cited. The awards are informative, but the controlling consideration is the Legislature's intent, as evidenced in the statutory provisions. Since the TEACHNJ Act established a permanent panel of 25 arbitrators to hear tenure charges, it is to be expected that awards may reach contradictory interpretations of the legislation. The awards are subject to judicial review, which may ultimately resolve conflicts among them. Until then, the awards ought not be regarded as final for purposes of collateral estoppel.

written response. Within five days from the deadline for a written response, the Commissioner must refer the case to an arbitrator, unless he or she determines that the evaluation process has not been followed. Thus, the Commissioner's determination must be made within a brief period.

The term "evaluation" is defined in N.J.S.A. 18A:6-119 as a process

> based on the individual's job description, professional standards and Statewide evaluation criteria that incorporates analysis of multiple measures of student progress and multiple data sources. Such evaluation shall include formal observations, as well as post conferences, conducted and prepared by an individual employed in the district in a supervisory role and capacity and possessing a school administrator certificate, principal certificate, or supervisor certificate.

The Legislature also defined the factors that an arbitrator may consider in analyzing the "evaluation process." Under N.J.S.A. 18A:6-17.2a.1, the arbitrator shall consider whether "the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan." If the employee is able to demonstrate such a failure, the arbitrator must determine if it materially affected the outcome. If it did not, the arbitrator renders a decision in favor of the board, and the employee is dismissed. N.J.S.A 18A:6-17.2b.

Thus, the Legislature created distinctive roles for both the Commissioner and an arbitrator in reviewing the evaluation process. The Legislature clearly intended the Commissioner to decide within five days whether a District had taken the requisite steps for completing an evaluation,[5] whereas the arbitrator was asked to determine whether those steps were carried out correctly and in accordance with the prescribed standards. This construction of the legislation gives meaningful purpose and effect to both its language and intent.

The Respondent's motion to dismiss presents several arguments challenging the way her evaluation was conducted, which is the domain of the arbitrator. Other arguments presented by the motion call into question the production of evidence and the discovery process. Since this occurred after the charges were referred to the Arbitrator, it cannot have been a matter for the Commissioner. Consequently, both categories of arguments submitted in the motion are properly before the Arbitrator and will be addressed to the extent necessary.

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[5] The Commissioner's determination that the steps leading to the teacher's evaluation were taken is an administrative decision that can be challenged only in a judicial forum.

B. Merits of the Motion to Dismiss

1. Contentions of the Respondent

The Respondent first addresses the tenure charge process, and then the reasons that the charges should be dismissed.

a. The tenure charge process

N.J.S.A. 18A:6-17.1 removed tenure charge hearings from the Office of Administrative Law and the Commission of Education. It substituted hearings before a permanent panel of arbitrators, in part to make the hearing process simpler and speedier. To that end, the scope of arbitral review was limited to the four matters set forth in N.J.S.A. 18A:6-17.2a, and the arbitrator was specifically prohibited from reviewing the evaluator's judgment about the quality of an employee's classroom performance. N.J.S.A. 18A:6-17.2c. Discovery, too, was streamlined. Upon referral of the charges to arbitration, the district was required to

> provide all evidence, including, but not limited to, documents, electronic evidence, statements of witnesses and a list of witnesses with a complete summary of their testimony to the employee or the employee's representative. N.J.S.A. 18A:6.17.1b3.

A district was precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. Id.

A prudent district would not file the charges until it was ready to proceed with discovery, since the respondent had to be given all discovery documents and a complete summary of each potential witness' testimony as soon as the case is referred to the arbitrator. Thus, the district should be thoroughly prepared before the tenure charge is filed.

Tenure litigation does not assure equity in the matter of access to information. In challenging a termination for inefficiency, the employee is limited to a maximum of 25 interrogatories. Depositions are not taken. Given the rapidity of the process, the window for acquiring information to prepare a case is open only briefly.

Offsetting the disadvantages attributable to the speed of the process and the limited discovery is the teacher's entitlement to timely receipt of all evidence that might be used against her and a complete summary of witness testimony. The entitlement helps balance the equities, since a district decides when to "pull the trigger" by filing the charge. The

teacher is in a reactive posture. For that reason, the burden is properly on the district to prepare the charge and the supporting material adequately before filing. In this instance, the district did not meet that burden.

b. The tenure charges must be dismissed as premature

The Respondent contends that under N.J.S.A. 18A:6-123e, the 2013-2014 school year is the first year in which an individual can be evaluated under the comprehensive scheme that requires termination if an individual is rated "ineffective" and/or "partially effective" for two straight years. The central issue is whether charges of inefficiency pursuant to TEACHNJ can be brought after the conclusion of 2013-2014 school year (using evaluations for the 2012-2013 and 2013-2014 school years), as argued by the District, or only after the conclusion of the 2014-2015 school year (using evaluations for the 2013-2014 and 2014-2015 school years), as argued by the Respondent. The issue has already been decided in favor of the teacher by several arbitrators. Their decisions support the Respondent's position that the charges must be dismissed when they are based on evaluations for the 2012-2013 and 2013-2014 school years. The doctrine of collateral estoppel precludes raising again an issue that was already decided in another arbitration case to which the District was a party. If the District believes that an arbitrator's interpretation of the statute is wrong, it can seek to have that decision vacated by a court. Until then, the District is bound by the decision. For that reason, the tenure charges against the Respondent must be dismissed as having been filed prematurely, in violation of TEACHNJ.

c. The tenure charges must be dismissed because the District failed to disclose all evidence to the Respondent when the charges were referred to arbitration

N.J.S.A. 18A:6-17.1b3 could not be more clear:

> Upon referral of the case for arbitration, the employing board of education shall provide all evidence, including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses.

When the Legislature enacted TEACHNJ, it sought to achieve speed without sacrificing fairness. In requiring teachers who are charged and suspended without pay to be returned to the payroll within 120 days (N.J.S.A. 18A:6-11), the Legislature allowed little time for discovery. It therefore required that a district, which chooses the time of filing, prepare its case in advance, disclosing to the teacher all pertinent documentation as well

as a complete summary of possible testimony. The completeness of the disclosure compensates for the relatively short time that the teacher has to respond to the charges. When a district fails to furnish full discovery at the time of the referral, as required by the Legislature, it cannot present any evidence at the hearing "except for purposes of impeachment of witnesses." N.J.S.A. 18A:16-171b3.

In the instant matter the District produced no evidence, no list of witnesses, and no complete summary of testimony until one week prior to the scheduled hearing. Production was late, despite prompting by the teacher's counsel. The District's tardiness violates TEACHNJ by hampering the teacher's ability to prepare a response. Consequently, the charges must be dismissed, since there is no evidence that the District can legally present at the hearing.

d. The charges must be dismissed, since the witness list provided by the District does not contain a complete summary of the witnesses' testimony

The law requires not merely a list of witnesses but "a list of witnesses with a complete summary of their testimony." The list of witnesses that the Petitioner submitted one week before the scheduled start of the hearing lacks a detailed account of the facts to which the individuals will testify. It contains only a general description of the matters that would be covered. Accordingly, even if it had been produced at the time the charges were assigned to the Arbitrator, the statement would have been insufficient.

The Respondent was entitled to learn the substance of the testimony, that is, the facts that would be adduced, not just a list of the topics that would be covered. The law makes it clear that while the process must move briskly, the Respondent should not be left to guess about the information that will emerge at the hearing. The Respondent was denied her right to be informed about any documentary or testimonial evidence that could be presented at the hearing.

In short, the Respondent did not receive a list of witnesses with "a complete summary of their testimony," either when the matter was transferred to the Arbitrator, two months before the scheduled hearing, or when the list of witnesses was given to the Respondent a scant week prior to the scheduled hearing. Therefore, the tenure charges must be dismissed.

e. The tenure charges must be dismissed, since the Petitioner has not replied to the Respondent's discovery requests

The Respondent submitted interrogatories as well as a request for a copy of any files concerning her that are maintained by the District. As of November 18, 2014, she had received no answers to the interrogatories, unless they are buried somewhere among the 1,690 pages of non-indexed documents that were delivered.

Without a complete response, the Respondent is denied the opportunity to pursue her statutory defenses: that procedural requirements of TEACHNJ were not met with regard to her entire evaluation process, that the District refused to accommodate her illness, that she was retaliated against for requesting accommodation, and that the District demanded her return to work from sick leave.

The District does not have the right to deny information to the Respondent that she needs to present a defense. The District cannot just deliver 1,690 pages of unorganized documents and a generalized witness list to a respondent the week before the hearing and expect the tactic to be considered compliance with the law. The statute calls for full discovery in ample time to prepare the litigation. The charges must be dismissed, because absent full discovery, the respondent could not effectively defend herself.

f. The Arbitrator does not have jurisdiction to decide a charge of inefficiency on an alternate statutory basis

The District argues that there is an independent statutory basis for pursuing charges of inefficiency, N.J.S.A. 18A:6-16. However, given that this argument has been rejected in another case, the Arbitrator here should reject the claim as well.

2. Contentions of the Petitioner

a. The evaluations of the Respondent for the 2012-2013 school year are valid as TEACHNJ was in full force and effect in the 2012-2013 school year and the collateral estoppel doctrine does not bar the Arbitrator from considering the District's arguments in this regard

i. Prematurity

The Respondent argues that inefficiency charges are premature and cannot be brought against her until after the conclusion of the 2014-2015 school year, pursuant to TEACHNJ.

The Respondent's argument that the 2012-2013 evaluations cannot be used as part of the two-year evaluation period under TEACHNJ is contrary to the plain text of the act. The legislation was passed on August 6, 2012, and went into effect before the beginning of the 2012-2013 school year. See N.J.S.A. 18A:6-117 to 129 and N.J.S.A. 18A:6-16 through 17.5., N.J.S.A. 18A:6-117.

In light of the statutory language, there is no question that evaluations in the 2012-2013 school year were to be used to determine whether tenure charges were warranted. That was the conclusion of the DOE on October 24, 2014. Although the Respondent terms the DOE's conclusion a "personal opinion" of the Assistant Commissioner, that characterization cannot detract from the import of the analysis of the act's effective date by the agency specifically tasked with implementing it.

ii. Collateral Estoppel

The Respondent's contention that collateral estoppel bars the filing of the charges rests principally on the allegedly binding effect of recent arbitration decisions. Those decisions found that the effective date of the act is the school year 2013-2014, so that an evaluation in the 2012-2013 school year could not be used as a reason to file charges. However, the Respondent failed to cite any statutory basis for finding that the effective date for taking action against a teacher was 2013-2014. The Respondent's reliance on a source other than the TEACHNJ statute should be given no weight.

Moreover, two of the conditions needed to invoke the collateral estoppel doctrine—a final judgment on the merits and no possibility of review—are not present here. The District still could seek vacation of the award relied upon by the teacher. Thus, there has been no final determination of the disputed legal issue.

Additionally, there is no judicial decision with respect to the general issue of the effective date of the act. Given that it was passed as recently as August, 2012, conflicting arbitration awards on legal issues related to the act's implementation are natural. Such conflicts will ultimately be resolved by New Jersey courts. Applying the doctrine of collateral estoppel during the act's infancy would be unjustified. Until the issue of the Act's effective date is resolved in a judicial forum, arbitrators are likely to render decisions that reflect their personal opinions.

b. The Arbitrator has jurisdiction to determine the inefficiency charge under either N.J.S.A. 18A:6-16 or N.J.S.A. 18A:6-17.3.

Relying on two arbitration awards, the District contends that the Arbitrator has jurisdiction to determine the inefficiency charge under either N.J.S.A. 18A:6-16 or N.J.S.A.

18A:6-17.3. Importantly, in the instant case, this matter was initially pleaded under both sections. While N.J.S.A. 18A:6-17.3 mandates charges for two consecutive annual ratings of "ineffective" or "partially effective," N.J.S.A. 18A:6-16 allows dismissal on the basis of inefficiency or other grounds specified in the statute, including conduct unbecoming a teacher. See N.J.S.A. 18A:6-10. Even if the Arbitrator concludes that the requirements for inefficiency charges under N.J.S.A. 18A:6-17.3 have not been met, the charge must be evaluated under N.J.S.A. 18A:6-16. Therefore, the case should proceed to hearing.

c. The District has complied with its discovery obligations and, in any event, there is no statutory authority to dismiss this matter on the basis of a board of education's failure to provide discovery

N.J.S.A. 18A6-17.1b3 instructs a board of education to provide its evidence and witness summaries "upon referral of the case for arbitration." There is no specific deadline by which this must be done. There are no reported cases that have analyzed the term "upon referral," but one arbitrator has rejected the Respondent's definition that "upon referral" means simultaneously with the referral.

The Respondent complains that the Petitioner did not provide its document production or witness summaries until one week before the scheduled hearing on November 20, 2014 and asserts that pursuant to N.J.S.A. 18A6-17.1b3, the tenure charges against the Respondent must be dismissed. However, during the first conference call between the parties on October 17, 2014, the Arbitrator directed them to work out discovery and motion deadlines. This fact alone removes the discovery process in this case from the strictures in N.J.S.A. 18A6-17.1b3. A comprehensive discovery schedule was not completed, as neither party contacted the other in order to create one.

On November 7, 2014, the District advised the Respondent that its evidentiary documents and witness list would be supplied on November 10, 2014 and November 12, 2014, respectively. Since the Respondent did not object to these deadlines, either to Petitioner or to the Arbitrator, the Petitioner's discovery was produced accordingly. Indeed, the first time the Respondent has sought a remedy from the Arbitrator with respect to discovery was the instant motion to dismiss. The Respondent also failed to provide any discovery or witness lists of her own. Applying a standard of reasonableness to these circumstances requires denial of the Respondent's motion to dismiss.

Additionally, this is not, as the Respondent implies, a case where a party is forced to prepare a defense based upon a naked pleading and would be prejudiced by last minute, voluminous discovery. The Statement of Evidence furnished to Respondent with the filing of the charges on August 26, 2014, included 19 exhibits and fully explained the basis for the charges. In any event, the Petitioner's evidence was in fact provided to the Respondent 10 days before the scheduled hearing.

As the Respondent points out, a tenure proceeding should ensure a speedy resolution. Indeed, while N.J.S.A. 18A6-17.1b3 does not set a precise deadline for a district to furnish its evidence, it does specify a deadline for the responding teacher to furnish his or her evidence, namely ten days before the hearing. The statute thus assumes that ten days is a sufficient period of time for counsel to have evidence in hand in order to prepare for a hearing.

While the Respondent complains of 1,690 documents "dumped" on her ten days before the hearing, most of those documents consist of Respondent's personnel file, which was requested by the Respondent. Much of the Respondent's personnel file is duplicative of Petitioner's Statement of Evidence and/or is irrelevant to the charges, a conclusion which can be reached by the Respondent's quick perusal of the dates of the documents themselves. The charges filed against the Respondent state that the underlying conduct began on October 19, 2012 (inefficiency) and June 7, 2013 (conduct unbecoming). In other words, the volume of the documentation does not correlate with the time needed to review it.

The Respondent points to no legal authority in support of the extraordinary remedy she seeks. Nothing in N.J.S.A. 18A6-17.1b3 supports dismissal of tenure charges for a district's failure to provide discovery beyond that provided in its statement of evidence. The Legislature could have allowed such a remedy if it so elected, as it in fact did in N.J.S.A. 18A:6-13, which provides for dismissal of tenure charges when a district fails to make a probable cause determination within 45 days after receipt of the written charge.

Moreover, the remedy in N.J.S.A. 18A6-17.1b3 for failing to produce witness summaries is not a dismissal of the charges but merely the preclusion of any evidence or witnesses not produced, except for impeachment purposes. The argument Respondent advances for dismissal is that "there is no evidence which [Petitioner] can legally present at the hearing". (See Page 8 of Respondent's initial brief). This is not true. The Petitioner has filed a Statement of Evidence, and the Respondent has filed an answer. The exhibits attached to the Statement of Evidence are admissible. The Respondent would not be prejudiced if a hearing were to go forward on the Statement of Evidence alone.

Additionally, N.J.S.A. 18A6-17.1f reads:

> Timelines set forth herein shall be strictly followed; the arbitrator or any involved party shall inform the commissioner of any timeline that is not adhered to.

At no point before the motion to dismiss did the Respondent advise the Commissioner or the Arbitrator that the District had not adhered to the discovery deadlines. The Respondent is therefore not in compliance with the statute she cites and cannot avail herself of its remedies.

III. Discussion

TEACHNJ established a new structure for processing teacher tenure charges. A keystone of the structure is referral of charges to arbitration proceedings that are intended to be expeditious yet guarantee the teacher due process. In order to accomplish these objectives, the Legislature limited the arbitrator's substantive review of teacher evaluations and mandated prompt disclosure of relevant evidence to the teacher. Specifically, N.J.S.A. 18A:6-17.1b3 states:

> Upon referral of the case for arbitration, the employing board of education shall provide all evidence, including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses.

Thus, the Legislature made it clear that the teacher was to receive "all evidence," including the items listed in the statute, "upon referral" of a case to arbitration. This requirement serves two important interests: (1) ensuring that the teacher gains access to the district's evidence early enough to mount an effective defense; and (2) ensuring that the proceeding begins swiftly and operates under strict time constraints.

In the instant case, the Commissioner informed the parties that the tenure matter was being referred to the Arbitrator on October 10, 2014. According to the plain language of the statute, the District was required to disclose all evidence to the Respondent on that date. The Legislature could not have more lucidly articulated the District's obligation. That body might have instructed the District to send the evidence within a reasonable period after referral or within a specified number of days of referral. But it did not. Rather, consistent with its goal of assuring both rapid hearing of a charge and due process, the Legislature expressly required the District to turn over all evidence precisely when the matter was referred to arbitration. No delay was contemplated.

To read the statute as allowing the District to wait until a later time would be inconsistent with the purposes of the legislation, inasmuch as it would hinder the teacher's ability to defend herself, denying her due process. As the party that initiated the process, determined when charges would be filed, and possessed the evidence that underpinned them, the District should have been prepared to comply in a timely fashion with its statutory disclosure obligation. If the obligation is not enforced in this instance, the structure envisioned by the Legislature may collapse when the volume of cases swells.

It is readily apparent that the District did not provide the Respondent with all evidence on October 10, 2014, the date on which the matter was referred to the Arbitrator. Indeed, the District does not argue otherwise. According to the record, the District supplied the Petitioner with the following material on the dates specified:

(1) On November 10, 2014, one month after the date the matter was referred to the Arbitrator, the Petitioner delivered to the Respondent 1,690 pages of documents, with no index, that the District intends to rely on at the hearing.

(2) On November 13, 2014, the Petitioner provided the Respondent with a list of ten potential witnesses.

(3) On December 5, 2014, the Petitioner gave the Respondent an index of the 1,690 documents sent on November 10, 2014.

(4) On December 5, 2014, the Petitioner submitted answers to the Respondent's interrogatories, which were sent on October 22, 2014, and revised on October 30, 2014.

The timing of these submissions establishes that the Petitioner did not comply with its statutory obligation to provide all evidence to the Respondent upon referral of the charge to the Arbitrator.[6]

The Respondent argues that the District's failure to comply with its statutory obligation mandates the dismissal of the tenure charge. The District, on the other hand, maintains that dismissal is unwarranted because: (1) there is no statutory provision permitting dismissal for failure to provide full discovery; (2) the remedy in N.J.S.A. 18A6-17.1b3 is not a dismissal but merely preclusion of any omitted evidence or witnesses, except for impeachment purposes; (3) a hearing can go forward on the Petitioner's Statement of Evidence and Exhibits, which was attached to the charges and which the

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[6] The District notes that when it advised the Respondent on November 7, 2014, that it would supply its evidentiary documents and witness list on November 10, 2014, and November 12, 2014, respectively, the Respondent did not object to these dates. The District also asserts that the first time the Respondent sought a remedy from the Arbitrator with respect to discovery issues is with the instant motion to dismiss, and further contends that the Respondent has failed to provide any discovery or witness lists of her own. The short answer to these contentions is that: (1) the District's November 7, 2014, statement could not, and did not, cure its failure to provide the documents and witness list when the tenure charge was transferred to the Arbitrator almost one month earlier; (2) the Respondent was under no obligation to object to the District's November 7, 2014, statement at that time and appropriately objected in her motion to dismiss; and (3) any alleged failure by the Respondent to provide discovery or witness lists does not excuse the District's failure to comply with its statutory obligation. In any event, the Petitioner has not at any point objected to the Respondent's alleged failure.

The District also notes that during a conference call with the parties on October 17, 2014, the Arbitrator directed the parties to work out discovery and motion deadlines. The District asserts that this fact removes the discovery process in this case from the strictures in N.J.S.A. 18A6-17.1b3. However, nothing stated in that conference call in any way modified or contravened the applicability of relevant statutory provisions and, as such, does not serve to nullify their relevance here.

Respondent has answered; and (4) the Respondent is not in compliance with N.J.S.A. 18A6-17.1f because, at no point before the motion to dismiss, did the Respondent advise the Commissioner or the Arbitrator that discovery deadlines had been ignored.

The absence of a statutory provision specifying a remedy for failure to provide discovery—beyond the Statement of Evidence—implies that the Legislature left to the Arbitrator the determination of an appropriate remedy under all the relevant circumstances. The District's reliance on N.J.S.A. 18A:6-17.1b3 is also unavailing. That provision does not prescribe remedies for failure to provide all evidence upon referral of the case for arbitration. Rather, it precludes a board of education from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. Nowhere does the provision assert that preclusion is the only possible consequence of noncompliance, nor does it explicitly limit the scope of an arbitral remedy for a district's failure to effect timely discovery.

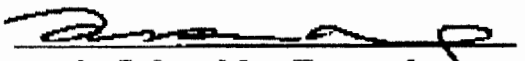
Contrary to the Petitioner's argument, holding a full evidentiary hearing is not a prerequisite to considering the motion to dismiss. Nothing in the relevant statutory provisions limits an arbitrator's ability to resolve motions before holding a hearing. Indeed, demanding a full evidentiary hearing before ruling on potentially dispositive motions could unnecessarily prolong tenure disputes, ignoring the expressed desire of the Legislature to expedite them.

Any appropriate remedy must further the statute's purposes—ensuring both due process and timeliness in the resolution of tenure charges. To permit a hearing to be held solely on the basis of the District's Statement of Evidence and Exhibits and the Petitioner's answer, as suggested by the District, would be incompatible with due process and would, in effect, reward the District for failure to comply with its statutory obligation in a full and timely manner. Such an approach allows a district to impede preparation of a teacher's defense, compromising the fairness of the process, without even explaining the cause of the delay.

Finally, the District's reliance on N.J.S.A. 18A6-17.1f is misplaced. That provision requires an arbitrator or any other involved party to inform the Commissioner of a failure to adhere to a time limit. The Respondent effectively informed the Commissioner, through service of filings on the District, that timeliness was an issue. Additionally, through this ruling on the motion to dismiss, a copy of which is being served on the Commissioner, the Arbitrator will have informed the Commissioner of her determination that the District has not conformed to a statutory timeline. Further, even assuming lack of compliance with N.J.S.A. 18A6-17.1f, nothing therein suggests that it was intended to affect in any way the appropriateness of a remedy for the District's failure to comply with a different provision—N.J.S.A. 18A:6-17.1b3. As such, N.J.S.A. 18A6-17.1f imposes no bar to granting the motion to dismiss.

IV. Conclusion

For the reasons set forth above, the Respondent's motion to dismiss the charges is granted on the basis of the District's substantial and unexplained failure to comply with the timeliness mandate in N.J.S.A. 18A:6-17.1b3. In light of this decision, there is no need to address the Respondent's remaining arguments for dismissal, primarily regarding whether filing of the inefficiency charge was premature and whether the charge of conduct unbecoming a teacher is properly before the Arbitrator. This ruling is premised squarely on the breach of statutory time limits. Finally, the dismissal is without prejudice to the District's right to file charges again in a manner that fully comports with applicable statutory provisions.



Tia Schneider Denenberg
Arbitrator

DATED: January 30, 2015

In the Matter of the Tenure Hearing of

Marie Ebert,
State-Operated School District
of the City of Newark
Essex County

Agency Docket No. 267-9/14

Ruling of Arbitrator

The undersigned arbitrator, having been appointed, pursuant to P.L 2012, c 26, to hear and decide the above-captioned matter, rules as follows:

The Respondent's motion to dismiss the charges is granted on the basis of the District's substantial and unexplained failure to meet the timeliness mandate in N.J.S.A. 18A:6-17.1b(3). Marie Ebert shall be reinstated as a teacher with full back pay and benefits. The dismissal is without prejudice to the District's right to file charges again.

Tia Schneider Denenberg
Arbitrator

Dated: January 30, 2015

State of New York
County of Columbia

On this 30th day of January, 2015, before me personally came and appeared TIA SCHNEIDER DENENBERG, to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed the same.

Ralph Peters Hubbell, Jr.
Notary Public State of New York
No. 4793303
Qualified in Dutchess County
Commission Expires October 31, 2015

49-15L

49-15

State of New Jersey

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

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

February 5, 2015

Andrew D. Linenberg, Esq.
Cooper Levinson
1125 Atlantic Avenue
Atlantic City, NJ 08401

Michael P. Stanton, Esq.
McCrosson & Stanton
200 Asbury Avenue
Ocean City, NJ 08226

Dear Counsel:

I have reviewed the Petition for Declaratory Ruling entitled *Upper Township Board of Education, Cape May County v. Board of Education of the City of Ocean, Cape May County*, Agency Dkt. No. 377-12/14, together with respondent's motion to dismiss the petition.

Upon such review, I have determined to exercise my discretion to decline the request pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a)1, and instead direct that the matter shall proceed as a petition of appeal pursuant to *N.J.A.C.* 6A:3-1.1 *et seq*.

Accordingly, petitioner's request for declaratory ruling is declined and this matter shall be transmitted forthwith to the Office of Administrative Law.

Sincerely,

David C. Hespe
Commissioner of Education

c: County Superintendent

54-15

IN THE MATTER OF THE TENURE HEARING OF LEGISTREAN PURVIS-CHAPMAN, GLASSBORO SCHOOL DISTRICT, GLOUCESTER COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

Petitioning Board certified tenure charges of insubordination, unbecoming conduct, incapacity and inefficiency against respondent – a tenured history teacher – and sought to terminate her employment with the district. Neither respondent nor any attorney acting on her behalf filed an answer to the petition following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.4(h), the allegations – which respondent has chosen not to deny – may be deemed admitted and are sufficient to warrant respondent's dismissal from her tenured position. Accordingly, the Commissioner granted summary decision to the petitioner, dismissed the respondent from her tenured position in petitioner's school district, and forwarded a copy of this decision to the State Board of Examiners for review and action as that body deems appropriate.

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

February 9, 2015

54-15

AGENCY DKT. NO. 370-12/14

IN THE MATTER OF THE TENURE HEARING OF LEGISTREAN PURVIS-CHAPMAN, GLASSBORO SCHOOL DISTRICT, GLOUCESTER COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

For the Petitioner, Cameron R. Morgan, Esq.
No pleading by or on behalf of Respondent.

This matter was opened before the Commissioner of Education on December 19, 2014, through certification by the Glassboro School District Board of Education (petitioner) of tenure charges of insubordination, unbecoming conduct, incapacity and inefficiency against Legistrean Purvis-Chapman (respondent), a tenured teacher in petitioner's employ. Following its review of the charges as filed, together with the supporting evidence,[1] petitioner certified the charges to the Commissioner on December 17, 2014 and provided respondent with written notice of the certified charges on December 18, 2014.

On December 29, 2014 the Department directed respondent – via both certified and regular mail – to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*is required to file written response to the charges within 15 days of date filed with Commissioner.*" It further

[1] There is no indication in the record that respondent appeared before the petitioning Board to contest the charges.

57-15

STATE OF NEW JERSEY COMMISSIONER OF EDUCATION

IN THE MATTER OF THE ARBITRATION OF THE TENURE CHARGE between **STATE OPERATED SCHOOL DISTRICT, CITY OF NEWARK,** Petitioner, -and- **LINDA KELLY-GAMBLE,** Respondent	DOE DOCKET NO. 266-9/14 **OPINION & AWARD** **ON** **MOTION TO DISMISS**

BEFORE: MICHAEL J. PECKLERS, ESQ., ARBITRATOR

DATES OF ORAL ARGUMENT: November 6, 2014; January 5, 2015

DATE OF AWARD: January 30, 2015

APPEARANCES:

For the Petitioner:

Ramon E. Rivera, Esq., Of Counsel
Shana T. Don, Esq., (On the Motion to Dismiss Brief & 1/5/15 Oral Argument)

For the Respondent:

Robert T. Pickett, Esq., PICKETT & CRAIG, ESQS.

I. BACKGROUND CONSIDERATIONS

Linda Kelly-Gamble is a tenured and veteran instructor of 20 years with the State Operated School District City of Newark ("the Newark School District"). At

all times that should be considered relevant for the purposes of this case, Ms. Kelly-Gamble taught at the Alexander Street School. On August 22, 2014, Principal Maria Ortiz executed a NOTICE OF INEFFICIENCY CHARGES against the instructor. Paragraph 2 indicated that the tenure charges were being filed pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-17.3 and N.J.A.C. 6a:3-5.1. CHARGE ONE: INEFFICIENCY thereafter submitted that "[d]uring the period from December 21, 2012 to the present, Respondent has demonstrated an inability to completely and responsibly execute her duties as a teacher in the following: a. the Respondent was rated as 'ineffective' and/or 'partially effective' in 2 consecutive annual evaluations...."

The accompanying and comprehensive STATEMENT OF EVIDENCE again identified Respondent's perceived inability to satisfactorily perform her instructional duties and responsibilities from December 21, 2012 to the point of the filing, and additionally specifically referenced in part: "¶ 3. The Formal Observation Form dated December 21, 2012, wherein Respondent was rated 'Partially Effective;' ¶ 9. An Evaluation Summary Form dated February 20, 2013 wherein Respondent was rated 'Partially Effective;' ¶ 11. The Formal Observation Form dated April 15, 2013, wherein Respondent received an 'Ineffective' rating; ¶13. An Observation Form dated April 16, 2013, wherein Respondent was rated as 'Ineffective' in Tailored Instruction; ¶ 17. An Annual Evaluation Summary Form dated June 7, 2013, wherein Respondent was rated 'Partially Effective;' ¶27. Corrective Action Plan ('CAP') prepared by Respondent in collaboration with

Gamble's 2012 - 2013 summative annual evaluation is otherwise inaccurate, inadmissible and/or otherwise may not be considered by the Commissioner of Education and/or any duly assigned arbitrator for purposes of seeking her termination as a tenured teacher with the District;" THIRD AFFIRMATIVE DEFENSE, "[t]he implementation of the District's 2012 - 2013 Teacher Evaluation Guidelines and procedures related thereto were part and parcel of a 'pilot program' and, as such, summative evaluations relating to that school year may not be utilized by the District for [the] purpose of seeking or bringing tenure charges against District teachers, including respondent Kelly-Gamble."

On October 21, 2014, M. Kathleen Duncan, Director of DOE Controversies and Disputes notified the parties that following receipt of Respondent's answer on October 14, 2014, the tenure charges had been reviewed pursuant to N.J.S.A. 18A:6-17.3c and that upon full review the Commissioner is unable to determine that the evaluation process has not been followed and that accordingly, they had been referred to me as required by statute. A referral letter was also sent under separate cover.

On October 20, 2014, I forwarded a correspondence to counsel advising of the foregoing, and proposing potential dates for a conference call, as well as hearing(s). On October 22, 2014, Ramon E. Rivera, Esq., SCARINCI HOLLENBECK, counsel for Petitioner State Operated School District, City of Newark sent a correspondence to Director Duncan. This initially noted that on September 22, 2014, the District filed a Notice of Inefficiency Charges and

Statement of Evidence with the Commissioner and emphasized that by letter dated September 23, 2014, Ms. Duncan advised Respondent that she was required to file a written response to the charges within ten (10) days. Petitioner thereafter asserted that Respondent's "Certification of Mailing" attests to the fact that the answer was transmitted "on or about October 10, 2014, which was at least eight (8) days past the deadline to file an answer." *See* N.J.A.C. 6A:3-53; *see also* N.J.A.C. 6A:3-5.1(c)(5) ("Day means business day when the period specified is less than seven (7) days, and calendar day when the period specified is seven (7) days or more"). On this basis, Petitioner requested that the tenure charges be deemed admitted, with a default judgment entered per N.J.A.C. 6A:3-5.3.

A preliminary conference call in the case was held on October 30, 2014, with a briefing and oral argument schedule set down in order to entertain Petitioner's motion for a default judgment. This provided for Respondent filing her papers in opposition to the motion by November 5th, with Petitioner allowed the opportunity to submit a reply brief prior to the oral argument scheduled for November 6th.

The material facts cited by Petitioner were not disputed by Respondent, with counsel acknowledging he failed to file the answer on behalf of Ms. Kelly-Gamble within the ten (10) day window. Rather, Mr. Pickett cited a conversation with an unnamed source within the Bureau of Controversies and Disputes on October 1, 2014 about the filing date and deadline. Phone pen records were also

attached to his CERTIFICATION, which demonstrated that a call was made to the DOE that date. In a November 24, 2014 ORDER denying Petitioner's application, I determined:

* * *

> There are a number of factors, however, which militate against the entry of the default judgment sought by the Petitioner in this instance. Initially, while the Newark District maintains that the *Newton* case is *on all fours* with the case at bar, the plain language of the same indicates that there was no answer filed at all by either respondent or his attorney, which caused the Commissioner to determine the tenure charges were admitted — '[d]eeming the allegations to be admitted and noting that respondent has failed to respond to the charges certified against him, the Commissioner finds that the District has demonstrated that respondent is guilty of inefficiency, warranting dismissal from his tenured position.' It is noteworthy that in the instant case, such action did not take place. Instead, as counsel for Kelly-Gamble has emphasized, '[t]he Petition and Answer of the Respondent was reviewed and assessed by the Director of the Division of Controversies and Disputes, the Hon. Katherine Duncan, for completeness and forwarded to the designated Arbitrator herein, Michael J. Pecklers, Esq., without any indication that the 'filed' Answer was 'defective' or 'late' in any way.'
>
> The case law submitted by Petitioner while admittedly standing for the proposition that tenure timelines should be strictly construed, is however inapposite as it is factually distinguishable. *See generally*, Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572, 587 (1993) (appeal filed more than 5 months after learning of the failure to be afforded post RIF rights or 2 months after the expiration of the 90 day filing deadline); Kous v. Board of Education Township of Old Bridge, Middlesex County, Agency Docket No. 26-2/12 (March 2, 2012) (petitioner did not respond to the insubordination tenure charges either at the Board of Education or the Commissioner level, leading to the disposal of the matter in summary fashion in July 2009); I/M/O The Tenure Hearing of Cemran Biricik, School District of Jersey City, Hudson County, 2014 N.J. Super. Unpub. LEXUS 2640 (November 7, 2014) (respondent failed to respond to tenure charges or ask for an adjournment in light of accidental disability application filed with T.P.A.F. which was later denied); Portee v. Board of Education of

the City of Newark, Essex County, OAL Docket No. EDU 5855-93 (April 14, 1994) (petitioner's complaint in Superior Court, within the jurisdiction of the Commissioner of Education, was filed 248 days (and not within 90 days) after the notice of termination by the Board).

The record establishes that Respondent has been employed as a teacher with the Newark School District for 20 years. It is well settled that our tenure laws were originally enacted and designed to establish a competent and efficient school system, and to protect teaching and other staff members from dismissal for unfounded, flimsy or political reasons. The statutory status of a tenured individual should accordingly not be lightly removed. *See generally,* Viemeister v. Prospect Park Board of Education, 5 N.J. Super. 215, 218 (App. Div. 1949); Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982); *see also*, In re Tenure Hearing of Claudia Ashe-Gilkes, City of East Orange School District, 2009 WL 246266 (January 12, 2009), *adopted* by the Commissioner of Education (May 28, 2009). As such, Respondent has a significant property interest in her position, and is entitled to have the charges determined on the merits notwithstanding the intransigence of her counsel. Any other result is at odds with the fair and efficient administration of justice, as our judiciary has recognized in connection with *R.* 4:50 default proceedings. *See, e.g.* Professional Stone, Stucco & Siding Applications, Inc. v. Jim Carter, 409 N.J. Super, 64 (App. Div. 2009).

Noting that the Courts have on occasion utilized *R.* 4:50-1 to determine the suitability of vacating a final agency order, the Appellate Division in *Biricik* indicated that it was mindful that the Rule was "designed to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case." *citing*, Lee v. W.S. Steel Warehousing, 205 N.J. Super. 153, (1985); U.S. Bank National Association v. Guillaume, 209 N.J. 330, 334 (1993).

The record further demonstrates that Respondent has thoroughly contested the tenure charges both at the Board and Commissioner level. On September 15, 2014, a 14 page WRITTEN RESPONSE IN OPPOSITION TO THE PROPOSED TENURE CHARGES was submitted to the Board of Education prior to its certification of the charges, which challenged the same on both a procedural and substantive bases. *See also*, CORRESPONDENCE TO BOARD COUNSEL & SUPERINTENDENT, dated September 15, 2014. The

> ANSWER filed with the Commissioner likewise pleads 13 affirmative defenses and renews the contentions previously made. Particularly with respect to the utilization of evaluations from 2012 – 2013 in the subject tenure charges these appear meritorious, given recent arbitral rulings dismissing tenure charges which included the same.
>
> I am mindful of the fact that based upon this ruling, the Respondent will be permitted to file a MOTION TO DISMISS with respect to the fact that the District considered evaluations from the 2012-2013 School Year. Even in the event that application is denied, the Petitioner has properly argued that it will be prejudiced in prosecuting its case by the expedited time frames of the TEACHNJ ACT. For this reason, I have this date applied to M. Kathleen Duncan, the Director of Controversies and Disputes, for an extension of the initial 45 day period within which to hold a hearing until JANUARY 5, 2015. Assuming this is granted, the District will have sufficient time to prepare its case, and Respondent her defense. Based upon the totality of the foregoing findings of fact, Petitioner's motion for a default judgment pursuant to N.J.A.C. 6A:3-5.3 is **DENIED**. The case will accordingly proceed on the merits. In light of this ruling, Respondent's MOTION FOR EXTENSION OF TIME TO FILE AN ANSWER NUNC PRO TUNC has not been reached. IT IS SO ORDERED.

Due to the protracted nature of the motion practice, that same date a letter was sent to Ms. Duncan requesting an extension of time to hold the first hearing until January 5, 2015. This request was graciously granted in a December 1, 2014 correspondence from Ms. Duncan, transmitted to me via facsimile. Respondent's MOTION TO DISMISS was then filed on December 4, 2014, with a December 19, 2014 Reply. Petitioner for its part, submitted a brief IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS on December 12, 2014, and Sur-Reply on December 31, 2014. Oral argument on the motion proceeded as scheduled on January 5, 2015, with the instant AWARD dismissing the tenure charges subsequently issued.

II. RELEVANT STATUTORY & REGULATORY LANGUAGE

NEW JERSEY STATUTES ANNOTATED TITLE 18A

18A:6-10 Dismissal and reduction in compensation of persons under tenure in public school system. No person shall be dismissed or reduced in compensation,

(a) If he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state or

(b) If he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner, except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

* * *

18A:6-16 Proceedings before commissioner; written response; determination

* * *

If, following receipt of the written response to the charges, the commissioner is of the opinion that they are not sufficient to warrant dismissal or reduction in salary of the person charged, he shall dismiss the same and notify said person accordingly. If, however, he shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section 22 of P.L. 2012 Ch. 26 (C.18A:6-17.1) for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for purposes of deciding the motion.

* * *

18A:6-17.1 Panel of arbitrators

* * *

b. The following provisions shall apply to a hearing conducted by an arbitrator pursuant to N.J.S. 18A:6-16, except as otherwise provided pursuant to P.L. 2012, c. 26 (C.18A:6-117 et al.):

(1) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case;

* * *

(3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely, including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.

Discovery shall not include depositions, and interrogatories shall be limited to 25 without subparts.

c. The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

d. Notwithstanding the provisions of N.J.S. 18A:6-25 or any other section of law to the contrary, the arbitrator shall render a written decision within 45 days of the start of the hearing.

e. The arbitrator's determination shall be final and binding and may not be appealable to the commissioner or the State Board of Education. The determination shall be subject to judicial review and enforcement as provided pursuant to N.J.S. 2A:24-7 through N.J.S. 2A:24-10.

f. Timelines set forth herein shall be strictly followed; the arbitrator or any

involved party shall inform the commissioner of any timeline that is not adhered to.

g. An arbitrator may not extend the timeline of holding a hearing beyond 45 days of the assignment of the arbitrator to the case without approval from the commissioner. An arbitrator may not extend the timeline for rendering a written decision within 45 days of the start of the hearing without approval of the commissioner. Extension requests shall occur before the 41st day of the respective timelines set forth herein. The commissioner shall approve or disapprove extension requests within five days of receipt.

* * *

18A:6-17.2 Consideration for arbitrator in rendering decision. a. In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:

(1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;

(2) there is a mistake of fact in the evaluation;

(3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law; or other conduct prohibited by State or federal law;

(4) the district's actions were arbitrary and capricious.

(b) In the event that the employee is able to demonstrate that any of the provisions of paragraph (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.

(c) The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review.

(d) The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.

(e) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case. The arbitrator shall render a decision within 45 days of the start of the hearing.

18A:6-17.3. Evaluation process, determination of charges. a. Notwithstanding the provisions of N.J.S. 18A:6-11 or any other section of the law to the contrary, in the case of a teacher, principal, assistant principal, and vice principal:

(1) The superintendent shall promptly file with the secretary of the board of education a charge of inefficiency whenever the employee is rated ineffective or partially effective in an annual summative evaluation and the following year is rated ineffective in the annual summative evaluation;

(2) If the employee is rated partially effective in two consecutive annual summative evaluations or is rated ineffective in an annual summative evaluation and the following year is rated partially effective in the annual summative evaluation, the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency, except that the superintendent upon a written finding of exceptional circumstances may defer the filing of tenure charges until after the next summative evaluation. If the employee is not rated effective or highly effective on this annual summative evaluation, the superintendent shall promptly file a charge of inefficiency.

* * *

b. Within 30 days of the filing, the board of education shall forward a written charge to the commissioner, unless the board determines that the evaluation process has not been followed.

c. Notwithstanding the provisions of N.J.S. 18A:6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a. of this section, the commissioner shall examine the charge. The individual against whom the charges are filed shall have 10 days to submit a written response to the charges to the commissioner, The commissioner shall within five days immediately following the period provided for a written response to the charges, refer the case to an arbitrator and appoint an arbitrator to hear the case, unless he determines that the evaluation process has not been followed,

d. The only evaluations which may be used for purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L.2012, c.26 (C. 18A:6-117 et al.)

* * *

18A:6-120 School improvement panel. A. In order to ensure the effectiveness of its teachers, each school shall convene a school improvement panel. A panel shall include the principal, or his designee, an assistant or vice-principal, and a

teacher. The principal's designee shall be an individual employed in the district in a supervisory role and capacity who possesses a school administrator certificate, principal certificate, or supervisor certificate. The teacher shall be a person with a demonstrated record of success in the classroom who shall be selected in consultation with the majority representative. An individual teacher shall not serve more than three consecutive years on any one school improvement panel, In the event that an assistant or vice-principal is not available to serve on the panel, the principal shall appoint an additional member to the panel, who is employed in the district in a supervisory role and capacity and who possesses a school administrator certificate, principal certificate, or supervisor certificate.

Nothing in this section shall prevent a district that has entered a shared services agreement for the functions of the school improvement panel from providing services under that shared services agreement.

b. The panel shall oversee the mentoring of teachers and conduct evaluations of teachers, including an annual summative evaluation, provided that the teacher on the school improvement panel shall not be included in the evaluation process except in those instances in which the majority representative has agreed to the contrary. The panel shall also identify professional development opportunities for all instructional staff members that are tailored to meet the unique needs of the students and staff of the school.

c. The panel shall conduct a mid-year evaluation of any employee in the position of teacher who is evaluated as ineffective or partially effective in his most recent annual summative evaluation, provided that the teacher on the school improvement panel shall not be included in the mid-year evaluation process, except in those instances in which the majority representative has agreed to the contrary.

d. Information related to the evaluation of a particular employee shall be maintained by the school district, shall be confidential, and shall not be accessible to the public pursuant to P.L. 1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented.

* * *

18A:6-122 Annual submission of evaluation rubrics. a. A school district shall annually submit to the Commissioner of Education, for review and approval, the evaluation rubrics that the district will use to assess the effectiveness of teachers, principals, assistant principals, and vice-principals and all other teaching staff members. The board shall ensure that an approved rubric meets the minimum standards established by the State Board of Education.

b. Notwithstanding the provisions of subsection a. of this section, a school district may choose to use the model evaluation rubric established by the

commissioner pursuant to subsection f. of section 17 of P.L. 2012, c.26 (C.18A:6-123) to assess the effectiveness of its teachers, principals, assistant principals, and vice-principals and all other teaching staff members. In the case in which the district fails to submit a rubric for review and approval, the model rubric shall be used by the district to assess the effectiveness of its teachers, principals, assistant principals, and vice-principals and all other teaching staff members.

18A:6-123. Review, approval of evaluation rubrics. a. The Commissioner of Education shall review and approve evaluation rubrics submitted by school districts pursuant to section 16 of P.L. 2012, c. 26 (C.18A:6-122). The board of education shall adopt a rubric approved by the commissioner.

b. The State Board of Education shall promulgate regulations pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C.52:14B-1 et seq.) to set standards for the approval of evaluation rubrics for teachers, principals, assistant principals, and vice-principals. The standards at a minimum shall include:

* * *

c. A board of education shall adopt a rubric approved by the commissioner by December 31, 2012.

d. Beginning no later than January 31, 2013, a board of education shall implement a pilot program to test and refine the evaluation rubric.

e. Beginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved adopted evaluation rubric for all educators in all elementary, middle and high schools in the district. Results of evaluations shall be used to identify and provide professional development to teaching staff members. Results of evaluations shall be provided to the commissioner, as requested, on a regular basis.

f. The commissioner shall establish a model evaluation rubric that may be utilized by a school district to assess the effectiveness of its teaching staff members.

* * *

NEW JERSEY ADMINISTRATIVE CODE, TITLE 6A EDUCATION

* * *

6A:3-1.5 Filing and service of answer

* * *

(g) Nothing in this section precludes the filing of a motion to dismiss in lieu of an answer to a petition, provided that such motion is filed within the time allotted for the filing of an answer. Briefing on such motions shall be in the manner and within the time fixed by the Commissioner, or by the ALJ if the motion is to be briefed following transmittal to the OAL.

* * *

6A:3-1.10 Dismissal or transfer of petition

At any time prior to transmittal of the pleadings to the OAL, in the Commissioner's discretion or upon motion to dismiss filed in lieu of answer, the Commissioner may dismiss the petition on grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true for lack of jurisdiction, failure to prosecute or other good reason.

* * *

6A:3-1.12 Summary decision

(a) At any time concurrent with or subsequent to the filing of an answer, but prior to transmittal of a matter to the OAL, any party may apply to the Commissioner for summary decision by way of a motion with proof of service on each other party. The Commissioner may decide the motion directly or transmit it to the OAL for disposition.

* * *

6A:3-5.1 Filing of written charges and certificate of determination

* * *

(c) If the tenure charges are charges of inefficiency pursuant to N.J.S.A. 18A:6-17.3, except in the case of building principals and vice principals in school districts under full State intervention, where procedures are governed by the provisions of N.J.S.A. 18A:7A-45 and such rules as may be promulgated to implement it, the following timelines and procedures shall be observed:

* * *

5. Upon receipt of the charge, the Commissioner or his designee shall examine the charge. The charge shall be served upon the employee at the same time it is forwarded to the Commissioner and proof of service shall be included with the filed charge. The individual against whom the charge is filed shall have 10 days to submit to the Commissioner a written response to the charge.

* * *

6A:3-5.3 Filing and service of answer to written charges

(a) Except as specified in N.J.A.C. 6A:3-5.1(c)(5), an individual against whom tenure charges are certified shall have 15 days from the date such charges are filed with the Commissioner to file a written response to the charges. Except as to time for filing, the answer shall conform to the requirements of N.J.A.C. 6A:3-1.5(a) through (d).

1. Consistent with N.J.A.C. 6A:3-1.5(g), nothing in this subsection precludes the filing of a motion to dismiss in lieu of an answer to the charges, provided the motion is filed within the time frame allotted for the filing of an answer. Briefing on the motions shall be in the manner and within the time fixed by the Commissioner, or by the arbitrator if the motion is to be briefed following transmittal to an arbitrator.

6A:3-5.5 Determination of sufficiency and transmittal for hearing

(a) Except as specified in N.J.A.C. 6A:3-5.1 (c) within 10 days of receipt of the charged party's answer or expiration of the time for its filing, the Commissioner shall determine whether such charge(s) are sufficient, if true, to warrant dismissal or reduction in salary. Where the charges are determined insufficient, they shall be dismissed and the parties shall be notified accordingly. If the charges are determined sufficient, the matter shall be transmitted immediately to an arbitrator for further proceedings, unless the Commissioner retains the matter pursuant to N.J.A.C. 6A:3-1.12.

* * *

III. CONTENTIONS OF THE PARTIES[1]

Respondent Linda Kelly-Gamble

Respondent Kelly-Gamble is a tenured teacher employed by the Petitioner State Operated School District of the City of Newark ("District") for twenty (20) years. The within tenure charges of "inefficiency" were submitted

1/ As previously discussed, there was extensive motion practice in the case. The CONTENTIONS OF THE PARTIES summary includes positions advanced in the original MOTION, ANSWER, REPLY AND SURREPLY.

by the District pursuant to Section 25 of the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ" or "Act"), N.J.S.A. 18A: 6-17.3(a)(2), to the Commissioner of Education on or about September 22, 2014. This section provides for the filing of such charges based upon ratings of "Ineffective" or "Partially Effective" during two consecutive annual evaluations. N.J.S.A. 18A: 6-17.3(a)(2).

In the case of Respondent Kelly-Gamble, the tenure charges of "inefficiency" are based upon a "Partially Effective" rating which she received on her annual summative evaluation for the 2012 - 2013 School Year and an "Ineffective" rating she received on her annual summative evaluation for the 2013 - 2014 School Year. It is respectively submitted that these charges are legally, procedurally and factually defective, unwarranted, arbitrary and capricious and must be dismissed, as they do not comply with the standards imposed by TEACHNJ, P.L. 2012, and c.26.

The material facts necessary to resolve this application are undisputed. It is undisputed that the tenure charges filed against Respondent by the District are based solely upon summative/annual evaluation ratings she received for the 2012 - 2013 and 2013 - 2014 School Years pursuant to N.J.S.A. 18A: 6-17.3 (See Petitioner's *Charge One: Inefficiency* paragraph "a" and *Statement of Evidence* in proceeding paragraphs 17 & 49 which reflect two summary/annual evaluations which rated the Respondent "Partially Effective" for the 2012 - 2013 School Year and "Ineffective" for the 2013 - 2014 School Year.) (*See* Exhibit A).

As discussed below, pursuant to the applicable statutory provisions, as well as guidance from the Office of the Commissioner (See attached Guidance from the Commissioner's Office & Department of Education attached hereto as Exhibit C), the 2012 - 2013 School Year served only as a "pilot" year for purposes of allowing school districts in New Jersey, including the Petitioner District, to develop, enhance and refine their observations and evaluation forms, procedures, training, guidance and rubrics for their tenured teachers with the intention that this evaluation process would go into effect in the 2013-2014 school year.

Those statutory and regulatory provisions allowing for removal of a tenured teacher for alleged "Ineffective" and/or "Partially Effective" performance in two (2) consecutive school years were not intended to and, as a matter of law, did not go into effect until the commencement of the 2013 - 2014 School Year. See N.J.S.A. 18A: 6-120 (e) & N.J.A.C. 6A: 10-4.1 et seq. As such, consideration of Respondent Kelly-Gamble's 2012 - 2013 annual summative/annual evaluation in connection with the instant charges, despite the defects in the assessment and evaluations that are contrary to applicable law, renders the filed tenure charges facially and legally deficient and subject to dismissal by the Commissioner or the assigned Arbitrator.

The Petitioner School District claims, without any legal support for its posture and assessment, that its participation in a "pilot program" during the 2011 - 2012 School Year somehow exempts it from the mandates of the TEACHNJ Act and its regulations. The obvious flaw in that argument is that this so-called 2011 -

2012 pilot program actually occurred prior to the passage of TEACHNJ, which was signed into law on August 6, 2012 by Governor Chris Christie. It is therefore meaningless under the law. In fact, it is obvious that the purpose of the 2011 – 2012 School Year pilot program was to assist in the development of what later became and was ultimately passed as the TEACHNJ Act. No matter how much it may protest, the Petitioner remains subject to that Act and its implementing regulations.

Instead of citing any applicable law in support of its position, the District actually throws out a series of distractions. It claims that somehow a collective bargaining agreement, memorialized as a Memorandum of Agreement ("MOA") between the Respondent's Union, the Newark Teachers Union Local 481 ("NTU") and the Petitioner District, allows it to utilize the 2012 – 2013 School Year for purposes of bringing Inefficiency Charges. Of course, the Petitioner cannot cite any language in the MOA which supports that proposition and ridiculous conclusion. Besides, even if it could, the MOA would not trump the applicable law which would preempt the terms of the MOA. *See,* State v. State Supervisory Employees' Assn., 78 N.J. 54, 80-81 (1978).

Although the MOA references using ratings of "Highly Effective" or "Effective" for evaluations received during the 2012 – 2013 School Year, these ratings are only used with regard to the award of performance bonuses or other salary decisions — which are properly governed by the parties collective negotiations — not with regard to the revocation of teaching staff members'

statutory tenure rights. In fact, the MOA does not mention tenure at all. Accordingly, the MOA cannot possibly provide the basis to file tenure charges based upon the 2012 – 2013 School Year evaluations. *See,* In the Matter of Sandra Cheatham, Agency Docket No. 226-8/14 (Bluth, 2014); In the Matter of Neil Thomas, Agency Docket No. 244-9/14 (Simmelkjaer, 2014) and In the Matter of Elena Brady, Agency Docket No. 270-9/14 (Klein, 2014).

The Petitioner School District has not, and cannot cite any alternative basis for proceeding against the Respondent. If the District wishes to pursue tenure charges against a seasoned educator who, prior to the 2012 – 2013 School Year had received nothing but exemplary evaluations, based on only one (1) year of allegedly deficient performance, then it is required to reinstate Respondent and go back to the proverbial drawing board by properly noticing the Respondent of any new charges in accordance with the applicable statutory and regulatory procedure.

And contrary to the District's argument about the transmittal of the charges and the motion to the Arbitrator, this did not constitute a determination that the District complied with the many strict standards imposed by the evaluation process pursuant to N.J.S.A. 18A:6-17.3. Likewise, the District cannot now simply request that the Arbitrator magically transform the charges brought under one (1) specific section of the law into a different type of charge altogether (N.J.S.A. 18A:6-16) as suggested by Petitioner District, simply because it is fearful that its house of cards will crumble using the flawed designs it chose to

build it upon.

Finally, the District's reliance on arbitration decisions decided prior to the effective date of TEACHNJ, in support of the general proposition that it cannot be foreclosed from preceding against Respondent are of no significance as all of these decisions precede the implementation date of the TEACHNJ Act. Instead, as the law and the evidence reveals, the District's claims are nothing more than an attempt to obfuscate a clear statutory mandate, which demands that the matter be dismissed in its entirety.

Pursuant to N.J.A.C. 6A: 3-5.5, the Commissioner is authorized to dismiss a charge of inefficiency. The regulation provides in relevant part:

> Except as specified in N.J.A.C. 6A: 3-5 1(c), within 10 days of receipt of the charged party's answer or expiration of the time for its filing, the Commissioner shall determine whether such charge(s) are sufficient, if true, to warrant dismissal or reduction of salary. **If the charges are determined insufficient, they shall be dismissed and the parties shall be notified accordingly** . . . . [*emphasis added*].

As detailed below, because the District's charges of inefficiency are woefully deficient, the Commissioner and his designated Arbitrator are authorized to and should dismiss the charges as a matter of law as permitted by the aforementioned statute as well as N.J.S.A. 18A:6-17.3(c) which authorizes the assigned Arbitrator to make that same assessment and decision.

The Arbitrator is vested with full and complete authority to rule on the instant application and to dismiss the instant tenure charges prior to hearing. The

TEACHNJ Act and the regulations promulgated by the Department of Education in connection with the Act, set forth a detailed procedure for the filing of tenure revocation charges alleging inefficiency. Built into this filing procedure is a comprehensive review process to ensure that school districts filing Inefficiency Charges have complied with the evaluation procedures required by law. *See,* N.J.A.C. 6A:3-5.1 (c) and N.J.S.A.18A:6-17.3.

Notably, this review process requires a determination of compliance with evaluation procedures at each stage of the filing process and prevents such tenure charges from proceeding to arbitration "if the evaluation process has not been followed." *See,* N.J.A.C. 6A:3-5.1 (c). The TEACHNJ Act contains identical language, which also provides that a board of education and/or the Commissioner shall forward the charges "unless [they] determine that the evaluation process has not been followed." N.J.S.A. 18A:6-17.3 (b) and (c). Indeed, and as confirmed by the DOE in its regulatory guidance document: "[d]istricts must ensure the following evaluation procedures are followed (at minimum) prior to filing an inefficiency charge. Failure to adhere to these requirements can result in the tenure charge being dismissed."

The District's contention that a tenure charge cannot be dismissed absent a determination that its failure to follow the mandated evaluation process "materially affected the outcome of the evaluation in the relevant school year" finds absolutely no basis in law or reality. N.J.A.C. 6A:3-1 (c) is clearly devoid of any such requirement, and dictates that any failure to abide by the evaluation

procedure prohibits the movement of the tenure charges to the next stage of the filing process, including an arbitration proceeding.

The language quoted by the School District is actually derived from Section 23 of the TEACHNJ Act (N.J.S.A. 18A:6-17.2). That section entitled "Considerations for Arbitrator in rendering decision," limits the issues that an arbitrator can consider, and in turn, the defenses an employee can raise at an arbitration hearing. One of those defenses is whether "the employee's evaluation failed to adhere substantially to the evaluation process. . ." It is readily apparent, however, that the restrictions set forth in N.J.S.A. 18A:6-17.2 only apply to decisions on the substantive merits of a tenure charge which occur only after an arbitration hearing has concluded. Thus, N.J.S.A. 18A:6-17.2 has no bearing on a pre-hearing motion to dismiss, which seeks a ruling on a procedural arbitrability issue. To conclude otherwise would render the review provisions set forth in N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1 (c) a nullity.

Accordingly, Respondent's motion is properly before the Arbitrator for resolution, as he is vested with the authority to enforce school laws once a "controversy and dispute" has been transferred to him, including ruling on procedural and substantive motions before, during and after a substantive hearing. This is consistent with the Commissioner's authority to appoint an "Arbitrator" to examine the charges and conduct an appropriate hearing provided in N.J.A.C. 6A:3-5 (c)(5).

The District has unequivocally stated that these tenure charges of inefficiency have been filed against Respondent Kelly-Gamble pursuant to Section 25 of TEACHNJ *Act.* N.J.S.A. 18A: 6-17.3, which mandates the filing of an inefficiency charge in instances where a teacher is "rated ineffective or partially ineffective in an annual summative evaluation" for at least two years. See N.J.S.A. 18A-6-17.3(a) (1) and (2). Where that prerequisite is met, Section 25 effectively divests school superintendents of any discretion in filing tenure charges against a tenured teacher by mandating that "inefficiency" charges be filed against the teacher. Section 25 of TEACHNJ further provides, however, that " . . . [t]he only evaluations that may be used for the purpose of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the Commissioner pursuant to P.L. 2012, c.26 (C. 18A:6-117 et al)." See also N.J.S.A. 18A: 6-17.3(d).

It is undisputed that the Petitioner District's evaluation/observations form and rubric for 2012 - 2013 School Year had not been approved and authorized by the Commissioner, especially since the use and authorization of the new evaluation process and approved rubrics would not begin until the fall of 2013-2014 School Year. Because Section 25 created a new type of "inefficiency" charge, one that is mandatory if a teacher is rated sufficiently poorly under the new evaluation rubrics established by Section 16 of the TEACHNJ, N.J.S.A. 18A: 6-122, over a specific period of time (at least 2 years – N.J.S.A.18A: 6-17.3(a)(1) & (2)), it is essential that the only evaluations utilized be those which are

conducted under the new evaluation rubrics which did not begin until the 2013-2014 School Year. Indeed, it is important to note that N.J.S.A. 18A: 6-17.3(d) clearly states that "[t]he only evaluations which may be used for purposes of this section [filing of tenure charges for inefficiency] are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L.2012, c.26 (C.18A: 6-117 et al.)".

In the absence of a showing that the Commissioner had approved or authorized the observation and evaluation form & rubrics by the Petitioner District, the utilization of an annual summative evaluation for the 2012 - 2013 School Year by Petitioner School District is plainly inappropriate pursuant to applicable law and the Commissioner's issued Guidance to Districts (See Exhibit C attached hereto) and renders these tenure charges filed against Respondent Kelly-Gamble by the District fatally flawed. It is undisputed that the applicable regulations establishing the guidelines and procedures for the timing and conduct of teacher evaluations and observations pursuant to both TEACHNJ and *AchieveNJ* – and thus the full implementation of TEACHNJ did not go into effect until the beginning of the 2013-2014 school year, in October 2013. See N.J.S.A. 18A: 6-120 (e) & N.J.A.C. 6A: 109-1.1 et seq.

These regulations include, but are not limited to, provisions governing the content of evaluation rubrics and components (N.J.A.C. 6A: 10-4.1), procedures on rubric approval by the Commissioner (N.J.A.C. 6A: 10-5.1); and critically the development of procedures concerning the timing, form, nature and number of

teacher evaluations and observations required (N.J.A.C. 6A: 10-4.4) among other requirements. While TEACHNJ allowed for the adoption of evaluation rubrics by School Districts, including the Petitioner District, as of December 31, 2012 (about midway through the 2012 - 2013 School Year), it does not follow that utilization of evaluations conducted under those rubrics for tenure charges was sanctioned, approved, authorized, warranted or appropriate. See N.J.S.A. 18A: 6-17.3(d). N.J.S.A. 18A: 6-123 (d) provides that the "Beginning no later than January 31, 2013, a board of education **shall implement a pilot program** to test and refine the evaluation rubric." [*emphasis added*]. N.J.S.A. 18A: 6-123 (d).

In fact, utilization of the preliminary evaluation rubrics (by no later than January 31, 2013) was merely developed as a "pilot program" to test and refine those evaluation rubrics – not full implementation of it. N.J.S.A.18A: 6-123(e) specifically provides that the implementation does not occur until the 2013 - 2014 School Year by indicating that: "Beginning with the 2013 - 2014 School Year, a board of education shall ensure implementation of the approved, adopted evaluation rubric for all educators in all elementary, middle, and high schools in the district". Therefore, it is quite clear that the evaluation rubric used to assess the Respondent Kelly-Gamble's teaching performance during the 2012 - 2013 School Year was simply a "pilot program" not yet authorized or approved by the Commissioner and thus cannot be used in filing tenure charges against her.

Indeed, as noted above, the entire teacher evaluation and observation guidelines and process was not established and approved by the

Commissioner until October 2013, after the commencement of the 2013 - 2014 School Year nor did the District have in place, as required by N.J.S.A. 18A: 6-120 and N.J.A.C. 6A: 10-3.1, a School Improvement Panel at Respondent Kelly-Gamble's school during the 2012 - 2013 School Year. The absence of a duly created School Improvement Panel is a critical deficiency in the Petitioner District's tenure charge proceeding in its failure to establish that Panel pursuant to both N.J.S.A. 18A: 6-120 and N.J.A.C. 6A: 10-3.1 to assist and enhance teaching effectiveness.

N.J.S.A. 18A: 6-120 and N.J.A.C. 6A: 10-3.1 require that each school within a district establish a School Improvement Panel that conducts evaluations and oversees the mentoring program. Specifically, N.J.S.A. 18A: 6-120 provides, in relevant part, that "[t]he panel shall oversee the mentoring of teachers and conduct evaluations of teachers, including an annual summative evaluation, provided that the teacher on the school improvement panel shall not be included in the evaluation process, except in those instances in which the majority representative has agreed to the contrary." How can a School Improvement Panel be responsible for the conduct of evaluations and implementation of TEACHNJ during the 2012-2013 school year when the Panel was nonexistent during the 2012-2013 school year and did not come into existence until late in 2014? The answer is quite simple: It cannot.

As to the Respondent Kelly-Gamble, there is no evidence produced by the Petitioner District that the School Improvement Panel at her school had been in

existence in the 2012 - 2013 school year (the pilot year) created as required by statute or even met with Respondent Kelly-Gamble at any time in the 2012 - 2013 and 2013 - 2014 School Year (See Exhibit B Respondent Kelly-Gamble's Response to the tenure charges dated September 15, 2014 /Answer to Notice of Tenure Charge of Inefficiency).

Thus, the statutory and regulatory evaluation and observation process implemented by school districts in the 2012 - 2013 School Year was merely a preview of the "new" process intended to bring both teachers and evaluators up-to-speed on the new evaluation system and its requirements for the upcoming 2013-2014 school year, with formal implementation of those requirements commencing at the beginning of the 2013 - 2014 school year. It, therefore, stands to reason that the Petitioner District's failure and/or inability to meet the standards of the new statutory and regulatory evaluation and assessment process during the 2012 - 2013 School Year renders formal judgment of Respondent Kelly-Gamble's teaching performance for that year, through the "new" tenure removal proceedings, inappropriate, unlawful, *de facto* arbitrary and capricious.

This is supported by information and guidance disseminated by the Department of Education outlining and explaining the new evaluation process for filing inefficiency charges under TEACHNJ and the new evaluation system (*AchieveNJ*), which provides that a district's evaluations and observations for purposes of commencing tenure charges must comply with all applicable

statutory or regulatory requirements. A copy of this guide entitled "Summary of Legal Requirements for Evaluation and Tenure Cases" is attached hereto as Exhibit C. It provides, in part, that:

> '[t]he TEACHNJ Act outlines a new process for filing inefficiency charges under the new evaluation system (*AchieveNJ*). This guide outlines **the actions required in law before bringing an inefficiency tenure charge based on the new tenure revocation process** . . ..' [*emphasis added*].

The plain meaning of the statute tells us that the 2012 – 2013 School Year was intended to serve as a test run for purposes of all tenure related issues – not only criteria for attaining tenure, but also for completing evaluations and observations under the new evaluation procedures and rubrics, and revocation of tenure. Pursuant to the nature of the testing phase during the 2012 – 2013 School Year under the statute, it was not until the start of the 2013 – 2014 School Year that the revised evaluation law and regulations went into effect. That the District may have opted into a pilot program in the prior year 2011 – 2012 is inconsequential.

Further evidence that the 2012 – 2013 School Year was intended to serve as a test run is found in the voluminous publications issued by the DOE itself, as well as the reports issued by the various committees that were convened by the DOE in anticipation of the implementation of the new law in 2013 – 2014. For example, in a guidance document issued by the Department of Education and entitled "Excellent Educators for New Jersey," the Department explicitly set forth the 2011 – 2012 pilots in which the District participated; the 2012 – 2013

statewide pilots and the then anticipated implementation of both TEACHNJ and its implementing regulations for the 2013 – 2014 School Year. Throughout this document, the State makes clear that the new evaluation system would not be implemented until the 2013 – 2014 School Year.

Moreover, the DOE's 2012 *Evaluation Pilot Advisory Committee EPAC Interim Report*, which was issued by the Committee appointed by the Department of Education to oversee the pilot program, declared its mission quite clearly, stating in the Executive Summary that "New Jersey is preparing to implement a statewide educator evaluation system in the 2013 – 2014 School Year. That same report provides a plethora of evidence that the 2012 – 2013 School Year was used as a year to prepare for the implementation of the new evaluation system.

While it is undisputed that Petitioner School District did participate in that pilot, it must be made clear that its participation was extremely limited. As detailed in the report and the District's recent submission in opposition to the Motion, only seven (7) Newark public schools participated in the pilot. Based on a review of the Petitioner's website, there are approximately sixty-five (65) schools in Newark. Thus, barely 10% of the Newark schools actually participated in the 2011 – 2012 pilot program. More importantly, the 2012 EPAC Report repeatedly indicates that "[t]here is still a great deal of work to be done... More clarity is needed... And that the decision to push back full implementation to 2013 – 2014 was met with universal acclaim by EPAC members." All are signs that the law

was not then in effect anywhere, and was not intended to be in effect.

The 2013 *Evaluation Pilot Advisory Committee Final Report* similarly explains in great detail, not only the purpose of expanding the pilot to include the 2012 – 2013 School Year, but also the results of that pilot year, with an eye again to implementation of the law for the 2013 – 2014 School Year. The EPAC Report in 2013 stated that extending the pilot for a second year "was critical to many of [its] policy decisions... and provided for districts to learn about SGOs (Student Growth Objectives) and prepare for implementation in the 2013 – 2014 School Year." Notably, the Petitioner School District also participated in the second year of the pilot program for principal and teacher evaluation systems concurrently with the official state evaluation pilot and shared information with the Department during both years of the pilot program.

In addition, the "*Summary of Legal Requirements for Evaluation and Tenure Cases* definitively frames the minimum requirements for bringing the instant tenure charges, including specific compliance with N.J.A.C. 6A:10- 2.4, 4.4, 4.5 etc., which did not exist during the 2012 – 2013 School Year. Finally, the Department of Education issued *Frequently Asked Questions (*FAQs), which provided as follows:

> Q. Will summative ratings 'count' this year (2012 – 2013) toward tenure decisions?
>
> A. No the only item 'on the clock' is the mentorship year for new teachers. No evaluation outcomes in the 2012 – 2013 school year will impact tenure decisions. 2013 – 2014 is the first year where the statewide system will be in place, and the first year

when summative rating clock (i.e. teachers needing to be rated at least effective for two of three years) will start.

Among the "actions required in law" is the regulatory scheme established by the Commissioner – and not adopted until October 2013 – providing for minimum observation requirements for tenured teachers, a mandatory summative evaluation process, minimum Corrective Action Plan requirements and the existence of a School Improvement Panel, among other mandates. Simply stated, the Department of Education's own statutory and regulatory guidance for tenure cases precludes consideration of evaluations conducted prior to full implementation of both the TEACHNJ Act and *AchieveNJ* for the 2013 - 2014 School Year.

The District, in an attempt at polite subterfuge and confusion, asserts that it conducted its own pilot program during the 2011 – 2012 school year preceding the enactment of TEACHNJ and was thereafter officially authorized to fully implement its own teacher evaluation program during the 2012 – 2013 school year. Thus, the Petitioner School District maintains that it can proceed with the filing of Inefficiency Charges pursuant to N.J.S.A. 18A:6-17.3. This position, however, completely ignores the express language of the TEACHNJ Act and its implementing regulations; the voluminous DOE issued *Guidance Directives*, as well as the fundamental principles governing the waiver of statutory rights and the deference that is regularly accorded administrative agencies in interpreting their own regulations.

In conclusion, the District is unable to cite any legal authority or exhibits that would permit the Arbitrator to simply ignore the plain and unambiguous language of the relevant statute and regulations. The District's compliance with evaluation procedures is a prerequisite to proceeding with Inefficiency Charges referred to arbitration. This is a matter of procedural arbitrability and cannot be ignored. Because Respondent Kelly-Gamble's 2012 - 2013 annual summative evaluation is precluded from consideration by the Commissioner or the assigned Arbitrator, the District lacks the required two consecutive deficient performance evaluations necessary to bring tenure charges against Respondent Kelly-Gamble pursuant to N.J.S.A. 18A:6-17.3(a) (1) & (2). As a result, these tenure charges must be dismissed.

Petitioner State Operated School District City of Newark

TEACHNJ required all New Jersey public school districts to develop "evaluation rubrics" to assess the performance of their teachers, and to obtain approval for their "rubrics" from the New Jersey Department of Education ("DOE") by December 31, 2012. N.J.S.A. 18A:6-123(c). To comply with that mandate, the District adopted an evaluation rubric as part of a performance evaluation system known as the Newark Public Schools Framework for Effective Teaching ("Framework"), to be implemented beginning in the 2012 - 13 School Year. To inform its teachers and school administrators of the new Framework and to provide guidance on its implementation, the District published a

Guidebook to the Framework for use in 2012 - 2013. *Id.* The Framework clearly describes the new "levels of performance" as highly effective, effective, partially effective and ineffective. *Id.*

In October 2012, the District and the Newark Teachers Union ("NTU") (the exclusive bargaining representative for the District's teachers, among other employees) entered into a Memorandum of Agreement ("MOA") for a successor collective bargaining agreement. The MOA provided that a new evaluation process would be implemented beginning in the 2012 - 2013 School Year. *Id.* In particular, Section I.A. of the MOA states:

> NPS WILL IMPLEMENT A NEW EVALUATION SYSTEM BEGINNING SY 2012-2013. In accordance with the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), N.J.S.A. 18A:6-117 *et seq.*, teachers will receive an annual summative evaluation rating that designates them as highly effective, effective, partially effective or ineffective. [*emphasis added in original*].

Section II of the MOA pertains to compensation and benefits. *Id.* Section II.A.4 states again that "NPS [the District] shall implement a new educator evaluation system with four (4) summative rating categories beginning in school year 2012 - 2013." This section further provides that the entire agreed-upon compensation system would be based on teacher performance as measured by the new evaluation framework. As such, the NTU specifically agreed to a new evaluation system to be used in the MOA.

Moreover, the District had implemented four (4) summative rating

categories beginning in the 2011 - 2012 School Year. During the 2011-2012 school year, seven (7) of the District's schools participated in a "pilot" of a new teacher evaluation system ("2011 - 2012 Pilot Program"). The District's 2011-2012 Pilot program was part of the Department's Excellent Educators for New Jersey ("EE4NJ") teacher evaluation pilot in which eleven (11) school districts participated, including the District. The Department of Education approved the District's participation in the pilot program and allowed the District to begin using the new framework and new rating system in the 2011 - 2012 School Year. This framework and new rating system was then used throughout the entire district in the 2012 - 2013 School Year following the adoption of the MOA and the passage of TEACHNJ.

On October 24, 2014, the State of New Jersey Department of Education ("DOE") responded to the District's request for clarification of the DOE's intent in the "Guide to the TEACHNJ Act," as well as the status of the District's evaluation rubric during the 2012 - 2013 School Year. The DOE provided the following clarification with respect to its intent in the "Guide to the TEACHNJ ACT":

> [s]ince August 2012, the Department has published many resources meant to support districts in the implementation of the Act. One such document was a response to questions regarding TEACHNJ's new requirement that teachers must demonstrate four years of teaching within a school district, with a rating of effective or highly effective in two annual summative evaluations within the first three years of employment. . . [many non-tenured teachers requested] that the District clarify how the law applied to their tenure acquisition and the Department responded accordingly:
>
> *No evaluation outcomes in the 2012-2013 school year will impact tenure decisions, 2013-2014 is the first year where the*

> *statewide system will be in place, and the first year when the summative rating "clock"... will start.*
>
> [S]uch clarifications did not indicate a prohibition on school districts to use 2012-2013 evaluation data to make personnel decisions, such as the decision to renew or non-renew a non-tenured teacher or the decision to bring a tenure charge of inefficiency against a tenured teacher. . . In fact, the Department issued multiple publications notifying pilot school districts that any personnel consequences connected with evaluations were a matter of local decision and applicable State law. . . The Department did not perceive any limitations to the use of evaluation rubrics in the 2012-2013 school year for personnel decisions as no such limitation is mentioned in the TEACHNJ Act. *Id.* [*emphasis supplied in original document].*

Accordingly, the tenure charges filed against the Respondent are valid and should proceed to hearing.

Contrary to Respondent's bald assertion, it is not undisputed that the tenure charges are based on only the Respondent's Annual Summative Evaluation for School Years 2012 - 2013 and 2013 - 2014. Respondent's characterization of the facts in this matter as "undisputed" is simply not a true statement. The Notice of Inefficiency Charges states that: "I hereby file charges based upon inefficiency, pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1 (*See,* Exhibit A to Certification of Shana T. Don, Esq., hereinafter "Don Cert."). These charges were filed based upon both the "new" inefficiency standard of TEACHNJ's N.J.S.A. 18A:6-17.3 encompassing two consecutive annual evaluations for poor performance and the "old" inefficiency [standard] of N.J.S.A. 18A:6-16. *Id.* [*emphasis supplied in original*]

The Charges, again contrary to Respondent's assertion, list nineteen (19)

separate bases for the Charge of Inefficiency of which the Annual Summative Evaluations for School Years 2012 - 2013 and 2013 – 2014 are only two (2). The Statement of Evidence appended to the Notice of Inefficiency is comprised of twenty-seven (27) exhibits, again of which the Annual Summative Evaluations for School Years 2012 – 2013 and 2013 – 2014 again comprise only two (2). The remainder of Respondent's brief is factually inaccurate. Without belaboring the factual discrepancies between Respondent's allegations and the filed Tenure Charges, the litany of disputed facts demonstrates the necessity of holding a hearing in this matter. Should the Respondent wish to raise an argument concerning the District's filing of tenure charges of inefficiency against Respondent, the proper mechanism is to elicit evidence to support any such contention at a hearing, in accordance with N.J.S.A. 18A:6-17.2(3) and (4). Moreover, neither statute cited by Respondent, N.J.S.A. 18A:6-17.2 nor N.J.A.C. 6A:3-5.3 provide for summary disposition of tenure charges. Therefore, disposing of this matter prior to a hearing on the merits is inappropriate and the Motion to Dismiss should be denied.

Additionally, Respondent's intertwined argument that the inefficiency charges cannot be brought until after the conclusion of the 2014 – 2015 School Year pursuant to the TEACHNJ Act, N.J.S.A. 18A:6-117 *et seq.* is also not properly before the Arbitrator. As a threshold matter – and as Respondent herself notes repeatedly – it is the Commissioner of Education who is solely authorized to determine the sufficiency of the evaluation process and resulting tenure

charges. N.J.S.A. 18A:6-16. Thus, a dispositive motion by a teacher subject to tenure charges based upon the failure of a board of education to follow the evaluation process may only be made to the Commissioner prior to the referral to an arbitrator.

The role of an arbitrator in a tenure proceeding is set forth in N.J.S.A. 18A:6-17.1. Under TEACHNJ, tenure charges are no longer transmitted to the Office of Administrative Law and are instead submitted to an arbitrator to be evaluated under specific criteria and under strict time lines. Once it is found that the tenure charges are sufficient, based upon appropriate criteria and a referral is made to an arbitrator, an arbitrator's authority is confined to a determination of the following: (a) whether or not the employee's evaluation failed to adhere substantially to the evaluation process; (b) whether there was a mistake of fact in the evaluation; (c) whether the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, or discrimination, or (d) whether the board of education's actions were arbitrary and capricious. N.J.S.A. 18A:6-17.2.

Therefore, whether the District acted in compliance with law in filing charges based upon the 2012 – 2013 school year has been answered in the affirmative by the Commissioner of Education and is outside the scope of the arbitrator's authority. This vested authority has been recognized by arbitrators in tenure hearings under TEACHNJ. See, I.M.O. the Tenure Hearing of Edgar Chavez, State Operated School District of the City of Newark, Essex County,

Docket No. 269-9/12 (February 6, 2013) (an arbitrator recognized the Commissioner's statutory authority and provided that "[b]ecause the charges have been deemed sufficient by the Commissioner, I find I need not determine whether or not the District complied with claimed controlling procedures and process or whether the District was required to comply with a tiered evaluation system or other issue"). *Id.* Thus, the Respondent's Motion should be denied on its face as the Commissioner has deemed these charges sufficient to proceed to hearing and indeed directed that a hearing be held on the merits of the case.

Here, the Respondent is arguing *inter alia*, that the evaluation process was not followed because the filing of the tenure charges was premature pursuant to the Act. N.J.A.C. 6A:3-5.3(a)(1), the relevant regulation governing a Motion to Dismiss under TEACHNJ provides that an individual who was served with tenure charges is not precluded from filing a motion to dismiss in lieu of an answer to the charges. This provision is consistent with N.J.A.C. 6A:3-1.5(g), which allows a motion to dismiss to be filed in lieu of an answer in response to petitions filed with the Commissioner. The Respondent did not, however, properly file her Motion to Dismiss with the Commissioner prior to the referral to the Arbitrator. Thus, the motion must be denied as a matter of law.

Contrary to Respondent's argument relating to prematurity, the Act was enacted on August 6, 2012, and went into effect prior to the commencement of the 2012 – 2013 school year. The effective date of the Act is provided after each section of the Act and the statutes that established the procedure for adjudicating

tenure charges. *See*, N.J.S.A. 18A:6-117 to 129 and N.J.S.A. 18A:6-16 through 17.5 respectively. It is therefore indisputable that evaluations conducted in the 2012 – 2013 school year may be used in tenure charges of inefficiency and the charges against the Respondent are not premature.

Further, this conclusion was clearly expressed by the New Jersey State [Department] of Education ("DOE") on October 24, 2014, in correspondence discussed further above, expressly stating that District evaluations conducted during the 2012 – 2013 school year were to be used to evaluate teacher efficiency. *See*, Exhibit B, Don Cert; *see also*, the effective date of adoption of each section of the Act and the statutes that established the procedure for adjudicating tenure charges. N.J.S.A.18A:6-117 to 129 and N.J.S.A. 18A:6-16 through 17.5, respectively.

Respondent relies upon the tenure case I/M/O the Tenure Hearing of Sandra Cheatham, School District of the City of Newark, Docket No. 226-8/14 to suggest that this Arbitrator find that Petitioner's inefficiency charge is premature. However, Respondent failed to cite any statute that indicates that the effective date of adoption of TEACHNJ was a later date. As such, the Respondent's reliance on anything other than the TEACHNJ statute should be given no weight in this matter.

Respondent's reliance on the decision I/M/O the Tenure Hearing of Neil Thomas, State-Operated School District of the City of Newark, Docket No. 244-

9/14 is also misplaced. The issues here are controlled by statute, not non-binding decisions. It is imperative to note that the practical effect of these decisions, which the District maintains may very well be overturned on appeal, is that Respondent would essentially get a "free pass" for years of poor performance. Simply, Respondent is not entitled to a "free pass" for one (1) year of poor evaluations and ineffective teaching.

Importantly, as a distinction in the Thomas case, this matter was initially [pled] under both sections of the Tenure Law – the old and the new. (The Arbitrator in Thomas provided "[s]ince the District's inefficiency charge was not pleaded in the alternative, but rather bases on TEACHNJ, it cannot amend its pleading at this juncture." While N.J.S.A. 18A:6-17.3 provides for mandatory charges brought on the basis of two consecutive annual ratings of ineffective or partially effective, N.J.S.A. 18A:6-16 provides for charges when those specific conditions have not been met but dismissal is nonetheless warranted on the basis of inefficiency or any other grounds specified by statute. *See,* N.J.S.A. 18A:6-10. Therefore, because the District pled tenure charges under both statutes and the Arbitrator has jurisdiction to decide this matter of inefficiency under either N.J.S.A. 18A:6-16 or N.J.S.A. 18A:6-17.3 of the TEACHNJ Act, this case should proceed to hearing.

Furthermore, since TEACHNJ's adoption, arbitrators have not hesitated to consider tenure charges of inefficiency in non-mandatory cases pursuant to N.J.S.A. 18A:6-16. *See, e.g.,* I/M/O Tenure Hearing of Lawrence E. Hawkins,

State-Operated School District of the City of Newark, Docket No. 243-10/13 (March 10, 2014) (where the Arbitrator sustained the charges of inefficiency and dismissal of Respondent); I/M/O Tenure Hearing of Felicia Pugliese, State-Operated School District of the City of Newark, Docket No. 272-9/12 (February 15, 2013) (Arbitrator upheld the tenure charges of inefficiency against the Respondent), *confirmed*, Superior Court of New Jersey, Chancery Division, Essex County, Docket No. C84-13 (oral opinion September 16, 2013), *appeal pending*, Docket No, A-000857-13.

In contrast to this trend, in Cheatham, the arbitrator overstepped his authority in making a decision as to the appropriateness of the District's evaluation process, a matter expressly left to the Commissioner pursuant to N.J.S.A. 18A:6-10 and 17.3. As discussed *supra*, N.J.S.A. 18A:6-10 requires that once a matter is transmitted to arbitration by the Commissioner, the arbitrator must proceed to a hearing on the merits. The Commissioner alone, had the authority to examine tenure charges once transmitted to the Commissioner by the District. *Id.*

Respondent has recently submitted two (2) additional cases. At base, the Award entered in I/M/O the Tenure Hearing of Sandra Brienza and the State Operated School District of the City of Newark, Docket No. 235-8/14, is a wholesale adoption of Cheatham, without consideration of either the Arbitrator's authority or citation to any authority on which basis to wholly adopt the reasoning of another arbitration decision. The same tactic was adopted by Arbitrator

Gregory in I/M/O the Tenure Hearing of Lorraine Williams and the State Operated School District of the City of Newark, Docket No. 255-9/14, and as argued above, although these arbitration decisions may be considered by an arbitrator they are neither binding nor the law.

No final decision on the merits has been adopted in these matters and the District has the right of appeal, which it fully intends to invoke in each instance. In each and every decision subsequent to Cheatham, which too shall be appealed, an arbitrator improperly invoked the doctrine of collateral estoppel. Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 521, 523 (2006), held that the invocation of the doctrine is not permitted to foreclose a party from asserting a legal claim or defense unless that party is unable to appeal it as a matter of law. *See also*, Lopez v. Patel, 407 N.J. Super. 79 (2009).

In conclusion, under N.J.S.A. 18A:6-16, the issue before the arbitrator is whether the evidence in the record presented supports the charge of inefficiency. *See,* Hawkins, *supra,* pp. 39-43; Carter, *supra*, pp. 24-27; Pugliese, *supra*, pp. 8-10. The only issue for the arbitrator is whether the record supports a finding that the charges are true. *See,* Chavez, *supra*, pp. 11-12. Accordingly, even if the Arbitrator here concludes, notwithstanding the facts and argument presented herein, that the requirements for inefficiency tenure charges under N.J.S.A. 18A:6-17.3 have not been met, the inefficiency charge against Respondent should not be dismissed. Instead, the charge must be evaluated under N.J.S.A. 18A:6-16, as initially pled, with the case proceeding to hearing. For the foregoing

reasons, the Respondent's Motion to Dismiss must be denied in its entirety.

IV. STATEMENT OF THE CASE

At the outset and as a threshold matter, the Petitioner insists that I lack jurisdiction to entertain the instant motion, as it is the Commissioner of Education who is solely authorized to determine the sufficiency of the evaluation process and resulting tenure charges, per N.J.S.A. 18A:6-16. From the District's point of view, therefore, a dispositive motion by a teacher subject to tenure charges based upon the failure of a board of education to follow the evaluation process may only be made to the Commissioner prior to the referral to an arbitrator.

Such a narrow reading of the TEACHNJ Act and its enabling regulations was not contemplated by the framers. The plain language of N.J.S.A.18A:6-16 provides the Commissioner of Education with the discretion to determine that if a tenure charge is sufficient to warrant dismissal or reduction in salary of the person charged, "he shall refer the case to an arbitrator pursuant to section 22 of P.L. 2012, c. 26 (C.18A:6-17.1) for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner *may* retain the matter for purposes of deciding the motion."

The pre-Act Administrative Code regulation is found at N.J.A.C. 6A:3-1.5(g) in the SUBCHAPTER 1. GENERAL PROVISIONS section, and permits a respondent to file a motion to dismiss in lieu of an answer. It goes on to say that "briefing on the motions shall be in the manner and within the time fixed by the

Commissioner or by the ALJ if the motion is to be briefed following transmittal to the OAL. The subsequent regulation found at N.J.A.C. 6A:3-5.3(a)1 under SUBCHAPTER 5. CHARGES UNDER TENURE EMPLOYEES HEARING ACT tracks the prior language and substitutes "arbitrator" for "ALJ."

Read *in pari materia*, the statute and the regulation therefore clearly contemplate that dispositive motions may be heard by an arbitrator assigned to a tenure dispute. The Petitioner has asserted that neither N.J.S.A. 18A-17.2 nor N.J.A.C. 6A:3-5.3 provide for the summary disposition of tenure charges. Such a position misses the mark, however, as Respondent has correctly maintained, the former limiting arbitral review in inefficiency cases refers to a hearing on the merits and not a pre-hearing motion. And while the latter may not expressly address this situation, it does not proscribe it. Under those circumstances, the AAA Labor Arbitration Rules are controlling, per N.J.S.A.18A:6-17.1c. Rule 27, *Evidence and Filing of Documents* confers broad discretion on an arbitrator to accept and to determine the relevancy and materiality of evidence, while Rule 47 permits him to interpret and apply the rules insofar as they relate to his powers and duties.

Furthermore, I fully credit the position of Respondent, that arbitrators in tenure hearings are vested with the authority to enforce school laws once a "controversy and dispute" has been transferred to them, including ruling on procedural and substantive motions before, during and after a substantive hearing. This is consistent with the Commissioner's authority to appoint an

arbitrator to examine the charges and conduct an appropriate hearing as provided in N.J.A.C. 6A:3-5.1 (c)5. *See,* I/M/O of the Tenure Charge of Inefficiency Against Neil Thomas and the State Operated School District of the City of Newark, Agency Docket No. 244-9/14 (Simmelkjaer, 2014 at p. 33).

Nor is Petitioner's reliance upon the boilerplate language in the DOE's transmittal letter that "[t]he Commissioner is unable to determine that the evaluation process has not been followed," of any moment. Moreover, as Arbitrator Klein has remarked "[i]n other words, the Commissioner is expressly not making a finding." *See generally*, I/M/O the State Operated School District for the City of Newark and Elena Brady, Agency Docket No. 270-9/14 (Klein, 2014 at p. 8). [*emphasis supplied in original*].

Furthermore and as a practical matter, Petitioner's jurisdictional position is at variance with the actions of the Commissioner in this very case, and its prior conduct. In that regard, when the District filed its own MOTION TO DISMISS seeking a default judgment, DOE transmitted that application to me for resolution. As previously discussed, no threshold challenges to arbitral authority were lodged at that time by the Petitioner, which thoroughly litigated its position before me. It is accordingly somewhat curious that the District apparently believes I am empowered to hear its own dispositive motion but not Respondent's. Based upon the foregoing considerations, I find that the instant motion is properly before me for resolution.

In deciding this MOTION TO DISMISS this inefficiency tenure charge, any disputed facts have been viewed in a light most favorable to the non-moving party, in the case the Newark School District. As the proponent of this affirmative defense which operates as a threshold consideration, Respondent Kelly-Gamble accepts the burden of making a *prima facie* demonstration of her entitlement to the same, by a preponderance of the credible evidence. Once that is satisfied, the burden shifts to the Petitioner to attempt to rebut this prefatory showing through its affirmative defenses. Upon my analysis of the respective arguments and case citation exhaustively set forth in the parties' briefs, I find that the instant tenure charges of inefficiency must be **DISMISSED WITH PREJUDICE,** as the District has been unable to rebut the Respondent's *prima facie* presentation.

Petitioner suggests that the TEACHNJ Act went into effect on August 6, 2012 prior to the commencement of the 2012 – 2013 School Year, and that it is "[t]herefore indisputable that evaluations conducted in the 2012 – 2013 School Year may be used in tenure charges of inefficiency." While it is certainly true that evaluation rubrics had to be adopted by a board by December 31, 2012, per N.J.S.A. 18A:6-123 (c), the full implementation of the new inefficiency standards governing teacher evaluations came into existence during 2013 -2014.

2/ N.J.S.A. 18A:6-122-123 provide for the annual submission of evaluation rubrics by New Jersey school districts to the Commissioner for review and approval. N.J.A.C. 6A:10-4.1 details the components of the required rubric. The *Guide To The TEACHNJ Act* ("Guide") published by the New Jersey State Department of Education indicates that the districts choose their own observation measure, with the following TEACHER PRACTICE INSTRUMENTS available: Danielson 2011; Danielson 2007; Stronge; McREL; Marzano; Marshall; Rhode Island Model; Other. A footnote advises that a district may choose its own model but must seek the approval of the DOE. A board of education was then obligated to adopt an evaluation rubric approved by the commissioner by December 31, 2012, pursuant to N.J.S.A. 18A:6-123 (c).

Indeed, as Respondent has underlined, the comprehensive guidance published by the Department of Education itself severely undercuts the position of the Petitioner. The *Guide* referenced in note 2 discusses the *Intersect of Act and Regulations,* as follows:

- TEACHNJ Act, P.L. 2012, c. 26 adopted August 6, 2012
- 2 Rounds of Regulation
  - 1st Round
    - Meant to help districts prepare to launch improved evaluations in 2013 – 2014
    - Adopted in February of 2013 (2/7/2013)
  - 2nd Round
    - Proposed March 6, 2013
    - Is meant to contain "more details on evaluation policies and procedures"
    - To be effective for the 2013 – 14 school year
    - Projected adoption date November 2013
- **Practice Point**: What is operative at the beginning of the school year will change mid-year

The *Parameters of the Act* section provides:

Support

- **Required training** on the evaluation system
- Targeted feedback to drive professional development
- **School Improvement Panel** conducts evaluations, leads mentoring, and identifies professional development opportunities

- **Corrective Action Plan** for Ineffective, Partially Effective rating

Evaluation

- Implementation in **2013 – 2014**
- **Four levels** of summative ratings
- Educator practice instruments used for **multiple observations**
- **Multiple objective measures** of student learning for teachers, principals, VPs/APs

Tenure

- Teachers earn **tenure after 4 years based on effectiveness**
- Effective ratings required to maintain tenure
- Dismissal decisions decided by **arbitrators**

[*emphasis supplied in original*]

It is the *History: Timeline for Implementation* section of the *Guide* that is perhaps most telling, and includes:

EVOLUTION OF EVALUATION REFORM IN NEW JERSEY

2010 – 2011

NJ Educator Effectiveness Task Force work	/	Teacher evaluation pilot opportunity announced

2011 – 2012

Teacher evaluation pilot In progress	/	Capacity-building requirements announced for all districts to follow in 2012 – 2013

2012 – 2013

Cohort 2 teacher evaluation/new principal evaluation pilots in progress; districts building capacity	/ New tenure legislation in effect

2013 – 2014

Statewide Implementation of New Evaluation System

In *History: Timeline for Implementation*, the *Guide* identifies the 2013 – 2014 School Year Implementation Guideline. This explained that: "[t]o build capacity leading up to statewide implementation in 2013 – 2014, districts were required to form District Evaluation Advisory Committees and School Improvement Panels, select evaluation instruments, and begin training during SY 12-13. The following timeline depicts additional implementation deadlines for SY13-14:"

By July 1

Train teachers on teacher practice instrument.

By Aug. 31

All teachers hired after May 1, 2013 must be trained on instrument. Districts report to state Department on progress of implementation.

By Oct. 31

Train principals and evaluators on principal practice instrument.

By Nov. 15

Teachers participate in goal-setting conference with their supervisor, finalize SGO(s).

By Feb. 15

Make adjustments to SGOs with approval from a principal and CSA.

By April 30

Complete required observations for non-tenured teachers.

By end of school year[3]

Complete all observations for teachers. Have annual summary conference to review available component scores

See also, N.J.S.A.18A:6-120; N.J.S.A. 18A:6-123 (e); N.J.A.C. 6A:10-4.1 *et seq*; Department of Education's 2012 *Evaluation Pilot Advisory Committee EPAC Interim Report & 2013 Final Report*; *New Jersey DOE Summary of Legal Requirements for Evaluation and Tenure Cases*, March 2014.

The record reflects that seven (7) of the Petitioner Newark District's schools participated in a 2011 – 2012 Pilot Program along with eleven (11) other districts throughout the state, in conjunction with DOE's Excellent Educators For New Jersey Program. Then during the 2012 – 2013 School year, the pilot was continued for the entire District. The parties agree that in both school years, the four (4) category rating system was utilized for teacher evaluations. Based in part upon these facts, Petitioner argues that the "Partially Effective" rating on

3/ The *Guide* also contained a *History Training Timeline*, which contained the 2013 – 2014 Training Requirements for teaching staff members, evaluators, and administrators, which included: all teaching staff members being trained on all components of the evaluation rubric by July 1, 2013; all observers being trained on the practice instrument by August 31, 2013 before observing for the purpose of evaluation, as well as participating in 2 "co-observations (at least 1 before December 1st, with the double observation used to calibrate teacher practice instruments and promote accuracy in scoring; all administrators, principals/assistant/vice principals being thoroughly trained on the principal evaluation rubric by October 31, 2013; superintendents/CSAs certifying each year that observers have been trained and can apply the educator practice instruments accurately and consistently.

Respondent's 2012 – 2013 annual summative evaluation along with the "Ineffective" rating for 2013 – 2014 should be utilized to satisfy the requirements of N.J.S.A. 18A:6-17.3(a)(2).

However, adopting such a position would require that I ignore the foregoing guidance from the very agency tasked with implementation as well as other critical components of TEACHNJ, such as N.J.S.A.18A:6-17.3(d), which mandates that "[t]he only evaluations which may be used for purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L.2012, c.26 (C. 18A:6-117 et al." It also eviscerates the remedial safeguards in the Act that are designed to assist an educator whose evaluations have been less than stellar.

An example is the School Improvement Panel ("SIP"), which the *Guide* counsels "is charged with ensuring the effectiveness of the school's teachers by overseeing mentoring activities, conducting evaluations, identifying professional development opportunities, and conducting a mid-year evaluation of any teacher rated Ineffective or Partially Ineffective in the most recent annual summative evaluation." *See,* N.J.S.A. 18A:6-120 and N.J.A.C. 6A:10-3.1. Respondent has maintained without challenge that the Newark District did not have a SIP in place during the 2012 – 2013 School Year and rhetorically questions how it can then be responsible for the conduct of evaluations and the implementation of TEACHNJ given that fact. *See*, ANSWER to NOTICE OF TENURE CHARGES OF INEFFICIENCY.

Several other factors are also worth noting. As Respondent has recognized, the 2011 – 2012 Pilot Program in which the District participated preceded the August 6, 2012 adoption of TEACHNJ. Of critical significance is the fact that the regulatory guidance provided in Title 6A of the Administrative Code only came into effect in 2013, with the 1st Round of regulations adopted February 7, 2013 and the 2nd Round proposed on March 6, 2013 and adopted March 14, 2013. Since the instant tenure charge encompassed the period from December 21, 2012 forward, that begs the question succinctly articulated by Arbitrator Bluth at page 11 of his Award in I/M/O Tenure Charge of Inefficiency of Sandra Cheatham and School District of the City of Newark, Agency Docket No. 226-8/14 (Bluth, 2014) of:

> [h]ow therefore, can the District claim their program was in compliance with the Department's regulations when the 2012 – 2013 School Year began? The clear answer is they could not because the District had no way of knowing what the effects of TEACHNJ would be until March 2013. By that time, approximately seventy percent of the school year had elapsed. This undermines the District's claim its evaluation program, which was implemented in September 2012 was the same as the plan outlined by the Department of Education in March 2013.

The preceding findings of fact establish that the Respondent has made a *prima facie showing* on her MOTION, that the instant tenure charges should be dismissed with prejudice. That is not to say that I do not recognize and endorse the District's position that Respondent or any other educator should not be afforded a *free pass* when it comes to inefficiency charges. The obvious caveat, however, is that only procedurally correct annual summative evaluations may be

utilized in order to fulfill the mandate of N.J.S.A. 6-17.3(a)(2) and that operates as a condition precedent. Accordingly, because 2012 – 2013 was designed to be a pilot year within the State of New Jersey and the Newark School District, Petitioner's consideration of the same in connection with the subject tenure charge renders it infirm. The burden is therefore shifted to Petitioner to establish its affirmative defenses.

Petitioner initially points to the October 24, 2014 guidance provided by the DOE which stands for the purported proposition that the intent of the Agency all along was to permit teacher evaluations conducted during the 2012 - 2013 School Year to be utilized for inefficiency charges brought pursuant to the TEACHNJ Act. The *ex post facto* nature of this *ex parte* communication which was clearly intended to pull an end run around Cheatham, coupled with the fact that the guidance is in direct conflict with DOE's own TEACHNJ literature, however militate against the acceptance of the same.[4]

4/ Respondent has also highlighted in her Reply Brief that Mr. Shulman's position taken in the October 24th correspondence contradicts his prior posture on the subject. *See, e.g.* July 30, 2012 Memorandum to Chief School Administrators, subject, EDUCATOR EVALUATION SYSTEM IMPLEMENTATION UPDATE, section 1 Capacity Building Requirements for all Districts for 2012 – 13: "[a]s we prepare for statewide rollout of an improved educator evaluation system in 2013 – 2014, all districts will conduct capacity-building activities detailed in previous memos and explained in our FAQs..."

One of the above *Frequently Asked Questions* provided as follows:

Q. Will summative ratings 'count' this year (2012 – 2013) toward tenure decisions?

A. No the only item 'on the clock' is the mentorship year for new teachers. No evaluation outcomes in the 2012 – 2013 school year will impact tenure decisions. 2013 – 2014 is the first year where the statewide evaluation system will be in place, And the first year when [the] summative rating clock will start.

Petitioner's contention that it has pled an alternative statutory basis under N.J.S.A. 6-16 to entitle a hearing on the sufficiency of the inefficiency charges under the "old" tenure law also is unpersuasive. Rather, a cursory reference in a pleading does not obviate the fact that the solitary tenure charge of INEFFICIENCY and the accompanying STATEMENT OF EVIDENCE make it abundantly clear the instant charges were brought under N.J.S.A. 18A: 6-17.3.

In that regard, paragraph a. of the charge contends that "[t]he Respondent was rated as "Ineffective" and/or "Partially Effective" in 2 consecutive annual evaluations. Paragraphs r and s go on to assert that "[t]he Respondent has received a partially effective/ineffective rating for the 2012 – 2013 School Year in an annual summative evaluation; " and "[t]he Respondent has received a partially effective/ineffective rating for the 2013 – 2014 School Year in an annual summative evaluation." Principal Ortiz's STATEMENT OF EVIDENCE states *inter alia* at # 2. that "[d]uring the period from December 21, 2012 to the present Respondent failed to satisfactorily perform the duties and responsibilities of a classroom teacher despite numerous suggestions and assistance given by the administrative staff."

Instead, as Arbitrator Simmelkjaer reasoned at page 51 of his Award in I.M.O. the Tenure Charge of Inefficiency against Neil Thomas, *supra* Agency Docket No. 244-9/14:

> [i]n the Arbitrator's opinion, had the legislature intended that a teacher charged with inefficiency for two consecutive years of ineffective or partially [ ]effective ratings on their annual summative

> ratings be evaluated utilizing two different and asymmetric evaluation procedures – one consistent with Section 25 of TEACHNJ and the other consistent with Section 8, N.J.S.A, 18A:6-16 – it had the wherewithal to provide the appropriate statutory language. In the absence of such language, the Arbitrator is compelled to dismiss the charges.

Accordingly, if Petitioner wishes to proceed against Respondent on alternative statutory bases, it must do so via the perfection of new tenure charges before the Commissioner of Education. The Pre-Act arbitration awards relied upon by Petitioner to support its position are also inapposite, as they preceded the full implementation of the new inefficiency tenure standards during the 2013 – 2014 School Year,[5] and are factually distinguishable. *See,* I/M/O the Tenure Hearing of Gerald Carter, School District of the City of Camden, Agency Docket No. 369-12/12 (Simmelkjaer, 2013); I/M/O/ the Tenure Hearing of Felicia Pugliese and the State Operated School District of the City of Newark, Essex County, Agency Docket No. 272-9/12 (Brent, 2013); I/M/O Tenure Hearing of Dr. Audrey Cuff and Cumberland Regional School District Board of Education, Docket No. 71-3/14 (Gerber, 2014).; I/M/O/ the Tenure Charges Against Vice Principal Lawrence E. Hawkins by the State Operated School District of the City Of Newark, Agency Docket No. 243-10/13 (Laskin, 2014).

5/ In I/M/O the Tenure Charge between State Operated School District, City of Newark and Owen Newson, Agency Docket No. 276-9/12 (Pecklers, 2013), I concluded that the evaluation rubric to be adopted by all boards and approved by the commissioner had a January 2013 submission date, and pursuant to [26] 25.d of the ACT, "[t]he only evaluations which may be used for the purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner." Accordingly, the old standard of "*beyond a preponderance of the evidence" was applied.* As argued by Respondent, the new inefficiency standard of N.J.S.A. 18A: 6-17.3 with attendant regulations represented wholesale changes to inefficiency cases heard under N.J.S.A. 18A:6-10, among them the elimination of the 90 day improvement period. N.J.S.A. 18A:6-17.2 limited the discretion of the arbitrator when considering an inefficiency charge. Nothing convinces me that the Legislature intended inefficiency cases filed during and after the 2013 – 2014 School Year to be heard under both.

The District next emphasizes the fact that in October 2012, a Memorandum of Agreement ("MOA") was entered into with the teachers' majority representative, the Newark Teachers' Union. ("NTU"). According to Petitioner, this provided that a new evaluation process would be implemented beginning in the 2012 – 2013 School Year, with four (4) summative evaluation rating categories adopted in accordance with TEACHNJ, N.J.S.A. 18A"6-117. Attention is then drawn to Section II.A.4 of the MOA, which provides that the entire agreed-upon compensation system would be based upon teacher performance, as measured by the new evaluation framework. The argument follows that as such, the NTU specifically agreed to this new evaluation system.

Notice is initially taken, that as urged by Respondent, nothing in the 36 page MOA addresses the issue of the use of the new evaluation system by the District in making tenure-based decisions. Rather, the MOA purely addresses the District's much-publicized merit pay initiative, as well as salary guides and every other related issue. Therefore, while the District may properly argue that the NTU agreed to a new evaluation system that was for the discrete purpose of teacher compensation.[6]

And even assuming without deciding that the MOA addressed the tenure charge at hand, it is axiomatic that the statutory provisions of the TEACHNJ Act

6/ The District adopted an evaluation rubric as part of a performance evaluation system known as the Newark Public Schools' Framework for Effective Teaching, which was implemented during the 2012 – 2013 School Year. According to Petitioner, the accompanying *Guidebook* clearly described the new levels of performance as highly effective, effective, partially effective and ineffective.

would preempt any local agreement to the contrary. *See generally,* State v. State Supervisory Employees' Association, 78 N.J. 54, 80-81 (1978); *see also*, I/M/O/ the State Operated School District for the City of Newark, and Elena Brady, Agency Docket No. 270-9/14 (Klein, 2014). Even in the event the NTU would have been permitted to waive a statutory right such as this on behalf of a Union member, Respondent has correctly argued that such a waiver would have to have been clear and unmistakable per Red Bank Regional Education Association vs. Red Bank Regional High School District, 78 N.J. 122, 140 (1978). No such evidence has been provided by the Petitioner Newark School District.

Petitioner also takes direct aim at the post-Cheatham awards of my arbitral colleagues, accusing each of improperly invoking the doctrine of collateral estoppel, in violation of the New Jersey Supreme Court's ruling in Olivieri v. Y.M.F Carpet, Inc., 186 N.J. 511, 521, 523 (2006). *See also*, Lopez v. Patel, 407 N.J. Super, 79 (2009). Leaving aside any technical definition, it should be made clear that Respondent herein has not relied upon that argument in her moving papers, nor is my AWARD grounded upon *collateral estoppel.*

Rather, the awards cited have been accorded persuasive and not precedential authority, in keeping with the generally accepted arbitral practice. Parenthetically, they are entitled to substantial deference unless palpably erroneous. *See generally, The Common Law of the Workplace, The Views of Arbitrators,* Second Edition, National Academy of Arbitrators, The Bureau of National Affairs, Inc., Washington, D.C. 2005, St. Antoine, Ed., at p. 85 § 2.16

Use of Prior Arbitration Awards. Therefore, based upon the totality of the foregoing considerations, Respondent has presented an un-rebutted *prima facie case* that the instant inefficiency tenure charge should be **DISMISSED WITH PREJUDICE**. IT IS SO ORDERED.

V. CONCLUSION

Respondent Kelly-Gamble has demonstrated by a preponderance of the credible evidence that the subject MOTION TO DISMISS must be granted.

AWARD

THE INSTANT TENURE CHARGE IS DISMISSED WITH PREJUDICE. MS. KELLY-GAMBLE SHALL BE IMMEDIATELY REINSTATED TO HER TEACHING POSITION WITH FULL BACK PAY AND SENIORITY AND MADE WHOLE FOR THE LOSS OF ANY CONTRACTUAL OR STATUTORY BENEFITS DURING THE INTERIM PERIOD.

Dated: January 30, 2015
NORTH BERGEN, N.J.

MICHAEL J. PECKLERS, ESQ.
ARBITRATOR

STATE OF NEW JERSEY
SS}
COUNTY OF HUDSON

ON THIS 30TH DAY OF JANUARY, 2015, BEFORE ME PERSONALLY CAME AND APPEARED **MICHAEL J. PECKLERS, ESQ.**, TO BE KNOWN TO ME TO BE THE INDIVIDUAL DESCRIBED HEREIN AND WHO EXECUTED THE FOREGOING INSTRUMENT, AND HE DULY ACKNOWLEDGED TO ME THAT HE EXECUTED THE SAME.

NOTARY PUBLIC

ZOILA R. VARGAS
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 5/27/2018

58-15

NEW JERSEY DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Hearing of Eric Baroni:

OCEAN CITY BOARD OF EDUCATION,
COUNTY OF CAPE MAY

"Petitioner,"

- and -

Eric Baroni

"Respondent."

DECISION APPROVING SETTLEMENT AGREEMENT

Agency Docket No. 306-10/14

Before
James W. Mastriani
Arbitrator

Appearances:

For the Petitioner:
Jeffrey R. Caccese, Esq.
Comegno Law Group, P.C.

For the Respondent:
Amy R. Weintrob, Esq.
Hankin, Sandman, Palladino & Weintrob

I was appointed to serve as arbitrator on November 20, 2014 pursuant to N.J.S.A. 18A:6-9 to hear and make a final determination on tenure charges filed by the Ocean City Board of Education [the "Petitioner"] against tenured teaching staff member Eric Baroni [the "Respondent"] pursuant to N.J.S.A. 18A:10. Upon receipt of that appointment, I conducted a conference call with counsel, at which time the procedure for processing this case was discussed and agreed upon. It was agreed that the matter should proceed directly to hearing.

Arbitration hearings in this matter were scheduled on January 14 and 20, 2015. Prior to the conduct of the January 14, 2015 hearing, Petitioner and Respondent voluntarily agreed to engage in informal discussions and mediation on the issues raised in this proceeding. These discussions led to the development of tentative terms for a Settlement Agreement. Those terms were drafted on January 14, 2015, signed by the Respondent on January 14, 2015 and formally approved and adopted by the Ocean City Board of Education on January 28, 2015. The terms of the settlement are as follows:

SETTLEMENT AGREEMENT

WHEREAS, ERIC A. BARONI (hereinafter "BARONI") has been employed by the OCEAN CITY BOARD OF EDUCATION, COUNTY OF CAPE MAY (hereinafter "BOARD") (BARONI and the BOARD are sometimes referred to severally as a "Party" or jointly as "the Parties" in this AGREEMENT) as a tenured teaching staff member pursuant to NJSA. 18A:28-5; and

WHEREAS, BARONI and BOARD mutually desire to terminate amicably BARONI'S employment and/or affiliation with BOARD as of January 14, 2015 through BARONI'S resignation of his employment with the Board and to settle and terminate any and all disputes between them by executing this SETTLEMENT AGREEMENT ("AGREEMENT");

IT IS HEREBY AGREED by and between BARONI and BOARD, as follows:

1. BARONI agrees that he shall resign and no longer be employed by BOARD effective January 14, 2015 BARONI further agrees that his signature on this AGREEMENT constitutes an acknowledgment that he is relinquishing any and all present and future rights to employment, recall and re-employment with the BOARD as of January 14, 2015 BARONI has provide his irrevocable letter of resignation, attached hereto as Exhibit A.

2. In full consideration of the mutual execution of this AGREEMENT, and the mutual agreement to be legally bound by its terms, and in recognition that BARONI'S waiver of his tenure rights, recall rights and right to a hearing represents good and valuable consideration, BOARD:

   (a) agrees not to contest any application by BARONI for unemployment benefits. The BOARD will respond truthfully to any inquiry by the Department of Labor and Workforce Development, Division of Unemployment Compensation regarding BARONI's employment or claim(s) for unemployment benefits;

   (b) agrees to provide a neutral letter of reference in the form attached hereto as Exhibit B upon request to employers of BARONI, which shall be limited to the period of BARONI'S employment by BOARD, his salary history and positions held, and upon BARONI' s request and execution of a release, shall only provide to any potential employers a copy of his yearly evaluations;

   (c) agrees to additionally provide neutral references upon request to prospective employers of BARONI, which shall include such information as the period of BARONI'S employment by BOARD, his salary history and positions held. Any prospective employer who inquires as to BARONI'S employment history shall be referred to the Superintendent of Schools or his/her designee and informed of BARONI'S resignation. In no event will the BOARD members, the Superintendent, or the Human Resources Department make any statement to any current or prospective employer, verbal or written, meant to disparage BARONI. All such references will be cleared through the Superintendent of Schools or his/her designee. Upon BARONI's request and execution of a release, the BOARD shall only provide to any potential employers a copy of his yearly evaluations

   (d) The BOARD will cooperate with BARONI to the extent necessary for him to be eligible and receive COBRA benefits. The receipt of COBRA shall be at BARONI'S

sole expense and is in no way the responsibility of the BOARD.

(e) subject to the arbitrator's decision approving this Agreement pursuant to N.J.A.C. 6A:3-5.6, and approval by the BOARD, BOARD agrees that any and all tenure charges filed by it shall be and are hereby withdrawn with prejudice;

(f) agrees that upon execution of this AGREEMENT that BARONI is deemed to be released from his employment with the Board upon fewer than 60 days written notice pursuant to NJ.S.A. 18A:28-8.

3. It is expressly agreed and understood that BOARD does not have and will not have any obligation to provide BARONI at any time in the future with any payments, benefits or consideration other than those recited in Paragraph 2, subsections (a) through (t) above, if any. BARONI hereby waives any claim for back pay from his suspension, dated October 15, 2014 through the date of his resignation, pursuant to N.J.S.A. 18A:6-7.

4. BARONI hereby agrees and recognizes that his employment relationship with BOARD will be permanently and irrevocably severed as of January 14, 2015 and that BARONI hereby waives any rights to seek any position, paid or unpaid, with the BOARD, and specifically promises not to apply for any position with the BOARD. BARONI agrees that any attempt to obtain a position with the BOARD will constitute a breach of this agreement and the BOARD and may rely on the breach in rejecting the application or refusing to employ, reemploy, appoint, nominate, or contract with BOARD. Moreover, BARONI specifically waives any tenure or recall rights and any right to a hearing. In addition, BARONI will request, the OCEAN EDUCATION ASSOCIATION ("OCEA") to withdraw with prejudice and without costs any and all pending grievances related to BARONI'S employment with the Board, including, but not limited to grievances arising from the increment withholding and discipline.

5. This is a settlement of the instant matter, as such it is a settlement of disputed claims. In settling this matter, neither party is admitting that its claims and/or defenses were correct or that the other party's position was without merit.

6. In consideration of the Settlement Amount and the other promises made herein, BARONI and the BOARD for themselves and (as applicable) their respective heirs, shareholders, directors, officers, employees, agents, attorneys, affiliates, parents, subsidiaries, predecessors, successors, assigns, and all persons acting by, through, under or in concert with any of them (the "Released Parties'), each release the other and their respective Released Parties from any and all charges, complaints, claims, liabilities,

obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses, and from any claims of any nature whatsoever, known or unknown, which they now have, claim to have, own, hold or which they at any time heretofore had, held, or claimed to have, relating in any manner whatsoever to: (i) any employment relationship between BARONI and the BOARD, and (ii) any other relationship by, among, and/or between BARONI and the BOARD. The Parties further understand, covenant, and agree that neither of the Parties will enter, permit to be entered or cause to be entered, directly or indirectly, any suit or other claim against the each other or any of the Released Parties related to the foregoing. The Parties represent and warrant that they have not sold, assigned, transferred, conveyed or otherwise disposed of any claim, demand or cause of action, including any claim for attorneys' fees, against the each other or the Released Parties. The Parties' release and discharge also includes, without limitation, any contract or tort claim or potential claim, and any claim arising under common law, such as claims for breach of contract, defamation, breach of implied covenant of good faith and fair dealing, misrepresentation, libel, slander, invasion of privacy, negligence, interference with advantageous relations, infliction of emotional distress, loss of consortium, discrimination, or wrongful termination.

This release shall not apply to any claim arising out of (a) the enforcement of this agreement; (b) any claim that arises after the date of this agreement; or (c) claims that may not lawfully be released, discharged, or waived. In addition, this release specifically excludes claims arising under the New Jersey Workers' Compensation Act, the Teachers Pension and Annuity Fund Act, and any claims arising from any breach of this AGREEMENT. BARONI certifies that he is unaware of any factual basis for such claims.

7. Should BARONI have certain personal property on BOARD premises, he and his designated representative shall be permitted, on notice to school administration, and at a mutually convenient day and time, to come onto school property, and, if deemed necessary, meet with a representative of school administration and accompanied by a representative, designate which property belongs to her and remove her personal property. The BOARD will cooperate in this regard.

8. By signing this AGREEMENT, the Parties certify that they have had ample opportunity to discuss this AGREEMENT with counsel. The parties are entering into this AGREEMENT freely and voluntarily. Neither has been forced or coerced to enter into this AGREEMENT. Neither party was under duress during the negotiation of or execution of this AGREEMENT. The parties have the capacity to understand the terms of this AGREEMENT

and at no point during its negotiation or execution has either party been under the influence of any medication or mind altering substance which would have impaired the party's ability to understand the substance of this AGREEMENT. They are fully satisfied with the services of their counsel with respect to both this AGREEMENT and all other aspects of this matter.

9. Should any provision of this AGREEMENT be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the Parties will make reasonable efforts to reform that provision to be legal, valid and enforceable. Should the provision remain illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not to be a part of this AGREEMENT.

10. This AGREEMENT, and all matters arising out of or relating to this AGREEMENT, shall be interpreted under the laws of the State of New Jersey. Any action to enforce this AGREEMENT, or matters arising out of or relating to this AGREEMENT, shall be brought in the Federal or State courts of the State of New Jersey. The Parties irrevocably consent to the personal jurisdiction of such courts.

11. This Agreement sets forth the entire agreement between BARONI and the BOARD. Any other prior agreements between some or all of them are hereby terminated and shall have no other force or effect. The Parties acknowledge and agree that neither of the Parties, or the Released Parties, have made any promises to each other than those set forth in this Agreement. This Agreement may be modified only upon an express written agreement executed by the Parties. Because the Parties' respective and separate counsel have had a full opportunity to review this Agreement with the Parties before they signed it, the language of this Agreement shall in all cases be construed as a whole, according to its fair meaning and not strictly for or against any of the Parties.

12. This AGREEMENT shall be subject to approval by the BOARD.

13. The Parties agree that this AGREEMENT may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

14. To the extent permitted by law, the parties agree that this settlement shall remain confidential.

15. The arbitrator appointed by the Commissioner of Education to hear and decide this matter, James Mastriani, Esquire, shall retain jurisdiction.

16. All parties to this AGREEMENT hereby waive any claim to counsel fees.

The arbitrator is required under N.J.A.C. 6A:3-5.6 to issue a decision approving the settlement of tenure charges and to explain why the arbitrator is approving the terms of settlement. I have approved these terms for the reasons that follow.

I am persuaded that the issues that were raised in the Statement of Tenure Charges and the Statement of Evidence filed by the Petitioner and the Answer to Tenure Charges filed by the Respondent have been fully reviewed and discussed by all parties and that the issues raised therein have been satisfactorily addressed by the terms of settlement. In addition to the fact that these terms are mutually acceptable to the parties, I conclude that the interests of the public will be served as well.

The parties have agreed that the interests of all concerned will be served by a separation from employment by voluntary resignation and the withdrawal of the tenure charges. The parties have acknowledged that these terms have been agreed upon without admission by either party as to the merits of the claims raised by the charges or by Respondent's defenses to the charges. The Settlement Agreement resolves Petitioner's desire that Respondent no longer be employed by the Board and the Respondent's intention to demonstrate through testimony and certifications that he has served with professionalism and also with character, as evidenced by offers of proof that he would have submitted into the

record. The Board and the public will further benefit by the budgetary savings achieved by avoiding the costs of litigation which, based upon the approval of the settlement terms, will no longer be necessary.

Accordingly, and based upon all of the above, this arbitrator has approved the parties' settlement agreement.

Dated: February 8, 2015
Sea Girt, New Jersey

James W. Mastriani

State of New Jersey }
County of Monmouth } ss:

On this 8th day of February, 2015, before me personally came and appeared James W. Mastriani to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

PATRICIA M FINDLAY
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Oct. 3, 2018

54-15

SHANE HUNSICKER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE HIGH POINT REGIONAL HIGH SCHOOL, SUSSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – who had been employed by the respondent Board under tenure as an athletic trainer – challenged the termination of his employment in September 2013, contending that he should have been afforded a tenure hearing and the protections associated therewith prior to his removal. The Board argued that petitioner's immediate removal was mandatory because his license as an athletic trainer – which was required by state law as a term of his employment – had expired in January 2009. Further, the Board contended that once the petitioner was lawfully removed from the athletic trainer position for failure to maintain the required license, his tenure rights ceased and the Board was under no obligation to rehire him.

The ALJ found, *inter alia*, that: in order to hold the position of school athletic trainer, an individual must hold the appropriate certificate from the Department of Education – pursuant to *N.J.S.A.* 18A:26-2.4 and *N.J.A.C.* 6A:9-13.17 – and complete requirements established by the State Board of Medical Examiners (SBME) for registration as an athletic trainer – pursuant to *N.J.S.A.* 45:9-37.37 and *N.J.A.C.* 13:35-10; licenses are issued by the SBME for a two-year period, and must be renewed following the expiration of each two year license; a license not renewed within 30 days of the expiration date is automatically suspended; if an employee fails to maintain the required licenses for the position, the employing district shall remove the employee; and there is no statute that details circumstances under which a person removed from a teaching position because of failure to maintain the required license will be entitled to reinstatement to their position. The ALJ concluded that the Board proved by a preponderance of evidence that the decision to remove the petitioner, as well as the decision to not re-appoint him after renewal of the license in question, was not arbitrary, capricious, or unreasonable. Accordingly, the ALJ affirmed the termination of petitioner's employment as an athletic trainer at High Point Regional High School.

Upon a comprehensive review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

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

February 12, 2015

59-15

OAL DKT. NO. EDU 17519-13
AGENCY DKT. NO. 278-11/13

SHANE HUNSICKER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE HIGH POINT REGIONAL HIGH SCHOOL, SUSSEX COUNTY,	:	
RESPONDENT.	:	

Petitioner, Shane Hunsicker, challenges the respondent Board of Education's termination of his employment as an athletic trainer. He maintains that before respondent removed him from his position it should have afforded him a tenure hearing and the protections associated therewith. After a June 30, 2014 hearing in the Office of Administrative Law (OAL), the Administrative Law Judge (ALJ) assigned to the case found that the basis for respondent's decision not to retain petitioner lay outside the laws concerning tenure, and that respondent properly followed regulations pertaining to athletic trainers when it terminated petitioner's employment. Having considered the record,[1] Initial Decision of the OAL, petitioner's exceptions and respondent's replies thereto, the Commissioner agrees with the ALJ.

N.J.S.A. 45:9-37.37 and *N.J.A.C.* 13:35-10 preclude an individual from working anywhere in New Jersey as an athletic trainer without an up-to-date license issued by the State Board of Medical Examiners. It is undisputed that petitioner's athletic trainer license expired on January 31, 2009. *N.J.A.C.* 6A:9-5.1(b) and (c), regulations which were operative on

[1] The record presented to the Commissioner did not include a transcript of the June 30, 2014 hearing

September 4, 2013 – the date on which respondent terminated petitioner – require employing school districts to refrain from hiring and, respectively, to remove any teaching staff members who fail to obtain or maintain **any license**, certificate or authorization that may be **mandated by State or Federal law or by a licensing board** for the individual to serve in a position. *See, N.J.A.C.* 6A:9-5.1(c) [Now recodified at *N.J.A.C.* 6A:9B-5.1(c)], which provides: "[t]he employing school district **shall** remove from the position any teaching staff member who fails to maintain the mandated license . . . ." Accordingly, when respondent learned – on or about August 28, 2013 – that petitioner's license had expired, it was required to remove petitioner from his position.

The Administrative Law Judge found that at the time of petitioner's removal from service "there [was] no statutory exemption that provide[d] a tenured licensee with protection from [the] removal [mandated by *N.J.A.C.* 6A:9-5.1(c)]." The Commissioner concurs. It was respondent's duty under the above referenced statutes and regulations – which must be seen as safeguards for the welfare of student athletes – to remove petitioner from a position for which he did not hold the required license. The tenure statutes allow teaching staff members to remain employed pending hearings about their fitness to teach, administer or provide special education services under certificates issued by the New Jersey Board of Examiners. However, there is no statutory authority which allows a local Board of Education or the Commissioner of Education to retain an individual whose work is also governed by the Board of Medical Examiners, and who has failed to conform to that Board's practice requirements.[2] Further, as the ALJ found, there is

[2] Less on point, but nonetheless supportive of respondent's position is the holding in *Michael Schailey v. Board of Education of the Southern Regional High School District, Ocean County,* Commissioner Decision No. 73-09 (February 19, 2009), wherein the Commissioner adopted the determination in the Initial Decision that a tenured physical education teacher whose teaching certificates were suspended by the Board of Examiners could be terminated from his school employment without a tenure hearing.

no authority which would have required respondent to rehire petitioner once his employment had been terminated.

The Commissioner is mindful that petitioner experienced a tragedy in 2010 which greatly affected his subsequent personal life. However, petitioner had let his license lapse over a year before the tragic event, and had continued to work without a license for five years. Those circumstances would not present a case for circumventing the mandate of *N.J.A.C.* 6A:9-5.1(c), even if the Commissioner had the discretion to do so.

Accordingly, the Initial Decision is adopted and the petition is dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 2/12/15

Date of Mailing: 2/13/15

[3] This decision, as the final decision of the State administrative agency, may be appealed to the Superior Court, Appellate Division pursuant to *N.J.S.A.* 18A:11-3 and *N.J.A.C.* 6A:3-7.6.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 17519-13
AGENCY DKT. NO. 278-11/13

SHANE HUNSICKER,

Petitioner,

v.

HIGH POINT REGIONAL HIGH SCHOOL,
BOARD OF EDUCATION,

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner, Shane Hunsicker (Oxfeld Cohen, attorneys)

James M. McCreedy, Esq., for respondent, High Point Regional High School Board of Education (Wiley, Malehorn & Sirota, attorneys)

Record Closed: August 6, 2014 Decided: December 22, 2014

BEFORE **EVELYN J. MAROSE**, ALJ:

STATEMENT OF THE CASE

Petitioner, Shane Hunsicker, challenges the termination of his employment as athletic trainer by respondent, High Point Regional High School (District), Board of Education (Board).

The New Jersey State Department of Education transmitted this matter to the Office of Administrative Law, where it was filed on March 27, 2014. A hearing was held on June 30, 2014. The record closed upon the receipt of written summations on August 6, 2014. Due to a voluminous caseload, an extension for filing of the initial decision was requested to December 21, 2014.

FACTUAL DISCUSSION AND FINDINGS

The parties agreed upon the following facts:

a) Petitioner began employment with the Board as an athletic trainer on September 1, 2001.

b) In order to be an athletic trainer in a public school sytem, petitioner was required to pass two separate licenses/certifications. The first, in accordance with N.J.S.A. 45:9-37.37 and N.J.A.C. 13:35-10, is issued by the State Board of Medical Examiners which permits an individual to practice athletic training in both interscholastic and intramural activities. The second, in accordance with with N.J.S.A. 18A:26-2.4 and N.J.A.C. 6A9:13.17, is an Educational Service Certificate together with a school Athletic Trainer Endorsement, issued by the State Board of Examiners in the Department of Education. As the position of school athletic trainer is included in N.J.S.A. 18A:28.5, the position is tenure eligible. See also Bower v. Bd. of Ed. of Salem, EDU 7472-11, Comm'r Decision (June 11, 2012), http://njlaw.rutgers.edu/collections/oal.

c) Petitioner's athletic trainer license issued through the State Board of Medical Examiners expired in January 31, 2009, and, as of the commencement of the 2013-14 school year, had not been renewed by petitioner. The District had no notification of the failure to renew and petitioner continued to act as athletic trainer after January 31, 2009.

d) By letter dated September 4, 2013, District Superintendent Scott D. Ripley (Superintendent) advised petitioner that the Board had been informed by the State Board of Medical Examiners on August 28, 2013, of the expiration of petitioner's athletic trainer license. The Superintendent advised petitioner that,

pursuant to N.J.A.C. 6A:9-5.1, he was being removed from the position of athletic trainer.

e) The State Board of Medical Examiners issued a $1,000 civil penalty to petitioner for violating the Athletic Training Practice Act. The penalty was stayed as a result of the mitigation presented by petitioner concerning both medical and personal issues.

f) Within a few weeks of receiving the superintendent's Letter, dated September 4, 2013, petitioner took all the appropriate steps and had his medical license restored.

Based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses, in addition to the stipulated facts, I **FIND** the following pertinent **FACTS**:

Petitioner was employed by the Board as an athletic trainer. He achieved tenure in that position. Though he initially obtained the two separate licenses/certifications that were required for the position of athletic director and renewed those licenses for some eight years, he failed to renew his athletic trainer license issued through the State Board of Medical Examiners in January 31, 2009, though he continued to be employed as an athletic trainer for the District. Petitioner always kept current in the continuing education requirements for an athletic training.

In late August 2013, the Board was advised by the Athletic Training Advisory Committee of the New Jersey Office of the Attorney General that petitioner, though he was currently performing the duties of an athletic trainer for the District, did not hold an active athletic trainer license. The Committee requested that the Board provide the Committee, within seven days, with the following:

1.) Petitioner's employment history with the District including, but not limited to, his job title, job descriptions, dates of employment, and a copy of any curriculum vitae submitted to the Board by petitioner.

2.) The names and license number of all other athletic trainers on the staff of High Point Regional High School.

3.) The name and license number of each athletic trainer's supervising physician.

4.) A copy of the plan of care used by the athletic trainer. (J-2.)

Scott D. Ripley (Superintendent Ripley), after reviewing and considering a letter from the Athletic Training Committee, called petitioner into his office, verbally terminated him, and provided him with a written letter, dated September 4, 2013, detailing the reasons for the termination. Superintendent Ripley stated that, by statute, petitioner had to be removed since he was not in compliance with the laws of the State of New Jersey regarding appropriate licensure for the the performance of his job duties because his license expired on January 31, 2009. A copy of the Board's job description for athletic trainer was attached to the letter of termination that he provided to petitioner. (J-1.)

Superintendent Ripley opines that he did not have the discretion to allow petitioner to remain in the position of athletic trainer when his license was suspended, regardless of petitioner's tenure position. Superintendent Ripley further opines that once petitioner was lawfully removed from the positon of athletic trainer, his tenure rights to that position ceased. The Board could, and did, appoint another person to the positon of athletic trainer. The Board has no desire to re-appoint petitioner to the position of athletic trainer at this time.

Petitioner acknowledges that it was his responsibility to pay his athletic fees every two years and not the Board's responsibility. He further acknowledges that he did not pay the fees for his license, which was due on or before January 31, 2009, until September 2013. However, he asserts that he had tenure rights to the position of athletic trainer that were not considered and that there are equitable circumstances that mitigate against the harsh remedy of termination.

Sometime in 2009, petitioner's wife became pregnant with their first child. The baby was born on April 17, 2010, and passed away from Sudden Infant Death Syndrone (SIDS) on November 30, 2010. After the couple lost their child, their marriage began to

dissolve. Petitioner moved out of the marital home in January 2012. He has no recollection of receiving a bill for his license from 2009 through 2013. From the time that he married in 2002 to the time that he separated from his wife, petitioner's wife paid all of the bills, including his athletic trainer license, which was renewed every two years. She also took responsibility for their income tax filings. During the period in question, petitioner and/or his wife also failed to timely pay some other financial responsibilities, for example his car registration. The day after learning that his license had been suspended for failure to pay the biennial fees, petitioner forwarded a check for approximately $400 to the State to bring his license current. Petitioner's license was re-instated as of September 27, 2013.

LEGAL ANALYSIS AND CONCLUSIONS

In order to hold the position of school athletic trainer, an individual must hold both the Department of Education certificate and "satisfactorily complete the requirements established by the State Board of Medical Examiners for registration as an athletic trainer pursuant to N.J.A.C. 13:35-10." N.J.A.C. 6A:9-13.7. All licenses issued by the New Jersey State Board of Medical Examiners shall be issued for a two-year licensure period.

A licensed athletic trainer who seeks a renewal of the license shall submit a completed renewal application and the renewal fee prior to the expiration date of the license. N.J.A.C. 13:35-10.4(a). A license that is not renewed within thirty days of its expiration hall be automatically suspended. An individual who continues to practice with a suspended license shall be deemed to be engaged in unlicensed practice and shall be subject to penalties for practicing without a license. N.J.A.C. 13:35-10.4(d). A licensed athletic trainer whos license has been automatically suspended for failure to renew may be reinstated by the Board upon completion of 1.) payment of the reinstament fee and all past delinquent biennial renewal fees; and 2.) submission of an affidavit of employment listing each job held during the period of suspended license which includes the name, address, and telephone number of each employer. N.J.A.C. 13:35-10.4(e).

No person shall practice or hold himself out as being able to practice athletic training in the State of New Jersey unless licensed in accordance with N.J.S.A. 45:9-37.37. If an employee fails to maintain any other license required for a position the "employing district shall remove from the position any teaching staff member who fails to maintain mandated license . . . the district shall also report the names of these individuals to the Board of Examiners." There is no statutory exemption that provides a tenured licensee with protection from removal. N.J.A.C. 6A:9-5.1; N.J.S.A. 18A:28.5; Breitwieser v. State-Operated Sch. Dist. of City of Jersey City, 286 N.J. Super. 633, 644 (App. Div.1996). There is also no statute that details circumstances under which a person removed from a teaching position because of failure to maintain a mandated license will be, or might be, entitled to re-instatement to his position.

In the case at hand, The Board removed petitioner from the position of High Point's athletic trainer after receiving notice that petitioner failed to pay the necessary fees and renew one of two licenses that he needed to perform his job duties. N.J.S.A. 45:9-37.37 and N.J.A.C. 6A:9.51. I **CONCLUDE** that the Board proved, by a prepondence of the evidence, that the District's decision to remove him from his position was not arbitrary, capricious and unreasonable, but rather pursuant to statute. I further **CONCLUDE** that the number of years that petitioner was employed and his earned tenure did not entitle petitioner to remain in a position for which he lacked current required certificates.

After the Board confirmed, to the Athletic Training Advisory Committee, that petitioner contined to serve as athletic trainer after January 31, 2009, the Advisory Committee issued petitioner a civil penaty of $1,000 for violating the Athletic Training Practice Act. However, the Committee, in its discretion, chose to stay the penalty as a result of the mitigating presented concerning medical and personal issues, and re-instated petitioner's license in less than one month. Once petitioner's athletic license was renewed, the Board did not, in its discretion, chose to rehire petitioner as athletic trainer, though mitigating circumstances were asserted. Among other things, the Board stated that it had not been made aware of petitioner's personal struggles, that the personal struggles that petitioner asserted post-dated petitioner's failure to renew his license, and that petitioner was able to come to work on a regular basis and continue to

maintain his athletic trainer educational requirements during the relevant period, from January 31, 2009, to September 4, 2013, despite the personal struggles. Accordingly, petitioner's asserted personal struggles do not justify his failure to pay his licensing fees for some four years, which resulted in the expiration of a license that he had to keep current for his job. I **CONCLUDE** that the Board proved, by a prepondence of the evidence, that the District's decision not re-appoint petitioner, after his license had been restored, was not arbitrary, capricious and unreasonable or required by statute.

ORDER

It is **ORDERED** that the termination of petitioner's employment as athletic trainer is hereby **AFFIRMED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

Dec. 22, 2014
DATE

EVELYN J. MAROSE, ALJ

Date Received at Agency: December 22, 2014

Date Mailed to Parties: December 29, 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

kep

APPENDIX

WITNESSES

For Petitioner:

Shane Hunsicker

For Respondent:

Scott Ripley

EXHIBITS

Joint:

J-1 Letter to petitioner from Superintendent Ripley, dated September 4, 2013

J-2 Letter from Athletic Training Advisory Committee, the N.J. Office of the Attorney General, dated August 28, 2013

65-15

LINDA TURRELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – employed for many years as an elementary media specialist in respondent Board's school district – sought reinstatement retroactive to June 30, 2010 to a teaching position with the Board based on her tenure rights and seniority status following the elimination of her media specialist position as part of a reduction in force (RIF). Petitioner contended that she had tenure under her instructional certificate with endorsement as a Teacher of English, which – along with her seniority rights – entitled her to a full-time teaching position or assignment in the district. The Board argued that petitioner never achieved tenure under her instructional certificate, and that her tenure rights are therefore limited to the media specialist position – which position was abolished in the 2010 RIF. The parties filed cross motions for summary decision.

The ALJ found, *inter alia,* that: there are no material facts at issue herein, and the matter is ripe for summary decision; petitioner was employed by the Board for approximately 23 years as a media specialist; the Board demonstrated that petitioner taught for only 10 months under her instructional certificate during the 2001-2002 school year, which is not sufficient to qualify for tenure; and petitioner's assertion that her time in the district should be viewed as a dual assignment because she served simultaneously as an educational media specialist and a teacher of language arts literacy is without merit. The ALJ concluded that petitioner has demonstrated only one year's time as a teacher of English under her instructional certificate, which is insufficient to qualify her for tenure in that position. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the case.

Upon comprehensive review, the Commissioner concurred with the ALJ's determination that the petitioner did not acquire tenure under her instructional certificate as an English teacher. Accordingly, the Initial Decision was adopted as the final decision in this case, and the petition was dismissed.

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

2/19/15 ISSUED

OAL DKT. NO. EDU 9327-10
AGENCY DKT. NO. 140-7/10

LINDA TURRELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

The petitioner's exceptions substantially reiterate the substance of her post-hearing submission at the OAL, recasting the arguments therein to support the contention that the Administrative Law Judge (ALJ) erroneously found that the Board did not violate the petitioner's tenure and seniority rights. In her exceptions, the petitioner points out that it is undisputed that she held two certificates throughout her employment in the district, including an educational services certificate with an endorsement as an educational media specialist and an instructional certificate with an endorsement as a teacher of English. Petitioner argues that as a result of her simultaneous instructional and media specialist assignments from September 1, 1987 through June 30, 2010, she acquired tenure as both a media specialist and an English teacher. Therefore, when the Board abolished the district's media specialist position in 2010, it had an obligation to recognize the petitioner's tenure right to claim a position as an

English teacher over any non-tenured and/or less senior teaching staff members for the 2010-2011 school year.

In reply the Board also reiterated the positions advanced in its submissions at the OAL, arguing that the ALJ properly determined that the petitioner did not acquire tenure as an English teacher. The Board emphasizes that with the exception of the petitioner's teaching assignment during the 2001-2002 school year, petitioner only served in the district under her educational services certificate as a media specialist. Although petitioner had clearly acquired tenure as a media specialist, petitioner's one year of service as a teacher during the 2001-2002 school year does not come close to meeting the standards for the acquisition of tenure as an English teacher under *N.J.S.A.* 18A:28-5.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the Administrative Law Judge – for the reasons thoroughly set forth in the Initial Decision – that the petitioner did not acquire tenure under her instructional certificate as an English teacher. The objections raised in the exceptions filed by the petitioner mimic the arguments previously raised before the ALJ and were clearly taken into account by her in determining that the Board was entitled to summary decision. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/15

Date of Mailing: 2/19/15

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 09327-10
AGENCY DKT. NO. 140-7/10

LINDA G. TURRELL,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,
Respondent.

Richard A. Friedman, Esq., on behalf of petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Michael J. Gross, Esq., on behalf of respondent (Kenney, Gross, Kovats, & Parton, attorneys)

Record Closed: March 5, 2013 Decided: January 5, 2015

BEFORE **LAURA SANDERS**, Acting Director and Chief ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Linda G. Turrell filed a petition of appeal on July 6, 2010, seeking reinstatement retroactive to June 30, 2010, to a position with the Board of Education of the Township of Hazlet, Monmouth County (respondent, or the Board) based on tenure

rights and seniority status, following a reduction in force. She contends that her tenure under her instructional certificate and her English endorsement and seniority rights entitle her to a full-time teaching position or assignment, and if neither of these exist, a lesser position. The Board contends that her tenure rights are limited to the media specialist position, and that it has none of these positions. The contested case was transmitted to the Office of Administrative Law (OAL) for a hearing pursuant to N.J.S.A. 52:14B-1 to -15. It was filed on August 4, 2010.

The matter originally was assigned to Administrative Law Judge John Schuster, and on October 16, 2012, in a letter to Judge Schuster, the parties agreed to a schedule for submission of joint stipulations of facts and exhibits, briefs and response briefs, in relation to cross-motions for summary decision. The parties adhered to that schedule. As ALJ Schuster was delayed in deciding the motions, and no issues of credibility were involved, the matter was transferred to the undersigned on December 10, 2014.

FACTUAL DISCUSSION

The parties have stipulated to the following facts. Linda G. Turrell has held an Educational Services Certificate with an endorsement as an Educational Media Specialist since April 1984, and an Instructional Certificate with endorsements as a Teacher of English and Teacher of German since 1975. On or about September 1, 1987, Turrell began employment with the Hazlet Board of Education in the full-time position of librarian. From the 1987-88 school year through the 1993-94 school year, she was assigned to the Sycamore Drive Elementary School and the Raritan Valley Elementary School.

Beginning in the 1994-1995 school year, through the 2000-2001 academic year, Turrell was assigned to Raritan High School (the secondary category). During the 2001-2002 school year, she was specifically assigned to teach seventh and eighth grade English at Hazlet Middle School. That assignment was the subject of an appeal to the Commissioner, alleging that the Board violated her tenure and seniority rights as

a media specialist by the transfer. On April 22, 2002, the Commissioner of Education approved a settlement agreement, which provided that Turrell would be assigned in the 2002-2003 school year to a media specialist position. It further provided that she would not be "assigned any duties which are outside the scope of her Media Specialist endorsement for this assignment." In addition, the agreement provided that the Board "shall continue to assign Turrell to a Media Special[ist] position in the District, as long as she continues to retain tenure status in the position of Media Specialist."

For the 2002-2003 year, she was assigned to the Sycamore Drive, Cove Road, and Middle Road Elementary Schools. From the 2003-2004 through 2008-2009 school years, she was assigned to the Sycamore Drive, Cove Road, and Lillian Drive Elementary Schools. During the 2009-2010 school year, she was assigned to the Beers Street, Cove Road, and Lillian Drive Elementary Schools.

On or about April 27, 2010, Turrell was informed by respondent that it had determined to abolish her position as an elementary media specialist and terminate her employment effective June 30, 2010, as a result of a reduction in force. The Board voted on April 26, 2010, to approve elimination of two elementary media specialist positions, effective July 1, 2010. It also voted to terminate Turrell effective July 1, 2010. (Exhibit K.) In a letter dated April 28, 2010, Turrell notified the Board of her intention to assert a tenure and seniority claim to another position in the district. She also requested a copy of a seniority list for all certified staff in the school district. By letter dated April 29, 2010, respondent advised Turrell of her placement on a preferred eligibility list for a media specialist position, should the district ever reinstate the position. But it took the position that she had no tenure rights to any teaching position, as she only worked under her instructional certificate "for a few months, several years ago." (Exhibit M.) Turrell then requested copies of the job descriptions for "teacher of library (media specialist)" and English teacher. (Exhibit N.) The Board provided Turrell with an approved job description for teacher (Exhibit P), and one for "High School Librarian." (Exhibit R.) In a letter dated May 7, 2010, the Board stated it has "no approved job description for the position of media specialist." (Exhibit O.)

Throughout her years of service in the district, Turrell was required to prepare and submit lesson plans, and was subject to annual observations and evaluations of her job performance. For all of her years of service, she received annual employment contracts. As the above is drawn from the stipulations, it is **FOUND** as **FACT**.

With regard to the lesson plans, most of them refer solely to library-type activities, such as learning how libraries organize information, evaluating websites for reliability, understanding genres, developing literary appreciation, understanding graphic organization, and using an information-management booklet. However, one is about creating sentence outlines, another about how to study for a test, including using a study-skills booklet, and a third, learning how to analyze a story for the main idea, support information, and conclusions. (Exhibit T.) The classroom observations record topics such as creating strategies for test-taking, learning how to do a speech to persuade, and identifying story themes, but the majority of the lessons addressed areas such as using a table of contents, checking out books, evaluating different encyclopedias, and learning how to use three computer databases.

The evaluations, which are positive, include such comments as, "Mrs. Turrell's goals were to empower educators to work with community partners to improve instruction and to use research to increase global and diversity awareness. . . . She wrote and updated several excellent unit lesson plans. Evidence includes copies of web pages, handouts, unit plans, and memos to principals and staff" (from 2009-2010). "In her lessons, Miss Turrell's lesson plans are detailed and aligned with New Jersey Core Curriculum Content Standards" (from 2006-2007). "Ms. Turrell was most instrumental in securing information and allowing and accessing the purchase of classroom library books, dove-tailing the Character Education initiative, Literacy Links. . . . . Ms. Turrell is to be commended for her efforts in getting this project off the ground and completed" (from 2006-2006). "Ms. Turrell conducts a solid Library School Program" (from 2004-2005) "Her lesson plans are aligned with the library curriculum" (from 2003-2004). "Ms. Turrell directs the day-to-day operation of an 18,000+ volume library . . . ." (from 2000-2001). "Ms. Turrell is in the process of preparing the library for automation . . . . She has been published in many educational journals, most recently

in Media and Methods, a professional educational technology magazine, regarding library management and concerns and has her own series of writing workbooks available nationwide" (from 2002-2001.) "During the fall semester, Ms. Turrell provided library orientation and usage skills as part of the regular scheduled Language Arts program. Ms. Turrell is instrumental in overseeing the day-to-day operations of the library" (from 1999-2000). "Ms. Turrell is extremely competent in performing her duties as a school librarian" (from 1993-1994). (Exhibit U.)

Although Turrell has a media specialist certificate, she first was appointed as a librarian (Exhibit C) and from 1994-95 through 2000-01, was assigned to Raritan High School. The Job Description for a High School Librarian, requires eligibility for a Permanent School Librarian Certificate or a Limited School Librarian Certificate, along with a bachelor's degree. (Exhibit R.) A master's or doctor's degree is preferred, as is a minimum of three years successful teaching experience in a classroom. The Broad Definition states that, under the direction of the principal, the High School Librarian shall:

1. Coordinate all activities under his (or her) jurisdiction with the established philosophy of the school.
2. Organize, administer, supervise and evaluated (sic) the effectives of the library services designed to meet the needs of the students, the staff and the community.
3. Institute reasonable measures to insure a high degree of professional rapport and the maintenance of the proper atmosphere for a library.
4. Institute reasonable procedures and administer effective programs to be certain the library services reflect sound principles of good public relations.
5. Plan, administer and maintain an adequate information program designed to acquaint school personnel and the community with the library program.
6. Delegate reasonable responsibility, institute equitable rules and regulations, establish satisfactory procedures and make assignments necessary for the efficient operation of an optimum library program.
7. Organize and supervise an adequate instructional program for the students and staff in the purposes, policies, regulations and proper procedures for the efficient utilization of the library.

8. Assist the staff in the selection of reference materials necessary for the enrichment of the instructional program.
9. Organize, administer, and maintain adequate systems for the previewing, requisitioning, processing order on receipt of shipment, and establishing and maintaining an adequate system of card files.
10. Establish, administer, supervise and evaluate adequate systems of records, filing, book-keeping, compilation of necessary statistics, perpetual inventory, and the maintenance and care of property assigned to his custody.
11. Organize, administer and evaluate the effectiveness of an adequate in-service training program for personnel under his jurisdiction.

The job description for teacher requires holding a Teacher Certificate appropriate to the area of instruction, and describes the primary function to be participating "as a member of an instructional team or department in directing the learning activities of pupils in the attainment of established curriculum goals." (Exhibit P.) The specific tasks include:

1. Organizes and plans effectively for the instructional task.
2. Prepares and maintains accurate and up-to-date pupils' records as required by law and Board policy.
3. Report to the school and to the teaching and other duty stations which are assigned, punctually and prepared to carry out his or her assigned duties.
4. Develops, establishes maintains conditions at his/her teaching and or/duty station which are safe and healthful for students and reports promptly to the supervisor in charge upon any undesirable condition which he/she as a teacher cannot effectively control or eliminate.

. . .

7. Uses school supplies and equipment efficiently and conserves those resources and encourages students to do so as well by both example and instruction.
8 Demonstrates a thorough knowledge and understanding of the subject matter which he/she is assigned to teach.
9. Establishes and maintains standards of pupil behavior needed to achieve a functional learning atmosphere in the classroom.
10. Plans and implements a program of study that within the resources provided by the district meets the individual needs, interest, and ability of the students.

. . .

14. Communicates with parents through regularly scheduled conferences and through other means to discuss pupil's progress and interpret the school program as the need arises.

The employment contracts in Exhibit U refer to Turrell as a teacher.

As the above is drawn from the exhibits which are also part of the stipulations, they are **FOUND** as **FACT**.

LEGAL ANALYSIS

Motion for Summary Decision

Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). Additionally, if no response is filed within twenty days, summary decision, if appropriate, shall be entered. Ibid.

The New Jersey Supreme Court has modified and clarified the analysis required when considering a motion for summary decision or judgment. In Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 540 (1995), the Court adopted the summary judgment standard utilized by federal courts:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." [Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986).] . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be

> considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. Liberty Lobby, supra, 477 U.S. at 250, 106 S. Ct. at 2511, 91 L. Ed. 2d at 213. The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214, the trial court should not hesitate to grant summary judgment.

The burden is on the moving party to exclude all reasonable doubt as to the existence of any genuine issue of material fact, and all inferences of doubt are drawn against the moving party and in favor of the non-moving party. Saldana v. DiMedio, 275 N.J. Super. 488, 494 (App. Div. 1994). The critical question therefore is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one-sided that one party must prevail as a matter of law." Brill, supra, 142 N.J. at 533 (citation omitted). If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998). As there is no genuine, material issue of fact, I **CONCLUDE** that the matter is appropriate for summary decision.

The issue is whether the tenure rights and seniority gained through approximately twenty-three years as a media specialist in the district apply to the position of teacher in the district. The Board contends that the ten months Turrell taught English in the 2001-2002 school year are the only time relevant to the position of teacher. It also points out that her 2001 appeal complained that the teaching assignment violated her tenure rights, and that she is now arguing the converse. Petitioner argues that, "Although she was originally hired to serve in the position of librarian under her media specialist certificate, throughout almost all of her employment with the Board, Ms. Turrell also taught language arts classes under her English certificate." (Pet'r's br.) "Therefore, her time in the district should be viewed as a dual assignment because she served simultaneously as an educational media specialist and a teacher of language arts literacy." (Ibid.) Petitioner also contends that the written observations and evaluations make clear that during her years in the elementary schools, she taught lessons correlating with the New Jersey Core Curriculum Content Standards for Language Arts Literacy. This area includes reading, writing, speaking, listening, and viewing and media literacy.

"Tenure is achieved within a position and tenure protection as against non-tenured individuals following a reduction in force extends only to assignments within that tenured position for which the individual is qualified by virtue or his or her certification." Wallen v. Rancocas Valley Reg'l High Sch. Dist., 92 N.J.A.R.2d (EDU) 670 (citing Howley v. Bd. of Educ. of Ewing Twp., 1982 S.L.D. 1328, aff'd, State Bd. of Educ., 1983 S.L.D. 1554). The State Board of Examiners issues only three categories of educational certificates: Instructional, Administrative, and Educational Services. N.J.A.C. 6A:9B-5.2(a). Each is a separate category with separate standards. Teachers fall within the Instructional certificate (N.J.A.C. 6A:9B-9B-8.1(a) et seq.); school library media specialists fall within the Educational Service certificate. (N.J.A.C. 6A:9B-12.1 et seq.) In order to have tenure in a position related to the certification, one must have served the requisite number of years in the position. For those with more than one certification, it is possible to have tenure in more than one position, provided that the person has served the required number of years in each position. Here, Turrell is arguing that years served in the media specialist position should also count as years toward a teaching position within the Instructional Certificate positions because of the content of what she was actually doing.

In evaluating whether someone has earned tenure time in a particular position, the Commissioner and the courts have focused on the duties of the position. For instance, in Kish v. Elmwood Park Board of Education, 96 N.J.A.R.2d (EDU) 135, the Commissioner examined the requirements of the Staff Development Departmental Facilitator and the Instructional Supervisor Multi-Discipline and determined that the descriptions "substantially overlapped." Similarly, the New Jersey Supreme Court compared the duties of guidance counselor and a class supervisor and determined that the two were distinctively different because the supervisor evaluated teachers, not students. Dennery v. Passaic Reg'l High Sch. Dist., 131 N.J. 626 (1993).

As the Board notes, Wallen, supra, 92 N.J.A.R.2d (EDU) 670 involves a situation bearing a substantial similarity to Turrell's, as Wallen was a tenured media specialist who sought to exercise tenure rights under her English certificate. Here, the absence of a job

description for a media specialist is unfortunate. Turrell's first full-time appointment in the district was to the position of school librarian for the 1987-1988 year. (Exhibit C.) In 1994-1995 through 2000-2001, she was assigned to Raritan High School. The employment card for those years lists the "grade or subject" as librarian, as it does through 2009 (with the exception of the 2001-2002 year). (Ibid.) However, the settlement recognized Turrell's rights as a media specialist and required the Board "to continue to assign" her to a media specialist position. (Exhibit I.) Thus, at some point, "librarian," morphed into "media specialist," but whether that simply recognized the dramatic technological changes in research and physical resources is in question.

The primary documents concerning Turrell's actual activities are the lesson plans, the evaluations, and the observations of Turrell. With the exception of creating sentence outlines, learning test-taking, and analyzing stories, the lesson plans focus on library-type activities. Similarly, the classroom observation on the lesson about how to do a speech to persuade is notable for its difference from items such as using a table of contents, evaluating encyclopedias for various purposes, and learning to use computer databases. The 1999-2000 evaluation comment about providing library orientation and usage skills as part of the regular, scheduled Language Arts program does refer to the overall English goals, but it is linked to a comment about overseeing the day-to-day operations of the library.

Just as in Wallen, petitioner's position and training as a media specialist "included a significant instructional component," and the materials demonstrate the valuable teaching that went on in the library, but the positions of teacher and media specialist "are substantially distinct." Among other things, the teacher position makes the holder responsible for maintenance of student records, for planning an instructional program related to the individual needs and abilities of each student, and for communicating with parents—none of which appear in any of the documents related to Turrell's position. Thus, the years in the media specialist position cannot be counted toward tenure in a teaching position. For that position, I **CONCLUDE** that Turrell has demonstrated only one year's time, which is insufficient to qualify for tenure.

Therefore, I **CONCLUDE** that she has not demonstrated tenure rights to the position of English teacher.

ORDER

For the reasons cited above, petitioner's appeal is **DISMISSED** with **PREJUDICE**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

January 5, 2015
DATE

Laura Sanders
LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency: January 5, 2015

Date Mailed to Parties: January 5, 2015

/caa

EXHIBITS

J-1 Joint Stipulations of Facts and Exhibits

A. Educational Service Certificate with Educational Media Specialist endorsement; and Instructional Certificate with Teacher of English and Teacher of German endorsements

B. Initial employment contract dated August 31, 1987

C. Portions of Board minutes of August 31, 1987

D. Employment card for 1994-1995 school year through 2000-2001 school year, and for 2003-2004 through 2009-2010 school years.

E. Written course of study for "Communication Today Level II" for 2001-2002 school year

F. Petition of Appeal, Agency Docket Number 306-7/01 and OAL Docket Number EDU 6249-01

G. OAL Initial Decision approving settlement dated March 4, 2002

H. Commissioner's approval of settlement dated April 22, 2002

I. Settlement Agreement

J. Letter from William O. George, Ed.D., Superintendent of Schools, to Linda Turrell, dated April 27, 2010

K. Board minutes dated April 26, 2010, approving elimination of two elementary media specialist positions effective July 1, 2010

L. Letter from Linda Turrell to Board dated April 28, 2010

M. Letter from William O. George to Linda Turrell concerning placement on preferred eligibility list for media specialist position, dated April 29, 2010

N. Letter to Chris Mullins, Board Secretary, from Linda Turrell dated May 6, 2010 (not 2012—see stipulations)

O. Letter from Christopher J. Mullins, CPA, School Business Administrator/Board Secretary, to Linda Turrell dated May 7, 2010

P. Teacher Job Description

Q. Letter from Williams O. George, Ed.D., Superintendent of Schools, to Linda Turrell, dated May 17, 2010

R. Job Description, High School Librarian

S. Sample lesson plans

T. Written observations

U. Annual evaluations

V. Employment contracts

67-15

67-15ASECEL

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

State of New Jersey
DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
Commissioner

February 20, 2015

VIA FACSIMILE AND REGULAR MAIL

Carl N. Tripician, Esq.
1230 Shore Road
Linwood, NJ 08221

Joshua S. Sklarin, Esq.
Parker McCay
1009 Lenox Drive
Building Four East, Suite 102A
Lawrenceville, NJ 08648-2321

Corey J. Lowell
831 Dunlevy Street
Asbury Park, NJ 07712

Re: *Corey J. Lowell v. Geneva Smallwood and Felicia Simmons*
SEC Docket No. C 16-14

Dear Parties:

I have reviewed the papers filed in connection with respondent Simmons' request for interlocutory review of the February 11, 2015 denial, by the Acting Director of the School Ethics Commission (SEC), of respondents' emergent applications for a stay of the February 24, 2015 hearing which has been scheduled to adjudicate the above-captioned matter. I note first that the timing of the application does not allow a reasonably adequate response time. Further, upon full consideration of respondent Simmons' papers, I have determined that the application fails to satisfy all of the standards for the granting of emergent relief which were established in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Finally, I do not find that the arguments presented by respondent Simmons justify the piecemeal litigation that interlocutory review of the SEC's stay denial would engender.

Accordingly, pursuant to my discretion under *N.J.A.C.* 1:1-14.10, I herewith deny petitioner's motion.

Sincerely,

David C. Hespe
Commissioner of Education

c. Joanne M. Restivo, Acting Director
School Ethics Commission

69-15IM

69-15

State of New Jersey

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

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

DAVID C. HESPE
Commissioner

February 24, 2015

Angela Barrett
11 Powder Lane
Burlington, New Jersey 08016

David M. Serlin, Esq.
Blason II, Suite 120
505 South Lenola Road
Moorestown, New Jersey 08057

Re: *A.B. on behalf of minor child, L.M.D.-R. v. Board of Education of the Township of Burlington, Burlington County, Agency Dkt. No. 291-11/13, Commissioner Decision No. 180-14.*

Dear Parties:

I have reviewed the materials filed in connection with petitioner, A.B.'s Motion for Reconsideration of the Acting Commissioner's May 2, 2014 decision ordering the petitioner to reimburse the Burlington Township Board of Education $18,381.34 in tuition costs for her grandson, L.M.D.-R.'s period of ineligible attendance in the district.

Pursuant to *N.J.A.C.* 6A:3-1.15(b)2, a motion for reconsideration shall be considered based upon the following:

i. claim(s) of mistake, provided, however, that disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake" for purposes of this section;
ii. newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence;
iii. newly ascertained misrepresentation or other misconduct of an adverse party, where such misrepresentation could not have been previously known; or
iv. reversal of a prior judgment on which the present matter is based.

Upon review and consideration of the submissions, I find that the petitioner has failed to satisfy any of the requisites for granting such relief specified in *N.J.A.C.* 6A:3-1.15(b)2. The petitioner does not argue that she has satisfied any of the requirements for reconsideration, but rather she requests that the Commissioner reconsider this matter based on the fact that she

pays taxes in Burlington Township and that she agreed to co-parent her grandson because of her daughter's economic hardship. The petitioner, however, has not presented any new information indicating that L.M.D.-R was actually residing with her in Burlington Township between February 13, 2013 and June 25, 2013, and September 9, 2013 and February 4, 2014. The fact that the petitioner currently has full custody of L.M.D.-R., and that he is now lawfully attending school in the district does not negate the fact that tuition is owed for his ineligible attendance between February 13, 2013 and February 4, 2014.

Accordingly, the Motion for Reconsideration is hereby DENIED.*

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library

DCH/MKD/JKH

Via Regular Mail

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

70-15

OAL DKT. NO. EDU 8063-14
AGENCY DKT. NO. 162-6/14
COMMISSIONER DECISION No. 489-14

AAA SCHOOL, LLC / EL ELDESOUKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
PASSAIC COUNTY EDUCATIONAL SERVICES COMMISSION,	:	DECISION
RESPONDENT.	:	

Petitioner's motion for reconsideration of the Commissioner's December 18, 2014 decision in this matter has been fully reviewed. Respondent filed no response.

Upon consideration, the Commissioner finds that petitioner has failed to meet the requirements of *N.J.A.C.* 6A:3-1.15(b)(2), and accordingly denies petitioner's motion.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/24/15

Date of Mailing: 2/25/15

71-15

CALVIN CARLSTROM,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner filed an appeal in March 2006, challenging the Board's charging of his accumulated sick leave for absences associated with petitioner's alleged exposure to a contaminated worksite. This matter was the subject of a pending Worker's Compensation case, and was placed on the inactive list in May 2006. A hearing in the matter was scheduled for January 14, 2015, but petitioner failed to appear. A notice was sent to the parties by the Office of Administrative Law on January 21, 2015, which provided the petitioner with an opportunity to submit an explanation for his failure to appear to the Department of Education within thirteen days of the notice. No explanation was filed with the Department.

There being no explanation for his non-appearance filed by the petitioner, the matter was deemed to no longer be a contested case before the Commissioner. Accordingly, the Commissioner dismissed the petition with prejudice.

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

February 24, 2015

OAL DKT. NO. EDU 5105-06
AGENCY DKT. NO. 115-3/06

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

The record of this matter – transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and including an advisement of petitioner's failure to appear at the scheduled January 14, 2015 OAL hearing – has been reviewed. Petitioner filed no explanation for his failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/24/15
Date of Mailing: 2/25/15

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

72-15

CAROLYN BURNETTE	:	
Petitioner,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY	:	DECISION
Respondent.	:	

SYNOPSIS

Petitioner filed an appeal in January 1998, challenging the Board's charging of her accumulated sick leave for absences associated with a work-related injury. This matter was the subject of a pending Worker's Compensation case, and was placed on the inactive list. A hearing in the matter was scheduled for January 14, 2015, but petitioner failed to appear. A notice was sent to the parties by the Office of Administrative Law on January 21, 2015, which provided the petitioner with an opportunity to submit an explanation for her failure to appear to the Department of Education within thirteen days of the notice. No explanation was filed with the Department.

There being no explanation for her non-appearance filed by the petitioner, the matter was deemed to no longer be a contested case before the Commissioner. Accordingly, the Commissioner dismissed the petition with prejudice.

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

February 24, 2015

72-15

OAL DKT. NO. EDU 01369-98
AGENCY DKT. NO. 371-11/97

CAROLYN BURNETTE	:	
Petitioner,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY	:	DECISION
Respondent.	:	

The record of this matter and advisement of failure to appear transmitted by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 – along with copies of notifications sent to the parties by OAL on January 21, 2015, providing an opportunity to submit an explanation for such nonappearance – have been reviewed. There being no explanation filed by petitioner, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/24/15
Date of Mailing: 2/25/15

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

73-15

OAL DKT. NO. EDU 10090-14
AGENCY DKT. NO. 181-7/14

P.D., on behalf of minor child, M.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/24/15

Date of Mailing: 2/25/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10090-14
AGENCY DKT. NO. 181-7/14

P.D. ON BEHALF OF MINOR CHILD, M.D.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
MORRIS SCHOOL DISTRICT, MORRIS COUNTY
Respondent.

Shelly L. Stanger, Esq. for petitioner (Law Office of Shelly L. Stangler, attorney)

Marie-Laurence Fabian, Esq. for respondent (Porzio, Bromberg and Newman, attorneys)

Record Closed: January 13, 2015 Decided: January 13, 2015

BEFORE **ELLEN S. BASS**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 12, 2014 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

January 13, 2015
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 1-16-15

Mailed to Parties: JAN 16 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

2015 JAN 13 A 10:58

AGREEMENT AND RELEASE

This Settlement Agreement and General Release ("Agreement") is made and entered into by and between the MORRIS SCHOOL DISTRICT BOARD OF EDUCATION (hereinafter "the Board" or "the District") and P.D. o/b/o M.D. (hereinafter the "Releasor" or the "Parent"), (collectively the "parties") for full settlement of certain civil and administrative claims that were alleged and/or could have been alleged by Releasor.

WITNESSETH:

WHEREAS, the Board operates the Morris School District; and

WHEREAS, P.D. and M.D. are domiciled in the Morris School District; and

WHEREAS, on July 22, 2014, P.D. filed for a petition of appeal challenging the discipline imposed on M.D. by the Board on April 28, 2014, which is pending before the New Jersey Commissioner of Education/Office of Administrative Law, bearing Agency Reference Number 181-7/14 and OAL Docket No. EDU 10090-2014 N; and

WHEREAS, the parties desire to amicably resolve this dispute and avoid the additional expenses of litigation.

NOW, THEREFORE, in consideration of the foregoing and for other good and valuable consideration, it is hereby agreed by and between the parties hereto as follows:

1. **Non-Admission By the Board.** This Agreement shall not be construed as an admission by the Board of any of the acts or omissions alleged or those that could have been alleged by Releasor, or of any acts or omissions alleged or which could have been alleged against the Board. The Board specifically denies any liability whatsoever for any damages, injuries or other claims by Releasor or those which were alleged or could be claimed by Releasor.

2. **Return to School.** The parties agree that M.D. will continue on home instruction through the end of 2nd marking period. As of February 1, the first day of the 3rd marking period (unless postponed as a result of school closings due to inclement weather), M.D. will be allowed to return to Morristown High School ("MHS") on a limited basis as described herein. M.D. will take two courses, English and Physical Education, which meet on "A" days, from 11:42 AM to 2:27 PM. M.D. will arrive at MHS on such "A" days no earlier than 11:37 AM and will leave the premises of MHS no later than 2:30 PM. He will not be allowed to participate in any extracurricular activities during that time. The parties agreed that M.D. and P.D. will attend a re-entry meeting with Mr. Manning, the MHS Principal, which meeting will be scheduled by Mr. Manning at a date prior to M.D.'s first day back. Assuming M.D. meets the requirements for graduation, he will be allowed to participate in the graduation ceremony scheduled for June 24, 2015.

3. **Code of Conduct Violations.** The parties further agree that in the event M.D. violates the Board's Code of Student Conduct and/or its policy prohibiting Harassment Intimidation and Bullying, he will forfeit his rights under this Agreement, including the right to participate in the graduation ceremony, and be placed on home instruction for the remainder of the school year.

4. **Release.** In exchange for the consideration set forth herein, the Releasor releases and gives up any and all claims and rights she may have against the Board for any damages or injuries to Releasor in connection with M.D.'s education, including any claims for full reinstatement, compensatory education, compensatory damages, punitive damages, or any damages or injuries to M.D., arising out of alleged acts or omissions, whether known or unknown, that have taken place through the date of this Agreement. As used in this Agreement,

the term "Board" means: the Morris School District Board of Education, its current or former elected or appointed officials, administrators, employees, attorneys, agents, servants, representatives, predecessors and successors, insurance carriers, and all other persons or entities for whom any of the above have been or may be legally responsible. Releasor specifically releases the following claims as to the Board:

(a) Any and all claims that were brought and that could have been brought in the Petition of Appeal, bearing Agency Reference No. 181-7/14 and OAL Docket No. EDU 10090-2014N and any other civil or administrative claims that Releasor could assert now, or in the future, resulting from any action or failure to act occurring prior to the time Releasor signs this Agreement, under any provision of any law, common or statutory, of the United States, New Jersey or any other state, city, county, or locality, including but not limited to all statutory claims arising under the New Jersey Anti-Bullying Bill of Rights, the New Jersey Law Against Discrimination, the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964 as well as any other federal, state, or local statute or regulation; and the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* and *N.J.A.C.* 6A:14-1 *et seq.*; and

(b) Any and all available claims for attorney's fees and expert costs under any law or regulation.

5. **Agreement Not to Sue.** Releasor agrees not to file any lawsuit or claim against the Board, based on any events, whether known or unknown, occurring prior to the date of the execution of this Agreement, in any court or tribunal of the United States, New Jersey or any other state, city, county, or locality, for any claims released in this Agreement.

6. **Indemnification and Hold Harmless.** The Releasor agrees to defend, indemnify and hold harmless the District and its representatives, insurers, third party administrators and attorneys from any claim that may be brought by or on behalf of M.D., during and at any time subsequent to the term of this Agreement, regarding the subject matter of this dispute, provided the Board has not breached any terms of this Agreement.

7. **Confidentiality and Non-Disparagement.** The Parent specifically acknowledges and agrees that this Agreement was reached without any admission by the Board of any of the acts or omissions alleged or those that could have been alleged. The parties agree that the terms of this Agreement will be kept confidential to the extent permitted by law and that they will not criticize, denigrate, or disparage each other. The parties further agree that in the event of a discussion about this settlement, the parties shall state, "the matter was amicably resolved without an admission of liability." Releasor acknowledges that this confidentiality/non-disparagement requirement is a material term to this Agreement.

8. **Non-Domicile.** The Board's obligations under this Agreement shall end immediately upon M.D. no longer being domiciled within the boundaries of the Morris School District.

9. **No Precedent.** The parties agree that this Agreement may not be used to establish precedent in any future proceeding of any type whatsoever involving the Board and that it shall be inadmissible in any such proceeding, other than a proceeding to enforce or prove the existence of same. This Agreement shall not be construed as an admission by the Board of any wrongdoing.

10. **Who is Bound.** The parties and their agents are bound by this Agreement. Those who succeed to their rights and responsibilities, such as heirs, the executors of their estate, or their personal or legal representatives, are also bound.

11. **Representation**. The parties acknowledge that they are fully satisfied with their respective legal representation in this matter and that they have reviewed the terms of this Agreement with their respective counsel.

12. **Entire Agreement.** This Agreement contains the sole and the entire agreement between Releasor and the Board, and fully supersedes any and all prior agreements and understandings between Releasor and the Board pertaining to the subject matter of this Agreement. Releasor represents and acknowledges that she has not relied upon any representation or statement by the Board, or her counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth in this Agreement. No other promises or agreements shall be binding unless in writing, signed by Releasor and the Board, and expressly stated to be a modification of this Agreement.

13. **Signatures.**

BY SIGNING THIS AGREEMENT RELEASOR STATES THAT:

A. SHE HAS READ IT;

B. SHE AGREES WITH EVERYTHING IN IT;

C. SHE HAS HAD THE OPPORTUNITY TO CONSULT WITH AN ATTORNEY PRIOR TO EXECUTING THIS AGREEMENT, NAMELY, SHELLEY L. STANGLER, ESQ.;

D. SHE HAS SIGNED THIS AGREEMENT KNOWINGLY AND VOLUNTARILY.

Releasor

Patricia Soares (P.D.)
P.D.

Dated: 12-8-14

Morris School District Board of Education

By: Leonard Posey
Board President

Dated: 1-8-15

Attest: _____
Christine Kelly, Business Administrator/Board Secretary

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF MORRIS SCHOOL DISTRICT, MORRIS COUNTY, NEW JERSEY, AS RECORDED IN THE OFFICIAL MINUTE BOOK.

The Board of Education of Morris School District, in the County of Morris, New Jersey, convened in Regular Session on **Monday, January 5, 2015 at 6:30 p.m.** in the 2nd floor conference room of Lafayette Learning Center 31 Hazel Street, Morristown, New Jersey.

The following members of the Board of Education were present: **Mrs. Nancy Bangiola, Ms. Lucia Galdi, Morris Plains Representative, Dr. Peter Gallerstein, Mrs. Teresa Murphy, Ms. Lisa Pollak, Mr. Leonard Posey, Mrs. Ann Rhines, Mrs. Fran Rossoff, Ms. Jeanette Thomas**

The following members of the Board of Education were absent: **Mr. Norman Blanchard**

The following Resolution was offered by **Ms.Pollak** seconded by **Mrs. Rossoff** and adopted by the Board of Education by the following roll call vote:

Roll Call:

AYES: Mrs. Bangiola, Mr. Blanchard, Dr. Gallerstein, Mrs. Murphy, Ms. Pollak, Mr. Posey, Mrs. Rhines, Mrs. Rossoff, Ms. Galdi as it pertains to the high school

NOES: None

ABSENT: Ms. Thomas

RESOLVED ***STIPULATION OF SETTLEMENT***

Motion #3 that, upon the recommendation of the Interim Superintendent, the Board of Education approve the confidential Stipulation of Settlement resolving all claims alleged in an appeal of disciplinary action filed by student #605067. The Settlement Agreement is on file in the office of the Superintendent.

STATE OF NEW JERSEY)
)ss
COUNTY OF MORRIS)

I, Christine A. Kelly, Business Administrator/Board Secretary of Morris School District, in the County of Morris, State of New Jersey, hereby certify that the foregoing Extract from the Minutes of the Meeting of the Board of Education of said district, duly called and held on **Monday, January 5, 2015**, compared by me with the original Minutes as officially recorded in my office in the Minute Book of said Morris School District Board of Education, and is a true complete copy thereof and of the whole of said original Minutes so far as the same relate to the subject matter referred to in said Extract.

In witness, I have hereunto set my hand and affixed the corporate seal of said Board of Education this **9th day of January, 2015.**

(Seal)

Business Administrator/Board Secretary

74-15E

14-15

OAL DKT. NO. EDU 00638-15
AGENCY DKT. NO. 5-1/15

GLENN CIRIPOMPA	:	
Petitioner,	:	COMMISSIONER OF EDUCATION
v.	:	DECISION ON
BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY	:	APPLICATION FOR EMERGENT RELIEF
Respondent.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This case shall proceed at the OAL to a plenary hearing, or such other proceedings as the ALJ and the parties determine, to resolve the underlying claim on the merits.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/25/15

Date of Mailing: 2/25/15

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 00638-15
AGENCY DKT. NO. 5-1/15

GLENN CIRIPOMPA,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY,
Respondents.

Edward Cridge, Esq., for Glenn Ciripompa, petitioner (Mellk O'Neill, attorneys)

Robert J. Merryman, Jr., Esq., for Bound Brook Board of Education, respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: January 22, 2015 Decided: January 23, 2015

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

Glenn Ciripompa (petitioner) filed a petition for due process seeking an order directing the Bound Brook Board of Education (respondent) to restore his salary and

emoluments retroactive to November 15, 2014 through the date that a determination is made in his tenure case. In the current proceeding, petitioner seeks an order on emergent relief granting the sought after relief immediately pending the due process proceeding.

PROCEDURAL HISTORY

On January 12, 2015, petitioners' petition of appeal was filed with the Office of Controversies and Disputes of the New Jersey Department of Education, along with a request for emergenct relief. On January 14, 2015, the emergent matter was filed along with the due process request with the Office of Administrative Law. The emergent relief request was scheduled for oral argument, which was held on January 22, 2015.

FACTUAL DISCUSSION

Many of the facts do not appear to be disputed. Petitioner is a math teacher employed by respondent, most recently assigned to Bound Brook High School. On July 14, 2014, respondent certified tenure charges against petitioner, and suspended petitioner without pay pending the resolution of the tenure charges in accordance with N.J.S.A. 18A:6-14. The charges were filed with the Commissioner of Education on July 17, 2014. The matter was referred to an arbitrator for disposition in accordance with N.J.S.A. 18A:6-17.1. On October 20, 2014 (ninety eight days after the certification of charges and suspension) the assigned arbitrator issued his decision and award, which maintained petitioner's tenure but imposed a one hundred twenty day suspension, without pay. Respondent subsequently moved to vacate the arbitrator's decision and award in the Superior Court of New Jersey, Chancery Division. The Court issued an order vacating the arbitrator's award and remanding the matter to a new arbitrator on January 8, 2015 because the award was procured by undue means in accordance with N.J.S.A. 18A:6-17.1e and N.J.S.A. 2A:24-8.

On January 9, 2015 petitioner filed in the Appellate Division seeking reversal of the order to vacate. That appeal is currently pending. On January 10, 2015 petitioner filed the herein matter, seeking an order directing respondent to restore his salary and

emoluments retroactive to November 15, 2014 (the one hundred twenty first day after certification of charges to the commissioner) through the date that a determination is made in his tenure case. On January 15, 2015 petitioner filed a motion in the Superior Court seeking to stay any further arbitration proceedings pending the outcome of petitioner's appeal to reverse the order vacating the arbitrator's award. That motion is currently returnable February 6, 2015. A new arbitrator has been assigned, and although he has indicated his availability to hear the matter on February 4, 9 or 13, 2015 (Certification of Robert Merryman, Esq., Exhibit 3) he has since informed the parties that no proceedings will ensue until the motion to stay has been decided.

LEGAL DISCUSSION

The standards which must be met by the moving party in an application for emergent relief are embodied in N.J.A.C. 1:1-12.6 and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). Emergency relief may only be granted if the judge determines that:

1. The petitioner will suffer irreparable harm if the relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The petitioner must satisfy all four prongs of the Crowe test.

N.J.S.A. 18A:6-11 states:

> Any charge made against any employee of a Board of Education under tenure during good behavior and efficiency shall be filed with the secretary of the Board in writing, and a written statement of evidence under oath to support such charge shall be presented to the Board. The Board of Education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the

> charge, statement of position and statements of evidence presented to it, the Board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. The Board of Education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address. In the event the Board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the Commissioner for a hearing pursuant to N.J.S.A.18A:6-16, together with a certificate of such determination. The consideration and actions of the Board as to any charge shall not take place at a public meeting.

Furthermore, N.J.S.A. 18A:6-16 provides, in pertinent part, that , "Upon receipt of such a charge and certification, or of a charge lawfully made to the Commissioner, the Commissioner or the person appointed to act in the commissioner's behalf in the proceedings shall examine the charges and certification . . . If, following receipt of the written response to the charges, the commissioner . . . shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator[.]" N.J.S.A. 18A:6-17.1b(1) requires that a hearing "be held before the arbitrator within forty-five days of the assignment of the arbitrator, and N.J.S.A. 18A:6-17.1d requires that "the arbitrator shall render a written decision within forty-five days of the start of the hearing."

Finally, N.J.S.A. 18A6-14 provides:

> Upon certification of any charge to the Commissioner, the Board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the arbitrator is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. Should the charge be dismissed at any stage of the process, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed at any stage of the process and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the Board of Education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension. Should the

> charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension.

As to the second and third prongs required to be met before emergent relief can be granted, petitioner argues that the law is well settled and that petitioner will likely succeed on the merits because once the Chancery Division vacated the arbitrator's award it became a nullity, as though it had never existed. Therefore the timeline was not met and no arbitrator's decision was in place once 120 days had passed since the certification of charges. Accordingly, petitioner asserts that the plain language of N.J.S.A. 18A:6-14 entitles him to return to pay status effective the one hundred twenty-first day. Respondent, on the other hand, argues that the arbitrator did meet his statutorily imposed deadline and that N.J.S.A. 18A:6-14 does not contemplate the vacation of an arbitrator's award.

Neither view appears to take into account the complete set of circumstances before us. On the one hand, it is easy to see petitioner's point of view. When the award was vacated it was made essentially as though it did not exist. N.J.S.A. 2A:24-8 provides a judge with discretion in ordering that a vacated matter be reheard by arbitrators. While the language in question seems to contemplate contractual as opposed to statutorily mandated arbitration, if he had not ordered it, the Commissioner of Education potentially could have invoked the provisions which govern what is to occur when an arbitrator does not issue his or her decision within the required timeframe. N.J.S.A. 18A:17.1h provides that, "The commissioner may remove any arbitrator from an arbitration case or an arbitration panel if an arbitrator does not adhere to the timelines set forth herein without approval from the commissioner. If the commissioner removes an arbitrator from an arbitration case, the commissioner shall refer the case to a new arbitrator within five days. The newly-assigned arbitrator shall convene a new hearing and then render a written decision within 45 days of being referred the case." These provisions make no mention of staying or tolling the 120 day rule imposed by N.J.S.A. 18A:6-14.

On the other hand, respondent strikes a resonant argument when pointing out that petitioner, by seeking a stay of further arbitration proceedings until the appeal of the order of vacation is resolved, is potentially delaying resolution of the matter. A new arbitrator was assigned who indicated his availability to hear the matter as early as February 4, 2015, which would require a decision forty-five days later, possibly sooner if the requirements of N.J.S.A. 18A:6-17.1h are invoked. While petitioner notes that Court Rule R.2:9-5(c) requires that when an order compelling arbitration is appealed and a party requests a stay of arbitration proceedings pending the appeal, that request shall be granted absent a finding of exceptional circumstances, he also acknowledges that a request must first be made and that a stay is not executed automatically. In respondent's eyes the matter could be resolved shortly and petitioner's actions are causing a delay, seeking to receive pay without working for a longer period than is necessary.

Without ascribing intentions or motives, it is still apparent that two paths lay before the parties and the practical result of sorting this out may be a longer period of time in which petitioner is suspended with pay due to his request to stay proceedings; a result which may or may not be consistent with the legislative intent of N.J.S.A. 18A:6-14. While the statute does provide for pay status while a board appeals a dismissal of charges, it is noted that no dismissal occurred here – rather a vacation of an award which reduced the penalty. Additionally the statute indicates that a return to pay status may not be caused by delays requested by the petitioner, although the request for stay has occurred after the 120th day since certification. Additionally, respondent asserts that discovery is needed to determine what amount, if any, would need to be deducted from petitioners salary to account for substitute employment during the suspension should petitioner prevail, although petitioner's counsel asserts that petitioner has certified that there is none.

All of which is to say that when viewed through the prism of the current emergent relief application, the legal question is at best unsettled and appears to be a matter of first impression with regard to the amendments to the laws governing teacher tenure charges placed into effect for the 2012-2013 school year. Accordingly, I **CONCLUDE** that petitioner has failed to demonstrate that he has a likelihood of succeeding on the

merits of the underlying claim. It is stressed that this analysis does not represent a conclusion that either party is more or less likely to prevail at hearing, but only articulates that the legal questions are not settled to a point that petitioner is deemed for purposes of emergent relief sufficiently likely to succeed at hearing, and that litigation of the underlying petition will be helpful in resolving these issues.

Petitioner argues that irreparable harm will exist if emergent relief is not granted, relying on petitioner's certification as to financial distress. Although petitioner acknowledges arguments against finding irreparable harm where money is at issue, he argues that denying emergent relief or finding no irreparable harm would frustrate the specific intent of the statute requiring a return to pay status, which is designed to be self-executing and not require litigation to be triggered. Respondent counters that return to pay status is specifically a monetary issue which can be addressed satisfactorily if necessary upon conclusion of a plenary hearing, and that finding irreparable harm goes against a vast body of case law on the matter.

"Irreparable harm" is defined as the type of harm "that cannot be redressed adequately by monetary damages." Crowe, supra, 90 N.J. at 132-33. In addition, the irreparable harm standard contemplates that the harm be both substantial and immediate. Subcarrier Communications v. Day, 229 N.J. Super. 634, 638 (App. Div. 1977). However, pecuniary damages may sometimes be inadequate because of the nature of the injury or the right affected. Crowe, supra, 90 N.J. at 133. For example, in Crowe the Court determined neither an unwarranted eviction nor reduction to poverty could be compensated adequately by monetary damages awarded after a distant hearing. Ibid.

In the present matter, however, the governing statute specifically contemplates the ability to assume substituted employment during suspension as a means of mitigating harm caused by the suspension. While that often may be easier said than done, the record, specifically petitioner's certification, is devoid of any description of efforts undertaken to obtain substituted employment. Petitioner may not merely claim a reduction to poverty to prove irreparable harm without demonstrating the futility of efforts to mitigate or avoid such harm.

Additionally, petitioner has not provided, nor I am aware of, any persuasive controlling authority which stands for the proposition that where a dispute arises over a purely monetary issue which involves determination of whether criteria for a statutorily mandated automatic provision of money has been met transforms the monetary issue to one constituting irreparable harm. Accordingly, I **CONCLUDE** the issue at hand is one that can be redressed adequately by monetary damages and that petitioner has failed to demonstrate that he will suffer irreparable harm if emergent relief is not granted.

As to the fourth and final prong, each party argues that they will suffer greater harm if they do not prevail on the question of emergent relief. Considering the forgoing, it is apparent that if emergent relief is denied, petitioner still will have the opportunity to be heard and possibly obtain the relief he seeks upon conclusion of a plenary hearing. The same cannot be said for respondent, who if successful at plenary hearing would have to undertake proceedings at public expense to recoup any money paid to petitioner as a result of the award of emergent relief. Accordingly, I **CONCLUDE** that the balance of equities argument favors respondents, and that petitioner has **FAILED** to satisfy this prong.

Consequently, the petitioners' request for emergency relief is **DENIED**.

ORDER

For the foregoing reasons, I **CONCLUDE** that petitioner is not entitled to the requested emergent relief and that the petitioner's request for emergency relief is **DENIED**. The matter will now be scheduled for plenary hearing on the underlying due process petition.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

January 23, 2014
DATE

ELIA A. PELIOS, ALJ

EAP/mel

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OAL DKT. NO. EDU 00429-15
(EDU 07247-14 ON REMAND)
AGENCY DKT. NO. 129-5/14

JOHN CODOMO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, PASSAIC COUNTY	:	DECISION ON REMAND
RESPONDENT.	:	

The Initial Decision on Remand of the Office of Administrative Law (OAL), the parties' revised settlement agreement, and the record of this matter have been reviewed – mindful of the Commissioner's January 5, 2015 determination that the prior settlement agreement recommended for adoption by the Administrative Law Judge contained no indication of Board of Education approval.

Accordingly, since the agreement now contains the signature of the Board attorney, the Commissioner adopts the Initial Decision recommending approval of the parties' settlement as the final decision in this matter, which is hereby dismissed – subject to compliance with the terms of the settlement. A copy of this decision will be transmitted to the New Jersey Department of Labor and Workforce Development for review and action as that body deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/25/15
Date of Mailing: 2/25/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 00429-15
AGENCY DKT. NO. 159-5/14

JOHN CODOMO,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, PASSAIC COUNTY.

Respondent.

Louis P. Bucceri, Esq., for petitioner (Bucceri & Pincus, attorneys)

Rodney T. Hara, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: January 16, 2016 Decided: January 16, 2015

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

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law on June 12, 2014 for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A telephone conference was held on November 14, 2014 and during that time the parties advised the undersigned that a settlement had been reached. The

Settlement Agreement indicating the terms of settlement was signed by the parties and forwarded to the OAL on January 16, 2015. A copy of the Settlement Agreement is attached hereto and made part hereof.

1. The parties have voluntarily agreed to the settlement as evidenced by the signature of the parties and/or signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.
3. The settlement conforms with the standards set forth in *Cardonick v. Brookline BOE, dec'd by the Comm'r,* April 7, 1992, *aff'd. St. Bd. of Ed.*, April 6, 1983, 1990 *SLD* 842, 846.

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

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

January 16, 2015
DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: 1-21-15

Date Mailed to Parties: JAN 21 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

sej

JOHN A. CODOMO, Petitioner, v. HAWTHORNE BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION OAL Dkt. No. EDU 07247-2014N Agency Ref. No. 129-5/14 **SETTLEMENT AGREEMENT**

RECEIVED
2015 JAN 16 P 1:30
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

THIS SETTLEMENT AGREEMENT is made by and between Petitioner, John A. Codomo ("Petitioner"), residing at 416 Chestnut Street, Nutley, New Jersey and the Respondent, Hawthorne Board of Education ("Board"), with offices at 445 Lafayette Avenue, Hawthorne, New Jersey (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner has commenced a tenure and seniority claim captioned as, John A. Codomo v. Board of Education of Hawthorne, which is presently pending before the Commissioner of Education and the Office of Administrative Law and docketed as OAL Dkt. No. EDU 07247-2014N, Agency Dkt. No. 129-5/14 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, the Petitioner has been voluntarily reinstated by the Board as a full time school counselor for the 2014-15 school year.

WHEREAS, the parties desire to resolve and settle all remaining disputes between them arising out of the Litigation, under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained here, the parties agree as follows:

1. The Parties mutually agree that Petitioner was tenured as a School Counselor as of March 3, 2014 and is therefore entitled to gross back salary in the amount of $ 9,518.02, for the period from May 9, 2014 through June 30, 2014. This gross salary amount is subject to reduction by an amount equal to the Unemployment Benefits received by Petitioner during that time period. On behalf of Petitioner, the Board will pay the amount due pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) to reimburse that Department for the payment of Unemployment Benefits received by Petitioner during the period from May 9, 2014 through June 30, 2014. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board, or any other party for the repayment of Unemployment Benefits received by Petitioner from May 9, 2014 through June 30, 2014. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of Unemployment Benefits for that time period. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from May 9, 2014 through June 30, 2014 was $ 4,579.20. Petitioner has received unemployment benefits for July and August 2014. In the event that it is determined by LWD that Codomo has to reimburse LWD for the unemployment benefits during that period, Codomo shall repay the amount to LWD and shall indemnify and hold the Board harmless for any obligation it may have to reimburse LWD for the unemployment benefits received as to the months of July and August, 2014 from the gross back salary paid in accordance with the terms of this Agreement.

2. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is $ 4,938.82.

3. Petitioner certifies in accordance with the law that he had no mitigating earnings from other employment during the period from May 9, 2014 through June 30, 2014.

4. The Final Gross Amount of back salary due to Petitioner shall be $ 4,938.82. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "John A. Codomo".

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis arising out of the claims raised in the Petition in this matter which were or could have been asserted against the Board in the Litigation with respect to the 2013-14 school year. The back pay amount specified represents back salary due (after the reductions and deductions specified above) for the period from May 9, 2014 through June 30, 2014.

6. The Parties agree that, by virtue of his employment by the Board as a properly certified School Counselor in a non-substitute capacity from March 1, 2011 through and after March 3, 2014, Petitioner achieved tenure pursuant to N.J.S.A. 18A:28-5 (a) (3). In addition, Petitioner's seniority as a School Counselor will be credited for the period from May 9, 2014 through June 30, 2014 so that his seniority in that category for the 2013-14 school year shall equal a full year. The 2013-14 school year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be

credited with a full complement of sick days for the 2013-14 school year, less any days used during any portion of the time when Petitioner was actively employed by the Board during that year.

7. The Parties agree that Petitioner's seniority as of June 30, 2014 is:

a) 3 years and four (4) months of secondary seniority as a School Counselor, running from March 1, 2011.

8. Petitioner, in consideration of this Settlement Agreement, hereby agrees to a dismissal of his Petition of Appeal in this matter. Said dismissal shall have no effect on Petitioner's continuing tenure, seniority or recall rights, as well as any other rights he may have as a current or future employee of the Board, or under this agreement.

9. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be prevailing party for any purpose. Neither party may seek or claim an award of counsel fees in this matter.

10. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

11. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

12. Petitioner represents that he is freely entering into this Agreement, that he is acting with the advice of counsel of his choosing, and that he has read and fully understands the contents and effects of this Agreement.

13. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Hawthorne Board of Education.

14. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement Agreement by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

FOR PETITIONER

Louis P. Bucceri ,Witness
Dated: 10/10/14

10/10/14 J. A. Codomo
John A. Codomo
Dated:

FOR RESPONDENT,
HAWTHORNE BOARD OF EDUCATION

Date: Roberta Mussey
,Witness

, Board President
Dated:

Date:
,Witness

, Board Secretary
Dated: 8/21/14

FOGARTY & HARA, ESQS.
Attorneys for Respondent

By:
Rodney T. Hara

(9-30-2014)

Dated: 1/12/2015

KATHLEEN CAREW,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF OLD TAPPAN, BERGEN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured elementary school teacher – alleged that the respondent Board violated her tenure and seniority rights when it assigned her to a part-time position for the 2013-2014 school year after she had taught a full-time schedule during the 2012-2013 school year. Petitioner was originally hired to fill a full-time teaching position for the 2009-2010 school year, and taught full-time through the 2010-2011 school year. For the 2011-2012 school year, however, the Board reduced its staff and re-assigned petitioner as a part-time (0.50 full-time equivalent, or "FTE") teacher. For the 2012-2013 school year, the Board again assigned petitioner to a half-time schedule, but added an additional assignment as a 0.50 FTE family leave replacement teacher for a colleague who had been approved for a maternity leave – thus bringing petitioner's schedule to full-time for 2012-2013. When the Board eliminated the maternity assignment for the 2013-2014 school year and once again employed petitioner on a 0.50 FTE basis, she filed the within appeal, claiming, *inter alia*, that she had been subject to a reduction in force (RIF). The parties filed cross motions for summary decision.

The ALJ found, *inter alia,* that: there are no material facts at issue herein, and the matter is ripe for summary decision; whether petitioner was subject to a RIF prior to the beginning of the 2013-2014 school year depends on what position she held when she achieved tenure on the second day of the 2012-2013 school year. The ALJ concluded that petitioner was a 0.50 FTE teacher on the day that she achieved tenure, and petitioner was not subject to a RIF since the loss of a temporary leave-replacement position does not constitute a RIF. Accordingly, the ALJ granted the Board's motion for summary decision, denied petitioner's cross motion, and dismissed the petition.

Upon comprehensive review, the Commissioner found that no RIF occurred when only petitioner's half-time tenured employment was renewed for the 2013-2014 school year, and concurred with the ALJ's determination that the petitioner's rights were not violated. Accordingly, summary decision was granted to the respondent, and the petition was dismissed.

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

Issued 2/25/15

OAL DKT. NO. EDU 13462-13
AGENCY DKT. NO. 201-8/13

KATHLEEN CAREW,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF OLD TAPPAN, BERGEN COUNTY,	:	
RESPONDENT.	:	

Before the Commissioner is petitioner's contention that her tenure rights were violated when, in June 2013, she was offered a contract to teach sixth and eighth-grade language arts on a part-time basis only. In pressing her claim, petitioner alleges that: 1) by the summer of 2013, she had earned tenure; 2) by offering her half-time instead of full-time employment for the 2013-2014 school year, respondent subjected her to a reduction in force (RIF); 3) by June 2013, she had accrued more seniority in the district as a language arts teacher than had a colleague, Virginia Walsh; 4) because she had purportedly been "RIF'd", and had allegedly earned more seniority than Walsh, she was entitled to the full-time position respondent offered to Walsh for the 2013-2014 school year; and 5) in the alternative, being "RIF'd" entitled her to claim a Kindergarten position which had been offered to an untenured teacher. Upon review of the record, Initial Decision of the Office of Administrative Law (OAL), petitioner's exceptions and the respondent's and intervenors' replies thereto, the Commissioner concurs with the OAL's determination that petitioner's rights were not violated.

The facts which are critical to the instant controversy can be found in the parties' Joint Stipulation of Facts. Briefly, that document and the exhibits annexed thereto reveal the following. Carew and Walsh were first employed by respondent in June 2009 – on the same day. During the 2009-2010 and 2010-2011 school years, they each served full-time as language arts teachers. Carew's primary assignments for both years were sixth and eighth-grade language arts. Walsh's primary assignments were fifth and seventh-grade language arts in the first year, and fifth-grade language arts in the second year. For their third year of teaching, *i.e.*, 2011-2012, Walsh continued full-time – teaching fifth-grade language arts, as well as the language arts component of sixth and eighth-grade cycle classes. Carew accepted a half-time assignment teaching sixth and eighth-grade language arts.

During the 2011-2012 year, Walsh requested maternity and child-rearing leave for most of the 2012-2013 school year. It is undisputed that the leave request was granted by the respondent Board. On June 25, 2012 the Board voted to renew Walsh's full-time employment and Carew's half-time employment as language arts teachers for the 2012-2013 school year. Subsequently, on July 16, 2012, the Board voted to approve an additional half-time assignment for Carew as a leave-replacement teacher for Walsh for the 2012-2013 school year. The Board minutes approving the replacement assignment for Carew stated:

> EXPLANATION: Ms. Carew was originally a .5 FTE Language Arts teacher for the 2012-2013 school year. In light of the above resolution, she will become 1.0 FTE (i.e. - .5 FTE Language Arts teacher and .5 FTE Language Arts Leave Replacement teacher for Ms. Walsh).

Contracts executed on or about September 1, 2012 reflected the above-referenced Board actions for Walsh and Carew. Walsh's contract recited that she was engaged as a full-time teacher for the 2012-2013 school year, with her salary to be prorated in keeping with her

approved family leave, which leave actually commenced on September 13, 2012 and continued for the balance of the school year. Carew's contract provided that she was hired as a .5 language arts teacher and a .5 family leave*+ replacement teacher. On August 20, 2012, the Board approved the employment of another part-time Language Arts replacement teacher, *i.e.*, Kelly Fiedler. Her contract reflects that she was hired to serve as a 40 percent teacher aide (at $15/hour) and a 60 percent leave replacement teacher.

It is undisputed that on the first day of the 2012-2013 school year, both Walsh and Carew earned tenure as language arts teachers in respondent's district. From the commencement of the school year until September 12, 2012, Walsh taught twenty fifth-grade language arts classes, the language arts component of five sixth-grade cycle classes and five eighth-grade cycle classes, and two curriculum extension classes. The record indicates that she trained Fiedler to take over her fifth-grade language arts classes. Carew's schedule included seven eighth-grade language arts classes, twenty sixth-grade language arts classes and three curriculum extension classes.

At the end of the 2012-2013 school year – on June 24, 2013 – the respondent Board approved the re-employment of approximately sixty-five tenured staff members, including Carew and Walsh. Carew was approved for a half-time assignment and Walsh was approved for a full-time assignment.[1] Walsh's weekly schedule included 30 periods of fifth-grade language arts, a period of art history and a period of curriculum extension. Carew's weekly schedule included seven periods of eighth-grade language arts, ten periods of sixth-grade language arts and a period of curriculum extension.

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[1] Respondent also, on July 15, 2013, approved the hire of Angela Maida as a full-time Kindergarten teacher for the 2013-2014 school year. Maida had served as a leave replacement Kindergarten teacher during the 2012-2013 school year.

Carew filed her petition on August 28, 2013. In it she alleged that respondent's offer to her of half-time employment for the 2013-2014 school year, after she had been teaching a full-day schedule in the 2012-2013 school year, constituted a reduction in force. Based upon that supposition, petitioner reasoned that she was entitled to any positions – for which she was qualified by certification and endorsement – offered to 1) untenured teachers, or 2) teachers whose seniority was inferior to hers. Petitioner contended that Angela Maida – an untenured teacher who was offered a job teaching Kindergarten – fell into the former category, and Walsh fell into the latter category. The matter proceeded in the OAL by way of motions and a cross-motion for summary disposition. The Administrative Law Judge (ALJ) ultimately determined that no RIF had occurred in 2013, and that petitioner consequently had no claim to Walsh's or Maida's positions.

In her exceptions, petitioner contends that the ALJ erred in finding no RIF. She relies on two "facts." First, petitioner recites part of the text of a July 17, 2012 letter sent to her by respondent's superintendent after the respondent Board voted to offer her a half-time leave replacement assignment in addition to her regular half-time language arts position:

> The Old Tappan [B]oard of Education took action . . . on July 16, 2012, to approve you as an additional .5 Language Arts family leave replacement teacher (Ms. Vanessa Walsh) for the 2012-2013 school year. Therefore your position for the 2012-2013 school year will be full time. This full time position offers you health and dental benefits
> [Exhibit 15, annexed to the parties' Joint Stipulation of Facts]

Second, petitioner maintains that it was Fiedler, not herself, who served as Walsh's replacement leave teacher.

In considering the first "fact," the Commissioner finds it ironic that petitioner urges him to rely on a letter from the district superintendent (who holds no authority to define the

terms of her employment) to determine that her two assignments in 2012-2013 jointly constituted a full-time tenure track position, while at the same time urging him to disregard the language of petitioner's legally binding contract for the 2012-2013 school year, which plainly recited that the: "Board has employed and hereby does engage and employ the Employee as a .5 Part Time Teacher and .5 Family Leave Replacement Teacher in the public Schools . . . " *See,* Exhibit 16, annexed to the parties' Joint Stipulation of Facts.

In attempting to justify the discounting of terms of her employment contract, petitioner relies on language in *Platia v. Bd. of Educ. of Hamilton*, 434 *N.J. Super.* 382, 391 (App. Div. 2014), which quoted the Supreme Court in *Spiewak v. Bd. of Educ. of Rutherford*, 90 *N.J.* 63, 77 (1982): "A teacher's right to tenure 'never depends on the contractual agreement between the teachers and board of education.' '' In *Platia* the central question was whether a special education teacher's assignment during the 2009-2010 school year constituted leave replacement service or a tenure track position. The respondent Board in that case relied, for its contention that Platia's service was 'leave replacement,' on language in her contract characterizing the assignment as "long term substitute" to replace:

> an employee who is on leave of absence and who may be returning to his/her position at the expiration of this contract. This position is non-tenurial and carries no seniority eligibility. You will be assigned to the Substitute Teacher List if no position is available at the expiration of this contract.
> [*Platia,* 434 *N.J. Super.* at 385]

However, there were no actual facts which supported the proposition that Platia was acting in place of a teacher who was absent, disabled or disqualified, within the intendment of *N.J.S.A.* 18A:16-1.1, the statute which advises that temporary teaching staff members do not accrue tenure.

To the contrary, the record showed that Michele Snyder – the teacher who was supposedly on leave and whom Platia was supposedly temporarily replacing – was actually working in respondent's district as a literacy resource coach while Platia served as a special education teacher. Thus, the Appellate Division found that Snyder was not absent, disabled or disqualified; she was working in another position in the district, rendering her prior tenure track position vacant. By way of contrast, the record in the instant controversy evidences that: 1) Walsh actually was on leave for most of the 2012-2013 school year; 2) respondent created petitioner's part-time leave replacement assignment as a means to help fill the deficit caused by Walsh's family leave; and 3) petitioner was not filling a language arts teaching "vacancy" in the 2012-2013 school year.

As for the Superintendent's letter, even assuming, *arguendo,* that it could be regarded as legal authority, the Commissioner could not rely on it for guidance about tenure rights. It is clear that the term "full time" was utilized in the letter to recognize that petitioner's total number of scheduled hours would require that she be covered by health benefits. That is an issue which is independent of any tenure calculus.

Petitioner's second factual assertion, *i.e.,* that Fiedler – and not petitioner – was Walsh's replacement leave teacher, is also unsupported by the record of this case. Walsh's assigned teaching load for 2012-2013 included, as referenced above, twenty fifth-grade language arts classes, the language arts component of five sixth-grade cycle classes and five eighth-grade cycle classes, and two curriculum extension classes. It is undisputed that Fiedler only took over Walsh's twenty fifth-grade language arts classes; Walsh's ten cycle classes, two curriculum extension classes, and any other responsibilities she may have had, clearly needed to be covered by other staff. Petitioner has provided no evidence that any other language arts teachers were

hired as replacement leave employees for Walsh in 2012-2013; to the contrary, the record supports respondent's contention that the Board hired two part-time staff members (petitioner and Fiedler) as leave replacement teachers in order that Walsh's entire assignment would be covered while she was on family leave.

Nonetheless, based upon her contention that she did not cover any of Walsh's assigned classes, petitioner continues to urge that she was not actually a leave-replacement teacher, but rather a full-time tenure track employee entitled to full-time seniority credit for her service during the 2012-2013 school year. Petitioner relies, once again, on *Platia*, wherein the Appellate Division found significant the fact that during the period in which Platia was supposedly replacing Snyder she was not teaching in the school where Snyder had taught. This detail, in the *Platia* court's view, undermined the respondent Board's position that Platia was a temporary substitute for Snyder. No such circumstance is present in the instant case

During the 2012-2013 school year, petitioner was teaching the same subject – language arts – that Walsh taught, and was assigned to the same school in which Walsh taught. The fact that the schedules of other language arts teachers in the school may have been tweaked to cover the exact classes that Walsh had taught, leaving petitioner to teach grade levels with which she was familiar, does not bear upon petitioner's status as a replacement leave teacher. In *Giacomazzi v. Board of Education of the South Orange-Maplewood School District,* A-5686-07 (App. Div. September 2, 2009) (slip op.), a petitioner claimed that she should not have been regarded as a replacement leave teacher because she had not been teaching the exact courses that the person she was replacing had taught. The Commissioner of Education rejected her argument, finding that the "respondent Board of education ha[d] the discretion to modify teaching

assignments and locations [*i.e.*, rooms]. The Appellate Division agreed. *Giacomazzi, supra,* at 4.[2]

In light of the foregoing, the Commissioner finds that petitioner's 2012-2013 assignment consisted of a half-time tenure track position and a half-time leave replacement position. Consequently, no RIF occurred when only petitioner's half-time tenured employment was renewed for the 2013-2014 school year.[3] Because "an individual's entitlement to claim a position by reason of seniority remains inchoate unless and until that individual is affected by a reduction in force," *Benson v. Board of Education of Rockaway,* 92 *N.J.A.R.* 2nd (EDU) 15, 21, no discussion about petitioner's seniority *vis a vis* Walsh or other employees is necessary or warranted for the resolution of this case.

Accordingly, summary disposition is granted in favor of respondent and the intervenors, petitioner's cross-motion for summary disposition is denied, and the petition is dismissed.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 2/25/15
Date of Mailing: 2/25/15

[2] The Commissioner disagrees with the ALJ's finding of tension between *Giacomazzi* and *Platia.* The appellate division's conclusion that Platia did not act in place of Snyder was based both on the fact that Snyder was not on leave – as contemplated by *N.J.S.A.* 18A:16-1.1 – and by the fact that Platia and Snyder worked in different schools. This does not conflict with the holding in *Giacomazzi* that a replacement leave teacher's assignment may be modified at the Board's discretion and need not be identical to the replaced teacher's duties.

[3] Because the need for a replacement teacher for Walsh no longer existed, petitioner was not offered another additional half-time leave replacement assignment.

[4] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 13462-13
AGENCY DKT. NO. 202-8/13

KATHLEEN CAREW,
Petitioner,
v.
BOARD OF EDUCATION OF
THE BOROUGH OF OLD TAPPAN,
Respondent.

Alfred Maurice, Esq., on behalf of petitioner (Springstead & Maurice, attorneys)

Vittorio S. LaPira, Esq., on behalf of respondent (Fogerty & Hara, attorneys)

Gail Oxfeld Kanef, Esq., for Intervener Angela Maida (Oxfeld Cohen, attorneys)

Louis Bucceri, Esq., for Intervener Vanessa Walsh (Bucceri and Pincus, attorneys)

Record Closed: October 8, 2014 Decided: November 18, 2014

BEFORE **JOANN LASALA CANDIDO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law on September 20, 2013, and was filed for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Petitioner, Kathleen Carew, alleges that respondent Board of Education Borough of Old Tappan (Board) violated her tenure and seniority rights during a reduction in force (RIF). Prehearing Orders were issued on October 29, 2013, and May 13, 2014. By letter Gail Oxfeld Kanef, Esq., requested authorization to intervene, on behalf of her client Angela Maida, who allegedly holds a position that petitioner is claiming entitlement in the above-referenced matter. Although that request was denied by the undersigned on July 17, 2014, the Acting Commissioner of Education reversed the decision and permitted Maida to intervene.

On September 16, 2014, respondent filed a Motion for Summary Decision. On September 24, 2014, petitioner filed a Notice of Cross-Motion. On September 29, 2014, Intervener Angela Maida filed a letter in support of respondent's motion. On October 8, 2014, Intervener Vanessa Walsh filed a brief in support of respondent's motion.

FINDINGS OF FACT

The parties to the above-referenced action, including both interveners, by and through their attorneys, hereby agree to the following joint stipulation of facts:

1. The Old Tappan Board of Education (Board) operates the Old Tappan School District (District), providing educational services for kindergarten through eighth-grade students from the Borough of Old Tappan.

2. In the summer of 2009, the Board hired petitioner, Kathleen Carew (then named Kathleen Thumn), to fill a vacant full-time teaching position for the 2009-2010 school year, officially approving her hire by way of a resolution adopted on June 22, 2009.

3. On or around that same date, both Carew and the Board signed an employment agreement, dated June 22, 2009, memorializing the nature of their employer-employee relationship.

4. Carew holds certificates issued by the New Jersey Department of Education's Board of Examiners as an elementary school teacher, a teacher of English, and a reading specialist.

5. On the same day it hired Carew, the Board also hired Intervener Vanessa Walsh (then named Vanessa Thorne) to fill a vacant full-time teaching position for the 2009-2010 school year.

6. Walsh and the Board also signed an employment agreement, dated June 22, 2009, memorializing the nature of their employer-employee relationship.

7. Walsh holds certificates issued by the New Jersey Department of Education's Board of Examiners as an elementary school teacher in grades K–5 and teacher of English.

8. During the 2009-2010 school year, Carew taught sixth-grade and eighth-grade language arts classes, as well as four periods per week of curriculum extension classes (see Exhibit 21a), while Walsh taught fifth-grade and seventh-grade language arts classes, as well as two periods per week of curriculum extension classes.

9. The Board renewed both Carew and Walsh as full-time teachers for the 2010-2011 school year.

10. Both Carew and Walsh signed individual employment agreements with the Board in or around June 2010 memorializing the nature of their employer-employee relationships.

11. During the 2010 school year, Carew taught sixth-grade and eighth-grade language arts classes, two periods per week of seventh-grade study skills, and four periods per week of curriculum extension classes as a full-time teacher (see Exhibit 21b), while Walsh taught fifth-grade language arts as well as two periods per week of curriculum extension classes, as a full-time teacher.

12. At the end of the 2010-2011 school year, the board reduced its staff. The Board renewed Walsh as a full-time teacher for the 2011-12 school year, and she was assigned to teach fifth-grade language arts classes, as well as the language arts component of the sixth- and eighth-grade cycle classes (a total of ten periods per week) and two periods per week of curriculum extension. It re-hired Carew for 2011-12 as a part-time (0.50 full-time equivalent, or "FTE") teacher, who was assigned to teach sixth- and eighth-grade language arts.

13. During the 2011-2012 school year, Walsh requested a leave of absence for a portion of the 2012-2013 school year due to her pregnancy and anticipated birth date of her child early in the 2012-2013 school year.

14. The Board also took action on July 16, 2012, and on August 20, 2012, to address the appointment of teachers to replace Walsh during her maternity leave.

15. On July 17, 2012, the Board's then-acting Superintendent of Schools Dr. William M. Ward, wrote to Carew and informed her as follows:

> The Old Tappan board of Education took action Monday evening, July 16, 2012, to approve you as an additional .5 Language Arts family leave replacement teacher (Ms. Vanessa Walsh) for the 2012-2013 school year. Therefore, your position for the 2012-2013 school year will be full time. This full time position offers you health and dental benefits, however, you have informed the Business Office that you will be opting out of health insurance.

16. The Board executed employment agreements with Carew, Walsh, and Fiedler on or around September 1, 2012, memorializing the terms of their employer-employee relationships for the 2012-13 school year.

17. Walsh worked in the district at full salary from September 1, 2013, until she began her maternity disability leave at full pay from September 13, 2012, through October 12, 2012. After that she was on a child-rearing leave without pay through June 30, 2013. During the 2012-2013 school year, Carew taught sixth- and eighth-grade language arts classes, as well as three periods per week of curriculum extension classes. For 2012-2013, Fiedler worked as an aide and also as a teacher assigned to teach twenty periods per week of fifth-grade language arts classes, as well as five hours per week of homework club. Until her leave began, Walsh taught twenty periods of fifth-grade language arts classes and worked with Fielder outside of class time to prepare her to take over the fifth-grade classes when Walsh's leave began.

18. On June 23, 2013, the Board passed a resolution re-emplcying its tenured staff for the 2013-2014 school year, which included both Carew and Walsh.

19. Later that summer, the Board hired Intervener Angela Maida as a full-time kindergarten teacher.

20. During the 2013-2014 school year, Walsh again taught fifth-grade language arts classes, as well as one contact period per week of seventh-grade art history classes and one class period of curriculum extension. She was employed full time. Carew taught sixth- and eighth-grade language arts classes, as well as one period per week of curriculum extension, and was employed on a .5 part-time basis for 2013-14. Maida taught kindergarten on a full-time basis for 2013-14.

During the 2012-13 school year, Carew was actually assigned to teach sixth- and eighth-grade language arts classes, and three weekly periods of curriculum extension classes. Prior to her maternity leave, Intervener Walsh was assigned to teach twenty weekly periods of fifth-grade language arts, and trained Fiedler, not Carew, to assume her responsibilities. On September 13, 2012, Fiedler, not Carew, actually took over Intervener Walsh's classes.

Carew and Walsh agree that a graphic summary of Carew's teaching assignments and Walsh's teaching assignments illustrates the proper calculation of seniority:

Carew:
2009-10 Full Time 6th and 8th Grade Language Arts, and Curriculum Extension

2010-11 Full Time 6th and 8th Grade Language Arts, and Curriculum Extension[1]

2011-12 Part Time (.5) 6th and 8th Grade Language Arts

2012-13 Part Time (.5) 6th and 8th Grade Language Arts and Part Time (.5) Replacement Teacher[2]

2013-14 Part Time (.5) 6th and 8th Grade Language Arts[3]

Intervener Walsh:
2009-10 Full Time 5th and 7th Grade Language Arts, and Curriculum Extension

2010-11 Full Time 5th and 7th Grade Language Arts, and Curriculum Extension

2011-12 Full Time 5th and 7th Grade Language Arts, and Curriculum Extension[4]

2012-13 Full Time 5th Grade Language Arts, and Curriculum Extension[5]

2013-14 Full Time 5th and 7th Grade Language Arts

[1] Intervener Walsh's chart indicates that Carew taught seventh grade during the 2010-11 school year, as well, though this fact is legally immaterial. (See Intervener Walsh's Br. at 3.)
[2] Carew chart characterizes this assignment as a "full time assignment in both categories," which is the dispositive question of fact. (See Pet'r's Mot. to Dismiss at 5.)
[3] Carew's chart does not include the 2013-14 school year, though she agrees that this was her assignment that year. (See Pet'r's Mot. to Dismiss at 2, 4.)
[4] Intervener Walsh's chart indicates that Carew taught sixth grade during the 2011-12 school year, as well, though this fact is legally immaterial. (See Intervener Walsh's Br. at 3.)
[5] Carew chart characterizes this assignment as "on leave September 13 to schools [sic] end," which again, is the pivotal question of fact. (See Pet'r's Mot. to Dismiss at 5.)

PARTIES' ARGUMENTS[6]

As a threshold issue, the Board argues that no RIF occurred prior to the 2013-14 school year,[7] and accordingly, no teacher's tenure or seniority rights were triggered. Specifically, the Board argues that "the Board employed Carew as a part-time teacher in the middle school during the 2011-2012 school year, and on June 25, 2012, it hired Carew as a part-time (0.50) language arts teacher for the 2012-2013 school year, while hiring Walsh as a full-time language arts teacher for the same year." (Resp't's Motion to Dismiss at 6.) The 2012-13 school year would have been the first year both Carew and Intervener Walsh were eligible for tenure, so their respective positions on the first day of the 2012-13 are critical. Accordingly, the Board reasons that Carew was not subject to a RIF at the beginning of the 2013-14 school year, but rather, was simply renewed in her position as a part-time teacher. (See Resp't's Reply at 1-2.) Carew does not directly contradict this position, but rather, assumes, as a matter of both law and fact, that she was subject to a RIF at the beginning of the 2013-14 school year. (See Pet'r's Mot. for Summ. Decision at 2-6[8]; Pet'r's Reply at 1-2[9].)

Assuming, *arguendo*, the Board effectuated a RIF prior to the 2013-14 school year, Carew argues that "[I]intervener Walsh, although tenured, had less seniority than [Carew] at the time of the RIF and that Walsh should have been reduced in lieu of [Carew] for the 2013-2014 school year." (Pet'r's Mot. for Summ. Decision at 2.) Intervener Walsh argues that Carew miscalculated their respective seniority, and argues that she is entitled to seniority credit for her leave with pay, and the first thirty days of her leave without pay.

Carew further avers that whether all departmentalized grade assignments should be treated as secondary assignments, or only seventh and eighth-grade assignments, does not change the calculations of seniority. Intervener Walsh agrees that would be true, if both of their assignments were limited to sixth grade or higher. However,

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[6] As the four parties to this matter take different positions on numerous issues, raise alternative arguments, and rely in part on one another's arguments, the summary will recount the parties' arguments in the order such arguments become relevant.
[7] The 2011-12 RIF is not at issue, as neither Walsh nor Carew were tenured at that time.
[8] Carew's brief is not paginated. (See Ibid.)
[9] Carew's reply brief is not paginated. (See Ibid.)

Intervener Walsh points out that she was predominantly assigned to teach fifth grade, while Carew was only assigned sixth grade and higher. Accordingly, Carew only has seniority in the secondary category, while Intervener Walsh has seniority in both the elementary and secondary categories. Intervener Walsh reasons that since she was assigned to teach predominantly fifth grade during the 2013-14 school year, and since Carew has no elementary seniority credit, she is not entitled to Intervener Walsh's position.

Carew goes on to argue that though the 2012 Board resolution characterizes half of her assignment as a "leave replacement," she did not actually cover Walsh's classes, and accordingly, was not actually a leave-replacement teacher. Intervener Walsh counters stating that the mere fact that Carew did not actually teach Walsh's classes does not change the fact that Carew was contractually hired as a leave-replacement teacher. Moreover, both Intervener Walsh and the Board argue that if Carew's position as a leave-replacement teacher was automatically converted to a full-time position as of September 1, 2012, because Intervener Walsh actually worked until September 12, 2012, then reduced to a part-time leave replacement teacher on September 12, 2012, when Intervener Walsh began her maternity leave, then Carew's petition is untimely, and violates the ninety-day rule.

Finally, assuming, *arguendo*, Carew is not more senior than Intervener Walsh, she argues that she was entitled to Intervener Maida's full-time kindergarten teacher position during the 2013-14 school year, since as a tenured teacher, she is entitled to "bump" an untenured teacher, such as Intervener Maida, if her position is subject to a RIF. Intervener Walsh, in the alternative, argues that any claims to her position are mooted by the fact that an untenured teacher, Intervener Maida, was hired for a full-time position for the 2013-14 school year. Intervener Maida adopts the Board's position that Carew was not subject to a RIF, and accordingly, has no right to "bump" any teacher, tenured or not.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Summary decision is appropriate "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). To prevail, the adverse party must submit affidavits that "set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. A genuine issue is presented if "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

As a threshold issue, the Board argues that Carew was not subject to a RIF prior to the 2014 school year. Whether Carew was subject to a RIF prior to the 2013-14 school year depends on what position Carew held when she achieved tenure on the second day of the 2012-13 school year. The tenure statute provides that

> [t]he services of all teaching staff members . . . in the positions of teacher . . . shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause . . . .
>
> [N.J.S.A. 18A:28-5(a).[10]]

A teacher achieves tenure after she has been employed by a district for "[t]hree consecutive academic years, together with employment at the beginning of the next succeeding academic year." N.J.S.A. 18A:28-5(a)(2). However, a teacher employed in a temporary position may not count such service toward tenure acquisition. N.J.S.A. 18A:16-1.1. However, that exception "extends only to those who 'act in place of' another employee who is absent or disabled." Spiewak v. Bd. of Educ. of Rutherford, 90 N.J. 63 (1982).

[10] The recent amendments to the tenure statute are not applicable here, as both Carew and Intervener Walsh were employed prior to 2012, and the parties agree that Intervener Maida has not achieved tenure.

Here, the parties agree that Carew acquired tenure at the beginning of the 2012-13 school year, but dispute whether Carew held a part-time position (.5 language arts) and a temporary leave-replacement position, or a regular full-time position, at the time she acquired tenure.

Carew argues, without citation to legal authority, that the fact that she did not actually replace Walsh renders her 2012–13 school year position a full-time position. Notably, the Appellate Division recently held that a teacher hired as a "long-term substitute" may still count that service toward tenure, if the teacher does not actually substitute for an absent teacher. See Platia v. Bd. of Educ. of Hamilton, 434 N.J. Super. 382, 393 (App. Div. 2014). There, a teacher was hired as a "long-term substitute," and her contract explicitly stated that such employment would not count toward tenure acquisition. Id. at 385. However, in reversing the Commissioner of Education's decision, the Appellate Division noted that the record failed to "show that [the replaced teacher] was 'absent' from her employment or that [the long-term substitute] acted 'in place of' her." Id. at 391-92. Specifically, the replaced teacher was actually transferred to another position within the same district, and the "long-term substitute" did not actually cover her classes. Id. at 392. The Appellate Division expressly held that "[b]oth of these criteria must be satisfied for the temporary employee exception in N.J.S.A. 18A:16-1.1 to apply." Id. at 393.

Here, the Board argues that Platia is distinguishable "because there is no dispute here that Walsh took a leave of absence during the 2012-13 school year." (Resp't's Mot. to Dismiss at 17.) While that is correct, the Platia court clearly held that the exception in N.J.S.A. 18A:16-1.1 only applies if the replaced teacher is actually absent and the temporary teacher is actually assigned to the absent teacher's classes. Platia, supra, 434 N.J. Super. at 393. The Board relies on an unpublished Appellate Division case decided prior to Platia, Giacomazzi v. Board of Education of the South Orange-Maplewood School District, A-5686-07 (App. Div. September 2, 2009) (slip op.), <http://njlaw.rutgers.edu/collections/courts/>. There, a teacher was hired as a long-term substitute for a teacher on a leave of absence, due to active military duty. Id. at *2. When the absent teacher returned, he was assigned a third teacher's classes, who had

just left on maternity leave. Id. at *2-3. The long-term substitute continued to teach his original class, rather than the maternity leave teacher's class, to preserve continuity of instruction. Id. at *3. The Appellate Division concurred with the Commissioner of Education that

> although there were teachers on temporary leave during the 2002-2003 school year, there were no actual vacancies in the English department until June 2003 and therefore no tenure-track positions to which petitioner could lay claim; respondent Board has the discretion to modify teaching assignments and locations; and petitioner's claim that by continuing her assignment to teach the same courses in the same rooms for the remainder of the school year—after the permanent teacher she was hired to replace had returned to work—is without merit.
>
> [Id. at *4.]

In this matter, the Board argues that Giacomazzi supports the proposition that "the administration always retains discretion to make or modify subject and classroom assignments." (Resp't's Mot. for Summ. Decision at 13.) The Board further asserts that "nothing in Platia suggest that the principles established in Giacomazzi are no longer controlling." Id. at *17. However, Platia clearly and unequivocally held that N.J.S.A. 18A:16-1.1 only applies if the replaced teacher is actually absent and the long term substitute assumes the absent teacher's classes. Platia, supra, 434 N.J. Super. at 393. Notably, while Platia did not expressly overrule Giacomazzi, an unpublished case, the Platia court rejected and reversed the reasoning of the Commissioner and ALJ Williams, below. Id. at 385. In turn, ALJ Williams expressly relied on Giacomazzi, to conclude that Platia "was not entitled to tenure because she filled a leave of absence, not a permanent vacancy." Platia v. Bd. of Educ. of Hamilton, EDU 9861-11, Initial Decision, (September 17, 2012), adopted, Comm'r (November 2, 2012), <http://njlaw.rutgers.edu/collections/oal/>. Thus, to the extent Giacomazzi, as an unpublished case, is instructive, Platia is controlling. Cf. Ibid.; Platia, supra, 434 N.J. Super. at 393.

Moreover, the facts of this matter are clearly analogous to Platia and distinguishable from Giacomazzi. Cf. Platia, supra, 434 N.J. Super. at 393; Giacomazzi,

supra, A-5686-07 (slip op. at *2-3). Like the long term substitute in Platia, and unlike the long term substitute in Giacomazzi, Carew was never assigned to Walsh's classes, but to completely different classes, similar to the classes she was teaching part-time. Another teacher, Fiedler, actually took over Walsh's classes. There was no legitimate reason to assign Carew classes other than Walsh's, such as continuity of instruction after the unexpected return of the teacher on leave. See Giacomazzi, supra, A-5686-07 (slip op. at *2-3).

Nevertheless, this matter is distinguishable from both Platia and Giacomazzi, in that the critical issue is not whether Carew achieved tenure, as all parties agree that Carew is tenured, but what position Carew held when she achieved tenure, and consequently, whether she was the subject of a RIF. (See Resp't's Mot. for Summ. Decision at 5.)

As a threshold matter, "an individual's entitlement to claim a position by reason of seniority remains inchoate unless and until that individual is affected by a reduction in force." Benson v. Bd. of Educ. of Rockaway, 92 N.J.A.R.2d (EDU) 15, 21. The facts of Benson are analogous to the instant matter; a teacher claimed that she had been the subject of a RIF, because after the historically part-time teacher served as a full-time leave replacement teacher for one year, the school district reassigned her to her original part-time position. Id. at 16-17. However, the same year that the part-time teacher was returned to her part-time position, another teacher who was assigned to a full-time position (not as a leave-replacement teacher) was also reassigned to a part-time position. Ibid. A third teacher resigned that year, and the first and second teachers both asserted tenure rights to the vacancy. Ibid. ALJ Klinger concluded that the fact that the first teacher was not actually subject to a RIF was immaterial, and the vacant position must be awarded to the most senior teacher on the seniority list. Id. at 19-20. The Commissioner reversed, and explained that

> [a]ny seniority list prepared by a district for RIF or other purposes is to be clearly distinguished from the preferred eligibility list to be maintained pursuant to N.J.S.A. 18A:28-12, as it is from the latter list that vacancies are to be filled irrespective of there being more senior persons in the district who have not been riffed but are interested in the position.

[Id. at 21.]

ALJ Klinger had relied on cases that

> involve[d] situations where both petitioner and intervener had been riffed, although not in the same year; hence, because they were both on the preferred eligible list at the time of the later RIF, one as a direct result of the current RIF and the other as a consequence of an earlier reduction, the most senior teacher was entitled to the position at issue notwithstanding that that teacher's position had not been directly affected by the particular reduction then at issue.
>
> [Ibid.]

However, such cases did not support "the proposition that vacancies are to be filled by the district's most senior teacher in the affected category at the time of the RIF (the 'seniority list' as opposed to the Preferred Eligible List) regardless of whether his or her employment has, or had in the past, been reduced." Ibid.

Here, the Board argues that no RIF occurred prior to the 2013-14 school year, as the Board employed the same number of teachers and maintained the same number of positions from the 2012-13 school year through the 2013-14 school year. (Resp't's Mot. for Summ. Decision at 19.) However, a "[r]eduction in hours of employment is considered a reduction in force." Klinger v. Bd. of Educ. of Cranberry, 190 N.J. Super. 354, 357 (App. Div. 1982). Accordingly, if Carew was entitled to return to a full-time position for the 2013-14, then Carew was subject to a RIF, regardless of whether the number of teachers or positions remained the same. Ibid.

A similar factual situation was addressed in Benson, as a part-time teacher served as a full-time leave replacement teacher for one year, then argued that she was subject to a RIF when she was returned to her previous part-time position. The Commissioner explained that the teacher "was consistently a part-time employee except for one year's service in 1988-89 as a full-time replacement for a teacher on leave, after which she returned to her regular part-time employment." Benson, supra, 92 N.J.A.R.2d at 21. Accordingly, the teacher "was not appointed to a vacant position such

as would entitle her to employment rights associated with that position . . . rather, her full-time service as a sixth-grade substitute was plainly a temporary assignment outside her ordinary employment as a part-time supplemental instructor." Ibid. The teacher could not "fairly characterize her return to the same part-time position she had always held, and would held had the temporary assignment not presented itself, as suffering a reduction in force." Ibid. In contrast, the full-time (not leave replacement) teacher's "full-time supplemental position was undisputedly reduced to part-time for 1990-91. That reduction entitled the teacher "to placement on the Preferred Eligible List for full-time positions for which she qualifies and enables her to claim the elementary position herein." Ibid.

Here, Carew was employed as a part-time teacher during the 2011-12 school year, and at least purportedly employed as a part-time teacher (and a part-time leave-replacement teacher) during the 2012-13 school year. While Platia instructs that Carew's part-time leave-replacement position must be counted toward Carew's acquisition of tenure, Platia does not speak to whether a tenured teacher's loss of a temporary position constitutes a RIF. See Platia, supra, 434 N.J. Super. at 393. Admittedly, Carew achieved tenure in the year at issue, the 2012-13 school year, while the part-time teacher in Benson achieved tenure years prior to the alleged "RIF" of her temporary full-time position. See Benson, supra, 92 N.J.A.R.2d at 16-21. However, there have been no cases in which a teacher indisputably achieved tenure while working both permanent part-time and arguably temporary part-time positions, and then argued that she was entitled to a permanent full-time position. Nevertheless, the reasoning of Benson is applicable here, that Carew "was not appointed to a vacant position such as would entitle her to employment rights associated with that position." Id. at 21. Moreover, here, unlike in Platia, the allegedly absent teacher, Walsh, was in fact absent (on maternity leave), and returned, as expected, for the 2013-14. While Carew did not actually cover Walsh's classes, that additional prong is less relevant here, as the parties agree that Carew actually achieved tenure, and only dispute the extent of her position.

Although clearly factually distinct, the reasoning of Alfieri may be applied here. See Alfieri v. Saddle Brook Bd. of Educ., EDU 11677-98 and 1161-99, Initial Decision

(July 23, 2001), adopted, Comm'r (September 17, 2001), aff'd, State Bd. (January 8, 2003), <http://njlaw.rutgers.edu/collections/oal/>. There, a school district reduced the hours of tenured, part-time, supplemental teachers (with permanent positions). The teachers' contracts did not expressly state that the teachers were entitled to a minimum number of hours. Alfieri, supra, EDU 11677-98 and 1161-99, Comm'r Decision at 17. Of course, the fact that no allegedly temporary position was at issue is factually distinct, but importantly, the teachers argued that pursuant to Spiewak, "[i]ssues of flexibility and administrative convenience have no place in determining whether tenure is acquired." Id. at 15 (citing Spiewak, supra, 90 N.J. at 76-77 ("[w]hether certain teachers are entitled to tenure never depends on the contractual agreement between the teachers and the board of education")) The Commissioner fully agreed that the terms of tenure acquisition are dictated by statute, and are unaffected by a contractual characterization of a position as "part-time" or "full-time." Alfieri, supra, EDU 11677-98 and 1161-99, Comm'r Decision at 16. However, the Commissioner continued that the teachers "were not subject to a reduction in force or other adverse employment action which would trigger their tenure and seniority rights." Id. at 17. The Commissioner then looked to the terms of the teachers' employment contracts, noted that the reduction in hours still fell within the terms of their contract, and concluded that accordingly, the teachers were not subject to a RIF. Id. at 17-19. The Commissioner's conclusion implied that while contractual terms cannot contravene the statutory entitlement to tenure acquisition, such contractual terms can establish whether a tenured teacher is subject to a RIF, which invokes the teacher's tenure and seniority rights. Ibid. In affirming the Commissioner's decision, the State Board articulated that implication. See Alfieri, supra, EDU 11677-98 and 1161-99, State Bd. Decision at 6-7.

Specifically, the State Board reasoned that Spiewak involved tenure acquisition, and "[i]n contrast to Spiewak, there is no question that [the teachers] in this case achieved tenure pursuant to N.J.S.A. 18A:28-5." Alfieri, supra, EDU 11677-98 and 1161-99, State Bd. Decision at 6. Instead, the issue presented in Alfieri was "whether a reduction in staff occurred under N.J.S.A. 18A:28-9 such as to trigger the [teachers'] tenure rights. That issue was not involved in Spiewak, and, therefore, Spiewak does not entitle the petitioners to the relief they seek." Alfieri, supra, EDU 11677-98 and 1161-99, State Bd. Decision at 6. Critically, and in stark contrast to Spiewak, the State

Board reasoned that "[w]hen a teaching staff member asserts tenure rights on the basis of a reduction in staff pursuant to N.J.S.A. 18A:28-9, consideration of the hours of employment established by the district board upon the staff member's appointment is the starting point for determining whether such a reduction has occurred." Alfieri, supra, EDU 11677-98 and 1161-99, State Bd. Decision at 5.

Here, Carew does not expressly argue that contractual terms cannot contravene the statutory standard for whether a RIF occurred, but suggests that despite the express terms of her contract, the fact that she did not actually replace Walsh's classes renders her "leave replacement" assignment, together with her existing part-time position, a full-time position. While Platia supports that position for purposes of tenure acquisition, Afieri suggests that the terms of her contract determine whether she was subject to a RIF. Cf. Platia, supra, 434 N.J. Super. at 393; Alfieri, supra, EDU 11677-98 and 1161-99, State Bd. Decision at 5-7. As Benson concluded that a tenured teacher is not subject to a RIF due to the loss of a temporary full-time position, and Alfieri concluded that contractual terms, not actual service, determine whether a teacher has been subject to a RIF (in contrast to the standard for tenure acquisition), Carew cannot claim entitlement to her temporary leave-replacement position. Benson, supra, 92 N.J.A.R.2d at 16-21; Alfieri, supra, EDU 11677-98 and 1161-99, State Bd. Decision at 5-7. Since Carew was not the subject of a RIF prior to the 2013-14 school year, she cannot assert her tenure or seniority rights.

Even assuming, *arguendo*, that Carew would have been subject to a RIF due to the loss of the part-time leave-replacement position, Intervener Walsh correctly argues that Carew's claims against Walsh are moot, because Carew is clearly entitled to Intervener Maida's position. (Intervener Walsh Br. at 8.) The parties agree that Intervener Maida is not tenured, and agree that the Board first employed Maida as full-time kindergarten teacher position at the beginning of the 2013-14 school year (though she had served as a replacement kindergarten teacher during the 2012-13 school year). (Joint Stip. ¶ 20.) In the event of a RIF, a

> tenured part-time teaching staff member with proper certification can claim, as against a non-tenured applicant, seniority rights in seeking appointment to a full-time position

> that is within the specific categories covered by the certification and that has responsibilities identical to those of the part-time position in which employment was actually held.
>
> [Lichtman v. Bd. of Educ. of Ridgewood, 93 N.J. 362, 364 (1983).]

In Lichtman, a part-time tenured librarian was subject to a RIF, though the district hired a non-tenured librarian for a full-time position. Id. at 364-65. The Board asserted that as a part-time librarian, she had no seniority rights to a full-time position. Id. at 365. The New Jersey Supreme Court held that "[t]he service and experience she compiled in this position—her seniority—properly entitled her to a preference over a non-tenured applicant." Id. at 369. Accordingly, assuming, *arguendo*, Carew was subject to a RIF prior to the 2013-14 school year, she is entitled to preference over a non-tenured applicant, Intervener Maida. See Ibid.

Moreover, the fact that Intervener Maida taught kindergarten, while Carew taught sixth- and eighth-grade language arts, does not affect Carew's entitlement to preference over Intervener Maida. See Bednar v. Westwood Bd. of Educ., 221 N.J. Super. 239 (App. Div. 1987). On a different issue, Intervener Walsh argues that she has greater seniority than Carew with respect to elementary assignments, (her fifth-grade class) because pursuant to the applicable regulations, Carew only acquired secondary (sixth- and eighth-grade classes) seniority, while Intervener Walsh acquired both secondary and elementary seniority. (Intervener Walsh Br. at 11 (citing N.J.A.C. 6A:32-5.1(l)(17)-(18).) In Bednar, a tenured full time art teacher with seventeen years of elementary seniority, but no secondary seniority, was reduced to a part-time position. Bednar, supra, 221 N.J. Super. at 240. However, a non-tenured full-time high school art teacher was not reduced to a part-time position. Ibid. The tenured teacher argued that his "statutory tenure rights, wholly apart from seniority, bar the school district from reducing his hours while retaining a full-time non-tenured art teacher." Id. at 241. The State Board rejected that argument, and concluded "that tenure does not permit a teacher to claim an assignment in a job category in which he has no seniority against a non-tenured teacher with experience in the category. Id. at 242. The Appellate Division rejected that analysis, and reasoned that the statutory scheme that addresses seniority

"declares only the rights inter sese of tenured teachers in a RIF. Among them, seniority is determinative. But, the statute does not authorize regulatory dilution of tenure rights by affording a non-tenured teacher 'seniority.'" Id. at 243. Accordingly, "tenure as an art teacher [gave the teacher] the right to avoid a RIF by claiming the secondary school job of a non-tenured art teacher with experience in the specific category of secondary art." Id. at 241; see also Gillikin v. Garfield Bd. of Educ., A-1494-11 (App. Div. February 15, 2013) (slip op.), <http://njlaw.rutgers.edu/collections/courts/> (tenured teacher with endorsements as both a teacher of elementary education and a teacher of Italian, who exclusively taught Italian, was entitled to an elementary teacher position awarded to a non-tenured teacher, because tenure accrues to all a teacher's endorsements, regardless of the actual area of service). But see Aiello v. Bd. of Educ. of Westwood Reg'l Sch. Dist., A-5896-07 (App. Div. June 25, 2009) (slip op.), <http://njlaw.rutgers.edu/collections/courts/> (a tenured school social worker who held both an educational services certificate and an instructional certificate, who was exclusively employed as a teacher, was not entitled to preference over non-tenured teachers with respect to teaching positions).

Here, Carew is certified as an elementary school teacher, with endorsements as in "nursery, kindergarten, and grades 1-6." (Joint Ex. 3.) She is also certified as a teacher of English, with endorsements in "English 7-12." (Ibid.) Accordingly, only assuming again *arguendo*, Carew was subject to a RIF, she is indisputably entitled to preference over Intervener Maida, a non-tenured teacher, with respect to the kindergarten teacher position. Intervener Maida and the Board properly focus on whether Carew was subject to a RIF, and Intervener Walsh properly asserts that if Carew was subject to a RIF, she is entitled to preference over Intervener Maida, a non-tenured teacher, prior to preference over Intervener Walsh, a tenured teacher.

Based on the briefs, exhibits, and certifications submitted and for the aforementioned reasons, I **CONCLUDE** that Carew was not subject to a RIF since the loss of a temporary leave-replacement position does not constitute a RIF.

DISPOSITION AND ORDER

Based on the foregoing findings of fact and legal authority, I **GRANT** respondent's motion for summary decision and **DENY** petitioner's motion for summary decision and **ORDER** the petitioner's Verified Petition be and hereby is **DISMISSED WITH PREJUDICE.**

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

November 18, 2014
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: Nov 18, 2014

Date Mailed to Parties: NOV 19 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

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2014 DEC 23 A 11:03

JOHN J. HOFFMAN
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Attorney for New Jersey Department of Education,
School Ethics Commission
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	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
IN THE MATTER OF DR. SONN SAM	OAL DOCKET NO. EEC 05429-2014 N AGENCY DOCKET NO. C46=13
	CONSENT ORDER

WHEREAS, Petitioner, New Jersey Department of Education, School Ethics Commission ("SEC"), and Respondent, Dr. Sonn Sam ("Respondent"), have mutually agreed to settle the above-captioned matter, with JOHN J. HOFFMAN, Acting Attorney General of New Jersey, by Frederick H. Wu, Deputy Attorney General, appearing on behalf of the SEC, and Gregory S. Hyman, Esq., appearing on behalf of Respondent; and

WHEREAS, this matter arose from the SEC's decision of March 25, 2014, finding probable cause to credit the allegations that Respondent violated N.J.S.A. 18A:12-24(b) and (c); and

WHEREAS, the settlement of this matter shall not constitute precedent or be considered an admission of guilt in other pending or future litigation:

NOW, THEREFORE, the parties hereto agree to settle the above-captioned matter upon the following terms:

1. Respondent acknowledges that his actions constituted a violation of N.J.S.A. 18A:12-24(b) and (c).

2. The parties agree that the SEC will recommend that the Commissioner impose the penalty of a reprimand only.

3. The Commissioner agrees that he will adopt the SEC's recommendation and impose the penalty of a reprimand for the conduct described in the attached affidavit.

4. By accepting the penalty of a reprimand, Respondent agrees to waive any and all hearings to which he is entitled pursuant to N.J.S.A. 18A:12-29 and N.J.A.C. 6A:28-10.7, and Respondent further agrees that he will not oppose the reprimand.

5. The parties agree that this Consent Order fully resolves all issues between them arising from the SEC's March 25, 2014, Probable Cause Notice.

Gregory Hyman
Gregory S. Hyman, Esq.
Attorney for Respondent

Date: 12/10/14

Frederick H. Wu
Deputy Attorney General
Attorney for Petitioner

Date: 12/19/14

Respondent, Dr. Sonn Sam, is hereby reprimanded for the conduct described in the attached affidavit:

David C. Hespe
Commissioner of Education
As to penalty only.

Date: 3/4/15

RECEIVED BY
2014 DEC 23 P

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF
DR. SONN SAM

OAL DOCKET NO. EEC 05429-2014 N
AGENCY DOCKET NO. C46-13

Affidavit of Sonn Sam

RECEIVED BY
SCHOOL ETHICS COMMISSION
2014 DEC 23 A 11:04

Dr. Sonn Sam, of full age, being duly sworn upon his oath deposes and says:

1. I was formerly the Head of School for the Newark Prep Charter School ("Newark Prep"). I was the Head of School for Newark Prep from June 10, 2013 until my resignation in August 2014.

2. On or around June 27, 2013, I was informed by the Newark Prep School Board that the school was in urgent need of a World Language teacher for the school's summer program, which was set to begin on July 1, 2013.

3. I acknowledge that I recommended my wife, Dr. Daisy Duran, for the one-month position, by submitting her resume to the School Board President. She was the only candidate whose name I submitted.

4. On July 3, 2013, the School Board voted to approve Dr. Daisy Duran's hire. She was the only candidate considered for the position.

5. At the end of the 2013 summer program, my wife's position as World Language instructor ended. Newark Prep did not employ her in any other capacity, and has not employed her since then. For her services to Newark Prep, my wife received

approximately $5,600 in remuneration.

6. I acknowledge that my conduct set forth above violated the New Jersey School Ethics Act, N.J.S.A. 18A:12-24(b) and (c), and agree to accept a penalty of reprimand for that conduct.

7. I acknowledge that, in signing this affidavit, I have secured the advice of an attorney and I understand the terms of this agreement.

Dr. Sonn Sam

Sworn and Subscribed
before me this 5th day
of December, 2014

Felicia A. Parisi

FELICIA A. PARISI
Notary Public
State of New Jersey
My Commission Expires Apr. 25, 2017
I.D.# 2200147

82-15R

S2-15

H.F., on behalf of minor children, S.D. and A.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODLAND PARK, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her children in August 2013. A hearing at the Office of Administrative Law (OAL) was scheduled for January 24, 2014, but petitioner failed to appear. The OAL returned the file to the Commissioner and the petition was dismissed with prejudice. However, the matter was remanded to the OAL for resolution of the counterclaim for tuition which had been filed by the respondent Board.

A second hearing was scheduled for January 12, 2015 to address the tuition issue. Prior to that date, respondent's counsel filed a letter withdrawing its counterclaim on behalf of the Board. The hearing was held nonetheless. As the within petition had already been dismissed in March 2014, the Commissioner acknowledged the respondent's withdrawal of its counterclaim, and deemed the matter fully resolved and removed from his consideration.

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

Issued 3/02/15

OAL DKT. NO. 8027-14
(EDU 12626-13 ON REMAND)
AGENCY DKT. NO. 186-8/13

H.F., on behalf of minor children, S.D. and A.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODLAND PARK, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The instant matter was originally opened in August 2013 by way of a petition challenging respondent's determination that petitioner's children were ineligible to attend school in its district. Respondent answered and counterclaimed for tuition. When petitioner failed to appear for the January 24, 2014 hearing in the Office of Administrative Law (OAL), the Administrative Law Judge (ALJ) transmitted the matter to the Commissioner of Education pursuant to *N.J.A.C.* 1:1-14.4. The Commissioner dismissed the petition but was constrained to remand the matter to the OAL for supplementation of the record regarding respondent's open counterclaim, and for disposition of same.

Prior to a January 12, 2015 hearing scheduled by the ALJ to address the counterclaim, respondent's counsel filed a letter withdrawing same on behalf of his client. Nonetheless, the ALJ elected not to cancel the hearing. The petitioner did not appear. Indeed, since her petition had been dismissed, and the counterclaim against her had been withdrawn,

there was little reason for her to do so. It is not clear from the record whether respondent appeared for the hearing.

On January 14, 2015, the OAL sent a notice to the parties concerning petitioner's failure to appear for the hearing and returned the file to the Commissioner. Neither party has filed any further pleadings. Having already dismissed the petition in this case on March 5, 2014, it remains only for the Commissioner to acknowledge respondent's withdrawal of its counterclaim. In so doing the Commissioner deems the matter fully resolved and removed from his consideration.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/02/15

Date of Mailing: 3/06/15

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

83-15A

BARBARA LESINSKI,	:	
PETITIONER,	:	
v.	:	COMMISSIONER OF EDUCATION
GENEVA SMALLWOOD, ASBURY PARK BOARD OF EDUCATION, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

The respondent in this matter appealed the October 28, 2014 determination of the School Ethics Commission (Commission) that respondent violated *N.J.S.A.* 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members for taking private action that had the potential to compromise the Board; specifically, the Commission determined that respondent – an experienced member of the Board – took private action by contacting two potential candidates for employment and discussing confidential Executive Session matters with a third party. The Commission recommended a penalty of reprimand.

The Commissioner found, *inter alia*, that: the factual record fully supports the Commission's conclusion that respondent violated *N.J.S.A.* 18A:12-24.1(e) and (g); respondent admitted that she telephoned two potential candidates for employment absent any vote from the Board authorizing her to do so, which exceeded the scope of her duties as a board member and had the potential to compromise the Board; the record includes an e-mail exchange with one of the job candidates which supports the Commission's conclusion that respondent breached the confidentiality of Board Executive Session deliberations, in violation of *N.J.S.A.* 18A:12-24.1(g). The Commissioner concluded that the respondent's actions violated the Commission's code of ethics, and accepted the Commission's recommendation that a reprimand is the appropriate penalty in this case. Accordingly, the Commissioner ordered that the above-named respondent be reprimanded as a school official found to have violated the School Ethics Act.

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

Issued March 6, 2015

AGENCY DOCKET NO. 11-11/14A
SEC DOCKET NO. C14-04

BARBARA LESINSKI,	:	
PETITIONER,	:	
v.	:	COMMISSIONER OF EDUCATION
GENEVA SMALLWOOD, ASBURY PARK BOARD OF EDUCATION, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

This matter involves an appeal of the School Ethics Commission's October 28, 2014 determination that respondent violated *N.J.S.A.* 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members when she took private action by contacting two potential candidates for employment and discussing confidential Executive Session matters with a third party.[1] The Commission recommended a penalty of reprimand for the violation. Complainant filed exceptions, urging the Commissioner to impose a greater penalty. Thereafter, respondent appealed the Commission's findings pursuant to *N.J.A.C.* 6A:4-1.3(c). Having carefully reviewed the Commission's decision and the record in its entirety, the Commissioner finds that the Commission's decision is supported by sufficient, credible evidence and that respondent failed to establish that the decision is arbitrary, capricious or contrary to law. *N.J.A.C.* 6A:4-4.1(a). Additionally, the Commissioner finds that a penalty of reprimand is appropriate.

At the outset, a brief synopsis of the arguments advanced by the parties on exception and appeal is warranted. Complainant, in her exceptions, asserts a greater penalty

[1]The Commission dismissed the allegations that respondent violated *N.J.S.A.* 18A:12-24.1(a), (c) and (d).

should be imposed since respondent – the Board President – is a veteran, certificated Board member with eight years experience.[2] (Petitioner's Exceptions at 1) On appeal, respondent argues her actions were precipitated by a "misunderstanding" and she "legitimately and in good faith believed she had been authorized to contact Candidates 1 and 2 to gauge their continued interest in a position with the District." (Respondent's brief at 3) Contending the finding of violation of *N.J.S.A.* 18A:12-24.1(e) should be reversed, respondent denies that she exceeded her duties as Board President or potentially compromised the Board by calling the candidates. Further, respondent maintains that the Commission's conclusion as to a violation of *N.J.S.A.* 18A:12-24.1(g) is "nothing more than supposition and conjecture" requiring reversal because she testified that she did not reveal any confidential information to the candidates. (*Id.* at 11) In short, respondent's arguments on appeal are unpersuasive.

The factual record fully supports the Commission's conclusion that respondent violated *N.J.S.A.* 18A:12-24.1(e) and (g). First, as to the violation of *N.J.S.A.* 18A:12-24.1(e), respondent admitted that she telephoned two potential candidates for employment absent any vote from the Board authorizing her to do so. (Testimony of Geneva Smallwood, T at 9-12, 60; 24-25, 89; 1-3, 90)[3] Six other board members testified credibly that the Board never authorized respondent – formally or informally – to contact the candidates; instead, they agreed during Executive Session that respondent should contact the State Monitor to determine if her "out of the box" plan involving the candidates was viable.[4] (*SEC Decision* at 12) Absent a formal directive, respondent's actions exceeded the scope of her duties as a board member and had the

[2]Complainant did not file opposition to respondent's brief in support of the appeal.

[3]This citation refers to a transcript of a hearing held before the School Ethics Commission on September 23, 2014.

[4]After the State Monitor overruled the Board's candidate for superintendent in November 2013, respondent hatched a plan to hire both the rejected candidate and another candidate on a trial basis and discussed same with the Board in Executive Session, which led to the present controversy. (*SEC Decision* at 7)

potential to compromise the Board. By calling the candidates, respondent could have easily created the impression that she was acting on behalf of her Board when, in fact, they neither authorized her to contact the candidates nor approved her plan to hire them. See *Dericks v. Schiavoni*, Commissioner's Decision No. 260-09 SEC, decided August 18, 2009, at 5-6 ("communications from individual board members purporting or appearing to represent the full board" violate *N.J.S.A.* 18A:12-24.1(e)) For the reasons expressed in the Commission's comprehensive decision, respondent's conduct violated *N.J.S.A.* 18A:12-24.1(e).

Second, as to the violation of *N.J.S.A.* 18A:12-24.1(g), respondent's appeal brief fails to address a crucial document that she offered as evidence before the Commission – a revealing e-mail exchange with one of the candidates. (T at 19-24, 67; 4-25, 71; Respondent's Exhibit 3) Simply stated, the e-mails demonstrate that her discussion with said candidate was not limited to gauging his interest in future employment. Rather, at the candidate's request, respondent subsequently arranged an in-person meeting between her "delegation" and the candidate's "group" to discuss his "attributes." (Respondent's Exhibit 3) After the meeting, respondent e-mailed the candidate noting that she "found the exchange interesting and informative," that she would be reporting back to the Board, and that she was "doing everything" she could to "resolve this CSA situation."[5] (*Ibid.*) These e-mails support the Commission's conclusion that respondent breached the confidentiality of Executive Session deliberations when she called the candidates and discussed her plan "in greater detail than simply gauging the

[5]Although cited by respondent, *Verhasselt v. Madden*, SEC Decision No. C40-06, decided September 23, 2008, is distinguishable from the present matter – mainly due to respondent's own admissions (both her testimony during direct examination and her e-mail exchange with the candidate). In *Verhasselt*, the record lacked sufficient evidence to prove a violation of *N.J.S.A.* 18A:12-24.1(e) and (g) when complainant relied solely upon respondent's inconclusive answers to interrogatories and depositions in a civil matter. By contrast, there is nothing inconclusive about respondent's testimony or the content of the e-mail messages she offered as evidence.

candidates' interest," thereby sharing confidential information with a third party.[6] (*SEC Decision* at 13) For the reasons expressed in the Commission's comprehensive decision, respondent's conduct violated *N.J.S.A.* 18A:12-24.1(g).

As to penalty, the Commissioner accepts the Commission's recommendation that a reprimand is appropriate for the reasons expressed in its decision. Moreover, the Commissioner finds that issuance of a reprimand here is in accord with the penalties in prior cases involving violations of *N.J.S.A.* 18A:12-24.1(e) and (g). Therefore, the Commission's recommended penalty will not be disturbed.

Accordingly, IT IS ORDERED that Geneva Smallwood is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 3/06/15

Date of Mailing: 3/06/15

[6]Although respondent denied that she revealed anything confidential during her conversations, the Commission determined her testimony on that issue lacked credibility. (*SEC Decision* at 13)

[7]This decision may be appealed to the Superior Court, Appellate Division, pursuant to P.L. 2008, c. 36. (*N.J.S.A.* 18A:6-9.1)

BARBARA LESINSKI	:	
	:	**BEFORE THE SCHOOL**
v.	:	**ETHICS COMMISSION**
	:	
GENEVA SMALLWOOD	:	**SEC DOCKET NO. C14-14**
ASBURY PARK BOARD OF EDUCATION,	:	
MONMOUTH COUNTY	:	**DECISION**
	:	

PROCEDURAL HISTORY

This matter arises from a complaint, filed on April 15, 2014 by board member Barbara Lesinski, alleging that Board President Geneva Smallwood, Asbury Park Board of Education (Board), violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. The complaint specifically alleges that the respondent violated N.J.S.A. 18A:12-24.1(a), (c), (d), (e), and (g) of the Code of Ethics for School Board Members (Code). The respondent filed her answer to the complaint on June 10, 2014.

By letter dated June 12, 2014, the parties were notified that the School Ethics Commission would review this complaint on June 24, 2014. At its meeting on June 24, 2014, pursuant to N.J.A.C. 6A:28-10.8(a), the Commission voted to retain the complaint docketed as C14-14 for a hearing at a later date.

The Commission notified the complainant and respondent by letter of August 1, 2014, that on September 23, 2014, it would conduct a plenary proceeding to hear testimony and consider evidence in support of their respective positions. The complainant, Barbara Lesinski appeared *pro se*, and the respondent appeared with her attorney, Carl Tanksley, Jr., Esq. Accordingly, the Commission heard testimony on all Counts of the complaints. After hearing all testimony, as summarized below, the Commission voted during the public portion on September 23, 2014 and October 28, 2014 to find a violation of N.J.S.A. 18A:12-24.1 (e) and (g) of the Code of Ethics for School Board Members, to dismiss the allegations that the respondent violated N.J.S.A. 18A:12-24.1(a), (c) and (d) of the Code and to recommend the penalty of reprimand.

SUMMARY OF THE RECORD

After opening statements, the Commission heard the respondent's Motion to Dismiss the complaint on the grounds that the complaint, and the testimony it will elicit, would violate the confidentiality of Executive Session since respondent's disclosure of her actions occurred during closed session. At no time until that moment did respondent object to the complaint on these grounds. The complainant argued that if the Commission is not able to hear and decide whether a Board member violated the Act in closed session, then there would be no avenue for those filing such a complaint to challenge such conduct. She also argued that the Commission's Executive Session is also cloaked in the same protections; therefore, the testimony would also be safeguarded. After deliberations, the Commission denied the Motion without prejudice since the parties and all of

their witnesses were present at the Board meeting and all were privy to the events conducted under the protection of confidentiality.

The tribunal was certain that it could navigate around the restrictions posed by confidentiality by focusing the testimony on the events of the two meetings further limited by the narrow issue of whether the Board gave Respondent Smallwood permission to contact the two candidates for Superintendent. The Commission did not agree, however, that the confidentiality it enjoys in Executive Session transfers to the Board and vice versa. The Commission has determined in Messner & Condo v. Gray, Deptford Twp. Board of Education, Gloucester County, C16-13, 12/19/13 and Berglund v. Gray, Deptford Twp. Board of Education, Gloucester County, C22-13, 12/19/13 (Consolidated) that the protections afforded to the entity and its members in Executive Session are unique to that body and the individuals of which it is comprised. The protections of confidentiality cannot be expanded or transferred to include another person or group even though there exists in that relationship a different and separate protection.

In order to protect the confidentiality of Board members' discussion, the Commission limited testimony and confined the witnesses to the issue of whether they gave the respondent the permission to contact potential candidates for the positions of Interim Superintendent and Interim Director of Curriculum.

COMPLAINANT: Barbara A. Lesinski—Board Member

Barbara Lesinski testified that during Executive Session on February 11, 2014, the Board President, Respondent Smallwood, introduced the idea of two temporary positions to satisfy both factions of the Board. The members discussed her idea of hiring an Interim Superintendent and creating a second position of Interim Director of Curriculum as well as the two individuals under consideration to fill those positions. The respondent was directed to contact the State Monitor to see if she approved of the plan and report back to the Board at the next meeting. At the next meeting on February 25, 2014, the respondent advised the Board members that she had telephoned both candidates to see if they were still interested in the positions. The respondent objected to this testimony, which the Commission overruled, determining that details raised in the testimony were already reflected in the facts mentioned in the complaint. Nothing confidential was disclosed. Ms. Lesinski asserted that on February 11, 2014, the Board did not grant Respondent Smallwood the authority to contact the candidates.

On cross examination, Ms. Lesinski affirmed that she was in attendance at the two meetings in February. When questioned by the Commission, Ms. Lesinski testified that the Superintendent search had begun in January 2013, and the Board hired an individual whose selection the State Monitor overturned.[1] She restated that at no time did the Board authorize the respondent to contact the candidates.

[1]The Board sued the Monitor. In July 2014, five members of the Board again voted to appoint the same individual whose appointment was overturned without prior notice to four of the nine Board members that the vote would be taking place, without advising the County Superintendent for approval and without a background check.

Angela Ahbez-Anderson—Board Member

Regarding the February 11, 2014 meeting, Ms. Ahbez-Anderson testified emphatically that the Board did not authorize Respondent Smallwood to contact the two candidates. She was simply directed to contact the State Monitor. At the February 25, 2014 meeting, the witness stated that the respondent was "thinking out of the box" and when asked who authorized her to speak to the candidates, the respondent said the Board directed her to do so. Ms. Ahbez-Anderson affirmed that the Board did not grant Respondent Smallwood the authority to contact the candidates. On cross-examination, Ms. Ahbez Anderson maintained that the Board members who heard the respondent's reply were uniformly surprised.

Moreover, when questioned by the Commission, Ms Ahbez-Anderson stated that when she was Board President[2], she was never authorized to personally contact candidates for positions of employment.

Corey Lowell—Board Member

Ms. Lowell testified that on February 11, 2014, the respondent discussed with the Board her "out of the box" idea to try out an individual as Interim Superintendent and another individual as Assistant Superintendent, Director of Curriculum on a temporary basis as a compromise of sorts to assuage both factions of the Board. The candidate for Interim Superintendent was the same individual who the State Monitor had rejected. Ms. Lowell further testified that the Board directed the respondent to contact the State Monitor for review of her idea, but nothing more. She was not asked to contact the individuals in any manner at any time.

There were no other questions on cross or from the Commission, except to reaffirm that the Board did not authorize the respondent to contact the candidates

Geoffrey Hastings—Business Administrator

Mr. Hastings, the Business Administrator for nine years, testified that the Board was looking for options to find an individual to fill the position of Superintendent. At a meeting, the witness stated that Respondent Smallwood suggested a plan to temporarily hire an Interim Superintendent with a mentor or Assistant Superintendent and another as someone to help with the Director of Curriculum duties on a trial basis. When asked if the Board authorized the respondent to contact the candidates, he said that there was no formal action directing the respondent to call the candidates. The Board did not establish any course of action at the February 11, 2014. At the February 25, 2014, Mr. Hastings testified that Respondent Smallwood advised the Board members that she had been in contact with the two candidates, and they were amenable to some type of arrangement. (CD File 3, 31:01)

When questioned by the Commission, Mr. Hastings advised that the District now has a Superintendent as of September 11, 2014, pending contract approval. The witness was not sure if the State Monitor was present for the February 11, 2014 meeting, but was certain that she knew

[2] Ms. Ahbez Anderson's presidency ended January 2014.

about the proposed plan and that she was present for one of the meetings.[3] The Monitor advised that she would review the plan and return her findings to the Board. He had no recollection if the Board directed Respondent Smallwood to contact the State Monitor.

RESPONDENT: Geneva Smallwood—Board President

Geneva Smallwood testified that minutes of the meetings of February 11, 2014 and February 25, 2014 are scant. She does recall that she was "pushing the Board to complete the process" on the overturned superintendent candidate and also pushing the Board for other solutions, to "think outside the box" and offer different modules. (CD File 3, 48:20—29) She suggested having a Superintendent and Assistant Superintendent and would discuss it with the State Monitor when she was present at the next meeting. There were no other options on the table. She stated that the Board did not authorize her to contact the candidates at this meeting but did so at either the meeting on February 25, 2014 or at a meeting on March 18, 2014. Further, she stated that when the Board asked her to contact the candidates it was to determine if they were interested in filling the vacancies during this second round of the search. The respondent believes that the complainant and her witnesses have the wrong dates. (R-1) She further stated that when she contacted the candidates, she had no conversation with the candidates about the dual positions or trial period nor did she reveal any confidential information discussed in Executive Session.

Respondent sought to introduce R-2 to establish that a site visit of the candidate was a part of the selection process. As such, the respondent believes that the respondent's actions were consistent with the process recommended by NJSBA. Over the complainant's objection, the Commission admitted the document into evidence, but would accord it only the weight it deemed appropriate. The Respondent also identified an e-mail dated March 9, 2014 from Gregory Allen to the respondent to set up a site visit. (R-3) This is the same individual whom the State Monitor rejected. It is the respondent's position that all that she did was at the Board's direction.

On cross examination, when asked who had the responsibility to contact the candidates during the first round of the search, Respondent Smallwood stated that Board members did reference checks and that during the second round of the search the Board continued to use the same process as in the first round. She also testified that the BA gave her the phone numbers to contact the individuals to fill the vacancies to see if they were still interested. In addition, she also testified that the Board gave her permission to meet with candidate Gregory Allen in Atlantic City to complete the site visit from the first round. She had contacted all of the members of the personnel committee, but none could attend with her, except Ms. Simmons. She was not sure of the date on which the Board asked her to contact the State Monitor to discuss her "out of the box" plan and asserts that the Board asked her to negotiate with the State Monitor sometime in April. She never discussed her trip to Galloway Township (Atlantic City) with the State Monitor.

When the Commission attempted to resolve respondent's confusion about the date on which she was requested by the Board to contact the candidates, she responded that the dates are muddled and described the dates she has heard in the testimony as "mixy." (CD File 3, 1:20:14—23)

[3] Minutes of the February 11, 2014 meeting indicate that the State Monitor was absent, but that she was present for the February 25, 2014 meeting.

Again, she was not clear about the dates. Also, the record shows that there was no meeting between February 25, 2014 and March 18, 2014, for her to seek approval for the site visit she had planned during this time as indicated in R-3. She does not remember when she contacted the BA for the candidates' phone numbers and testified that she only asked them if they were still interested. She asserted that at no time did she discuss the terms of the "out of the box" idea. She could not recall exactly who directed her to contact the candidates, but said that it was the consensus of the Board members present. She said the other Board members are confused about the dates. (CD File 3, 1:31:34)

Christian Hall—Board Member

Respondent's attorney directed Mr. Hall's attention to the meeting of February 25, 2014. The witness testified that he did not recall the respondent's disclosure that she spoke to any candidates on any date although he did recall a discussion about a replacement candidate after the State Monitor overturned the Board's selection on the first round. He recalled Ms. Smallwood's statement about "thinking outside the box," at the February 11, 2014 meeting in the context of brainstorming of ideas to search for and select a Superintendent. He testified that the Board members divided duties of checking references, backgrounds and work ethic among themselves and that Respondent Smallwood and Ms. Simmons agreed to perform these checks. He did not recall anyone telling the respondent to make phone calls to the candidates or any discussion about contacting the candidates.

On cross-examination, Mr. Hall remembered that he suggested that the State Monitor develop a checklist of items for the Board to follow on the second round search to improve the Board's relationship with the Monitor. The Monitor did create a checklist, which included parts of the earlier process to follow in this second round, but he was not sure if the entire Board complied. He was not sure about the dates of the meetings.

When the Commission inquired whether all those present agreed to the process discussed, Mr. Hall stated that there was no objection to the process, which included performing reference and background checks. He did not remember, however, whether the Board took any affirmative action to revoke the NJSBA process, but that the State Monitor outlined a plan for the Board to follow. He did not remember if the members followed her plan. In response to a question from the Commission, Mr. Hall stated that the Board did not direct the respondent to call the candidates at any time at any meeting for any reason.

Felicia Simmons—Board Member

Ms. Simmons was asked to draw her attention to the February 11, 2014 meeting and whether there was a proposal regarding two candidates to fill the superintendent vacancy. She testified that the idea was suggested by Board member Connie Breech[4] to select one individual for Interim Superintendent and another to fill a new position of Assistant Superintendent. After the proposal, Ms. Simmons testified that the Board advised the respondent to contact the State Monitor to see if

[4] The minutes of the Board meeting of February 11, 2014 and February 25, 2014 indicate that Connie Breech was not present for the meeting nor do they indicate that Ms. Breech appeared by telephone. No one else attributed Respondent Smallwood's proposal to Board member Connie Breech.

she approved of the plan, as well as the candidates to see if they were still interested and willing to accept the proposal. Ms. Simmons stated that all of the members present, including the complainant and her Board witnesses accepted the plan. The respondent was directed to investigate a compromise deal with the candidates and report back. Ms. Simmons accompanied the respondent on one such meet and greet. Ms. Simmons reported her findings to the Board and was confused why certain Board members were surprised that the respondent had spoken to the candidates. Ms. Simmons testified that at the February 11, 2014, there was an affirmative, unanimous, straw vote to have the respondent seek approval of her proposal and to contact the candidates to move forward in its search as suggested. When Ms. Smallwood reported back the results of her contact with the candidates on February 25, 2014, Ms. Simmons testified that some of the Board members were shocked that Ms. Smallwood contacted the candidates and appeared to forget about the straw vote. Ms. Simmons testified that Ms. Lesinski asked, "Who told you to do that?"

On cross-examination, Ms. Lesinski asked Ms. Simmons if the State Monitor reported back to the Board regarding her approval of the plan. The witness testified that the she never did and the proposal "fizzled." (CD File 4, 12:23) When asked which Board members directed the respondent to contact the candidates, Ms. Simmons said they all did.

The Commission inquired about the nature of the motion on the straw vote. Ms. Simmons testified the Motion was to have the respondent contact the State Monitor to see if the suggestion of two positions was a viable solution and to contact the candidates, and that the members responded with a unanimous show of hands. She maintained that she did not know that the Board had to get the State Monitor's approval to advance the plan. Ms. Simmons stated that the respondent did not discuss the terms of the plan at the meet and greet with the candidate whose appointment had previously been overturned.

Nicole Harris---Board Vice President

Ms. Harris's attention was drawn to the February 11, 2014 Board meeting and testified that the Respondent discussed the need "to think outside the box"; however, there was no clear direction that night about how to proceed with the plan. Moreover, there was no straw vote to direct the respondent to do anything, but the respondent on her own initiative took action.

The complainant did not cross-examine this witness.

The Commission inquired if she remembered if a straw vote had taken place on February 11, 2014, and the witness testified that she did not remember the vote.

Respondent's Exhibits

R-1	List of Board Meetings January—December 2013
R-2	NJSBA Manual for Superintendent's Search January 22, 2013
R-3	Respondent's E-mail of March 12, 2014 to Gregory Allen Scheduling a Meeting

FINDINGS OF FACT

As the Trier of Fact in this matter, the Commission had the greatest opportunity to observe the demeanor of the witnesses and was qualified to assess their credibility. Based on the credible,

relevant testimony and documents in the record, the Commission makes the following factual findings on the limited issue of whether the Asbury Park Board authorized Respondent Smallwood to contact two candidates for the positions of Superintendent and Assistant Superintendent:

1. The complainant, respondent, and the witnesses were at all times, relevant to this matter, members of the Asbury Park Board of Education (Board) or employed by the District.

2. The Asbury Park Board has been subject to the oversight of a fiscal State Monitor, pursuant to N.J.S.A. 18A:7A-54 *et seq*. since September 2013.

3. The Board's search for a new Superintendent since early 2013 has been unsuccessful.

4. In November 2013, the State Monitor overturned the Board's appointed candidate for Superintendent, citing, *inter alia,* his lack of experience and concerns about his qualifications for the position.

5. Under the leadership of Respondent Smallwood, she and the Board abandoned the NJSBA process, outlined in R-2, which it utilized in its search in 2013 and resorted to "out of the box" proposals to appoint a new Superintendent.

6. The Board meetings at the center of the controversy were held on February 11, 2014 and February 25, 2014. (R-1)

7. No Board meetings took place between February 25, 2014 and March 18, 2014.

8. The parties to this complaint and the witnesses who testified were all present for the February 11, 2014 meeting.

9. Seven of the nine members, who comprise the Board, as well as the Business Administrator, testified at the hearing and had personal knowledge of the events, which took place during Executive Session at both meetings.

10. The discussion on the evening of February 11, 2014 included a proposal advanced by Respondent Smallwood to "think outside the box" and appoint one candidate as Interim Superintendent and the other candidate as Assistant Superintendent on a trial basis to see if either would work out.

11. The candidate under consideration for Interim Superintendent was the same individual whose appointment had been overturned by the State Monitor late in 2013.

12. After she overturned the Board's selection for Superintendent, the State Monitor and the Commissioner of Education established a process for the Board to follow to reopen its search for a new Superintendent.

13. On the evening of February 11, 2014 the Board directed Respondent Smallwood to contact the State Monitor for approval to proceed with her proposal to appoint the two candidates on a trial basis.

14. There was no straw vote of the members in attendance at the meeting of February, 11, 2014, authorizing Respondent Smallwood to contact the candidates to see if they were still interested in the position.

15. The respondent contacted the candidates between the dates of February 11, 2014 and February 25, 2014 without Board or State Monitor approval and at the February 25, 2014 meeting reported back to the members the results of her efforts.

16. At the meeting of February 25, 2014, the respondent was made aware that the Board did not approve of her contacting the candidates.

17. In an email, initiated by the candidate whose appointment was overturned, the candidate invited Respondent Smallwood to conduct a site visit even though his appointment had failed.

18. Respondent's reply on March 9, 2014 to this earlier email from the previously rejected candidate, attempting to schedule a site visit, establishes that the respondent engaged in an expanded conversation beyond merely gauging his interest in the position.

19. Respondent Smallwood and Felicia Simmons conducted the site visit without advising the State Monitor of their plan.

20. After the meeting, Respondent Smallwood wrote to the unsuccessful candidate saying, "I'm doing everything I can to resolve this CSA situation." (Respondent's Exhibit R-3)

21. The Respondent testified that she was "pushing the Board to complete the process" on the overturned candidate and also pushing the Board for other solutions. (CD File 3, 48:20—29)

ANALYSIS

During his closing arguments, respondent's attorney renewed his Motion to Dismiss on the grounds that the subject matter and the discussions which took place in Executive Session were protected by the principle of confidentiality which attaches to closed session deliberations.

As discussed, *supra*[5], the Commission has previously determined that the protection of confidentiality inures only to the body as a whole and to its members, who are sworn to safeguard it. Here, Respondent Smallwood argues that this complaint must not be heard because to do so would breach the confidentiality of the Board's Executive Session. Yet she maintains that the Board authorized her to contact the two candidates under consideration. If it is true that the Board gave her license to contact the candidates to inquire if they were still interested in the position, then

[5] Messner & Condo v. Gray, Deptford Twp. Board of Education, Gloucester County, C16-13, 12/19/13 and Berglund v. Gray, Deptford Twp. Board of Education, Gloucester County, C22-13, 12/19/13 (Consolidated),

whatever protection that this portion of the discussion, regarding the proposal advanced by the respondent, had was waived by the Board. Once a third party—the candidate—was inserted into the conversation, confidentiality evaporated. Moreover, by injecting a third party into the discussion, the respondent's contact of the candidate by phone is a public act and also not protected by the confidentiality of closed session. Similarly, when Respondent Smallwood reported the results of her conversations, she was sharing an event already made public and, therefore, not protected by the principle of confidentiality.

Conversely, if the Board did not authorize Respondent Smallwood to contact the candidates, and, by her admission, she did, then Respondent Smallwood breached the protection of confidentiality of discussions in Executive Session by insinuating a third party into the Board's protected conversation. She cannot now cloak herself with the very protection she rendered invalid.

For the reasons stated above, the Commission hereby denies Respondent Smallwood's Motion to Dismiss on the grounds of confidentiality.

Although respondent's attorney did not make his Motion to Dismiss the case after the complainant rested, he did so during his closing arguments. He argued that the complainant did not meet her burden of proof nor did she establish a violation of any of the subsections of the Act as alleged in her complaint. Based on the foregoing Findings of Fact, the Commission has determined that the complainant met her burden and established that Respondent Smallwood violated the Code. Consequently, the Commission denies respondent's Motion to Dismiss based on failure to prove a violation of the Code.

The relevant, credible testimony in the case now before the Commission revealed that the respondent, without Board authority and without the approval of the State Monitor, took private action, which had the potential to compromise the Board. She shared the confidential deliberations with at least one of two outsiders, who themselves were not parties to the Executive Session discussion and who would not have been permitted to attend the meeting or be privy to the Board's deliberations. Once shared with these individuals, confidentiality was breached. Consistent with this foregoing reasoning, the Commission reviewed these actions to determine the manner in which the respondent violated the Code.

The Commission again notes that the complainant bears the burden of factually proving any violations of the Code of Ethics for School Board Members in accordance with the standards set forth at N.J.A.C. 6A:28-6.4(a). See also, N.J.S.A. 18A:12-29(b). The complainant asserts that the respondent violated N.J.S.A. 18A:12-24.1(a), (c), (d), (e), and (g) of the Code of Ethics for School Board Members.

The Commission first considers the allegation that the respondent violated N.J.S.A. 18A:12-24.1(a), which states:

> I will uphold and enforce all laws, rules and regulations of the State Board of Education, and court orders pertaining to schools. Desired changes shall be brought about only through legal and ethical procedures.

The Commission's regulations require that:

> Factual evidence of a violation of N.J.S.A. 18A:12-24.1(a) shall include a copy of a final decision from any court of law or administrative agency of this State demonstrating that the respondent(s) failed to enforce all laws, rules and regulations of the State Board of Education, and/or court orders pertaining to schools or that the respondent brought about changes through illegal or unethical procedures. N.J.A.C. 6A:28-6.4(a)1.

The complainant did not produce a copy of a final decision from a court of law or administrative agency of this State which demonstrates that this respondent failed to enforce all laws, rules and regulations of the State Board of Education, and/or court orders pertaining to schools or that the respondents brought about changes through illegal or unethical means. See, David Hollander v. Judith Millman, et al., Springfield Twp. Board of Education, Union County, C33-07 (January 22, 2008); Denise Bouyer v. Rita Owens and Oscar McCoy, Willingboro Board of Education, Burlington County, C37-09 (December 15, 2009); Martha Oramas-Shirey v. Peter Gallo et. al., Bethlehem Twp. Bd. of Ed., Hunterdon County, C43-10 (March 22, 2011). Accordingly, the complainant failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(a).

The Commission next considers the allegation that the respondent violated N.J.S.A. 18A:12-24.1(c), which states:

> I will confine my board action to policymaking, planning, and appraisal and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

The Commission's regulations require that:

> Factual evidence of a violation of N.J.S.A. 18A:12-24.1(c) shall include evidence that the respondent(s) took board action to effectuate policies and plans without consulting those affected by such policies and plans, or took action that was unrelated to the respondent's duty to:
>
> i. Develop the general rules and principles that guide the management of the school district or charter school;
>
> ii. Formulate the programs and methods to effectuate the goals of the school district or charter school; or
>
> iii. Ascertain the value or liability of a policy. N.J.A.C. 6A:28-6.4(a)3.

The complainant presented no evidence that the respondent took any particular "board action" so as to implicate this provision of the statute. Rather, respondent's conduct implicates N.J.S.A. 18A:12-24.1(e), as set forth below. Accordingly, the complainant failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(c).

The Commission next considers the allegation that the respondent violated N.J.S.A. 18A:12-24.1(d), which states:

> I will carry out my responsibility, not to administer the schools, but together with my fellow board members, to see that they are well run.

The Commission's regulations require that:

> Factual evidence of a violation of N.J.S.A. 18A:12-24.1(d) shall include, but not be limited to, evidence that the respondent(s) gave a direct order to school personnel or became directly involved in activities or functions that are the responsibility of school personnel or the day-to-day administration of the school district or charter school. N.J.A.C. 6A:28-6.4(a)4.

Based on the testimony and in accordance with the Commission's findings of fact, the Commission finds insufficient evidence to conclude that the respondent gave a direct order to school personnel or became directly involved in activities or functions that are the responsibility of school personnel or the day-to-day administration of the school district. Accordingly, the complainant failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(d).

The Commission next considers the complainant's allegation that the respondent violated N.J.S.A. 18A:12-24.1(e), which provides:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

The Commission's regulations require that:

> Factual evidence of a violation of N.J.S.A. 18A:12-24.1(e) shall include evidence that the respondent made personal promises or took action beyond the scope of his or her duties such that, by its nature, had the potential to compromise the board. N.J.A.C. 6A:28-6.4(a)5.

In finding a violation of N.J.S.A. 18A:12-24.1(e), it is not necessary for the Commission to find that the respondent's action, in fact, compromised the Board. Rather, it is sufficient that the action was of such a nature that it might have compromised the Board. See, Tony John et al. v. Ken Gordon, Willingboro Bd. of Ed., Burlington County, C34-08 (October 27, 2009), *aff'd* Commission of Education Decision No. 102-10ASEC, decided March 30, 2010.

The Commission determines that based on the preponderance of the relevant, credible evidence, Respondent Smallwood took private action when she contacted the candidates to inquire whether they were still interested in the positions of Superintendent and Assistant Superintendent. Respondent's testimony reveals that she and the Board were frustrated that the process to select a

new Superintendent and all of their efforts to accomplish the task proved unfruitful. She asserted that she was "pushing the Board to complete the process" on the overturned candidate and also pushing the Board for other solutions, to "think outside the box" and offer different modules. (CD File 3, 48:20—29) The credible testimony reflects that at the meeting of February 11, 2014, the Board gave the respondent permission to contact the State Monitor to determine if her plan were viable since one of candidates was the same failed contender whose appointment the State Monitor overturned in November 2013. Of the eight who testified, six witnesses stated that the Board did not authorize the respondent, whether formally or informally, to contact the candidates. Only Felicia Simmons testified that a straw vote was taken that evening to permit the respondent to contact the candidates. According to Ms. Simmons, the vote was unanimous and in the affirmative. This Commission finds her testimony lacks credibility since no one, not even the respondent, testified that such a vote took place at any meeting at any time.

Moreover, the respondent set her sights on bringing the old candidate back and arranged for a site visit at the candidate's urging (R-3), accompanied by Ms. Simmons. In her email reply to the candidate, Ms. Smallwood stated to him, "I'm doing everything I can to resolve this CSA[6] situation." When the respondent was asked on cross examination if she contacted the State Monitor for approval of her visit, Ms. Smallwood stated that she had not. Further, the Commission determines that there was no need for the site visit, since this candidate's appointment had already been rejected months ago.

Based on the foregoing, the Commission finds that Respondent Smallwood took private action when she contacted the candidates for Interim Superintendent and conducted a site visit without the approval of the Board. Accordingly, the Commission finds that Respondent Smallwood took private action, which was of such a nature that it had the potential to compromise the Board in violation of N.J.S.A. 18A:12-24.1(e).

The Commission last considers the allegation that the respondent violated N.J.S.A. 18A:12-24.1(g), which provides:

> I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.

The Commission's regulation requires that:

> Factual evidence of a violation of the confidentiality provision of N.J.S.A. 18A:12-24.1(g) shall include evidence that the respondent(s) took action to make public, reveal or disclose information that was not public under any laws, regulations or court orders of this State, or information that was otherwise confidential in accordance with board policies, procedures or practices. Factual evidence that the respondent violated the inaccurate information provision of N.J.S.A.

[6] CSA is the acronym for the Chief School Administrator or Superintendent.

> 18A:12-24.1(g) shall include evidence that substantiates the inaccuracy of the information provided by the respondent(s) and evidence that establishes that the inaccuracy was other than reasonable mistake or personal opinion or was not attributable to developing circumstances. N.J.A.C. 6A:28-6.4(a)7. The purpose of executive session is to allow the Board to openly deliberate on select issues without the public being privy to those discussions. It is clear that the topics discussed during that portion of the meeting were confidential and it fell upon those individuals present in executive session ensure those discussions remain confidential.

The purpose of Executive Session is to allow the Board members to openly deliberate on select issues without the public being privy to those discussions. It is clear that the topics discussed during that portion of the February 11, 2014 meeting were confidential, and it fell upon those individuals present in Executive Session to ensure those discussions remained confidential. The Commission determines that Respondent Smallwood breached this duty.

The Commission confines it review to the first portion of this regulation, which requires evidence that the respondent took action to make public, reveal or disclose information that was not otherwise public. It is clear from respondent's actions in telephoning the two candidates to discuss her plan for their potential employment and in further pursuing the site visit for one of them revealed protected discussions. Given the circumstances of her testimony about her "out of the box" plan, it is illogical for her to simply have inquired by phone if they were still interested and then after receiving an affirmative reply, hung up. The conversation would logically require more information to the candidates since her plan envisioned a short-term paradigm to test their skills. One of the candidates was already employed, and the plan would have required him to leave his secure position for an uncertain future. The Commission does not find respondent's testimony credible. By telephoning the candidates, Respondent Smallwood made public Board discussions with individuals who could never be privy to the Board's deliberations without Board approval. In doing so, she took private action to make public, reveal or disclose information that was not public under any laws, regulations or court orders of this State, or information that was otherwise confidential in accordance with board policies, procedures or practices.

As discussed *supra,* Respondent Smallwood was not authorized to contact the candidates to gauge their interest in the Superintendent position in violation of N.J.S.A. 18A:12 24.1(e). The Commission's analysis of Respondent's Exhibit R-3 supports the conclusion that she divulged Executive Session conversations and shared far more information, including her "out of the box" proposal as well as the means by which the candidates would be vetted by the Board. There is no other way to explain how the candidate would have known to advocate for his own site visit. The Commission determines that this was a violation of N.J.S.A. 18A:12 24.1(g) and advances its conclusion supported by the following:

1. At the February 25, 2014 meeting, Ms. Smallwood was put on notice that on February 11, 2014, the Board did not grant her the authority to contact the candidates nor did the members do so at any time.

2. R-1 establishes that there were no meetings between February 25, 2014 and March 18, 2014; therefore, there would have been no opportunity for Ms. Smallwood to have received Board authorization for continued contact with the candidates, including a site visit.

3. The email trail in R-3 commences with a suspiciously undated email from the superintendent candidate the State Monitor rejected, reaching out to Ms. Smallwood to set up a site visit for his candidacy.

4. Ms. Smallwood responded on March 9, 2014, the period between the two meetings during which she was on notice that she did not have the authority to pursue the candidates or to unilaterally conduct the site visit, which occurred on Thursday, March 13, 2014, without the Board's authorization or the State Monitor's approval. As indicated in R-3, Ms. Smallwood planned to report back to the Board at its next meeting on Tuesday, March 18, 2014.

Based on the above, the Commission concluded that Respondent Smallwood discussed in her telephone call in greater detail than simply gauging the candidates' interest and disclosed confidential matters discussed in Executive Session in violation of N.J.S.A. 18A:12-24.1(g).

The Commission finds that sharing the deliberations of a closed meeting with any third party, who would not have been permitted to attend the meeting, is tantamount to a breach of trust and to the promise and expectation of confidentiality. Accordingly, the Commission finds that the complainant met her burden to establish a violation of the first part of N.J.S.A. 18A:12-24.1(g).

DECISION

The Commission finds that the complainant has proved by a preponderance of the relevant, credible evidence that Respondent Geneva Smallwood violated N.J.S.A. 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members, and the Commission dismisses the allegations that the respondent violated N.J.S.A. 18A:12-24.1(a), (c), and (d) of the Code.

PENALTY

The Commission recommends a penalty of reprimand.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the School Ethics Commission's recommended sanction. Parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of violation may file, within **13 days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies

and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal, pursuant to the standards set forth at N.J.A.C. 6A:4, within **30 days** of the filing date of the decision from which the appeal is taken. The filing date shall be three days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (13 days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: October 29, 2014

Resolution Adopting Decision – C14-14

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof, and the testimony of the parties from its hearing on September 23, 2014; and

Whereas, at its meetings on September 23, 2014 and October 28, 2014, the Commission found that the complainant established that the respondent violated N.J.S.A. 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members, but dismissed the allegations that the respondent violated N.J.S.A. 18A:12-24.1(a), (c), and (d); and

Whereas, at its meeting on September 23, 2014, the Commission voted to recommend to the Commissioner of Education a penalty of reprimand; and

Whereas, at its meeting on October 28, 2014, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs it staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public
meeting on October 28, 2014.

Joanne M. Restivo
Acting Executive Director
School Ethics Commission

84-15

A.E.T. AND L.T. ON BEHALF OF A.M.T.,:

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE NORTH HUNTERDON-VOORHEES REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY : DECISION

RESPONDENT.

SYNOPSIS

Petitioners challenged the determination of the respondent Board that their son, A.M.T., was ineligible for school tuition paid by the Board pursuant to *N.J.S.A.* 18A:38-1a. In 2004, A.M.T. was placed by the school district at Matheny Medical and Educational Center (Matheny) – a hospital and educational facility for children and adults with medically complex developmental disabilities. In May 2013, the Board notified the parents that A.M.T. was ineligible for continued enrollment in the school district based upon A.E.T.'s employment assignment in the Netherlands from 2009 until 2013. Petitioners contended that their domicile throughout this temporary work assignment remained within the school district. The Board sought tuition reimbursement from the parents in the amount of $277,410 for the period of A.M.T.'s ineligible attendance.

The ALJ found, *inter alia*, that: based on the documentation submitted by the petitioners and their credible testimony at hearing, at all times between 2009 and 2014, petitioners were domiciled in respondent's school district; though they also resided in the Netherlands due to A.E.T.'s temporary work assignment, they maintained a domicile within respondent's district and returned at the end of the assignment; the temporary residence abroad was funded by A.E.T.'s employer and the family never intended to remain in Europe nor to abandon their New Jersey domicile. The ALJ concluded that at all times relevant from 2009 to 2014, the parents were domiciled within the Board's school district and A.M.T. was entitled to receive a free and appropriate education at the Matheny School, paid for by the district. Accordingly, the petitioners' appeal was granted and the Board's cross-petition for reimbursement of tuition was denied.

Upon comprehensive review of the record and the Initial Decision, the Commissioner concurred with the ALJ's findings and conclusions. Accordingly, the Initial Decision was adopted as the final decision in this matter.

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

Issued 3/06/15

OAL DKT. NO. EDU 10201-13
AGENCY DKT NO. 124-6/13

A.E.T. AND L.T. ON BEHALF OF A.M.T.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTH HUNTERDON-VOORHEES REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY	:	DECISION
RESPONDENT.	:	

The present controversy involves whether petitioners' temporary residence in the Netherlands eradicated their New Jersey domicile, thereby rendering A.M.T. ineligible for school tuition paid by respondent pursuant to *N.J.S.A.* 18A:38-1a.[1] To resolve this dispute, the Commissioner conducted a full and independent review of the record, the Initial Decision of the Office of Administrative Law (OAL), plus the parties' exceptions and reply exceptions. Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) comprehensive findings of fact and conclusions of law which are wholly supported by the credible evidence in the record. Thus, during the time period in question, A.M.T. was entitled to a free and appropriate education paid for by the respondent.

Following a plenary hearing at the OAL, the ALJ found that at all times relevant between 2009 and 2014, petitioners were domiciled within respondent's district: initially in Tewksbury, New Jersey, and later in Lebanon, New Jersey – after the Tewksbury home was sold. Although petitioners also resided in the Netherlands due to A.E.T.'s temporary

[1]A.M.T.'s individualized education program (IEP) warranted placement at Matheny Medical and Educational Center – a hospital and educational facility for children and adults with medically complex developmental disabilities.

employment there – and L.T. frequently traveled between the Netherlands and New Jersey during A.E.T.'s overseas assignment – they maintained a domicile within respondent's district and returned home to Lebanon once A.E.T.'s employment concluded. Petitioners' temporary residence abroad was funded by A.E.T.'s employer; they never intended to remain there, nor did they intend to abandon their New Jersey domicile. Ultimately, the ALJ recommended granting petitioners' appeal and denying respondent's cross-petition for tuition reimbursement.

In its exceptions, respondent argues that: (1) the ALJ erroneously placed the burden of proof on the Board, ruling it failed to demonstrate petitioners had a domicile other than in the district; (2) the ALJ was swayed by petitioners' irrelevant testimony concerning A.M.T.'s severe disability; and (3) to the extent the ALJ determined that Board personnel waived the residency requirement, said finding is contrary to law. In their reply exceptions, petitioners argue that the ALJ utilized the proper burden of proof, that the facts surrounding A.M.T.'s disabilities are relevant, and that the ALJ did not base her decision on any theory of waiver.

The Commissioner finds respondent's exceptions to be without merit. First, the ALJ appropriately placed the burden of proof on petitioners, who demonstrated by a preponderance of evidence that they were domiciled within the district. Second, the ALJ's findings were not unduly influenced by testimony about A.E.T.'s disability and medical needs; on the contrary, the findings were made in accord with applicable law as cited within the Initial Decision. Third, the ALJ did not find that Board personnel waived the residency requirement – and the Commissioner makes no such finding here. Finally, respondent's reliance upon *Board of Education of Hunterdon Central Regional High School District, Hunterdon County v. E.F. and G.F.*, Commissioner Decision No. 321-04, decided August 4, 2004, is unconvincing. In that case, E.F. and G.F. failed to establish domicile in petitioner's district when they rented an

apartment in-district, admitted they did so to afford their children a better education, failed to rent out or sell their out-of-district home during the time period in question, and promptly returned to their out-of-district home once their youngest child graduated from high school. The facts herein are completely different.

Accordingly, the Initial Decision is adopted as the final decision in this matter, petitioners' appeal is granted, and respondent's cross-petition for tuition reimbursement is dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 3/06/15

Date of Mailing: 3/06/15

[2]This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

A.E.T. AND L.T. ON BEHALF OF A.M.T.,
Petitioners,
v.
NORTH HUNTERDON-VOORHEES REGIONAL BOARD OF EDUCATION,
Respondent.

OAL DKT. NO. EDU 10201-13
AGENCY DKT. NO. 124-6/13

Ira M. Fingles, Esq., appearing for A.E.T. and L.T. (Hinkle, Fingles & Prior, P.C., attorneys)

Rita Barone, Esq., appearing for North Hunterdon-Voorhees Regional Board of Education (Purcell, Mulcahy, Hawkins, Flanagan & Lawless, LLC, attorneys)

Record Closed: December 5, 2014 Decided: January 14, 2015

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

Petitioners, A.E.T. and L.T. (collectively, "the parents"), the parents of the special-needs child A.M.T., appeal the determination of the North Hunterdon-Voorhees Regional Board of Education ("district") that A.M.T. has not resided within the district since 2009. They seek to invoke the stay-put provisions for the child's placement at

Matheny Medical and Educational Center ("Matheny") pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.A. § 1400 et seq., or Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C.A. § 794a. The district seeks full tuition reimbursement from the parents in the amount of $277,410 for all periods of ineligible attendance of the child at Matheny.

PROCEDURAL HISTORY

On or about June 11, 2013, A.E.T. and L.T. filed to invoke the stay-put provisions for the child's placement at Matheny. An answer was filed by the district on July 24, 2013. On July 25, 2013, the matter was transmitted to the Office of Administrative Law ("OAL") for determination as a contested case and filed under OAL docket number **EDS 10161-13**. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On or about July 22, 2013, the district filed a counter-claim against A.E.T. and L.T. for reimbursement of tuition paid to Matheny for all periods of ineligible attendance. On July 25, 2013, the matter was transmitted to the OAL for determination as a contested case and filed under OAL docket number **EDS 10159-13**. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.[1]

On or about June 11, 2013, A.E.T. and L.T. filed an appeal of the district's determination that the child was not entitled to special education services at Matheny because of its determination that he was no longer a resident of the state. An answer and counter-claim were filed by the district on July 24, 2013. On July 25, 2013, the matter was transmitted to the OAL for determination as a contested case under OAL docket number **EDU 10201-13**. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.[2]

Prior to the hearing, the district moved for summary decision on **EDS 10161-13**, contending that all issues were within the jurisdiction of the Commissioner of the

[1] This matter appears to have been inappropriately labeled as a special education matter, because it does not concern special education, but rather residency, upon which the special education services were based.

[2] Although these matters shall be consolidated for purposes of the hearing, two decisions will be rendered on the EDS and EDU matters, as the former are final decisions while the latter is not.

Department of Education because they related to the child's residency, and did not involve IDEA or Section 504. A.E.T. and L.T. contended that the child's disabilities entitled him to a free and appropriate public education at Matheny paid for by the district for as long as he remained a resident of that district, and to that extent the IDEA and Section 504 were implicated in this matter. The district's motion for summary decision was denied on March 12, 2014.

The hearing in this matter was held on May 19, August 7, and November 12, 2014. Briefs were submitted and the record closed on December 5, 2014. This is the decision in the residency matter.

FACTUAL DISCUSSION

It is not disputed that the child A.M.T. has been diagnosed with cerebral palsy, spastic quadriplegia, severe cognitive impairments, a seizure disorder, and cortical blindness. His disabilities interfere with his learning and he has been classified as eligible to receive special education and related services pursuant to the IDEA. Due to the severity of his needs, the child was placed at Matheny by the district in 2004 and he has remained there since. A.M.T. reached the age of twenty-one in 2014 and now receives services through the Department of Developmental Disabilities (DDD).

Testimony

A.E.T. testified that he has three children, A.M.T, Li.T. and N.T. A.M.T. is his and his wife's natural son; Li.T. and N.T. are adopted. A.M.T. has attended Matheny (located in Peapack, New Jersey) since his placement there; the residential component of his placement is paid by New Jersey Medicaid.

A.E.T. is a softwear consultant who does program management. He has been an independent contractor in this field since 1996. It is typical for him to be employed on a project for a company for approximately three to four years, although some projects may take less time.

A.E.T. has lived in three places in his professional life: he lived in Maryland until 1995; in St. Louis until 2001; and in New Jersey from 2001 to the present. He was typically on the road five days a week, and the family stayed at home. While living in St. Louis, he was working in Dallas, Detroit, Toronto, Montreal, and California. He worked for Booz-Allen and commuted from Puerto Rico to Maryland every other week. After he moved to New Jersey, he worked for KPMG in Liberty Corner; then for Canon Long Island, and then for the Icahn group in New York City and later northern Virginia.

A.E.T. came to New Jersey on a project for Canon for a couple of years; he then went to Icahn for four years. In 2008, the economy was not very good and his old boss at Canon became chief executive officer of Canon Europe. A.E.T. went in as a temporary contract employee with the job of reorganizing, fixing sales, and reducing the cost of information technology. This position required him to go to the Netherlands, and ended after the program accomplished its objectives and his old boss retired.

A.E.T. asked Canon for a three-year commitment for this program because he knew his boss was going to retire, and the program would not last forever. A.E.T. had no intention of permanently living there. He had a work visa which expired at the end of March 2014, although the work was essentially concluded in August 2013. Canon paid for their housing in the Netherlands and for the cost of their return. He moved there for his employment and then moved back when the program ended. These programs do not last forever and he was working for a specific person, who retired.

A.E.T. tried to commute from the Netherlands once a month, and his wife, L.T., tried to come back once a month. L.T. went to the Netherlands in 2009 after she retired from work in 2008. Their son, N.T., went to the Valley Forge Military Academy for his senior year of high school, and then to the Netherlands for approximately one year. N.T. is now working in California.

A.E.T.'s daughter, Li.T., also had an individualized education program (IEP). She ended up attending the Netherlands American School in The Hague, but without an IEP. She went to college for a year and is now attending Raritan Valley Community College.

A.E.T. and his wife could not leave two seventeen-year-olds in New Jersey alone, since they needed a stable environment.

A.E.T. never applied for Dutch citizenship. They all had visas related to his work. His wife's visa had to be renewed every year, as the Dutch were very strict with spouses. All visas were terminated when his job ended. A.E.T. could not remain in the Netherlands after that if he were not employed. A.E.T.'s official time at Canon ended in August 2013. A.E.T. and his wife had temporary residents' cards in the Netherlands. He would not even have been eligible for permanent status until after he was there for five years and had passed a test on Dutch, which he does not know. They could not have stayed there permanently and had no intention of doing so. They never abandoned or gave up their New Jersey domicile.

A.E.T. and L.T. never hid where they were living from the district. A.E.T. had contact with A.M.T.'s case manager and Matheny personnel, who also met with his wife periodically when she came back. No one ever expressed concern to them about their residency. The first time anyone raised an issue about residency was in March 2013. They did communicate with their case manager when they rented their apartment in Lebanon. They are very attached to A.M.T. and see him often.

A.E.T. and L.T. originally lived at 6 Floral Mountain Way, Tewksbury, a house they owned. In the fall of 2010 they put it on the market, as it was a big house on a big lot and cost a lot to maintain. They rented a two-bedroom apartment in Lebanon before the house was sold, and advised A.M.T.'s case manager because they wanted to keep her informed. The apartment was furnished with their personal belongings. It had two bedrooms, and was about 1,200 square feet. Their daughter lived there with them, as she continues to do now. They had a storage unit for the overflow of personal possessions from the house, which was finally sold in May 2011.

A Notice of Ineligibility was sent to A.E.T. and his wife, to which A.E.T. responded:

1. He agreed that A.M.T. was a classified student eligible for special education.

2. He agreed that he and his wife were his legal guardians.

3. They always communicated with Shirley DiBrango and Matheny.

4. Although Publicover said she called the number and was told it was not in use, the number was and is active and is still in use.

5. L.T. worked for the school district until she retired and that information was public record.

6. The business number allegedly tried by Publicover was not provided, so he could not know where she was calling.

7. The fax number allegedly tried by Publicover was not provided, so he could not know where she was faxing.

8. The emergency number given to the school was the number of A.M.T.'s grandmother, who lived in Virginia and was the person to contact if A.M.T. had an emergency. They could not give that responsibility to anyone else in the district because they did not know anyone that well.

9. The district knew that Li.T. had gone to the Netherlands and that A.M.T. could not possibly be living with her, since he lived at Matheny. A.M.T. is medically fragile and it takes years to get him settled. A.M.T. has been at Matheny since 2001 and has never moved out.

10. The case manager had all the numbers for A.E.T. and L.T. in both New Jersey and in the Netherlands, because L.T. wrote the contact information down for them. The case manager told L.T. to provide the information to the school district's data person so it could be noted, which she did.

A.E.T and his wife always continued to pay federal and New Jersey state income taxes and property taxes. They continued to pay New Jersey taxes in 2009, 2010, 2011, and 2012, even though their accountant advised that payment was optional. They felt they did everything as if they lived here 100 percent of the time.

They used the UPS store as a mailing address, as it was a safe and secure way to get important mail. Their driver's licenses listed their New Jersey mailing address (which was the UPS store) because the Division of Motor Vehicles selected that address after being advised of both the residential address and the mailing address. Their voter identification cards listed their district address since 2001. Their automobiles were registered and insured in New Jersey. Their handicapped-equipped van was registered and insured in New Jersey for as long as they owned it. They were not hiding anything.

They renewed A.M.T.'s handicapped placard with the State of New Jersey in January 2012 while they were away. They gave up their handicapped-equipped van shortly thereafter, as it had almost 200,000 miles on it and broke down. They had receipts for van repairs from 2009 to 2011 which showed its usage. They had receipts and credit-card bills showing car and van rental receipts, and credit-card bills for rental-van usage after their own van was no longer serviceable. Their other cars were leased and were disposed of when they went to live in the Netherlands, as one lease had ended and one was terminated early. Their apartment in the district had cable and internet service, and all utility bills showed usage and activity from the start of lease until now. They ordered merchandise using that address.

L.T. spent more time in New Jersey than A.E.T. did because his time off from work was more limited. In 2009, her time here was approximately 44 percent; in 2010, 27 percent; in 2011, 21 percent; in 2012, 30 percent; and in 2013, 30 percent.

After he received the letter from Publicover in March 2013, A.E.T. responded. On March 27, 2013, he contacted Publicover, and advised her that he would put documents together. He definitely called her in March.

A.E.T. received a letter on April 10, 2013, and disagreed with the second paragraph and the notice of ineligibility. He and his wife provided the requested documents on April 14, 2013. He and his wife thought of Tewksbury and Lebanon as their home. Both municipalities are in the North Hunterdon-Voorhees regional high school district. A.E.T. believed the district was confusing physical presence with domicile. He was never told what was wrong with or missing from any documents he provided. He was not available for a meeting until his return from the Netherlands. He heard that the Board decided the issue without him being there to present his case.

In July 2013, A.E.T. and L.T. returned to New Jersey. They did not maintain a residence in the Netherlands after his return. They remained living in the same apartment complex in Lebanon, but had to move from one apartment to another because they had brought a dog back with them from the Netherlands.

As for their other children, N.T. went to Valley Forge Military Academy (VFMA). Prior to that he had been suspended from Voorhees; he did not have an IEP or a 504 plan, just behavioral issues. After he graduated from VFMA, he joined them in the Netherlands for one year. He is not likely to ever live with them again, as he needs space. Li.T. was a sophomore in 2008–2009. She could not have stayed alone in the United States, and even today she continues to live with them. Li.T. went to college for one year in the Netherlands, and now attends college here. Holidays were spent in a variety of places. Many times Christmas was spent here, as they were able to fly in and out of Washington, D.C., at a cheaper fare.

Canon paid for their living expenses in the Netherlands for so long as he was working for that company. Canon did not offer to purchase them a home in the Netherlands. Their house and their apartment here were never rented or subleased. The house was sold in 2011 at a short sale for less than the amount of the outstanding mortgage. They started renting the apartment in 2010, and stopped paying the mortgage shortly thereafter so the short sale could be accomplished.

The district contended that there were problems with telephone contact, but the district had used a permanent landline which was not used. The other number was L.T.'s American cell phone which was a working number.

The accounting firm KPMG did their Dutch and American taxes. The tax returns would have listed their mailing address as the UPS box, as this was a secure way to receive his mail. They rented the box around the time they rented the apartment in 2009.

He did not return to the United States immediately once his position ended because it would have caused income and medical-insurance coverage to cease; to receive his salary and benefits, he had to remain overseas until the contract ended. So he and L.T. stayed in the Netherlands and traveled to Russia, Helsinki, and Normandy. When he was offered the opportunity to attend the Board hearing in May, he asked if it could be rescheduled closer to his returning in August because he and his wife had made travel plans months before to spend May in St. Petersburg, Russia.

The JCP&L documents showed their energy use. In April 2014 letters of guardianship were filed for A.M.T. in Somerset County Superior Court because A.M.T. continues to reside at Matheny in Somerset County. They prepared a trust for A.M.T. in Hunterdon County, which is where they resided.

L.T. is A.M.T.'s mother. L.T. testified that A.M.T. has disabilities: cerebral palsy, visual impairments, swallowing difficulties, and an anxiety disorder. He cannot walk and is wheelchair bound. He has a specially built wheelchair that weighs eighty to one hundred pounds and does not collapse. It is manual and has to be pushed. He cannot speak but can make sounds. He has a VMAX device which helps him make choices by voice. There is a time lag, and people get tired of waiting for his speech. He cannot read, do math or write. He is not able to toilet himself. He wears diapers and needs two personal care attendants to put him into bed to change him. He needs help bathing and with his personal care. He is non-functional with his hands.

A.M.T. has had other medical problems. He needed surgery to correct crossed eyes. Both his hips were re-built surgically and he has had surgery on his feet. He requires a gastric tube for feeding and hydrating. He had a spinal fusion about a year ago because his scoliosis was affecting his breathing. He takes seizure medications and wears glasses.

When they first moved to Tewksbury in 2001, A.M.T. went to the Sawmill School, then to another school. He could not be included in the classes. He went to the Lakeview School, a day school, in Edison, for one and a half years, but the one-hour commute was difficult for him. Matheny was a place for education, therapy and socialization. At the Matheny School, A.M.T. receives physical therapy, occupational therapy, speech, music, recreation, and social activities. It is a teaching facility with general pediatric care and experts in all fields. It has a wheelchair clinic and splinting clinics. The district never voiced any objection to the Matheny School as his appropriate placement.

A.E.T. received the job offer from Canon in the Netherlands in April 2009. L.T. thought it would be a three- to five-year commitment. This would not be the first time her husband had worked so far from home. L.T. went over in April to explore, and moved there in July 2009. Their other two children were still in high school. Li.T. was a minor so they could not leave her at home. Li.T. and N.T. went for a visit, but N.T. attended high school at VFMA. A.M.T. did not go to the Netherlands. It takes A.M.T. a long time to get situated and to get to know the program. Netherlands has no Disabilities Act. Dutch is the language spoken in the Netherlands, and A.M.T. speaks English. There are only three such schools in the Netherlands, and two of them would not even accept Li.T., who had only an IEP.

In terms of prior assignments, this was the first time she moved to be with her husband, as typically he would go on assignment within the United States and A.E.T. would commute. One time her husband was working in Canada or Puerto Rico, and she stayed behind in Maryland. In 1998 her husband commuted between Montreal and St. Louis. Canon paid for the shipment of some personal belongings to the

Netherlands, but they had to place the rest of their belongings in storage here since they downsized from the house to the apartment and not everything fit.

A.M.T.'s case manager, Shirley DiBrango, was L.T.'s contact person at the school. (L.T. still receives school alerts on her cell phone, which is the phone number she provided to the district.) The school was aware of where they were. When they lived in Tewksbury, they visited A.M.T. about three to four times a week. L.T. travelled back and forth from the Netherlands to see him. The case manager took care of A.M.T. with his IEP, etc. She and the case manager emailed and phoned each other; they would have IEP meetings; they were in contact from the time they moved. DiBrango never raised an issue about their residency. L.T. and A.E.T. never tried to hide where they were living. She included all their addresses and phone numbers so the school could reach her in an emergency. She has had a good relationship with the district and Matheny. Matheny knew she was traveling.

Their house had been located in Tewksbury, but their post office box was in Califon. In November 2010 they rented their apartment in Lebanon, which was within the school district, and they advised the district of their new address. Their house was on the market in the fall of 2010 (and sold in May 2011). When they moved to the Netherlands, Li.T. went to school there and rarely traveled to the U.S. The apartment in Lebanon was big enough for them, as N.T. was a senior at VFMA and lived there. He did not stay at the apartment, but would go with his friends. He never came back to live at home, and now lives in San Francisco. He is an interesting, but difficult, child: he was suspended from the district high school; he thrived in a structured environment like VFMA; he likes to call his own shots. So he took off for California.

L.T. was the one who travelled the most between the Netherlands and New Jersey. She reviewed her airline tickets, and confirmed her husband's testimony about the percentage of her time spent in New Jersey each year from 2009 (44 percent, 27 percent, 21 percent, 30 percent, and 30 percent). Her husband could not get home as often as he would have liked.

L.T. said it was hard to be away. She missed her son and saw him as often as she could. She is his advocate.[3] Sometimes A.M.T. is sick. She goes to educate him, to entertain him, to keep him company. The caregivers are not "Mom." He needs appropriate clothing; she likes him to be well-dressed. She looks at his wheelchair to be sure it is not "out of whack." She stayed at the Lebanon apartment whenever she was visiting him. L.T. used their handicapped-equipped van for transportation until January 2012, when it broke down; then she used a rental car or van.

L.T.'s mother and father live in Virginia. They are attached to A.M.T. and visit him, too. She did not remember staying overnight in Virginia, as Virginia was not her home.

On August 27, 2010, L.T. received an email from DiBrango that A.M.T. was eligible for his triennial evaluation. L.T. was willing to waive it and signed the waiver form. She sent it back in August 2010 when she was in the Netherlands. She and her husband always attended the IEP meetings, which they continued to do after they went to the Netherlands. They did one meeting by phone, and one by FaceTime, and twice she was in New Jersey for the meeting.

At some point, the district challenged their residency. A couple of memos said something about terminating the placement. A letter dated April 10, 2013, stated that if there were no proof of residency, then A.M.T.'s enrollment would be terminated. Matheny became concerned when she advised them of the letter that his out-of-district placement might be effected. A.M.T. remained eligible for services from the New Jersey Commission for the Blind, the DDD and Medicaid.

L.T. and A.E.T. could not have made a permanent home in the Netherlands, as A.E.T. was an A-1 visa worker with specific knowledge and she was his spouse. His visa was good for a one- to two-year period and could be renewed; hers was good only for one year and could be renewed only if her husband continued to be employed with his visa. They never formed an intention to live there. They never intended to give up

[3] L.T. became emotional as she discussed her son and her love for him.

their domicile within the district. They did not immediately return to the United States after her husband's work ended, but he was still getting paid. It was a great opportunity for them to take an extended vacation and to travel within Europe before returning home.

L.T.'s driver's license showed her district address and was not changed to the Netherlands; she voted in elections in New Jersey by absentee ballot in 2010, 2011, and 2012. She and her husband paid their federal and state New Jersey taxes in 2010, 2011, 2012, and 2013 with a district address.

L.T. was aware that there was a registration process at the school. She believed she told the registrar of her contact information, but was sure she had told DiBrango, as she was the person with whom she had the most contact. L.T. wanted to be sure all her contact information was correct and wanted it on the cover of the IEP. DiBrango said to go to the registrar. When she disenrolled Li.T., she spoke with a guidance counselor, not the registrar. The IEP cover sheet had handwritten information provided by her, but some of it was not her handwriting.

The lease renewal was presented effective July 7, 2012, but was not executed until October 1, 2012. At that time the lease was effectively renewed for twenty months and it expired at the end of June 2014.

Mary Patricia Publicover is the director of special services at the North Hunterdon-Voorhees Regional High School District, where she has worked since 1986. From 2004 through October 2012 she was the supervisor of the Special Education Department. She was responsible for running compliance reports, which are required to insure that IEP meetings are held and IEPs finalized. A compliance run was done at the end of November 2012, and in January 2013.

A.M.T.'s IEP came up, as it was due in the middle of January 2013 and was lapsing, and the district's policy was never to have one lapse. She went to the case manager and asked for her to complete it within one week. The case manager said it was not possible because the parents were not in New Jersey. Publicover found out

that the mailing address they had given the district was a UPS store and that the house had been sold. She called cell and work numbers and received no response, and the emergency contact number was in Virginia.

Publicover called all the numbers in the database system and received no reply; she left messages that "[j]ust said contact me about a student in North Hunterdon-Voorhees Regional High School." She did not call the home landline more than once. On March 11, 2013, a notice of initial determination on ineligibility was prepared. She spoke with the case manager after the letter was written and asked for the student's file.

The front page of the IEP was where she found the information on the parents; other information was in the case manager's personal file. Publicover called L.T.'s old work number and found out she was no longer working there.

Publicover spoke with DiBrago about residency; she was told the parents rented an apartment in Lebanon and that they communicated by email. Publicover said the officials have to be notified. On or about March 23, 2013, she received a phone call from A.E.T. and they spoke about the ineligibility letter, including domicile and residency. A.E.T. understood and said he would provide information about both and that he was returning at the end of the summer 2013.

A.E.T. had to provide information to be reviewed by the Board, and he and his wife would have the opportunity to appear before the Board. Publicover received email correspondence which indicated that A.E.T. and his wife were gathering information, and then she received a package of information from them. The Board reviewed the information presented and said that enrollment was in question.

Publicover asked for the emails between the parents and the case manager. The email threads showed that L.T. attended some IEP meetings in person, but some were by conducted by phone or Skype. The State requires attendance by phone call or in person. She noted two addresses on the file: one in the United States and one in the Netherlands.

The Board considered the documentation presented at a meeting held on May 14, 2013. The parents were told they could come to the meeting, but they wanted to postpone it to August 2013 after their return to the United States.

Publicover handled this matter, as it came under special education out-of-district students. Publicover agreed that A.M.T. is well served at Matheny; the district inherited that placement and maintained it. This is the second such case she has handled. In the first case, the principal wrote the letters to the parents. Here, the principal had no correspondence with the parents.

Publicover noted that the parents had an address in-district from 2011. She saw the UPS-store address and the apartment-complex address commencing in November 2010 and did not dispute that. Nor did Publicover dispute the lease or its renewal or that the parents had a house or an apartment in the district at all times in dispute. The district did not believe that any of the documents were falsified or that the information was factually incorrect.

Intent is a factor in domicile, but it was not her decision to make. She just presented the information she had to the Board, but without reaching any conclusion as to whether the parents intended to return. There was nothing that she could point to that would indicate that the parents did not intend to return.

The parents did return in 2013 and moved to a different apartment in the same complex with a new lease, because they needed a different unit in order to keep their dog.

The parents needed to demonstrate they were living within the district with leases and utility bills. This was used for the 2013–14 school year and showed movement in the apartment and utility bills. The parents had the house until May 2011, when it was sold. They had started to rent an apartment in 2009, and maintained the lease at least until 2014. Documents for 2013–2014 showed that services were continued to the family.

Publicover did not know at what point the district contended that the parents abandoned their domicile in New Jersey. The district looked at when the two other children left New Jersey, and the district may have considered that as when domicile was abandoned, which may have been November 2009. She thought the family's domicile in New Jersey was sketchy.

After A.E.T.'s assignment ended and he was no longer working, she wondered why they waited to return. She later saw the parents in New Jersey during conferences and meetings and knew they had returned and had moved to a different apartment in the same complex. She saw the letter from Canon and knew that A.E.T. was released from his employment early in 2013, but was paid through August 2013, when his employment officially concluded. A.E.T. had a right to continued housing and benefits during this period, when he and his wife traveled in Europe.

Findings

In order to resolve the inconsistencies, the credibility of the witnesses must be determined. Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F. 2d 718 (9th Cir. 1963). Additionally, the witness' interest in the outcome, motive or bias should be considered.

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura- Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

I accept the testimony of A.E.T. and L.T. as fact, as indeed the district did not contest or dispute the validity of the leases or the physical evidence presented by the parents, or that the parents presented a valid address within the regional high school district. The district did not contend that any of the documents presented by the parents was falsified or that the information was factually incorrect. Rather, the district focused on the intent of the parents to give up their New Jersey domicile when they moved to

the Netherlands while A.E.T. was employed there, questioning why a UPS store was used as the mailing address, and the parents' alleged failure to advise the registrar of the address change until 2013. The district was also concerned that there was no response to telephone calls to L.T. and A.E.T., but the calls were placed only once, and the case manager remained in constant contact with L.T. by email.

I **FIND** that the parents did use a UPS mailing address for safety and convenience to insure that their mail was safely delivered in their absence. I also **FIND** that L.T. at all times had provided complete information to the district concerning her whereabouts and the best way to contact her. L.T. notified those whom she thought needed to be notified of the change, including the case manager and the guidance counselor, when she removed her daughter from the school. She immediately notified the registrar in 2013 after she was told to do so. Nothing was withheld from the district about the parents' addresses.

I **FIND** that the business opportunity to work in the Netherlands was temporary and required a special visa for A.E.T. and L.T. which permitted them to reside in the Netherlands, but not to become permanent residents. The parents did not purchase a residence in the Netherlands; rather, their housing expense was paid by Canon as an employment benefit. The parents left their furniture and other personal possessions in New Jersey, and shipped personal items to be used during their stay in the Netherlands. I also **FIND** that the parents intended to return to New Jersey and the district when A.E.T.'s work position was terminated, as indeed they did. I do not find the termination date of the lease significant, because the lease was executed approximately four months after the renewal date of July 1, 2012, and so was renewed for a twenty-month term, rather than the twenty-four set forth in the preamble.

I also **FIND** that the Division of Motor Vehicles was advised of both the home address and the mailing address of the parents, and determined to use the mailing address on the drivers' licenses. The parents filed their taxes in New Jersey even though it was optional, and voted in the district. L.T. was frequently in this state and remained in the apartment when she came to visit her son. A.E.T. visited as he was able, given his work responsibilities.

I **FIND** that the parents owned a home located in Tewksbury (a Califon mailing address) until it was sold in May 2011. In November 2010 they rented a two-bedroom apartment in Lebanon, which also was within the district. I also **FIND** that this apartment was of sufficient size for the parents and their daughter, who lived with her parents and returned to Lebanon when they did. There was no need for a larger apartment given that the parties' other child lived at a residential high school on a full-time basis and never returned home after he graduated. They moved to a different apartment within the same complex upon their return from the Netherlands in order to accommodate a dog they had acquired.

I also **FIND** that the decision to travel in Europe for a few months after A.E.T.'s job concluded was not unreasonable given the circumstances, and had been planned months before the domicile issue arose in the spring of 2013.

LEGAL ANALYSIS AND CONCLUSION

The issue in this matter is whether A.M.T. was entitled to be enrolled in the district for purposes of receiving a thorough and efficient public education under N.J.S.A. 18A:38-1(a), which provides that public schools shall be free to persons over five and under twenty years of age who are "domiciled within the school district." See V.R. ex rel A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (1980), aff'd, State Bd., 1981 S.L.D. 1533, rev'd on other grounds sub nom. Rabinowitz v. N.J. State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, in order for a student to receive a free education).[4]

A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district. N.J.A.C. 6A:22-3.1(a)(1). The parent/petitioner has the burden of proving domicile by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)(2).

[4] A student may attend school in a district in which he is a non-resident, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2.

The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374–76 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed.2d 518 (1999). A person may have many residences but only one domicile. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001).

Where a person has more than one residence, the following factors are useful in determining his domicile: the physical characteristics of each place, the time spent and the things done in each place, the other persons found there, the person's mental attitude towards each place, and whether there is or is not an intention, when absent, to return. Mercadante v. City of Paterson, 111 N.J. Super. 35, 39–40 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). "[A] choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile." In re Unanue, supra, 255 N.J. Super. at 376). "[D]omicile is 'very much a matter of the mind—of intention.' 'Where there are multiple residences . . . domicile is that place which the subject regards as his true and permanent home.'" Ibid. (citations omitted). The acts, statements and conduct of the individual, as viewed in light of all circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959).

Furthermore, when a man has acquired a domicile in a particular place, that place remains his domicile until he acquires another domicile. In re Unanue, supra, 255 N.J. Super. at 376 (citation omitted). In considering whether a change of domicile has occurred three elements must be considered: whether there had been an actual and physical taking up of an abode in a particular state; whether the subject had an intention to make his home there permanently or at least indefinitely; and whether the subject had an intention to abandon his old domicile. "The court must evaluate all of the facts of the case to determine the place in which there is the necessary concurrence of physical presence and an intention to make that place one's home." Ibid.

"In accordance with this principle [of one domicile] it has been held that one does not relinquish his domicile by having another residence based on reasons of health, society, **business** or employment." Id. at 375 (emphasis supplied). "New Jersey courts also consistently hold that once established, a domicile continues until superseded by a new domicile. Accordingly, once one party in a domicile contest establishes firmly that the subject was domiciled in a particular location at a particular time, if the adverse party seeks to establish that the subject was ultimately domiciled in some different location, he must demonstrate . . . that the subject did in fact effect a change of domicile." Id. at 377 (citations omitted).

The district relies on Board of Education of Hunterdon Central v. E.F. and G.F., EDU 6053-01, Comm'r Decision (August 4, 2004), <http://njlaw.rutgers.edu/collections/oal/>, in support of its position that the parents were not domiciled within the district. In that matter, the petitioners had not sold their Branchburg home, they admitted that the purpose of their Flemington apartment was to have their children finish high school in the district, and they had actually returned to Branchburg after their youngest child graduated. The Commissioner found that the petitioners satisfied the first element set forth in Lyon v. Glaser, supra, 60 N.J. at 264, when they took up residency within Flemington, but failed to satisfy the second two elements, that of demonstrating an intent to make the residence a permanent or at least an indefinite home, or of demonstrating an intent to abandon the old domicile.

That case can be distinguished and in fact supports the conclusion that A.E.T. and L.T. remained domiciled within the district, as not only did A.E.T. and L.T. spend significant time in Lebanon, they had no plans to stay permanently or even indefinitely in the Netherlands, and, moreover, they had already established a domicile within the district and never gave it up. This is unlike the petitioners in E.F. and G.F., who purposely rented an apartment in another school district to establish residency; here, the parents had already established domicile within the district and there was no demonstrable intent to abandon it, or set up a permanent domicile elsewhere.

The district also cites Samuelsson v. N.J. Division of Taxation, 22 N.J. Tax 243 (May 2005), in which the tax court concluded that the Samuelssons had in fact relocated to Florida and had established a domicile there. The Samuelssons had moved all their furniture to Florida; listed their New Jersey home for sale; enrolled their children in Florida schools; closed their New Jersey bank accounts and opened others in Florida; and obtained Florida driver's licenses. The testimony also indicated that the Samuelssons intended to abandon their New Jersey domicile and decided to return to New Jersey only when things did not work out in Florida. This is substantially different from A.E.T. and L.T., who maintained their district domicile even after their home sold, maintained their driver's licenses and their voter registration in New Jersey, and never intended, nor could they intend, to make the Netherlands their new domicile. Their old domicile was never abandoned as it must be to establish a new domicile. The fact that their daughter attended school in the Netherlands does not lead to the conclusion that district domicile was abandoned by her parents. In fact, after the parents returned to New Jersey, Li.T. continued her education at the county college.

In this matter, the district contends that the parents were no longer domiciled within the district and, therefore, A.M.T. was not entitled to a free and appropriate public education paid for by the district. However, the district did not point to any specific date as to when domicile within the district was abandoned. Was it in 2009, when A.E.T. accepted employment in the Netherlands; was it when his wife left New Jersey to join him; was it when their house was sold in 2011; was it when they rented an apartment in 2010 and used a separate box to obtain their mail?

The first issue to be addressed is whether the parents had in fact established a domicile in New Jersey within the district. There is no doubt that they had. They purchased their home in Tewksbury and lived there for many years. The children attended school within the district; the parents paid taxes, voted, and registered their vehicles in Tewksbury. They owned their home until 2011 and never rented it out. Just prior to the sale of the home, the parents rented a two-bedroom apartment in Lebanon which was sufficiently large to accommodate the parents and their daughter.[5] There

[5] Lebanon and Tewksbury are both within the North Hunterdon-Voorhees Regional School District.

was no need for a room for A.M.T., as he was not able to live at home, although he would be continued a resident of the household as the child of his parents, and N.T. lived elsewhere.

The parents continued to maintain their driver's licenses and voting registration within the district. For as long as they owned a vehicle, it was registered in New Jersey. Official government correspondence was addressed to them at their address within the district. They paid their taxes with a district address. The fact that they used a UPS store to secure their mail is not significant, as the use of a post office box to receive mail is not an indication that domicile has been abandoned.

The parents acted as if they lived within the district. They continued to pay significant New Jersey taxes. L.T. returned frequently to the apartment and visited her son. The time spent there ranged from 44 percent in 2009 to 30 percent in 2013.[6] The apartment showed utility use; the credit cards and other bills showed ongoing activity within the district.

Most importantly, the intention of the parents to return to the district and New Jersey was obvious. The job in the Netherlands was temporary; indeed, it could only be temporary. It was not an indefinite position either; it was expected to end and did end once the program was completed and A.E.T.'s supervisor retired as planned. A.E.T. and L.T. could not become permanent residents of the Netherlands: they were there on temporary visas issued to A.E.T. for his work and to L.T. as a spouse. Neither one spoke Dutch nor had an intention to remain in that country after the job was finished. And, indeed, once the job was concluded they returned to their apartment, where they remained for another year.

In applying the test set forth in In re Unanue, the parents did have two residences, one within the district and one in the Netherlands. Each place was capable of maintaining the family members who then resided in the household. While more time may have been spent in the Netherlands, nevertheless, L.T. spent a considerable

[6] On average, L.T. was in the apartment more than 30 percent of the time, which is significant considering the distance.

amount of time in New Jersey. Their daughter Li.T. went to school in the Netherlands because she was underage and could not be left alone, unlike her brother N.T., who attended a residential high school in the United States. The mental attitude of both A.E.T. and L.T. was convincing: each thought of their Lebanon residence as home, the place they had left temporarily for business reasons and the place to which they would return. They were quite explicit that they never intended to take up permanent residence elsewhere. And, indeed, they returned to the apartment when A.E.T.'s contract was concluded.

If the parents were not domiciled within the district, then where were they domiciled? No evidence was presented that the parents had taken up another domicile, whether in the Netherlands or elsewhere. The parents could not live permanently in the Netherlands on their temporary work-related visas. While they may have physically resided in the Netherlands, they never formed an intention to remain there permanently or even indefinitely, as they planned to return to New Jersey once A.E.T.'s job was concluded. Indeed they did return. No evidence indicated that A.E.T, and his wife ever intended to abandon their established domicile within the district.

I therefore **CONCLUDE** that at all times relevant from 2009 to 2014, the parents were domiciled within the North Hunterdon-Voorhees Regional School District. Accordingly, A.M.T. was entitled to receive a free and appropriate education at the Matheny School, paid for by the district.[7] The petition of the district for reimbursement of tuition for A.M.T. at the Matheny School is denied, and the appeal of the parents is granted.

ORDER

It is hereby **ORDERED** that the parents' appeal of the district's determination that the child was not entitled to special education services at Matheny because of its determination that he was no longer a resident of the state is **GRANTED**. The district's

[7] The district is correct that simply providing the information to the case manager and others would not constitute a waiver by the Board. Only the Board can waive tuition for a non-resident student. N.J.S.A. 18A:38-3(a). However, it should be noted that Board employees were aware of the parents' stay in the Netherlands, yet nevertheless treated the parents as residents of the district.

cross-petition for reimbursement of tuition paid to Matheny for all periods of ineligible attendance is hereby **DENIED**.[8]

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

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

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

Susan Scarola

January 14, 2015
DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency:

Date Mailed to Parties:

mel

[8] Again, this does not appear to be a special education issue, but, rather, one for the Commissioner of the Department of Education. To the extent the appeal encompassed special education issues, the decision in EDS 10159-13 and EDS 10161-13 addresses them.

WITNESSES

For the parents:

A.E.T.

L.T.

For the district:

Mary Patricia Publicover

EXHIBITS

For the parents:

P-1 A.E.T. sampling of work assignments

P-2 Email from A.E.T. to Mary Pat Publicover dated April 12, 2013

P-3 Email from A.E.T. to Mary Pat Publicover dated April 22, 2013

P-4 Email chain between Mary Pat Publicover and A.E.T. ending May 10, 2013

P-5 Letter from KPMG Meijburg & Co., dated April 11, 2013

P-6 Email chain between L.T. and Shirley DiBrango ending December 16, 2009

P-7 Email chain between L.T. and Shirley DiBrango ending December 15, 2011

P-8 Email chain between L.T. and Shirley DiBrango ending February 16, 2012

P-9 Draft IEP cover page dated January 18, 2013, with handwritten annotations

P-10 Email chain between L.T. and Shirley DiBrango ending January 29, 2013

P-11 Email chain between L.T. and Shirley DiBrango ending January 19, 2010

P-12 Email chain between L.T. and Shirley DiBrango ending August 27, 2010

P-13 Email chain between L.T. and Shirley DiBrango ending September 28, 2010

P-14 Email chain between L.T. and Shirley DiBrango ending January 3, 2011

P-15 Email chain between L.T. and Shirley DiBrango ending February 25, 2011

P-16 Email chain between L.T. and Shirley DiBrango ending February 17, 2012

P-17 Email chain between L.T. and Shirley DiBrango ending February 18, 2011

For the district:

R-1 Email chain between Shirley DiBrango and L.T. dated January 15 and 19, 2010

R-2 Email chain between Shirley DiBrango and L.T. dated August 26 and 27, 2010

R-3 Email chain between Shirley DiBrango and L.T. dated September 19 and 28, 2010

R-4 Email chain between Shirley DiBrango and L.T. dated December 21 and 29, 2010, and January 3, 2011

R-5 Email chain between Shirley DiBrango and L.T. dated February 22, 23, and 24, 2011

R-6 Email chain between Shirley DiBrango and L.T. dated December 20, 22, and 26, 2012, and January 2, 2013

R-7 Email from L.T. to Shirley DiBrango dated January 18, 2013

R-8 Email from L.T. to Shirley DiBrango dated January 24, 2013

R-9 Email chain between Shirley DiBrango and L.T. dated March 21 and 25, 2013

R-10 Correspondence from Mary Pat Publicover to A.E.T and L.T. dated April 10, 2013, and copy of signed certified return receipt card

R-11 Correspondence from A.E.T. and L.T. to Mary Pat Publicover, dated April 14, 2013 (with enclosed documents)

R-12 Email from L.T. to Mary Pat Publicover dated April 16, 2013

R-13 Correspondence from Mary Pat Publicover to A.E.T. and L.T. dated April 22, 2013

R-14 Correspondence from Mary Pat Publicover to A.E.T. and L.T. dated April 25, 2013, and copy of signed certified return receipt card

R-15 Notice of Ineligibility of Continued Enrollment, dated May 21, 2013, and copy of signed certified return receipt card

R-16 Correspondence from Shirley DiBrango, M.A., LDTC, to Sean Murphy, dated June 5, 2013

R-17 Correspondence from Shirley DiBrango, M.A., LDTC, to Sean Murphy, dated June 11, 2013

R-18 Tuition contracts and invoices for services between respondent and the Matheny School for school years 2009–10, 2010–11, 20111–12 and 2012–13

R-19 Correspondence from State of New Jersey, Department of Education, dated February 17, 2011, February 15, 2012, January 7, 2013, and January 9, 2014

R-20 Email chain between Shirley DiBrango and L.T. dated December 16, 2009

R-21 Email from A.E.T. to Mary Pat Publicover dated April 12, 2013

R-22 Email from A.E.T. to Mary Pat Publicover dated May 7, 2013–May 10, 2013

R-23 Correspondence from Mary Pat Publicover dated March 11, 2013, with copy of signed certified return receipt card

85-15

MAYOR TRANSPORTATION, T/A SALEH TRANS, INC.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, PASSAIC COUNTY EXECUTIVE SUPERINTENDENT OF SCHOOLS, AND COMMISSIONER OF EDUCATION,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioner – a school bus transportation provider – challenged the respondent school district's rejection of its low bids for various transportation routes. In rejecting the bids, the respondent district advised the petitioner that, because of multiple violations of prior contracts with the Paterson school district, Mayor Transportation (Mayor) was disqualified from receiving contract awards for the 2014-2015 school year and would not be permitted to bid on school bus routes in the district for a period of three years. Petitioner alleged that the district violated *N.J.S.A.* 18A:39-11.3(b)(1) by not holding a hearing before the executive county superintendent (ECS) and obtaining a finding of prior "nonperformance" from the ECS before disqualifying Mayor for "prior negative experience." Subsequently, Paterson requested such a hearing with the Passaic County ECS, which hearing was followed by a determination that petitioner had, in fact, "nonperformed," and petitioner was once again notified that it was disqualified from bidding on district contracts. Respondents then moved for dismissal of the case on the grounds that the issues raised in the petition had been mooted by the ESC hearing and subsequent outcome. Petitioner never responded to the respondents' motions for summary disposition.

The ALJ found that because petitioner failed to respond to the motions for summary disposition, it is in default. Accordingly, the ALJ granted the respondents' motions and ordered the petition dismissed.

Upon a comprehensive review of the record of this matter, the Commissioner concurred with the findings and conclusions of the ALJ and adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

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

Issued 3/06/15

OAL DKT. NO. EDU 10676-14
AGENCY DKT. NO. 227-8/14

MAYOR TRANSPORTATION, T/A SALEH TRANS, INC.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, PASSAIC COUNTY EXECUTIVE SUPERINTENDENT OF SCHOOLS, AND COMMISSIONER OF EDUCATION,	:	
RESPONDENTS.	:	

The instant controversy is a challenge by the petitioning transportation vendor to the respondent Paterson school district's (Paterson) rejection of petitioner's bids on several transportation routes. More specifically, petitioner submitted the lowest bid on 41 school bus routes for the 2014-2015 school year, but did not receive the awards for said routes. Instead, respondent advised petitioner, by letter dated August 15, 2014, that because of petitioner's multiple violations of the terms of its prior contracts with Paterson, it would be disqualified from receiving awards for the 2014-2015 school year and would not be permitted to bid on school bus transportation routes in the future – for a period of three years.

Petitioner's appeal to the Commissioner, filed on August 21, 2014, alleged that by disqualifying its bids, Paterson was violating *N.J.S.A.* 18A:39-11.3(b)(1) – which requires that disqualification for "prior negative experience" must be preceded by 1) a hearing before the

executive county school superintendent (ECS), and 2) a finding of prior "nonperformance" by the ECS. Parallel proceedings ensued.

On August 22, 2014, the petition was transmitted to the Office of Administrative Law (OAL) for a hearing.[1] On the same date, respondent Paterson applied to the Passaic County ECS for a hearing, pursuant to *N.J.S.A.* 18A:39-11.3(b)(1), concerning the issue of petitioner's alleged prior nonperformance. That hearing was held on August 29, 2014, and was followed by 1) a September 3, 2014 determination by the ECS that petitioner had, in fact, 'nonperformed,' and 2) a September 4, 2014 letter from respondent to petitioner disqualifying it – once again – from bidding on district transportation contracts. After the ECS issued the 'nonperformance' determination, petitioner amended its petition to add the ECS and the Commissioner of Education as respondents.

Both the State respondents (the Commissioner and the ECS) and the Paterson school district moved for dismissal of the case[2] on the grounds that the ultimate issues raised in the petition were moot. More specifically, respondents urged that since the hearing and determination – which petitioner had alleged was required before Paterson could disqualify it from bidding – had taken place, the grounds for the petition were no longer extant. Petitioner never responded to the summary disposition motions.

After the regulatory period for answering a dispositive motion had passed, the Administrative Law Judge (ALJ) assigned to the case in the OAL found petitioner in default and issued an Initial Decision granting respondents' motions and dismissing the petition. The Commissioner adopts the Initial Decision.

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[1] Petitioner applied for injunctive relief, but that application was denied by OAL order dated September 15, 2014. Said order was adopted by the Commissioner on October 29, 2014.

[2] The State respondents filed their motion on October 27, 2014 and the Paterson school district filed its motion on November 6, 2014.

As noted in the Initial Decision, on December 9, 2014, petitioner submitted to the ALJ a "Stipulation of Dismissal Without Prejudice." The ALJ properly rejected the "Stipulation," as there were no signatures or other indicia of respondents' concurrence with same.

Accordingly, respondents' summary disposition motions are granted and the petition is herewith dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 3/06/15
Date of Mailing: 3/06/15

[3] This decision, as the final decision of the State administrative agency, may be appealed to the Superior Court, Appellate Division pursuant to *N.J.S.A.* 18A:11-3 and *N.J.A.C.* 6A:3-7.6.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10676-14
AGENCY DKT. NO. 227-8/14

MAYOR TRANSPORTATION T/A SALAH TRANS, INC.,
Petitioner,
v.
STATE-OPERATED DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, ET AL.,
Respondents.

Thomas P. Bergwall, Esq., for petitioner (Bergwall Law Firm, attorneys)

Sidney A. Sayovitz, Esq., and **Joseph L. Roselle**, Esq., for respondent State-Operated District for the City of Paterson (Schenck, Price, Smith & King, attorneys)

Carolyn Jones, Deputy Attorney General, for respondent Commissioner of Education (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: November 26, 2014 Decided: December 9, 2014

BEFORE **JAMES A. GERAGHTY**, ALJ:

STATEMENT OF THE CASE AND FACT FINDING

On October 27, 2014 and November 6, 2014, respondents moved to dismiss on grounds of mootness, lack of jurisdiction, and failure to state a claim upon which relief can be granted. The procedural history is as set forth in the New Jersey Department of Education and Interim Executive County Superintendent for Passaic County, Robert Davis's motion. Petitioner is a school bus transportation provider who challenged the Paterson School District's and State District Superintendent's rejection of his low bids for various transportation routes on grounds that he is disqualified due to prior negative experience involving, inter alia, commingling bus routes. After a hearing, the OAL denied his motion for injunctive relief. By order dated October 29, 2014, the Acting Commissioner of Education ordered the denial adopted and stated "this matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure." (R-1.)

Under the Uniform Administrative Procedural Rules, a dispositive motion shall be granted if an adverse party does not respond. N.J.A.C. 1:1-15.5. The time to respond is twenty days. N.J.A.C. 1:1-12.2.

Petitioner failed to timely respond to the motions and is in default. The motion to dismiss is analogous to one for summary decision.

As petitioner has not responded to the dispositive motions as required by the OAL rules, I **FIND** that he is in default.

CONCLUSION

Based on the foregoing circumstances, I **CONCLUDE** that the OAL should grant the respondents' motions to dismiss and deny the petition. This day, the petitioner submitted a "Stipulation of Dismissal Without Prejudice." (P-1.) There is no stipulation

executed by the parties before the OAL, and the instant dismissal disposes of the matter.

DISPOSITION AND ORDER

Based on the foregoing findings of fact and conclusion of law, I grant the motions and **ORDER** the petition **DISMISSED**.

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

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

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

December 9, 2014
DATE

James A. Geraghty
JAMES A. GERAGHTY, ALJ

Date Received at Agency: December 10, 2014

Date Mailed to Parties: December 10, 2014

jb

86-15

OAL DKT. NO. EDU 450-14
(EDU 66-13 ON REMAND)
AGENCY DKT. NO. 355-12/12

T.R. and T.R., on behalf of minor child, E.R.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	
RESPONDENT.	:	

Respondent's motion for reconsideration of the Commissioner's November 10, 2014 decision, and respondent's reply thereto have been fully reviewed. The Commissioner finds that, pursuant to *N.J.A.C.* 6A:3-1.15(b)(2)(i), reconsideration is appropriate due to the commission of a "mistake." More specifically, it appears that the Office of Administrative Law (OAL) sent respondent's copy of the Initial Decision to an incorrect email address, and did not provide respondent with a copy of the decision *via* the postal service. As these circumstances precluded respondent from submitting exceptions to the Initial Decision prior to the issuance of the Commissioner's final decision in this case, a reconsideration of the matter by the Commissioner is warranted.

Accordingly, the Commissioner grants respondent's motion for reconsideration of his November 10, 2014 decision. The Commissioner will consider the exceptions to the

Initial Decision which respondent submitted on December 5, 2014, as well as any reply exceptions which petitioners may file – no later than ten days from receipt of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/26/15

Date of Mailing: 3/10/15

87-15

M.C., on behalf of minor child, K.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the decision of the Eligibility Appeals Committee (EAC) of the New Jersey State Interscholastic Athletic Association (NJSIAA) which found that her daughter, K.C., transferred from Mount Saint Dominic Academy (Mount St. Dominic) to West Orange High School for athletic advantage; the resulting ruling made K.C. ineligible to participate in cross-country, winter track and spring track for a one-year period. Petitioner contended that the one-year period of ineligibility should be changed to the customary 30-day ineligibility period because: she did not receive adequate due process from the NJSIAA; the NJSIAA's decision was arbitrary, capricious and unreasonable; and the primary reason for K.C.'s transfer was not for athletic advantage, but rather because of family finances and health issues.

The NJSIAA contended that: the petitioner was provided with due process; the decision of the EAC was not arbitrary and capricious as there was overwhelming evidence in the record that K.C. transferred for athletic advantage; the petitioner made written statements on three separate occasions that K.C. was transferring due to her dissatisfaction with the new running coach at Mount St. Dominic; and petitioner's explanation for the transfer provided at the time of the hearing was not credible, whereas statements made by petitioner at the time of the transfer – which were part of the record – best explain K.C.'s decision to leave Mount St. Dominic in favor of West Orange High School. The NJSIAA urged that it did not apply its rules arbitrarily and capriciously to the petitioner, and as such the Commissioner should affirm the decisions of the EAC.

The Commissioner upheld the NJSIAA's decision and dismissed the petition, finding that petitioner did not meet her burden so as to entitle her to prevail on appeal. In so deciding, the Commissioner – who may not substitute his judgment for that of the NJSIAA on appeal – noted that the NJSIAA's decision ruling that K.C. is ineligible to participate in cross-country, winter track and spring track for a one-year period was neither arbitrary nor unreasonable.

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

Issued 3/06/15

AGENCY DKT. NO. 339-11/14

M.C., on behalf of minor child, K.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

For Petitioner, Arthur C. Hopkins, Esq.

For Respondent, Steven. P. Goodell, Esq. (Herbert, Van Ness, Cayci & Goodell, P.C.)

This case involves an appeal of a decision of the Eligibility Appeals Committee (EAC) of the New Jersey State Interscholastic Athletic Association (NJSIAA) finding that K.C. transferred from Mount Saint Dominic Academy (Mount St. Dominic) to West Orange High School for athletic advantage, and ruling that K.C. is ineligible to participate in cross-country, winter track and spring track for a one-year period.

Athletic competition in New Jersey's public schools is overseen by respondent, NJSIAA – a voluntary, non-profit organization which promulgates the rules and regulations governing high school athletics. *See, B.C. v. Cumberland Reg. Sch. Dist.*, 220 *N.J. Super.* 214, 234 (App. Div. 1987). Article V, Section 4 (K)(2) of NJSIAA's Bylaws, Rules and Regulations imposes restrictions upon transfer students' eligibility for participation in varsity sports. Generally, when a student-athlete transfers from one school to another without a bona fide change of residence by the student's parent or guardian there is a 30-day period of ineligibility in any sport which the student has previously participated in. Article V, Section 4 (K)(2) (a).

New Jersey high schools have agreed that students should not transfer from one school to another for athletic reasons. Pursuant to Article V, Section 4 (K)(5),

> Any evidence of a transfer for athletic advantage shall subject the athlete to a prompt determination of eligibility by the Eligibility Appeals Committee and may subject the school and the athlete to disciplinary proceedings as set forth in Article X herein. A transfer for athletic advantage is defined as, but not limited to:
>
> a. Seeking a superior athletic team;
> b. Seeking relief due to a conflict with the philosophy or action of an administrator, teacher or coach relating to sports;
> c. Seeking a team consistent with the student's athletic abilities;
> d. Seeking a means to nullify punitive action by the previous school; or
> e. Seeking to be coached by the coach at the new school.

Therefore, if it is determined that the athlete transferred to another school for an athletic advantage, the athlete is subject to an extended period of ineligibility beyond 30 days.

On appeal, the petitioner argues that the decision of the NJSIAA imposing a one-year period of ineligibility on K.C. should be reversed and only the customary 30-day period of ineligibility should be imposed. First, petitioner maintains that she did not receive adequate due process from the NJSIAA. The petitioner contends that she experienced a "trial by surprise" at the October 1, 2014 EAC hearing, in that she had no sense of what the hearing was about in advance. Petitioner argues that: she had little knowledge of what documents had been submitted to the EAC; she had no opportunity to gather countervailing documents in advance of the hearing; and she had no opportunity to structure her testimony to address the eligibility criteria established by the bylaws and rules of the NJSIAA. The petitioner also contends that despite the fact that she waived her right to counsel at the hearing, the waiver is meaningless because she did not have adequate advance notice of the nature of the proceedings and the potential consequences of waiving her right to counsel.

The petitioner also argues that the NJSIAA's decision was arbitrary, capricious and unreasonable. The petitioner claims that five students who ran on the Mount St. Dominic track team transferred to other high schools coincident with the release of their former track coach at Mount St. Dominic, and three of the students who were superior athletes and transferred to superior track programs were allowed to transfer without untoward consequence by the NJSIAA. Yet K.C. – who is not a superior athlete and who transferred to an inferior track program – received the draconian penalty of a one-year period of ineligibility. The petitioner argues that inconsistent decisions reached in comparable circumstances are inherently arbitrary and the essence of capriciousness. Additionally, the petitioner stresses that the primary reason for her transfer was not for athletic advantage, but rather had more to do with family finances and health issues, and it strains credulity to even suggest that the transfer of K.C. – who rarely ever ran in a varsity meet, never scored in a cross-country meet and simply enjoys running – to an inferior track program was for athletic advantage. Therefore, the petitioner requests that the decision of the NJSIAA be reversed and suggests that only the customary 30-day period of ineligibility be imposed.

In reply, the NJSIAA maintains that the petitioner was provided with due process as the EAC issued its final decision after a hearing on notice to the parties and a full right to be heard. NJSIAA's assistant director scheduled the hearing and spoke directly to the petitioner about the hearing procedures and her right to have an attorney available. The petitioner, K.C., and West Orange High School administrators were able to present their arguments at the hearing, and the only documents that were relied upon by the EAC were drafted by the petitioner herself.

The NJSIAA also maintains that the decision of the EAC was not arbitrary, capricious or unreasonable as there was overwhelming evidence in the record that K.C.

transferred for athletic advantage. The NJSIAA points out that on three separate occasions the petitioner made written statements that K.C. was transferring due to her dissatisfaction with the new running coach at Mount St. Dominic. Additionally, the EAC did not find credible the petitioner's explanations for K.C.'s transfer at the time of the hearing. Rather, the statements made by the petitioner at the time of the transfer best explain the decision to leave Mount St. Dominic and transfer to West Orange High School. With respect to the other students who also transferred, the NJSIAA contends that it treated each student fairly and each case was decided on the merits of the individual case, taking into account the strength of the evidence before the EAC and the credibility of the witnesses. Therefore, the NJSIAA argues that it did not apply its rules arbitrarily and capriciously to the petitioner, and as such the Commissioner should affirm the decision of the EAC.

Upon careful review and consideration, the Commissioner determines to uphold the decision of the NJSIAA and dismiss petitioner's appeal. As explained above, the NJSIAA is a voluntary association of public and nonpublic schools, organized pursuant to *N.J.S.A.* 18A:11-3 to oversee athletics for its member schools in accordance with a constitution, bylaws, rules and regulations approved by the Commissioner of Education and adopted annually by member schools – for which they become school policy enforceable by the NJSIAA.

It is well-established that the Commissioner's scope of review in matters involving NJSIAA decisions, including determinations made by the Eligibility Appeals Committee, is appellate in nature. *N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. That is, the Commissioner may not overturn an action by the NJSIAA in applying its rules, absent a demonstration by the petitioner that it applied such rules in a patently arbitrary, capricious or unreasonable manner.

N.J.A.C. 6A:3-7.5(a)(2); *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987); *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). Nor may the Commissioner substitute his own judgment for that of the NJSIAA, where due process has been provided and where there is sufficient credible evidence in the record as a whole to serve as a basis for the decision reached by the NJSIAA. *N.J.A.C.* 6A:3-7.5(a)(1); *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 *S.L.D.* 259.

Additionally, the New Jersey courts have spoken as to the narrow scope of "arbitrary, capricious, or unreasonable" in the context of challenges such as petitioner's:

> In the law, "arbitrary" and "capricious" means having no rational basis. *** Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.*** (citations omitted) *Bayshore Sew. Co. v. Dep't of Envt. Protection*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974).

Petitioners seeking to overturn decisions of the NJSIAA therefore bear a heavy burden, and – considering the record of this matter in light of the prescribed standard of review – the Commissioner cannot find that petitioner herein has met her burden so as to entitle her to prevail on appeal.

More specifically, the Commissioner cannot find that the NJSIAA applied its rules in a patently arbitrary or unreasonable manner, in light of its duty to ensure fairness and integrity in athletic competition statewide. Additionally, there is no basis in the record to reject the EAC's determinations of witness credibility. It is undisputed that K.C. was dissatisfied with the new running coach at Mount St. Dominic, and there is substantial evidence in the record indicating that K.C.'s decision to transfer to West Orange High School was in fact for athletic advantage – including the Student/Parent Exit Form in which the petitioner stated that the

decision to leave Mount St. Dominic was due to "[K.C.]'s goal to run in college. At present Mount does not have that to offer her." Moreover, the circumstances related to other track students who also transferred from Mount Saint Dominic around the same time as K.C. are not before the Commissioner, and there is no evidence in the record indicating that the NJSIAA applied its rules differently to the other student athletes that transferred from Mount St. Dominic.

Accordingly, the Commissioner – having found that petitioner was afforded the due process to which she was entitled, and that the NJSIAA's decision ruling that K.C. is ineligible to participate in cross-country, winter track and spring track for a one-year period was neither arbitrary nor unreasonable – determines to uphold the NJSIAA's decision and hereby dismisses the petition of appeal.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/06/15

Date of Mailing: 3/09/15

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

89-15

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

----------X

In the Matter of Tenure Charges filed by
The School District of the Borough of
New Milford, Bergen County, New Jersey
Against Lawrence Henchey

Agency Docket No. 322-11/14

OPINON AND AWARD

Issued: March 4, 2015

----------X

ARBITRATOR
Joseph Licata, Esq.

APPEARANCES

FOR THE PETITIONER
Vittorio S. LaPira, Esq.
Fogarty & Hara, Esqs.

FOR THE RESPONDENT
Sheldon H. Pincus, Esq.
Bucceri & Pincus, Esqs.

NATURE OF DISPUTE

In accordance with N.J.S.A. 18A:6-10 et. seq. and N.J.A.C. 6A:3-5.1(b), on November 7, 2014, the New Milford Board of Education ("Board") filed with the New Jersey Department of Education, Bureau of Controversies & Disputes tenure charges against Lawrence Henchey ("Henchey") seeking to dismiss him from employment as a certificated Language Arts teacher based on five (5) Charges:

Charge No. 1 alleges that Henchey has consistently demonstrated inefficiencies and ineffectiveness in his teaching skills throughout the 2011-2012, 2012-2013 and 2013-2014 school years and as a result of the significant negative impact that his poor teaching performance has upon the quality of education that his students receive, Henchey must be dismissed from his position.

Charge No. 2 alleges that Henchey has consistently demonstrated inefficiencies and ineffectiveness in his teaching skills throughout the 2011-2012, 2012-2013 and 2013-2014 school years despite intensive and comprehensive assistance that has been continuously offered to him by the District Administration and his colleagues, and through multiple corrective action plans designed to address and improve his teaching deficiencies, which demonstrates either an inability or an unwillingness to improve, and which inability or unwillingness to improve constitutes inefficiency warranting dismissal from his position.

Charge No. 3 alleges that as a result of Henchey's consistent failure to, among other things, implement District initiatives; implement a more interactive method of instruction; integrate core content in lesson plans and classroom instructional practices;

use effective teaching strategies; implement consistent grading practices; and meet the professional expectancies set forth in the New Jersey Professional Standards for Teachers, Board Policies and his job description, Henchey's increments were withheld by the Board for the 2013-2014 and 2014-2015 school years, and which ongoing inefficiencies and ineffectiveness warrant dismissal from his position.

Charge No. 4 alleges that in addition to Henchey's consistent failure to demonstrate effective and efficient teaching performance during the 2011-2012, 2012-2013 and 2013-2014 school years, Henchey has failed, since 2002, to remediate certain deficiencies and demonstrate improvement in areas of specific concern, including but not limited to, the use of varied instructional techniques/student-centered activities and the provision of adequate lesson closure, and which inability or unwillingness to improve, and the resulting impact on the education received by his students, constitutes inefficiency warranting dismissal.

Charge No. 5 alleges that, in addition to Henchey's consistent failure to implement effective and efficient teaching strategies, and in addition to his unwillingness or inability to improve upon the same, Henchey has also demonstrated a lack of professionalism throughout the 2011-2012, 2012-2013 and 2013-2014 school years which has included a lack of respect for the Administration and a complete disregard for the high professional standards placed upon him, and which unprofessionalism constitutes incapacity and conduct warranting dismissal.

On November 21, 2014, within the applicable 15-day timeline (N.J.A.C. 6A:3-5.3(a)), Henchey filed with the New Jersey Department of Education, Bureau of

Controversies & Disputes, an Answer and Affirmative Defenses to the Tenure Charges. However, Henchey did not file a Motion to Dismiss in lieu of an Answer within the same applicable 15-day timeline. See, N.J.A.C. 6A:3-5.3(a)1.

On December 1, 2014, Kathleen Duncan, Director, Bureau of Controversies and Disputes notified the parties' respective representatives (1) that the Tenure Charges have been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary and (2) that the dispute was referred to the undersigned Arbitrator for resolution in accordance with N.J.S.A. 18A:6-16. On December 8, 2014, during a telephone conference, Counsel for Mr. Henchey notified Board Counsel and the undersigned of his intent to file a "Motion to Dismiss" the tenure charges. Ground rules governing the motion and hearing dates were discussed and set. The undersigned memorialized the results of the telephone conference in writing on the same day:

> In addition, Mr. Pincus has notified Mr. LaPira and I of his intent to file a motion to dismiss the certified tenure charges. Since an Answer has been filed, I regard the motion as one for summary judgment and I agree, in an exercise of discretion only, to decide that portion of the motion that is not subject to a genuine dispute of material fact. The motion schedule is as follows: December 10 (motion papers due via email and in MS Word format); December 19 (opposition papers due via email and in MS Word format); and December 26, 2014 (reply papers, if any, due via email and in MS Word format). The motion will be decided in advance of the first day of hearing. I have set down five days of hearing as follows: January 8, 12, 13, 14 & 15, 2015. All hearing days shall begin at 9:30 a.m. and conclude by 5:00 p.m. The hearing will be held at the administrative offices of the New Milford Board of Education. Testimony should be very limited with respect to past incidents, events, etc. that are a matter of record and that were not contemporaneously contested. Finally, the hearing will be governed by the Labor Arbitration Rules of the American Arbitration Association pursuant to N.J.S.A. 18A:6-17.1c.

On January 3, 2015, I granted Mr. Henchey's Motion for Summary Decision with respect to Charges Nos. 1-4 of the November 7, 2014 Tenure Charges. I denied the motion with respect to Charge No. 5, pars. 12-19. On Sunday, January 4, 2015, the Board filed a letter brief/motion for reconsideration. The Board took issue with that portion of my Summary Decision holding that the Board failed to comply with the mandatory evaluation procedures of TEACH NJ for the 2013-14 school year because it did not conduct a mid-year evaluation of Mr. Henchey. On January 5, 2015, Mr. Henchey filed a letter in opposition to the Board's request for reconsideration.

On January 6, 2015, on reconsideration, I reaffirmed my grant of Summary Decision with respect to Charges Nos. 1-4 regarding the 2013-14 school year based on the first of two alternative rationales, i.e., the inapplicability of Section 8 to interfere with the first two operative years of Section 25 (2013-14 and 2014-15). Implicitly, I did acknowledge the accuracy of the Board's objection to the second rationale, i.e., the Board's failure to conduct a mid-year evaluation during the first operative year of TEACH NJ (2013-14).[1] In setting the stage for the hearing process to follow, I reiterated the following Case Management Order (originally set forth at the conclusion of my Summary Decision and Order) to the parties:

Case Management Order

1. The hearing is now limited to the following issue: Did the Board have just cause to dismiss Lawrence Henchey from his teaching position based

[1] In so concluding, I commented that, unless this matter is remanded, I need not address Mr. Henchey's additional point that the Board failed to comply with other aspects of TEACHNJ, e.g., failure to demonstrate that it timely secured the approval of the McREL rubric by the Commissioner of Education and, thus, could not rely on the 2013-14 evaluation, even if the lack of a mid-year evaluation in 2013-14 was appropriate.

on his alleged continued incapacity and related conduct unbecoming as specifically set forth by Charge No. 5, pars. 12-19?;

2. All documents relevant to the charges of incapacity and conduct unbecoming (including rebuttal letters, if any) prior to the 2013-2014 school year shall be admitted without testimony;

3. The parties may simply refer to the Statement of Evidence identifying markers without the need to separately introduce the same documents as exhibits; documents obtained in discovery that are not contained in the Statement of Evidence must be introduced in exhibit format; and

4. Testimony shall be limited to the events of the 2013-14 school year, although the "decision-maker" may testify in summary fashion as to how, if at all, he or she factored in Henchey's overall work record (as reflected in the Statement of Evidence) in connection with the charges of incapacity and conduct unbecoming and the recommendation for dismissal. Mr. Henchey, of course, may refer to those portions of his prior work record that he deems supportive of his continued employment in the District.

I further elaborated upon CM Order #4, above, as follows:

"As to the distinction between inefficiency and incapacity, the latter offenses involve, among other things, a teacher's chronic failure to meet professional expectations, and unprofessional and hostile reactions to supervision by district personnel. See, IMO School District of the Borough of Butler, Morris County, 2010 WL 5624390; Board of Education of the Township of Parsippany-Troy Hills v. Greg Molinaro, 96 N.J.A.R. (EDU) 268, 1995 WL 863033 (1995); Bd. of Ed. Lawrence Twp. v. Lester Helmus, 2 N.J.A.R. 334 (1980). The Board may introduce any and all evidence originating during the 2013-14 school year in support of Charge No. 5, pars. 12-19 to prove Henchey's alleged incapacity and conduct unbecoming. Such evidence may include evidence of the assistance and/or constructive criticism provided to (or reiterated to) Mr. Henchey during the 2013-14 school year, no matter what the form – not to demonstrate inefficiency – but to serve as a predicate for the allegation that Henchey's incapacity and conduct unbecoming continued as demonstrated by the manner of his responses, or lack thereof, to such assistance and/or constructive criticisms" (Summary Decision on Reconsideration, dated January 6, 2015, page 5).

On January 12, 13, 14 and 15, 2015, the parties appeared before me for a hearing at the administrative offices of the Borough of New Milford Board of Education. Both parties had a full and fair opportunity to introduce witness testimony and documentary evidence. Whitney Perro, Principal, David E. Owens Middle School, Timothy Coughlin, Vice Principal, David E. Owens Middle School, Antonio Giovinazzo, ScIP officer/teacher, David E. Owens Middle School, Danielle Shanley, ELA Director of Curriculum (K-8), and Michael A. Polizzi, Superintendent of Schools testified on behalf of the Board. Testifying for Mr. Henchey were David Wilson, teacher and NMEA President, Harris Hirsch, NJEA/UniServ representative, and Lawrence Henchey. The Board introduced sixty-eight (68) exhibits. Mr. Henchey introduced sixty (60) exhibits.[2] Post-hearing briefs were received from Mr. Henchey's Counsel on February 6, 2015 and from Board Counsel on February 13, 2015, whereupon I closed the record. At all times, both parties were expertly represented by skilled legal counsel.

THE POSITIONS OF THE PARTIES

Summary of Position (Board)

Respondent Lawrence Henchey has, for several years, been incapable of satisfying the professional expectations and responsibilities that the New Milford Board of Education has for all of its teaching staff members. He was placed on a corrective action plan for the 2012-13 school year to address deficiencies observed in the prior year. He not only failed to address them – his performance declined. As a result, the Board withheld his salary increments for the 2013-14 school year – which he did not contest –

[2] The Exhibit Lists of both parties are set forth in the Appendix to this Opinion and Award.

and placed him on another corrective action plan, which included many of the same items, as well as a new item to address his increasing tardiness to school.

Again, instead of responding with improvement, Henchey's behavior and performance continued to deteriorate, and the District's witnesses credibly testified that he demonstrated a consistent failure to adhere to the administration's directives during that year: He failed to consistently input his grades into the District's student information system, give students timely feedback, or provide meaningful assignments reflected in his grading distribution, as the administration continually directed him. He failed to implement District initiatives, such as Study Island and Writers' Workshop, despite the administration's repeated directives. He failed to address concerns raised by his evaluators in his observations and the directives they gave him regarding his instructional practices. These were major concerns that directly impact the students that he was teaching, and the administration clearly articulated its concerns to him. But those were not the only problems that he had. He failed to take advantage of the help offered to him by the District. He failed to timely comply with a multitude of other administrative directives, arrived at meetings late, and missed meetings. He even failed to come to work on time, coming in late to school for more than 70 out of 180 school days. His unprofessionalism and inability to meet even simple demands, let alone major ones, demonstrate his unfitness to be a teaching staff member.

These issues alone were significant and demonstrate a repeated failure to follow administrative directives that compromised the instructional program. And then, in April 2014, he publicly embarrassed a student in front of her class. Amazingly, he failed to see

the problem with his behavior at the time. Nine months later, he continued to show no remorse or recognition of the impropriety with his actions.

There is no real question that Respondent is guilty of both incapacity and unbecoming conduct. The record is replete with evidence of his failures, many of which he refused to acknowledge. The District's witnesses testified credibly as to these repeated failures, as did one of Henchey's own witnesses. Although Henchey testified on his own behalf, his testimony was not credible when asked about his performance and conduct: he was argumentative, evasive, and dismissive. He, frankly, refused to admit to any deficiencies in his performance, and that is critical, because there is no reason to believe, based upon both the overwhelming evidence, and Henchey's own testimony, that any further action on the Board's part will do anything to improve his performance. Indeed, Henchey demonstrated that even after the Board took major disciplinary action against him, he was incapable of and unwilling to change. As such, there is only one result that is appropriate here: dismissal from his tenured teaching position.

Summary of Position (Henchey)

This four day arbitration follows the grant of a partial summary judgment motion dismissing Tenure Charges 1-4 in their entirety, and Charge 5 ¶¶ 1-11. A Case Management Order was thereafter entered by the Arbitrator, which Order is more particularly set forth on Pages 40 and 41 of the January 3, 2015 Summary Decision. On January 6, 2015, the remaining issues were clarified by the Arbitrator in a Decision that denied the Petitioner Board's Motion for Reconsideration.

The Respondent, Lawrence Henchey, respectfully asserts the following arguments in this post-hearing brief:

1. The charges must be dismissed as the factual assertions set forth in Charge 5 ¶¶ 12-19 were devoid of competent proof.

2. The charges must be dismissed as the Board failed to prove incapacity or conduct unbecoming a teaching staff member.

3. The charges must be dismissed inasmuch as the evidence adduced at best demonstrated alleged inefficiencies on Henchey' s part rather than incapacity or conduct unbecoming a teaching staff member.

4. The remaining charges must be dismissed as they are barred by double jeopardy and/or the concept of double punishment.

5. The charges must be dismissed as the Districts' actions were arbitrary and capricious.

6. The charges must be dismissed as they were based on mistakes of fact improvidently relied upon by the District administration.

7. The charges must be dismissed as they were based on a course of harassment visited upon Henchey by the District administration, rather than a good faith determination to help him.

8. For a remedy, Henchey must be reinstated to his tenured teaching position, together with back pay, seniority and all other emoluments and benefits of employment withheld from him during the course of his suspension.

FINDINGS

Background Leading Up To The 2013-2014 School Year

By way of introduction, and borrowing from the District's website, the "Junior Academy at David E. Owens Middle School" is dedicated to providing high quality educational opportunities for 500 students in grades 6 through 8. The professional staff is comprised of highly qualified teachers and administrators who provide an excellent academic program wherein students are able to reach their maximum potential in accordance with their specific individual needs, abilities, and talents. The curriculum, with an honors program in 8th Grade Language Arts Literacy, Social Studies, Science, and Mathematics, is designed to be comprehensive and varied to provide for individual learning opportunities and learning styles. Curricula offerings include Connected Math, a new, standards-based math initiative in the 6th and 7th grades, and Writer's Workshop in all three grade levels. The middle school is a "focus" school, as characterized by a significant gap in achievement between its highest and lowest student performers.[3]

Lawrence Henchey ("Henchey") has been employed by the Borough of New Milford Board of Education since 2002. He is a member of the New Milford Education Association. After one year teaching at the District high school, Henchey transferred to the David E. Owens Middle School where he has taught 8th grade Language Arts ever since. Henchey holds a teacher's certification in English, K-12.[4] In the 2008-2009 school year, Whitney Perro first served as Principal of the Middle School. Subsequently,

[3] As such, the DOE entrusts a Regional Achievement Center with monitoring and oversight responsibilities.
[4] Prior to becoming a teacher, Henchey worked as an electronic and print journalist for twenty years.

Danielle Shanley became the Director of Curriculum for the English Language Arts program (K-8). In each school year, commencing 2002-2003 until 2010-2011, Henchey received satisfactory performance evaluations and salary and adjustment increments. As late as December of 2011, Principal Perro rated Henchey as an effective teacher and deemed his performance acceptable for the 2011-2012 school year (Exhibits P38 and P39). Having said this, however, Ms. Perro placed Henchey on a Corrective Action Plan ("CAP") during the 2012-2013 and 2013-2014 school years (Exhibits P40 and 46).[5]

At the conclusion of the 2012-2013 school year, the Board voted to withhold Henchey's salary increment for the 2013-2014 school year. It did so for, among other reasons, Henchey's failure to meet the terms of his CAP, more specifically:

- Failure to implement District initiatives, including Writer's Workshop and the Spivey Writing Method, in accordance with our May 2012 Action Plan for Professional Improvement ("Action Plan");
- Failure to implement a more interactive method of classroom instruction in accordance with your Action Plan, resulting in pupil disengagement;
- Failure to display coursework of current students in accordance with your Action Plan;
- Failure to use a cohesive system of thematic instruction in accordance with your Action Plan;
- Failure to use multiple means of student assessment in accordance with your Action Plan;
- Inconsistent grading practices in accordance with your Action Plan;
- Incongruous student feedback practices; and

[5] But for Henchey's dismissal, he would have continued to serve under a CAP during the 2014-2015 school year (Exhibit P54). N.J.A.C. 6A:10–2.5 comprehensively describes the respective rights and obligations of an affected teacher and administrator/supervisor with respect to a CAP.

- Inappropriate comments in the presence of students in your classroom.

In addition to these performance-based reasons, which, standing alone, justify the decision to withhold your increments, our records further reflect that you have been tardy forty-one times during the current school year. This figure represents more than twenty percent of the teacher work year (Exhibit P56h).

The 2013-2014 School Year

Henchey's 2013-2014 CAP

In the 2013-2014 school year, Henchey's CAP reflected a continuation of his 2012-2013 CAP. Henchey's 2013-2014 CAP included the following nine points:

1. Implementation of an inquiry-based approach to instruction.
    - Weekly lesson plans documenting effective and authentic thematic units.
    - Lesson Plans will include collaborative group work and reflect authentic and planned student activities and not teacher-directed activities.
2. Implementation of District initiatives.
    - Including but not limited to effectively implementing Writer's Workshop and Spivey Method in a timely and consistent basis.
    - Facilitation and effective assessment of grade level national common core standards in ELA.
3. Assignment of Homework.
    - Homework assignments will be meaningful which correlate to the unit lesson and involve Higher Thinking Skills.
    - Homework assignments will reflect Board-adopted policy.
4. Classroom Instruction.
    - Increase movement and visibility in classroom.

- This includes limiting time sitting at computer when students are present.

- Circulate to allow increased interaction with student, clarification of directions and monitor student progress.

- Develop effective student-centered lessons with high levels of student engagements.

- Avoid long periods of direct instruction, writing or reading tasks.

- Provide daily evidence of active learning.

5. Classroom Environment.

   - Increased presence of current student work displayed around the classroom that is content appropriate and reflects best work or exemplars of the students.

   - The mural at the front of the room must be completed; this has been unfinished for two years.

   - Classroom themes will be changed at a minimum of quarterly.

   - The bulletin board outside the classroom must have background paper and a board including current student work.

6. Independent Reading.

   - Independent reading will be no more than ten (10) minutes.

   - Classroom library must be organized and records maintained for circulation.

   - Teacher must daily model reading independently while the students are reading.

7. Tardiness to school.

   - Mr. Henchey will report to work sign-in at the designated place at 8:00 a.m. each and every teaching day.

8. Discipline Referrals.

- Mr. Henchey will develop and display five classroom expectations by September 11, 2013.
- Expectations will be clear and be enforced consistently throughout the school year.
- Mr. Henchey will be provided with the resource Discipline with Dignity and will apply strategies from chapters 2, 3, 5, 6, 8 and 9.

9. Grading.

- Grades will be entered into PowerSchool no more than two weeks beyond the assignment date.
- Assignments will be graded in a timely manner (within one week) and returned to students with feedback for improvement.
- A variety of assignments will be given including authentic assessments.
- A true curve of grades will be represented.

Assistance Provided to Mr. Henchey

During the 2013-2014 school year, Antonio Giovinazzo ("Giovinazzo"), the District's Teacher of the year in 2013-14, served as the ScIP officer for the Middle School, through which he was expected to assist struggling tenured and non-tenured teachers to improve. Specifically, Giovinazzo would meet with the administration on a monthly basis so it could advise him of teachers needing assistance. In response, Giovinazzo would contact the teacher, introduce himself and offer his assistance. At the start of the 2013-2014 school year, the administration brought Henchey's performance issues to Giovinazzo's attention and requested that Giovinazzo provide him with assistance. Giovinazzo assisted Henchey to, among other things, upload his McREL artifacts, complete his McREL logs and input his grades in a timely fashion.

Giovinazzo's involvement with Henchey extended from September 2013 through February 2014. Henchey was receptive to this assistance.

However, Giovinazzo testified that "towards that period [February] I had checked up on him once and he was kind of curt or short with me, and I felt that he was frustrated, maybe overwhelmed, so I thought, my interpretation was maybe I should back off a little" (2T 160:21-25; 161:1-6). When asked to clarify whether Giovinazzo believed Henchey had a problem with him specifically, Giovinazzo summarized as follows:

> It was an internal feeling that he was just frustrated, you know, and maybe, maybe he was getting it from too many people, like everyone trying to help him and maybe he was overwhelmed you know, and so I was just, like, you, let me just back off a little, and if he needs me he knows where to find me, and he knows that I will always be available for him if he needs me. [2T 175:7-16 (emphasis added)].

In addition, for Henchey's benefit, the administration scheduled two non-evaluative training sessions with Meredith Alvaro, a Reading and Writing Workshop coach hired by the District to provide professional development to all staff members. Since Henchey had expressed an interest in working with Alvaro, the District hoped the training sessions would improve Henchey's teaching performance. Henchey attended one of the sessions. Principal Perro was able to verify that Alvaro actually modeled the entire lesson for Henchey. Principal Perro did not have first-hand knowledge as to whether Henchey was able to execute the lesson. Because Ms. Alvaro did not testify on such a pertinent topic in this type of proceeding, while admitting the testimony, ultimately, I do not accord significant weight to Principal Perro's hearsay statement that Ms. Alvaro told her that Henchey was unable to model her suggested lesson format. On

the contrary, Mr. Henchey's testimony and supported documentation (Exhibits R17A and B) show that he did "synthesize" Ms. Alvaro's techniques into a lesson entitled, "How to Write ASK Argumentative/Persuasive Essay – (Incorporating M. Alvaro techniques from Observation)".

Lastly, Principal Perro and Henchey, at Henchey's suggestion, agreed to meet weekly (subject to scheduling) to review Henchey's lesson plans and discuss his efforts to comply with the 2013-2014 CAP. The meetings were voluntary and non-disciplinary in nature (with the exception of April 1, 2014, discussed, *infra*). Exhibit P59 (a-n) set forth copies of Principal Perro's weekly meeting notes for three (3) meetings during the months of September, October, and November and one in December of 2013; and for one meeting on January 15, 2014, one on April 8, 2014 (after Principal Perro recommended tenure charges) and one last entry for May 14, 2014. Principal Perro authored various memoranda relating back to weekly meetings on February 10, 2014 (P57e), February 26, 2014 (P57f), March 6, 2014 (P57g), March 13, 2014 (P57h), and April 1, 2014 (P57i). Mr. Henchey introduced a copy of his weekly meeting notes as Exhibits R13 (A-M). In addition to the meetings mentioned above, Mr. Henchey documented a meeting on January 29, 2014 (13L) and February 14, 2014 (13M).

Henchey's 2013-2014 Observations and Evaluations

On October 4, 2013 (9:45 a.m. to 10:45 a.m.), Principal Perro conducted the first of Henchey's 2013-2014 performance evaluations. Perro contacted Henchey on September 11, 2013 to schedule a preconference meeting, and directed him to contact her secretary, Mrs. Moat, to set up the meeting by September 20, 2013 (Exhibit P60, p.16).

Ms. Perro then emailed Henchey on September 20, 2013 and advised him that because he failed to schedule the meeting, she set down the preconference meeting for September 26, 2013 (Exhibit P60, p.17). At the meeting, Perro reviewed Henchey's proposed lesson plan and discussed the planned observation with him.

The October 4, 2013 observation was introduced in evidence as Exhibit P48. In relation to Henchey's 2013-2014 CAP and the District's Independent Reading Initiative. Principal Perro did not see Mr. Henchey modeling the ten (10) minutes of reading. Principal Perro also expressed a concern over the pacing of the class. A concern was also noted in the observation that Mr. Henchey was not sufficiently providing a French-speaking ELL student with differentiated learning. In his post-observation conference with Vice Principal Coughlin and Danielle Shanley, Henchey explained that he paired the student with another student who is fluent in French. Ms. Shanley (who was not a co-observer) suggested that Mr. Henchey reach out to Ms. Vacarro to assist him locate materials – referred to by her as "high interest-low readability" texts. She also suggested that the student would benefit from more images or web-based translations until she mastered the foundations for reading English. Perro added under Standard 4, "Teachers Facilitate Learning for their Students" that all students were not engaged in the lesson, that Henchey was talking too much to one student at a time, that his pace was too fast, that he should slow down, stop and confer with a student, that he did not collect exit slips to measure student understanding of the lesson, etc. Perro offered Mr. Henchey additional coaching with Ms. Alvaro, the District's writing/reading trainer.

On November 20, 2013, Vice Principal Coughlin observed Mr. Henchey from 10:15 a.m. to 10:45 a.m. (Exhibit P49). As to pacing, Coughlin writes: "The pacing of the portion of the lesson that was observed was on target. Mr. Henchey took the time to delve into the writer's notebook responses and allowed for a deep discussion and interaction with the students. He set a clear goal for the lesson, which was that all of the information discussed from the various students responses in their writer's notebooks would be used to develop argumentative essays, and the students were able to relate to this objective." Coughlin offered constructive criticism as well: "Mr. Henchey should focus on the use of data to understand the skills and abilities of his students, as well as the notion of how to identify if all of the students demonstrate the ability to understand the topic." Consistent with Perro's observations of October 4, 2013, Coughlin commented that there was no evidence of differentiation for the ELL (French-speaking) student and that only 8-16 students actively participated in the lesson. Coughlin commented: "She could have been provided with modifications since she is a port of entry student." Lastly, Coughlin commented: "Mr. Henchey actively participates in professional development aligned with his professional goal, and considers and uses a variety of research based approaches to improve teaching and learning. He also recognizes the need to improve student learning in the classroom. Mr. Henchey is encouraged to continue implementing district initiatives with integrity and the full intent of the programs."

On February 7, 2014, Danielle Shanley, Director of Curriculum observed Henchey's class for Principal Perro. Ms. Shanley's name is not listed on the District's Observation/Evaluation Schedule as an evaluator of any tenured teacher (Exhibit R23)

and, yet she was substantially involved with Henchey's October 4, 2013 post-observation conference, Henchey's February 7, 2014 Observation and Henchey's February 20, 2014 post-observation conference. On the day of the observation, Henchey was preparing his students in their first attempt at writing an Explanatory Prompt Essay for the NJ ASK (believed to have been conducted in May of 2014). Based on her superior ELA skill sets and knowledge of the test (no longer administered due to the PARCC Assessment), Ms. Shanley offered comprehensive suggestions in both contemporaneous email communications with Henchey (Exhibit R24A) and within the text of the formal observation completed on February 20, 2014 (Exhibit P50) to improve upon his existing "Bull's eye" template. She did not direct him to discontinue using the template.

As to the items of observation that concerned Perro and Coughlin, Ms. Shanley observed too much teacher-directed conversation and a failure to model (IRB); instead, Mr. Henchey was setting up the Hovercam to display an explanatory writing prompt. Ms. Shanley encouraged Mr. Henchey to "travel the room to ensure participation and monitor their progress..." Ms. Shanley writes that there was no written feedback. Some students read, some spoke and essentially no students wrote today. In the positive, Ms. Shanley commented: "Mr. Henchey has established a warm classroom environment and treats students with respect. He encouraged them many times during this lesson, reminding them that the goals for this writing task are attainable and that he is sure they can do this... He highlighted the achievements of the 3 students whose work was reviewed by the class, and he provides constructive feedback for improvements." Ms. Shanley was aware that an ELL student was in the class but stated that she was unaware

of any modifications, except that Mr. Henchey pointed her out and told Ms. Shanley that "she is progressing nicely."

On March 5, 2014, following a post-observation conference, Mr. Henchey authored a letter of rebuttal as his right to do so (Exhibit P51). He noted that Perro allows teachers to upload artifacts to McREL in advance of the post-observation conference. In turn, the artifacts could be considered by the evaluator in order to, for example, move a checkmark from the "developing" to the "proficient" column (a higher rating). Under Principal Perro's approach, the artifacts did not have to be precisely tailored to the lesson observed. However, Ms. Shanley advised Mr. Henchey that she was only interested in artifacts related to the lesson she observed on February 7, 2014 (i.e., NJ ASK preparation). Since the lesson observed was only the second NJ ASK lesson taught by Mr. Henchey, there were no artifacts to upload in the narrow vein set by Ms. Shanley. Although Perro had agreed to meet with Mr. Henchey to review his concerns, according to Henchey's letter of rebuttal, she cancelled the meeting and ultimately refused to acknowledge the artifacts.

The second concern expressed by Mr. Henchey in his letter of rebuttal is that Ms. Shanley did not give Mr. Henchey any credit for complying with her suggested improvements from the date of observation to the date of the post-observation conference (See, e.g., Exhibit R25C).

On or about April 30, 2014 the Principal Perro completed Henchey's summative evaluation (Exhibit P52). The Summative Evaluation incorporates formal observations by Principal Perro on October 4, 2013 (Exhibit P48); by Vice Principal Coughlin on

November 20, 2013 (Exhibit P49); and by Director of Curriculum, Danielle Shanley on February 7, 2014 (Exhibit P50).

On June 9, 2014, Henchey signed off on his Professional Evaluation. Henchey scored 1.9 out of 4.0 which left him with a "Partially Effective" rating under TEACH NJ and ACHIEVE NJ and in the "Developing" category under the McREL rubric adopted by the Board, with the approval of the Commissioner of Education. A score in the range of 1.0-1.85 is deemed "Ineffective" under ACHIEVE NJ and "Developing" under McREL. A score of 2.65 is required to be considered "Effective" under ACHIEVE NJ and "Proficient" under McREL.

The Board's Withholding of Henchey's 2014-2015 Salary Increment

June 5, 2014 Letter from Superintendent Polizzi (Exhibit P57p)

The purpose of this letter is to inform you that on June 9, 2014, at 7:00pm in the New Milford High School Media Center, I will recommend to the New Milford Board of Education (the "Board") that your employment and adjustment increments be withheld for the 2014-2015 school year. I am recommending this action based on your persistent refusal to provide effective instruction to the students in your classes as evidenced by the formal observations which were conducted during the 2013-2014 school year by multiple evaluators as well as the informal observations and walkthroughs.

Your teaching skills and professional performance in all five standards that were assessed are overwhelmingly in the "developing" domain and only secondarily in the "proficient" domain. Not one standard reflects any teaching skill or professional practice in either the "accomplished" or the "distinguished" domain, despite the history of ongoing assistance that you have received by the New Milford School District (the "District") administration. Simply stated, your teaching performance does not meet the professional expectations of a teacher in the District.

Specifically, my recommendation that the Board withhold your employment and adjustment increments for the 2014-2015 school year is based upon your:

1. Failure to plan, pace and organize appropriately for instruction;

2. Lack of effective teaching strategies, such as scaffolding opportunities to demonstrate student learning; modeled, shared and independent practice; use of "Do Now" activities; and posting and referencing the daily agenda as well as objectives and essential questions;

3. Inability to engage all of the students in your class instead of just several students;

4. Failure to motivate and inspire students by using teachable moments effectively;

5. Failure to use classroom assessment data to guide program planning;

6. Failure to make necessary changes to instructional practice for the improvement of student learning;

7. Failure to integrate core content and 21st century content in lesson plans and classroom instructional practices;

8. Failure to apply and implement knowledge and skills attained from professional development activities;

9. Failure to consistently and effectively maintain a positive, productive, and nurturing leaning environment for all students;

10. Lack of consistent and effective differentiation for students of varying skill levels;

11. Lack of student engagement with higher levels of thinking and the integration of technology;

12. Emphasis on teacher directed discussion rather than student participation and teamwork;

13. Failure to consistently and effectively incorporate writing within the students' instructional regimen;

14. Failure to utilize research based approaches to improve teaching and learning; and

15. Consistent refusal to seek out and employ techniques and strategies for the improvement of instruction.

The Decision to File Tenure Charges

On April 3, 2014, Principal Perro recommended to Superintendent Polizzi the filing of tenure charges against Mr. Henchey (Exhibit P57j). Superintendent Polizzi rejected Perro's April 3, 2014 recommendation. In a follow-up document authored on either June 10 or 11, 2014, Perro shared with Superintendent Polizzi her statement to be presented to the Board in connection with the intended increment withholding action. It is clear from a reading of the summary that Principal Perro was not persuaded by Superintendent Polizzi's rejection of her request that tenure charges be filed against Henchey.

Principal Perro summarized what she considered to be Henchey's failure to comply with his CAP, i.e., failure to grade assignments on a true curve or enter grades with any consistency, failure to timely update his grade book, failure to implement district initiatives, failure to assign Study Island, failure to move about his classroom and engage students, failure to bring his Writer's notebooks to a weekly meeting on November 6, 2013, failure to display student work, tardiness to school (70 times), removal from his class on two separate occasions, failure to call in for substitute coverage or leave lesson plans in connection with a personal day granted on April 2, 2014 (and taken on April 14, 2014), failure to timely attend mandatory PARCC training on February 12, 2014, failure to achieve an effective rating on his ACHIEVE NJ evaluation, and failures to improve despite being present for workshops, having individual assistance from the ELA coach, being paired with a strong ELA peer, etc. Perro concludes her presentation: "If under the AchieveNJ system the hardest message we can send is to

withhold an increment I truly worry which 70 students will be assigned to his class next year. And what will happen if he begins to further fall apart if that first observation is poor."

Since no determination had been made to file tenure charges against Mr. Henchey, Henchey was advised by Perro on June 9, 2014 that his Professional Development Plan (Exhibit P45) had been completed for the current year and renewal was being recommended with an increment withholding (Exhibit P53). Additionally, a CAP for 2014-2015 had been prepared on May 7, 2014 and given to Henchey on May 29, 2014 (Exhibit P54). Henchey was separately provided with a letter of intent to renew his contract on May 13, 2014 (Exhibit R50).

It is clear from this record that until such time after June 23, 2014, Superintendent Polizzi was amenable to allowing Henchey the opportunity to complete the second year of the TEACH NJ evaluation framework. However, according to Superintendent Polizzi, he reflected on certain concerns over the summer, such as, ten blank pages in the students Writer's Workshop notebooks, concluding that Henchey's intention to have the students go back and fill in the blank pages "seemed like a deliberate attempt at deceit, a kind of cover-up" (3T 29:9-10).[6] Polizzi's change of position was also influenced by further reflection on Henchey's own misperceptions of his actions:

> The perception of his own attendance, 70 days late, and interpreting that as three or four. That's problematic. The perception that his students are doing well and have improved. And in looking at the data and doing the

[6] It is noted that Henchey was not charged in this proceeding with engaging in deceit regarding the ten blank pages in the journals of his students.

analysis and doing the calculations, that was not the case. I think all of those things cumulatively resulted in a change in my position [3T 29:18-25; 30:1-6].[7]

Polizzi ultimately testified that after June 23, 2014, his feelings were aligned with Perro's, and both felt that they needed to file tenure charges (Tr. 3, 49:20-50:16).

The Tenure Charges (Post Motion for Summary Decision)

Charge No. 5

That, in addition to Henchey's consistent failure to implement effective and efficient teaching strategies, and in addition to his unwillingness or inability to improve upon the same, Henchey has also demonstrated a lack of professionalism throughout the 2011-2012, 2012-2013 and 2013-2014 school years which has included a lack of respect for the Administration and a complete disregard for the high professional standards placed upon him, and which unprofessionalism constitutes incapacity and conduct unbecoming warranting dismissal. . . .

12. During the 2013-2014 school year, Henchey's classroom conduct, attitude towards others, and overall work performance continued to worsen. As a result, and for the reasons set forth more fully herein, the Principal ultimately recommended to the Superintendent that tenure charges be formally filed against Henchey.

13. On September 18, 2013, the Principal had to draft a memorandum to Henchey after he failed to timely submit his "Class Expectations" letter to be sent to the parents of his students.

14. On February 12, 2014 the English Language Arts department scheduled a thirty-minute meeting for an important presentation on the Partnership for Assessment of Readiness for College and Careers ("PARCC") Assessments. Henchey arrived seventeen minutes late without any

[7] Most of Henchey's students scored in the proficient range on NJ ASK. In essence, this is what Henchey accurately relayed to the Board during the increment withholding hearing. However, in response, Danielle Shanley took the initiative to analyze Henchey's NJ ASK scores over several years to demonstrate relative insufficient growth, and then she reported the resulting serial data to Superintendent Polizzi who, in turn, accepted the data in support of his belief that Henchey was not forthcoming with the Board.

explanation or apology. As a result, the Principal drafted a memorandum on February 14, 2014, which summarized that "[y]our action of being late was unprofessional and rude to the presenter."

15. After a pattern of habitual late arrivals, on or about March 26, 2014 Henchey arrived to work at 9:45 a.m. – one hour and forty-five minutes after his contractual start time. Henchey missed his assigned morning duty, his weekly meeting with the Principal, and his common planning time. As a result, on or about April 1, 2014 the Principal drafted a memorandum regarding Henchey's lateness to work which stated, among things, that "[y]our action of not calling the school and informing me you would be late was unprofessional."

16. On or about April 9, 2014, K.C., the parent of a student in Henchey's class (L.C.), emailed Henchey asking why her daughter's book was taken away and was sitting on Henchey's desk. Henchey responded to K.C. on April 10. 2014 advising that L.C.'s book had been taken away because she had lent it to another student who had misplaced their copy of the book. Henchey advised K.C. that L.C. has access to the book online. Then, on the following day, Henchey placed a redacted copy of the email on the Smartboard in the front of the classroom, and told all of the students in his class to inform their parents to stop contacting him. Students who were interviewed regarding the incident characterized Henchey's statements as a "rant," and some even added that such behavior was typical. Moreover, students reported that Henchey uttered the following statements, "I came in thirty minutes early and had to waste my time answering parent emails"; "I'm tired of students making up rumors about me..."; "I don't have time to answer questions from parents"; "I'm tired of guidance calling me about this..."; and "I know how to write an email and your parents will never win."

17. In response to this incident, the Principal and Vice Principal met with Henchey and two of his New Milford Education Association ("Association") representatives to discuss the matter. While Henchey admitted to copying and pasting the email and sharing it with the class, and further admitted to spending class time complaining about parental

communications, he (amazingly) did not believe he had acted inappropriately because he had redacted the names and gender identifiers in the copied email (notwithstanding the fact that every student in the class was aware that Henchey had L.C.'s book on his desk and could thus easily conclude that the email was from one of L.C.'s parents). As a result, the Administration and the Association representatives agreed that Henchey should take the rest of the day off, get in contact with his therapist and return after the spring recess.

18. On or about April 14, 2014, Henchey utilized a personal day, which had been approved on April 2, 2014. Pursuant to established District practice, all teachers utilizing sick and personal days are required to individually call in and schedule substitute teachers. On April 14, 2014 Henchey failed to call out for a substitute and, as explained by the Principal, "once again we [the District] needed to scramble to cover your classes." Moreover, because Henchey did not leave any lesson plans for his classes, Ms. Carroll was required to create plans and activities for Henchey's students. On April 14, 2014, the Principal provided Henchey with a memorandum to address his failure to follow District protocol, call in for a substitute and leave or email lessons plans.

19. Finally, throughout the entire 2013-2014 school year, Henchey repeatedly and consistently failed to comply with the Principal's weekly directives relating to his 2013 Action Plan. Henchey's consistent failure to do anything requested by the Principal, including such easily achievable requests as "bring your Writer's Workshop notebook to our weekly meetings," constitutes both inefficiency and conduct unbecoming a professional. . . .

OPINION

Synopsis

N.J.S.A. 18A:6-10 allows for the dismissal of tenured teachers and other tenured personnel for "inefficiency, incapacity, unbecoming conduct, or other just cause." In the present matter, I find that the Board's proofs do not support a finding of incapacity above

and beyond inefficiency. However, the Board's proofs do satisfactorily demonstrate that on the heels of two consecutive years of a Corrective Action Plan and one increment withholding, Mr. Henchey engaged in various serious forms of unprofessional conduct during the 2013-2014 school year that support the reasonableness of the Board's ultimate determination to dismiss him from employment. Accordingly, I am constrained to uphold the Board's action under a just cause standard of review.

Disposition of the Charge of Incapacity

After carefully reviewing the experience of the Office of Administrative Law and the Commissioner in addressing the subject matter, I adopt the oft-quoted explanation of the difference between inefficiency and incompetence (or incapacity) set forth in School District of the Township of East Brunswick v. Renee Sokolow, 1982 S.L.D. 1358, 1362, aff'd State Board of Education, 1983 S.L.D. 1645:

> The charge of incompetence, as distinguished from the charge of inefficiency, presumes that the proofs in support of the charge will demonstrate that respondent is so lacking in competency to perform the responsibilities of classroom teacher that the requirements of the 90-day improvement period, required for a charge of inefficiency, N.J.S.A. 18A:6-11, would be a useless exercise. Incompetence requires proof that the affected person regardless of the assistance offered by certified supervisors does not have the ability or capacity to be an effective teacher.

Charges of incapacity may be sustained when a teacher demonstrates a complete unwillingness or inability to correct or rectify significant performance-related shortcomings or improve the instruction provided to his students. See, e.g., Lawrence Twp. Bd. of Educ. v. Helmus, 2 N.J.A.R. 334 (N.J. Admin. Jan. 24, 1980) (tenured teacher with 17 years of experience was dismissed for lack of classroom control and

incapacity to teach in his assigned area); Parsippany-Troy Hills Bd. of Educ. v. Molinaro, 96 N.J.A.R.2d (EDU) 268 (N.J. Admin. Dec. 6, 1995) (incapacity charge sustained because teacher evidenced an inability to plan and implement curriculum and an inability to efficiently utilize classroom period for academic purposes); cf. In IMO Tenure Hearing of Patricia Finn, School District of Bordentown Regional School District, 2000 WL 266441, aff'd in part/remanded (Comm'r) 2000 WL 34401290 (nine year teaching staff member with history of positive teacher-student experience inappropriately charged with incompetency rather than inefficiency based on evidence indicating, over a 17-month period, lack of written lesson plans; disorganization; failure to utilize different teaching modalities; failure to report to class in a timely manner; failure to individualize lesson plans for special needs students; and, general failure to implement lessons which were planned in advance).

In conforming Sokolow and Finn to the present, and without yet addressing Henchey's unprofessional or unbecoming conduct during the 2013-2014 school year, I find that the record evidence does not support a finding of overall incapacity to teach, i.e., that it would be a useless endeavor to have provided Mr. Henchey with a full and fair opportunity under Section 25 of TEACH NJ to demonstrate teacher efficiency. I say this for many reasons.

First and foremost, I observe that the three 2013-2014 observations conducted of Mr. Henchey contain a mix of positive and negative findings that do not leave one with the impression that he is incapable of teaching. While the Board may rely upon its interpretation of the Perro, Coughlin, and Shanley observations to support the summative

evaluation and overall rating of partially effective, I disagree that the observations fairly lead to a conclusion of incapacity above and beyond inefficiency.

Second, within the framework of the observations-evaluation conducted, I find troubling certain actions by the administration. For example, although Principal Perro and Vice Principal Coughlin co-observed the October 4, 2013 lesson, Ms. Shanley, who was not present, plainly took the lead in conducting the post-observation conference and her writing permeates the bulk of the post-observation commentary. I am further concerned over the mechanics that left Henchey with no real meaningful opportunity to move the checkmarks by way of uploading artifacts to his February 7, 2014 observation conducted by Danielle Shanley (Exhibit P50). Not only was Ms. Shanley not listed as an observer on the master evaluator schedule but, contrary to Principal Perro's practice. Henchey's artifacts were not credited because they were not lesson-specific. Taken into account that the type of skills observed in a one-hour (or less) observation may be also demonstrated by uploading artifacts encompassing analogous skills or lesson implementation, I find it problematic that Henchey's artifacts were not considered by Ms. Shanley or Perro as a basis to "move a checkmark" on Henchey's behalf. Inserting an evaluator off-script may or may not be an arbitrary and capricious action. I need not determine as much in this case. Rather, what I deem problematic is the difference in practice or policy regarding the breadth of artifacts that may be uploaded to McREL between Mr. Henchey's primary evaluator, Principal Perro and the substitute evaluator, Danielle Shanley. By narrowing the category to lesson-specific artifacts, I agree with

Henchey that he was placed at a disadvantage and, at the very least, that he should have been permitted to submit for consideration the artifacts that he did have on file.

Third, contrary to the administration's belief, I am also satisfied that Mr. Henchey did show due diligence with respect to attempting to incorporate the comprehensive suggestions of Ms. Shanley within a reasonable period of time following her formal observation of Henchey on February 7, 2014. Ms. Shanley emailed Henchey certain suggestions that she believed should be implemented (Exhibit R24A). Henchey was receptive to Shanley's suggestions. Indeed, he replied that same day stating he would implement them and, that he looked forward to discussing the matter further when they met for a post-observation conference (Exhibit R24B).

Ms. Shanley sent Vice Principal Coughlin to visit Henchey's class on Wednesday, February 12, 2014 to see if Henchey had implemented the suggestions (Exhibit P60, page 037). Henchey, however, had undertaken to implement the suggestions in his class on Tuesday, February 11, 2014 (Exhibit R45J). He did so because February 12, 2014 was a half-day schedule, the afternoon of which he should have been in attendance at the PARCC lecture by Caitlin Carroll. Because of that schedule, he did not have Language Arts classes in the afternoon. He advised Shanley of this fact on February 12 (Exhibit R45J). To further the implementation of the efforts he had taken on February 11, Henchey worked during what normally would have been his lunchtime on February 12, 2014. He did so in order to prepare additional prompt materials to be used in the unit of studies then being addressed (Exhibit R25B). Accordingly, Henchey's reasonably

diligent responses to Ms. Shanley's suggestions indicate, quite frankly, the opposite of incapacity.

Fourth, I believe that Henchey has demonstrated compliance (or the Board has failed to demonstrate a lack of compliance) with regard to certain aspects of both his 2013-2014 CAP and/or comments made in the 2013-2014 observations. In particular, I find the record does not support a finding that Mr. Henchey did nothing to provide differentiated instruction to a French-speaking student. Even Perro acknowledged that as the year progressed, the ELL student developed her English-language skills, thereby implying that she was able to complete the class without any acrimony (Tr. 1, page 107). Additionally, Mr. Henchey testified that he paired the French-speaking ELL student with another student who speaks English-French; he had weekly meetings with his French-speaking ELL student; he provided Google-translate materials to both his French-speaking and Arabic-speaking ELL students; and that he did engage in an ongoing email dialogue with Vice Principal Coughlin and Isaam Helwani to obtain French-English novels.

Indeed, a review of the testimony of Vice Principal Coughlin and Mr. Henchey (as well as supporting email documentation) leaves an air of confusion as to who was responsible for purchasing the books in the first place. On November 27, 2013, Coughlin, referring to a list of novels in French-English suggested by Henchey and Mr. Helwani writes: "Larry, This is excellent! As soon as you get me that list I'll make sure we get her the books!" (Exhibit R47B). On December 4, 2013, Helwani refers Henchey to a list of bilingual novels for sale on Amazon.com. Mr. Henchey replies: "Many

thanks! I am including Mr. Coughlin in this reply as he is the one who will actually make the purchase (or approve me to do it)" (Exhibit R47A). On December 5, 2013, Mr. Coughlin advises both Henchey and Helwani that he found a publishing company that makes French/English novels; that he emailed the publisher a copy of the list of novels requested; and that the publisher was going to get back to him with the availability of such books or alternatives just in case they don't have it (Id.). The email trail drops off at this point and Messrs. Coughlin and Henchey essentially fault the other for dropping the ball. Regardless, there does not appear to be a non-arbitrary basis to conclude that Henchey did nothing to help the ELL student in his class.

Fifth, Principal Perro formed a conclusion that Mr. Henchey could not or did not implement the ELA lesson modeled by Ms. Alvaro. With respect to a charge of incapacity, the question becomes not one of qualitative execution, but whether the teacher exercised due diligence and at least demonstrated some progress. Ultimately, Perro did not have first-hand knowledge as to whether Henchey was able to execute the lesson. Because Ms. Alvaro did not testify on such a pertinent topic in this type of proceeding, while admitting the testimony, ultimately, I do not accord significant weight to Principal Perro's hearsay statement that Ms. Alvaro told her that Henchey was unable to model her suggested lesson format. On the contrary, Mr. Henchey's testimony and supported documentation (Exhibits R17A and B) show that he did "synthesize" Ms. Alvaro's techniques into a lesson entitled, "How to Write ASK Argumentative/Persuasive Essay – (Incorporating M. Alvaro techniques from Observation)." Thus, contrary to a finding of incapacity, I find that, similar to his reaction to Ms. Shanley's critique, Mr. Henchey did

professionally respond to the assistance provided to him by Ms. Alvaro, he did exercise due diligence, and he was able to document his efforts at compliance, thereby escaping a conclusion of incapacity.

Sixth, Henchey's first year TEACH NJ score of partially effective (1.9) leaves one with an understandable impression that Henchey may or may not have made it past the second year of TEACH NJ, but it does not and cannot support a conclusion that he is a finished product under the current, two-year evaluation rubric. Indeed, if Henchey was able to submit artifacts and if such submission resulted in a movement of the checkmarks with respect to his February 7, 2014 observation, I note, he may have scored higher than a 1.9 in the overall summative rating. Regardless, under TEACH NJ, if Henchey was permitted to continue during the 2014-2015 school year as the Superintendent had initially envisioned, then he may have regressed into the realm of "ineffective" (1.0-1.85) and automatically faced tenure charges, or he may have progressed to "effective" (2.65) and have avoided tenure charges.

In 2014-2015, Henchey would have been the recipient of a fourth observation as well as a mid-year evaluation by the ScIP (consisting of the principal, vice principal and designated ScIP officer (not the Director of Curriculum) elected with the consent of the NMEA) N.J.A.C. 6A:10-3.1. Simply put, in light of some of the deficits pointed out regarding the 2013-2014 observations and summative evaluation, allowing Henchey a second year would have at least provided him with additional formalized observations and an opportunity to receive a first mid-year evaluation by the ScIP -- all designed to help struggling teachers pass muster under a new evaluation rubric, as approved by the

Commissioner and implemented for the very first time during the 2013-2014 school year. Thus, given Henchey's first TEACH NJ score of partially effective, the deficits noted in the observation process that lead to that rating, and the conclusions in the summative evaluation not supported by the evidentiary record, I cannot conclude that it would have been a "useless exercise" to allow Henchey a full and fair opportunity to achieve an effective rating in the second of two years of a new statewide educator evaluation model.

Seventh, Henchey has taught in the District since the 2002-2003 school year. The earliest formal sign of significant struggle is embodied by Henchey's CAP for the 2012-2013 school year (signed by Mr. Henchey and Principal Perro on June 21, 2012, Exhibit P40). Even acknowledging Henchey's various shortcomings complying with the CAP during the 2012-2013 and 2013-2014 school years, I observe, Henchey's prior ten years of acceptable service militates against a conclusion that the provision of the aforementioned novel supports would have been a futile exercise (adopting, with modernization, Sokolow and Finn, *supra*).

Eighth, it is apparent from this record that Henchey became overwhelmed by the amount of scrutiny being placed on him and that this approach backfired during the first year of the administration's adaptation and implementation of the evaluation rubric. Without question, the 2013-2014 school year involved a learning curve for both evaluators and teachers under a new set of evaluation rules. As of February of 2014, the President of the NMEA and Perro discussed Mr. Henchey's feelings of being overwhelmed by the amount of other administrator-teacher contact time, such as, frequent drive by visits from the administration and various observe for success sessions

(10-15 minutes each). Mr. Giovinazzo, the ScIP officer, reported that he too formed the impression that Henchey behaved as if he was inundated by the amount of "assistance" being provided to him.

Ninth, ample support from this record shows that even Superintendent Polizzi was not convinced that Henchey should be precluded from completing the second year of TEACH NJ, i.e., 2014-2015 until well after the Board had voted to withhold Henchey's 2014-2015 increment. The Superintendent's change of heart came not as the result of his perception of Henchey's overall incapacity to teach ELA, but more out of a growing concern over Henchey's alleged deceit, i.e., ten pages left intentionally blank in the journals of Henchey's students (not charged) and Henchey's representation to the Board that his students were performing well on standardized testing (not charged). Polizzi testified that he changed course also due to Henchey's inability to appreciate the magnitude or impact of his chronic tardiness (expressed, in part, and implied, in part under Charge No. 5, par. 15).

Lastly, although I acknowledge that the Board has satisfactorily demonstrated Henchey's more willful disregard of certain aspects of his CAP, as reinforced through weekly meetings with Principal Perro, other similar allegations have not been so demonstrated and the above-mentioned mitigating factors must be considered as well. Accordingly, I do not credit the Board's evidence of Henchey's conduct unbecoming during the 2013-2014 school year as sufficient to support a finding of overall incapacity under N.J.S.A. 18A:6-10.

Based on the foregoing, I find and conclude that the Board has failed to satisfactorily support a charge of incapacity under N.J.S.A. 18A:6-10, despite the existence of evidence of conduct unbecoming, discussed next.

Disposition of the Charge of Conduct Unbecoming a Professional

In light of the foregoing, I will address Tenure Charge No. 5, paragraphs 12-19 under the category of unbecoming conduct, although par. 19 reads more like a charge of insubordination.[8] Charge No. 5, par. 19 states:

> Finally, throughout the entire 2013-2014 school year, Henchey repeatedly and consistently failed to comply with the Principal's weekly directives relating to his 2013 Action Plan. Henchey's consistent failure to do anything requested by the Principal, including such easily achievable requests as "bring your Writer's Workshop notebook to our weekly meetings," constitutes both inefficiency and conduct unbecoming a professional.

As a general rule, in the area of labor relations, an employee cannot refuse to cooperate with the employer regarding legitimate work-related conduct. To do so is an act of Insubordination, subject to disciplinary action up to and including discharge. See, Prestige Stamping Co., 74 LA (BNA) 163; St. Joe Minerals Corp., 76 LA (BNA) 421; and City of Franklin, 81-1 ARB (¶8069). I will address the major aspects of this allegation below insofar as only the charge of conduct unbecoming/insubordination is at hand. If an item of Henchey's multi-factored 2013-2014 CAP is not addressed below, then the parties can assume that the allegation not discussed would lead to, at best, a finding of inefficiency, but not to a finding of conduct unbecoming/insubordination.

[8] N.J.S.A. 18A:6-10 does not include an express disciplinary charge regarding insubordination. However, I am satisfied that the willful failure or refusal of a teacher to comply with significant directives from administrators, in the professional employment context of education, does constitute conduct unbecoming a professional.

Writer's Workshop/Spivey

District-wide initiatives are designed to improve student achievement. Implementation of District Initiatives, such as Writer's Workshop and Spivey method were part of Mr. Henchey's 2012-2013 and 2013-2014 CAPs (Exhibit P40 and P46). Deficiencies concerning the use of Study Island and Smart Responders were not set forth in either of Henchey's two CAPs or within the 2013-2014 increment withholding decision. Conversely, a failure to implement Writer's Workshop and the Spivey (preexisting District Initiatives) were made part of the 2013-2014 increment withholding.

In this matter, I conclude that the Board has failed to convincingly demonstrate that Mr. Henchey was, in essence, insubordinate, with respect to incorporating Writer's Workshop and Spivey. See, Exhibits R8A and B (showing the Spivey Tree and a representative example of the Spivey exercise); Exhibit R38 (showing the Spivey Tree Mural in Henchey's classroom for reference by students during class); Exhibit R32A (showing period submission of Writer's Workshop journals); Exhibit R32B (evidencing prompts created by Henchey to implement Writer's Workshop); Exhibit R13A-M (weekly meeting memos showing discussions, among other things, entries into Writer's Workshop notebook). In addition, during a formal observation of November 20, 2013 by Vice Principal Coughlin, Coughlin commented under Standard #4 that Mr. Henchey demonstrated positive interaction with students and, among other things, demonstrated a proper utilization of the Writer's notebook as an essential tool for the ELA classroom. Under Mr. Coughlin's Standard #1 comments, Coughlin noted that Henchey "took the

time to delve into the Writer's notebook responses and allowed for a deep discussion and interaction with the students..." (Id.).

Mr. Henchey testified that Spivey is a "huge book" that can span grades k through 8 or even k through 12. In short, Henchey implemented Spivey chapters 29 and 30 because he believed it was more grade appropriate than other chapters.

In light of the foregoing, I cannot conclude that the Board has demonstrated a knowing failure to implement the administration's directives concerning Spivey and Writer's Workshop to the extent that a charge of unbecoming conduct/insubordination (as contrasted with inefficiency) is warranted.

Smart Responders

In this matter, I conclude that the Board has failed to convincingly demonstrate that Mr. Henchey was, in essence, insubordinate, with respect to incorporating one Smart Responder assessment by the end of the first semester (or by January 29, 2014). Approximately thirty (30) Smart Responders were donated graciously by the PTO for use in the 2013-2014 school year. During the January 15, 2014 weekly meeting, Principal Perro and Mr. Henchey discussed utilization of the District's Smart Responders on Tuesday, January 19, 2014 regarding "Flowers for Algernon" (Exhibit P59l).[9] According to Principal Perro, each teacher was responsible for facilitating one Smart Responder assessment in the first semester (first two marking periods) and an additional assessment in the second semester (or third and fourth marking periods). Importantly, Principal

[9] Smart Responders enable students to enter questions at the conclusion of a lesson and receive instantaneous feedback.

Perro did not reject Mr. Henchey's suggestion that he implement the first semester Smart Responder assessment in the form of an exit slip on January 19, 2014, however, she was concerned that he was "cutting it close" based on the end of the first semester, i.e., January 29, 2014.

On February 4, 2014, Mr. Henchey apologized to Principal Perro in connection with her email communication dated February 3, 2014 asking him to submit the data from his Smart Responder assessment as requested for the first half of the year (Exhibit P60, page 33). Mr. Henchey explained that he intended to accomplish the task on January 22, 2014, but he learned on January 17, 2014 that he needed SchoolDude Adobe Flash for his desktop. Mid-term exams intervened and Henchey arranged to do a joint Smart Responder assessment with Ms. Carroll (whose classroom desktop did have SchoolDude Adobe Flash installed). Henchey assured Perro that he would have the data entered by February 7, 2014 – which fell in the second semester (Exhibit P68, page 18). In rejecting a finding of unprofessional conduct/insubordination above and beyond inefficiency, I note that the Board has failed to demonstrate that Henchey exhibited a knowing intent to disregard a directive concerning Smart Responders. Rather, Henchey clearly intended to comply, albeit at the end of the target date range.

Additionally, the Board does not dispute Henchey's assertion that his classroom lacked the technological capability of implementing Smart Responders.

Lastly, the Board makes no allegation that Henchey failed to timely implement a Smart Responder assessment in the second semester. Accordingly, I cannot conclude that the Board's evidence concerning Henchey's belated submission (by eight or nine days) of

the first semester Smart Responder assessment rises to the level of conduct unbecoming/insubordination, as opposed to teacher inefficiency.

Study Island

I sustain the charge of conduct unbecoming/insubordination with respect to Study Island. During a faculty meeting on September 4, 2012, among other topics, a weekly use of Study Island was discussed (Exhibit P66, page 1). According to Principal Perro, Study Island is a web-based program that has been in use at David E. Owens Middle School for several years. In Study Island, students can log on to the program and answer approximately ten questions. For example, in language arts, students may be asked to read a paragraph and then answer related questions about the reading. Principal Perro further explained that the Study Island questions at the time mirrored NJ ASK questions (presumably, now geared toward the PARCC Assessment). As discussed during the faculty meeting and periodically by administrators, Study Island was expected to be assigned on a weekly basis to 8th grade ELA students.

In relationship to the weekly meetings between Principal Perro and Mr. Henchey, I observe, Study Island had not been assigned in Mr. Henchey's class as of September 25, 2013 (Exhibit P59d). In handwritten commentary, Perro states: "Study Island needs to start". Notwithstanding Perro's commentary, following the pairs' October 30, 2013 weekly meeting, Perro noted in handwriting: "No Study Island." (Exhibit P59g).

As of the January 29, 2014 meeting between the pair, Principal Perro reiterated to Mr. Henchey, among other items, his obligation to assign Study Island one time per week to his classes and record his results in his grade book (Exhibit P57b). As of the following

weekly meeting, i.e., March 6, 2014, Perro reports that she again directed Mr. Henchey to "include Study Island at least once per week." (Exhibit P57g). Then, following a March 13, 2014 weekly meeting, Principal Perro entered the following: "Study Island should be assigned once per week. To date you only have two posted Study Island assignments in over four weeks of the marking period" (implying that Henchey did post two Study Island assignments).

In Perro's April 3, 2014 recommendation of increment withholding memo to Superintendent Polizzi, Perro notes, among other things, "Despite being told in writing that Study Island is to be assigned weekly, Mr. Henchey as of April 3, 2014 has only assigned/graded two assignments in the marking period." In Perro's update in the middle of June 2014, Perro states the following:

> Mr. Henchey was repeatedly reminded to assign/collect and provide feedback on homework. To date in his grade book there are no homeworks assigned including Study Island which is a school initiative. He was directed to assign Study Island at our January 20, 2014 meeting which he did not comply. He was directed again in writing on February 26, 2014 which he did not comply. In a memo dated March 31, 2014, he was reminded again to assign Study Island. (Exhibit P57c).

In handwritten comments to our April 3, 2014 memorandum, as of May 27, 2014, Perro observed that Mr. Henchey had entered no Study Island assignments in the fourth marking period (Exhibit P57j, page 1).

In Mr. Henchey's April 30, 2014 teacher evaluation summary, Perro writes in the comment section under Standard #4 (Teacher's Facilitate Learning for Their Students) "Each teacher was required to assign Study Island once a week and you failed to do this." (Exhibit P52, page 12).

Even Mr. Henchey, on cross-examination, acknowledged that he issued only nine Study Island assignments during the 2013-2014 school year (Exhibit R28).

In light of the importance of the initiative and the number of reminders provided by Principal Perro, I conclude that the Board has demonstrated conduct unbecoming/insubordination on the part of Henchey with respect to a critically important component of the 8th Grade ELA curriculum.

Grades

I sustain the Charge with respect to Henchey's failure to timely enter mid-term grades during the 2013-2014 school year. I dismiss the Charge in all other respects as more appropriately evidencing inefficiency.

On December 17, 2013, Vice Principal Coughlin sent an email communication to Mr. Henchey advising him that seventy (70) students had no grades entered or comments (progress reports) for the 2nd marking period. Coughlin discovered a technical error on Henchey's part in that, Henchey entered grades under the category of "Quiz" and the software program does not count quizzes as part of the grades (Exhibit P60, page 29). In response to Mr. Coughlin's email, Mr. Henchey thanked Mr. Coughlin for bringing the technical discrepancy to his attention and assured Mr. Coughlin that he would enter the progress report comments for all students prior to 12:00 noon and that he would confer with Ms. Carroll for the purpose of properly categorizing grades in the computer system. (Id.). Ultimately, Henchey's second marking period grades and progress reports were entered by December 18, 2013. Although demonstrating inefficiency, I cannot conclude that Henchey's failures rise to the level of insubordination.

The opposite holds true with respect to mid-term grades, that is, Henchey's conduct was more akin to insubordination. In the weekly meeting between Principal Perro and Mr. Henchey on February 26, 2014, Perro documented that "mid-term grades will be posted shortly." Principal Perro explained that contrary to Henchey's CAP, mid-terms were facilitated at the end of the January of 2014 and, yet, Henchey still had not posted mid-term grades as of February 26, 2014. As of the duo's March 6, 2014 weekly meeting, Henchey had not yet posted his mid-term grades (Exhibit P57g). Next, during the March 13, 2014 weekly meeting, Principal Perro expressly directed Henchey to continue updating his grade book and, moreover, to post his mid-term grades on or before the pair's next meeting date of March 20, 2014 (Exhibit P57h). As of April 3, 2014, Henchey still had not posted ten mid-term grades. Henchey's failure to comply with Perro's March 20, 2014 deadline, in light of previous reminders and the importance of the subject matter to students, parents and the administration of the 8th Grade ELA curriculum, in my opinion, amounts to conduct unbecoming/insubordination.

In sum, I find and conclude that, pursuant to N.J.S.A. 18A:6-10, the Board has demonstrated Henchey's unprofessional misconduct/insubordination in the form of his failure to assign Study Island, as directed and his failure to post mid-term grades by March 20, 2014, as directed.

I will next address the anecdotal evidence of Henchey's unbecoming conduct (not involving insubordination or inefficiency) as set forth under Charge No. 5, pars. 12-18.

As both parties can readily observe, par. 12 is introductory and factual resolution is unnecessary. Par. 13 states:

> On September 18, 2013, the Principal had to draft a memorandum to Henchey after he failed to timely submit his "Class Expectations" letter to be sent to the parents of his students.

This charge alleges that Henchey engaged in conduct unbecoming and/or demonstrated incapacity in accordance with a memorandum that Perro wrote to Henchey on September 20, 2013 (Exhibit P57a). The memorandum set forth that Perro had not received a copy of the class expectations letter which was to have been sent to parents and that she wanted a copy no later than September 23, 2013.

In the Weekly Meeting memo for September 18, 2013, Henchey noted that he had sent the letter out to parents on September 17, 2013, and Perro's handwritten notation indicates that she requested Henchey to send her a copy (Exhibit P59c). Henchey did, in fact, send Perro a copy of the letter via email on September 20, 2014 (Exhibit R45T). The Weekly Meeting memo for September 25, 2013 (Exhibit P59d) confirmed this fact. Accordingly, I dismiss the disciplinary specification laid out under Charge No. 5, par. 13.

Par. 14 states:

> On February 12, 2014 the English Language Arts department scheduled a thirty-minute meeting for an important presentation on the Partnership for Assessment of Readiness for College and Careers ("PARCC") Assessments.[10] Henchey arrived seventeen minutes late without any explanation or apology. As a result, the Principal drafted a memorandum on February 14, 2014, which summarized that "[y]our action of being late was unprofessional and rude to the presenter."

[10] According to the PARCC website, the PARCC is a group of states working together to develop a set of assessments that measure whether students are on track to be successful in college and their careers. These high quality, computer-based K–12 assessments in Mathematics and English Language Arts/Literacy give teachers, schools, students, and parents better information whether students are on track in their learning and for success after high school, and tools to help teachers customize learning to meet student needs. The PARCC assessments will be ready for states to administer during the 2014-15 school year. In New Jersey, the standardized PARCC Assessment replaced NJ Ask testing.

On February 12, 2014, Henchey arrived seventeen (17) minutes late to a thirty (30) minute mandatory training session concerning the PARCC Assessment model and implementation in place of NJ ASK. Henchey explained his actions as follows:

> Q: This email is written by you at 1:13 p.m. on February 12, 2014 to Ms. Shanley?"
>
> A: Yes
>
> ....
>
> Q: Now what time was Ms. Collins—Carroll's program due to commence?
>
> A: I believe it was 1:30
>
> ...
>
> Q: And you had done this, and then you concluded this up, and emailed it to her at 1:13, and what did you do at that point, you know, notwithstanding that there was a meeting scheduled approximately 17 minutes later at 1:30?
>
> A: Well, I was famished, and I estimated I could get to Wendy's in Bergenfield and back, and eat a burger on the way back, within the course of 15 minutes.[4T 37:14-25; 39:15-23 (emphasis added)]

In making the decision to leave school grounds to purchase lunch seventeen (17) minutes before an important PARCC training session, I agree with the Board that Henchey displayed a significant lapse in judgment. Assuming Henchey immediately left the school building after his email to Ms. Shanley and walked to his car, I surmise, he likely had no more than fifteen (15) minutes to make it to and from Wendy's in time for the meeting and that is not factoring in either traffic delays and/or ordinary delays ordering and receiving lunch at Wendy's.

According to MapQuest, the round trip from David E. Owens Middle School (470 Marion Avenue, New Milford, New Jersey) to Wendy's (150 N. Washington Avenue,

Bergenfield, New Jersey) is approximately ten (10) minutes without traffic.[11] Any significant delay at either the drive-thru or at the counter inside Wendy's during lunch hours, I observe, would have made it almost impossible for Henchey to make it back for the start of the meeting, even without a train delay, which Henchey assumed the risk of experiencing, and which he did experience. Put simply, Henchey is at fault; that he was preoccupied trying to address his February 7, 2014 observation by Ms. Shanley and did not eat lunch sooner is not an acceptable excuse for his actions. That Ms. Carroll took the additional time and effort to provide individual orientation to Mr. Henchey does not serve as a mitigating factor either. On the contrary, Ms. Carroll was left with little choice but to take unplanned, additional time away from her schedule to accommodate Henchey's belated arrival. In addition, throughout this proceeding, in various ways, Henchey expressed his perception that he was under the microscope throughout the 2013-2014 school year. Feeling this way, one must query why Henchey would engage in such a game of chance when there must have been a food source within the borders of New Milford or even within the Middle School itself? Given the importance of the PARCC Assessment training and the lack of mitigating factors presented, I sustain specification/par. 14 as evidence of unprofessional conduct, pursuant to N.J.S.A. 18A:6-10.

Par. 15 states:

> After a pattern of habitual late arrivals, on or about March 26, 2014 Henchey arrived to work at 9:45 a.m. – one hour and forty-five minutes after his contractual start time. Henchey missed his assigned morning duty,

[11] As a lifelong resident of the area, I am confident in the accuracy of the MapQuest results.

> his weekly meeting with the Principal, and his common planning time. As a result, on or about April 1, 2014 the Principal drafted a memorandum regarding Henchey's lateness to work which stated, among things, that "[y]our action of not calling the school and informing me you would be late was unprofessional."

On March 26, 2014, Mr. Henchey arrived to work at 9:45 a.m. for an 8:00 a.m. start without notice. In relation to Mr. Henchey's daily schedule, he missed hall duty, his weekly meeting with Principal Perro and his common planning time with Ms. Carroll. He did not miss any instructional time. Henchey overslept, explaining that the stress that he was experiencing by this juncture in the school year left him with anxiety and sleeplessness at times. Although I do not disbelieve Henchey's explanation, unlike his typical late arrival at or slightly after 8:05 p.m. (the commencement of hall duty) the March 26, 2014 incident directly impacted the schedules of Principal Perro and Ms. Carroll. As such, I agree with the Board that Henchey's inaction was, nonetheless, an example of his unprofessional conduct during the 2013-2014 school year.

As to the assertion that Henchey's tardiness to that point in time was "chronic", I observe that when the Board undertook to withhold Henchey's 2013-2014 increments, its' action was based, in part, on Henchey's 41 alleged instances of tardiness (Exhibit P56h). However, when the Board again undertook to withhold Henchey's increments for 2014-2015, while tardiness was not one of the listed reasons for the Board doing so (Exhibit P57r), it was nonetheless raised by the Board at the informal hearing and considered when resolving to withhold his increments. Suffice it to say that the issue of Henchey's frequent episodes of *de minimis* tardiness as of March 26, 2014 does not alter my decision in any significant respect. Importantly, Henchey's day-to-day tardiness was

not significantly addressed in real time throughout the 2013-2014 school year, with the exception of a reference by Principal Perro in her weekly meeting minutes of October 30, 2013 (Exhibit P59g). If the issue was truly problematic from an educational or operational standpoint, then one would have expected to see much more prompt remedial action from the administration. Accordingly, while I sustain the charge of conduct unbecoming a professional employee based on Henchey's March 26, 2014 partial no-show, no-call, I dismiss the balance of the charge in all other respects.

Par. 16 states:

> On or about April 9, 2014, K.C., the parent of a student in Henchey's class (L.C.), emailed Henchey asking why her daughter's book was taken away and was sitting on Henchey's desk. Henchey responded to K.C. on April 10, 2014 advising that L.C.'s book had been taken away because she had lent it to another student who had misplaced their copy of the book. Henchey advised K.C. that L.C. has access to the book online. Then, on the following day, Henchey placed a redacted copy of the email on the Smartboard in the front of the classroom, and told all of the students in his class to inform their parents to stop contacting him. Students who were interviewed regarding the incident characterized Henchey's statements as a "rant," and some even added that such behavior was typical. Moreover, students reported that Henchey uttered the following statements, "I came in thirty minutes early and had to waste my time answering parent emails"; "I'm tired of students making up rumors about me..."; "I don't have time to answer questions from parents"; "I'm tired of guidance calling me about this..."; and "I know how to write an email and your parents will never win."

I sustain this charge, in part. Animal Farm is part of the 8th Grade ELA curriculum. The District had purchased new paperback copies of the book. Teachers Henchey and Carroll were experiencing problems with the students losing the books that each of them had individually assigned. Consequently, Henchey and Carroll instituted a policy/practice that, if a student lost his/her book, he/she would not be assigned another

one. Instead, that student was required to access the book in the public domain where it was obtainable. And, in the event that Carroll or Henchey found that a student had borrowed a copy of the book from another student, they would take that book and similarly subject the lending student to the terms of the policy.

On April 9, 2014, the parent of L.C. understandably emailed Henchey seeking to have him return the copy of Animal Farm which L.C. had either lost or, had taken away by Henchey because she had lent it to another student who then misplaced it (Exhibit P57k). According to the email communication of L.C., she questioned why the book was taken away, she stated that her daughter had been without the book for two weeks, and she commented that her daughter was falling behind.

On the next day, April 10, 2014, Henchey emailed a polite reply to the mother of L.C. explaining what occurred and the basis for his actions (Exhibit P57k). Unfortunately, Henchey's reaction did not end at this point. Rather, Henchey deemed it useful and not inappropriate to redact L.C.'s identifying information and place the email on a projection screen for all students to take note of. He then commented to the class that he had to waste 30 minutes addressing the email. To me, the combination of Henchey's acknowledged actions and admitted verbiage were plainly designed to send a message to both parents and students alike that parental complaints were not welcome and, in any event, they would not end the policy (Tr. 4, pages 195-196). Additionally, Henchey noted that he had heard from guidance about this issue on too many occasions (Tr. 4, pages 49-55).

Henchey's action in projecting the redacted email was allegedly reported to Vice Principal Coughlin by two students. The students and others who were allegedly interviewed by Coughlin allegedly attributed certain other statements or actions being made by Henchey in class on April 10. These include:

a) That Henchey was in a "rant" on the day in question:

b) That Henchey typically behaved that way;

c) That Henchey complained about having to waste his time responding to parent emails;

d) That Henchey stated he was tired of students making up rumors about him:

e) That Henchey stated he did not have time to answer questions from their parents; and

f) That Henchey stated he knows how to write an email and their parents will never win (Exhibit P57l) (Tr. 4, pages 56 and 60-61).

None of the students who allegedly made the report or were interviewed by Coughlin testified at the arbitration (Tr. 2, page 125). Nor did the Board introduce any written statements from any student. Henchey denied making the statements other than complaining about a waste of time.

In sustaining the allegation of unprofessional conduct, I observe that Henchey's actions/verbiage carried the realistic potential of emotionally upsetting the student whose parent complained, even if Henchey took efforts to protect her identity from the remainder of the class. Imagine instead a teacher reading to the class an example of a poorly written essay without identifying the author. If the author is still a student and in

that very class one can easily imagine how upset he or she would be. Henchey's actions on April 10, 2014 carried the realistic potential of causing a similar degree of emotional harm to the student who did not have her Animal Farm book for over two weeks. In addition, Henchey's actions/verbiage likely would be shared by K.C. to L.C. and by other students with their parents. I find it difficult to believe that the parents of students in Mr. Henchey's class would be satisfied with such a mode of teacher-parent communications.

On the contrary, I would doubt that any parent wants to find out that a legitimate communication about his or her son or daughter with a teacher ended up on an overhead projector for the purpose of deterring other students from complaining to their parents and/or for the purpose of deterring other parents from similarly communicating with the teacher of his son or daughter. Even if the end was justifiable (which Principal Perro answered in the negative by directing the cessation of the policy), the means used by Henchey alone on April 10, 2014 to reinforce the policy was unprofessional and properly chargeable in this proceeding.

Lastly, I am troubled that Mr. Henchey engaged his students in such a manner in light of being reprimanded in the 2011-2012 school year for reprimanding a student in front of her class (Exhibit P55a) and after receiving an increment withholding for the 2013-2014 school year for, among other things, "making inappropriate comments in the presence of students" (Exhibit P56h).

Based on the foregoing, I conclude that the Board has demonstrated that Henchey's actions on April 10, 2014 constituted conduct unbecoming a professional teacher within the meaning of N.J.S.A. 18A:6-10. Accordingly, I sustain this charge.

Par. 17 states:

> In response to this incident, the Principal and Vice Principal met with Henchey and two of his New Milford Education Association ("Association") representatives to discuss the matter. While Henchey admitted to copying and pasting the email and sharing it with the class, and further admitted to spending class time complaining about parental communications, he (amazingly) did not believe he had acted inappropriately because he had redacted the names and gender identifiers in the copied email (notwithstanding the fact that every student in the class was aware that Henchey had L.C.'s book on his desk and could thus easily conclude that the email was from one of L.C.'s parents). As a result, the Administration and the Association representatives agreed that Henchey should take the rest of the day off, get in contact with his therapist and return after the spring recess.

In light of my findings concerning Par. 16, above, I dismiss this specification due to redundancy.[12]

Par. 18 states:

> On or about April 14, 2014, Henchey utilized a personal day, which had been approved on April 2, 2014. Pursuant to established District practice, all teachers utilizing sick and personal days are required to individually call in and schedule substitute teachers. On April 14, 2014 Henchey failed to call out for a substitute and, as explained by the Principal, "once again we [the District] needed to scramble to cover your classes." Moreover, because Henchey did not leave any lesson plans for his classes, Ms. Carroll was required to create plans and activities for Henchey's students. On April 14, 2014, the Principal provided Henchey with a memorandum to address his failure to follow District protocol, call in for a substitute and leave or email lessons plans.

I sustain the above charge and note the following circumstances for contextual support. Henchey was directed to leave school early on April 11, 2014 as a result of his

[12] The Board's allegation (based on Coughlin's testimony) that Henchey demanded the names of those students complaining (implying intent to retaliate) cannot be processed herein because it was not expressly subsumed within the tenure charges. For the record, Henchey testified that he demanded names because he did not trust the accuracy of the administration's complaints against him based on his perception of past experiences. Lastly, I agree with Counsel that references to Mr. Henchey's therapist do not advance the Board's cause in this proceeding.

emotional state following the meetings with Principal Perro and Superintendent Polizzi. He remained out for the week of April 14-18, 2014. When Henchey returned, Perro provided him with a Memo/reprimand that she had issued in his absence (Tr. 4, pages 63-64; Exhibit P57m). Principal Perro testified that the Memo issued for failing to call the substitute service for the scheduled personal day and causing the need "to scramble to cover his classes" (Exhibit P57m). He was further reprimanded for not leaving lesson plans for April 14, 2014. Ms. Carroll had to pick up the slack again. Page 11 of the Teachers Handbook (Exhibit P68) requires teachers to call the substitute service when a personal day is granted. Similar to Henchey's failures to timely attend the PARCC assessment training on February 12, 2014 and to timely call-in a late arrival on March 26, 2014, I cannot credit Henchey's experience of stress caused by other employment-related events as an excuse for his ensuing, separate misconduct. Accordingly, I sustain the charge of Conduct Unbecoming a professional teacher with respect to this allegation.

Summary of Disposition of Charges

The Tenure Charges (Post Motion for Summary Decision)

Charge No. 5

That, in addition to Henchey's consistent failure to implement effective and efficient teaching strategies, and in addition to his unwillingness or inability to improve upon the same, Henchey has also demonstrated a lack of professionalism throughout the 2011-2012, 2012-2013 and 2013-2014 school years which has included a lack of respect for the Administration and a complete disregard for the high professional standards placed upon him, and which unprofessionalism constitutes incapacity and conduct unbecoming warranting dismissal. . . .

12. During the 2013-2014 school year, Henchey's classroom conduct, attitude towards others, and overall work

performance continued to worsen. As a result, and for the reasons set forth more fully herein, the Principal ultimately recommended to the Superintendent that tenure charges be formally filed against Henchey. **[Dismissed].**

13. On September 18, 2013, the Principal had to draft a memorandum to Henchey after he failed to timely submit his "Class Expectations" letter to be sent to the parents of his students. **[Dismissed].**

14. On February 12, 2014 the English Language Arts department scheduled a thirty-minute meeting for an important presentation on the Partnership for Assessment of Readiness for College and Careers ("PARCC") Assessments. Henchey arrived seventeen minutes late without any explanation or apology. As a result, the Principal drafted a memorandum on February 14, 2014, which summarized that "[y]our action of being late was unprofessional and rude to the presenter." **[Sustained].**

15. After a pattern of habitual late arrivals, on or about March 26, 2014 Henchey arrived to work at 9:45 a.m. – one hour and forty-five minutes after his contractual start time. Henchey missed his assigned morning duty, his weekly meeting with the Principal, and his common planning time. As a result, on or about April 1, 2014 the Principal drafted a memorandum regarding Henchey's lateness to work which stated, among things, that "[y]our action of not calling the school and informing me you would be late was unprofessional."**[Sustained, in part].**

16. On or about April 9, 2014, K.C., the parent of a student in Henchey's class (L.C.), emailed Henchey asking why her daughter's book was taken away and was sitting on Henchey's desk. Henchey responded to K.C. on April 10, 2014 advising that L.C.'s book had been taken away because she had lent it to another student who had misplaced their copy of the book. Henchey advised K.C. that L.C. has access to the book online. Then, on the following day, Henchey placed a redacted copy of the email on the Smartboard in the front of the classroom, and told all of the students in his class to inform their parents to stop contacting him. Students who were interviewed regarding the incident characterized

Henchey's statements as a "rant," and some even added that such behavior was typical. Moreover, students reported that Henchey uttered the following statements, "I came in thirty minutes early and had to waste my time answering parent emails"; "I'm tired of students making up rumors about me..."; "I don't have time to answer questions from parents"; "I'm tired of guidance calling me about this..."; and "I know how to write an email and your parents will never win." **[Sustained, in part].**

17. In response to this incident, the Principal and Vice Principal met with Henchey and two of his New Milford Education Association ("Association") representatives to discuss the matter. While Henchey admitted to copying and pasting the email and sharing it with the class, and further admitted to spending class time complaining about parental communications, he (amazingly) did not believe he had acted inappropriately because he had redacted the names and gender identifiers in the copied email (notwithstanding the fact that every student in the class was aware that Henchey had L.C.'s book on his desk and could thus easily conclude that the email was from one of L.C.'s parents). As a result, the Administration and the Association representatives agreed that Henchey should take the rest of the day off, get in contact with his therapist and return after the spring recess. **[Dismissed].**

18. On or about April 14, 2014, Henchey utilized a personal day, which had been approved on April 2, 2014. Pursuant to established District practice, all teachers utilizing sick and personal days are required to individually call in and schedule substitute teachers. On April 14, 2014 Henchey failed to call out for a substitute and, as explained by the Principal, "once again we [the District] needed to scramble to cover your classes." Moreover, because Henchey did not leave any lesson plans for his classes, Ms. Carroll was required to create plans and activities for Henchey's students. On April 14, 2014, the Principal provided Henchey with a memorandum to address his failure to follow District protocol, call in for a substitute and leave or email lessons plans. **[Sustained].**

19. Finally, throughout the entire 2013-2014 school year, Henchey repeatedly and consistently failed to comply with the Principal's weekly directives relating to his 2013 Action Plan. Henchey's consistent failure to do anything requested by the Principal, including such easily achievable requests as "bring your Writer's Workshop notebook to our weekly meetings," constitutes both inefficiency and conduct unbecoming a professional. . . .**[Sustained – Study Island and Mid-Term Grades; dismissed in all other respects].**

The Penalty Of Dismissal

Arbitrators widely apply the following standard of review when asked to judge the appropriateness of a disciplinary penalty: If a preponderance of the evidence supports the disciplinary allegations, an employer must also show that the penalty imposed is just in light of factors, such as: [1] the gravity of the offense; [2] the employee's overall record and length of service; [3] the provision of proper notice of rules and penalties; [4] an employer's adherence to progressive discipline, if applicable; [5] whether there has been lax enforcement of rules; and [6] whether the employer's actions or failure to act contributed to the disciplinary offense(s). *Elkouri and Elkouri*, How Arbitration Works, 5th Edition, pages 930, et. seq. The determination as to whether a teacher has engaged in conduct warranting dismissal from a tenured position requires consideration of the nature of the act, the totality of the circumstances and the impact on the teacher's career. I/M/O Tenure Hearing of Molokwu, OAL Dkt. No. EDU 9650-04 (2005) citing In re Fulcomer, 93 N.J.Super. 404, 421 (App. Div. 1967).

In the present case, I have dismissed any allegation proving to be pure inefficiency or that may have been brought about by the evaluative opinion of an administrator(s). What remains, however, is, among other offenses, Henchey's willful failure to comply

with Principal Perro's important directives concerning the assignment of Study Island on a weekly basis and to post mid-term grades by March 20, 2014. Henchey's disregard of Perro's directives constitutes serious offenses that impact negatively the District's initiative to assess student feedback and growth (Study Island) and to timely assess student performance (mid-term grades). Henchey further compounded matters by exhibiting other episodes of unprofessional conduct during the 2013-2014 school year, such as his late arrival to a mandatory PARCC Assessment training lead by Ms. Carroll in favor of a failed attempt to timely make it to Wendy's and back; his late arrival to work without notice on March 26, 2014 (missing a weekly meeting with Principal Perro and collaborative planning with Ms. Carroll); his projection of a parent email to all students designed to deter further student/parent complaints regarding his book confiscation policy; and his failure to call in a substitute and leave lesson plans for a personal day absence on April 14, 2014 (leaving the administration scrambling to cover his classes). At the end of the day, Henchey alone had control over his destiny with respect to the aforementioned behaviors.

In addition, I am satisfied that Principal Perro did attempt non-disciplinary interventions in good faith over the course of the 2011-2012-2012-2013-2014 school years, including weekly meetings, two CAPs, and the deployment of the ScIP officer in 2013-2014, etc. prior to requesting the filing of tenure charges on April 3, 2014.

Lastly, although I acknowledge Henchey's service to the District since the 2002-2003 school year, his record is not unblemished. Rather, Henchey has received reprimands and he did not challenge the imposition of an increment withholding for the

2013-2014 school year.[13] Thus, as I observed in my January 3, 2015 Summary Decision and Order, . . . "this means that Mr. Henchey enters the hearing process with a major disciplinary record in the form of an increment withholding under Title 18A for incapacity and related conduct unbecoming. . ." In my opinion, given the precarious position in which Henchey entered the 2013-2014 school year in the New Milford School District, there simply was no room for Mr. Henchey to have engaged in the number and type of professional misconduct incidents that he did. Accordingly, I conclude that the Board's dismissal of Mr. Henchey from employment as a teacher in the New Milford School District was for just cause.

[13] Based on my previous double jeopardy ruling, and the Board's position regarding double jeopardy, I did not consider the Board's withholding of Henchey's increment for the 2014-2015 school year for any purpose in this proceeding.

AWARD

For the reasons more fully set forth herein, I find and conclude that the Borough of New Milford Board of Education has demonstrated just cause to dismiss Lawrence Henchey, a tenured teacher for conduct unbecoming a professional school teacher pursuant to N.J.S.A. 18A:6-10.

Respectfully submitted,

Joseph Licata

Dated: March 4, 2015

State of New Jersey)
) :SS
County of Bergen)

On the 4th day of March, 2015, before me personally came and appeared Joseph Licata, to me known and known to me to be the person described herein who executed the foregoing instrument and he acknowledged to me that he executed the same.

Notary Public

Susan Lucas DeMarte
Notary Public of New Jersey
My Commission Expires,
March 30, 2015

91-15

JEAN M. LANING,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF UPPER DEERFIELD, CUMBERLAND COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

This matter arose when the respondent Board denied petitioner a medical leave of absence prior to her retirement in December 2013, charged her sick leave bank for 59 sick days from September to December 2013, and subsequently stopped paying the petitioner's salary from October 15, 2013 until her retirement on December 1, 2013. Petitioner challenged the Board's authority to make inquiries into her illness beyond the scope of the medical notes she provided in support of her request for a medical leave of absence, and demanded back pay for sick leave charged and for the period when her pay was docked prior to the date of her retirement. The Board contended that sick leave requests are tentative and subject to reasonable verification before approval. The parties filed cross motions for summary decision, which were denied because there were genuine issues of fact in dispute. Thereafter, the parties ultimately reached an amicable monetary settlement following the submission – for *in camera* review by the ALJ and respondent's counsel – of more detailed information about the medical condition that precipitated petitioner's request for sick leave.

The ALJ's Initial Decision recited the procedural history of this matter, stated that the issues transmitted to the OAL had been resolved amicably, but opined that there might be remaining policy issues for the Commissioner's consideration.

Upon review, the Commissioner concluded, *inter alia*, that – in light of the settlement entered into by the parties – there are no issues necessitating the Commissioner's review. Accordingly, the case was closed.

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

March 12, 2015

OAL DKT. NO. EDU 17329-13
AGENCY DKT. NO. 280-11/13

JEAN M. LANING,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF UPPER DEERFIELD, CUMBERLAND COUNTY,	:	
RESPONDENT.	:	

The instant controversy began when – shortly before she retired in December 2013 – petitioner requested extended sick leave. Her requests were denied as insufficiently supported because petitioner did not comply with respondent's demands that she 1) provide specific information about her condition, and 2) submit to an examination by the school physician. Respondent stopped petitioner's pay in October 2013, the petition was filed on November 15, 2013, and the matter was transmitted to the Office of Administrative Law on December 3, 2013 – two days after petitioner officially retired.

The parties moved and cross moved for summary disposition, both of which motions were denied on September 25, 2014. Two months later, on November 17, 2014, petitioner's counsel submitted for *in camera* review – by the Administrative Law Judge (ALJ) and respondent's counsel – more detailed information about the medical conditions which had precipitated her requests for sick leave. Said information led to an amicable monetary settlement between the parties.

In their "Settlement Stipulations" dated November 25, 2014, aside from declaring that they had entered into a confidential agreement, the parties wrote:

> Neither Petitioner nor Respondent shall file any exceptions to the opinion of Judge Todd Miller in the underlying case with the full understanding that Judge Miller will be forwarding the decision to the Commissioner for review with a notation that no exceptions were filed by either party[.]

ALJ Miller did indeed forward an Initial Decision to the Commissioner, which appears to approve of the settlement and contemplates the possibility that there might be further issues of policy amenable to consideration by the Commissioner. The Commissioner finds none.

Before the parties settled their differences, the threshold questions in the instant case were 1) what may comprise adequate support for an application for disability leave, and 2) what are the parameters of a Board's right to obtain specific information about the disability underlying an application for disability leave and compensation. These issues were rendered moot by petitioner's *in camera* submission of medical information. Simply stated, the *in camera* discovery was apparently deemed by respondent and the ALJ to constitute an adequate foundation for petitioner's application for leave, and respondent was allowed – *via* the *in camera* review – access to a greater amount of information than had been provided in the doctor's notes that petitioner had originally submitted with her leave request. Further, the parties' settlement rendered academic any ancillary issues, such as petitioner's contention that withholding her payment for sick leave was a tenure violation.

It is well settled that controversies which have become moot or academic prior to judicial scrutiny are deemed improper subjects for judicial review. *See, e.g., Cinque v. Dept. of Corrections,* 261 *N.J. Super.* 242, 243 (App. Div. 1993); *Anderson v. Sills*, 143 *N.J. Super.* 432, 437 (Ch. Div. 1976). In other words, courts will not usually decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete

adversity of interest, *Anderson v. Sills*, *supra,* 143 *N.J. Super.* 432, 437 (Ch. Div. 1976). An exception to this principle occurs when issues raised in the course of a technically moot controversy are of great public importance, such as procedural requirements relating to involuntary civil commitment (*In re Geraghty,* 68 *N.J.* 209, 212), or the validity of a rule adopted by the New Jersey Supreme Court (*Busick v. Levine,* 63 *N.J.* 351, 364, *appeal dismissed* 414 *U.S.* 1106 (1973)). However, the issues framed by the pleadings in this matter do not rise to that level.

Accordingly, the Commissioner concludes that – in light of the settlement entered into by the parties – there are no issues necessitating the Commissioner's review, and the case is closed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision 3/12/15

Date of Mailing 3/13/15

*This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 17329-13
AGENCY DKT. NO. 280-11/13

JEAN M. LANING,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF UPPER DEERFIELD,
Respondent.

Ned Rogovoy, Esq., for petitioner

Frederick A. Jacob, Esq., for respondent (Jacob & Chiarello, LLC)

Record Closed: December 1, 2014 Decided: December 11, 2014

BEFORE **W. TODD MILLER**, ALJ:

STATEMENT OF THE CASE

The present matter involves contested facts as to whether petitioner was legitimately disabled "due to illness or injury" justifying her request for extended sick time or extended leave from her public employment shortly before she retired? Petitioner challenges the Board's authority to make inquiries into her illness beyond the scope of the medical notes she provided to the Superintendent or the Board of Education. The Board contends that sick time requests are tentative and subject to

reasonable verification, before approved. Both parties filed motions for summary decision. As indicated herein, there are contested facts regarding the validity of petitioner's sickness or medical condition. By **ORDER** dated September 25, 2014, the motions for summary decision were **DENIED**.

DISPOSITIVE PROCEDURAL HISTORY AFTER THE ORDER

The petitioner submitted detailed medical explanation dated November 17, 2014, from a treating physician for an in camera review[1] by the undersigned and opposing counsel. The content was sufficiently more detailed than any prior submissions. The medical details provided after the **ORDER** was issued were medically sufficient to excuse petitioner from working. Therefore the parties settled their differences after the **ORDER** denying motions of summary decision was issued. The stipulation of settlement provides that the aforementioned **ORDER** will become an Initial Decision, reviewable by the Commissioner of Education, because it might contain policy considerations that fall within the Commissioner's expertise. The parties agreed to waive filing exceptions. The remaining contested issues between the parties were resolved amicability and confidentially, due to personal medical concerns and related confidentially requirements.

STATEMENT OF MATERIAL FACTS

1. Petitioner is a ten-month employee with the Upper Deerfield Township School District (Upper Deerfield or Board). Ten-month employees are covered under a bargaining agreement, dated December 7, 2011 (July 1, 2011 to June 30, 2014) Respondent's Brief - Exhibit G. The Board employed petitioner for a total of thirty-eight years.

2. On or about July 22, 2013, Upper Deerfield received a note with written by petitioner's physician Tracy DeBiaso, MD. The letter states as follows:

[1] The medical report dated November 17, 2014, was returned petitioner's attorney to hold as a custodian of the record during the appeal process.

> To whom it may concern:
>
> Jean Laning is under my care, and will not be able to return to work on September 3, 2013. She will need to remain out of work until further notice.
>
> Thanking you in advance for the consideration given to my patient in this matter.
> Respondent's Brief - Exhibit A.

2. On August 12, 2013 the Superintendent of Upper Deerfield wrote a letter to petitioner stating her leave of absence would be granted, contingent upon the following:

> a. You schedule an appointment with our school physician, as a follow-up to certify your condition and treatment. This appointment should be scheduled by August 31, 2013. Dr. Kim is located at 10 Magnolia Avenue, Bridgeton, NJ 856.451.4140.
>
> b. You provide our school physician, as well as our payroll and benefits clerk the specifics of your condition and treatment as the notice from Dr. DeBiaso indicates you are under her care. There is no condition of treatment and it is necessary, given the scope of magnitude of your duties, and the district needs to understand that, based on the conditions and treatment, that the situation is not debilitating to affect performance and/or if specific accommodations are necessary.
>
> c. Any recommendations from our school physician be adhered to, including deeming being fit for work.
> Respondent's Brief - Exhibit B.

3. Petitioner did not challenge the Superintendent's letter or ask for a hearing before the Board.

4. On August 23, 2013, petitioner's leave of absence request was approved by the Board.

5. On September 23, 2013, the Board voted to rescind the leave absence because petitioner did not fulfill the conditions contained in the Superintendent's August 12,

2013, letter including scheduling an appointment with the school doctor by August 31, 2013, or producing documentation detailing the specific nature of her alleged disability.

6. Petitioner retained the services of Ned P. Rogovoy, Esquire. On September 30, 2013, Mr. Rogovoy's advised, in part, as follows:

> Jean Laning will be calling out sick in the short term if she does not have a long term leave of absence and if necessary, we will provide another doctor's note.
>
> ...should her pay stop then we will have no choice but to go to the commissioner...
> Respondent's Brief - Exhibit C.

7. On September 30, 2013, petitioner forwarded a letter to the Superintendent advising that she would be retiring effective December 31, 2013. Respondent's Brief - Exhibit D.

8. On October 3, 2013, Board Counsel submitted a letter to Mr. Rogovoy, Esq. clarifying the Board's obligation to pay sick time through the retirement date. The letter further stated the Board would not allow petitioner to use sick time through her retirement date. The letter states, in part:

> The School Board stands by its decision to revoke Ms. Laning's leave of absence and the process in which it proceeded. The School Board was well within its rights to require additional documentation from Ms. Laning's personal physician and for her to undergo an evaluation by the school physician. Such information is required for the Board to make an informed decision regarding Ms. Laning's request. Ms. Laning's failure to comply with the Board's request is just grounds to deny payment of sick leave benefits.
> Respondent's Brief - Exhibit E.

9. On October 18, 2013, a second letter from Dr. DeBiaso was submitted to the Board. This letter failed to give a specific diagnosis, prognosis or description of petitioner's disability. That note states as follows:

> To whom it may concern:

> Jean Laning is under my care for multiple medical conditions, for this reason she will need to remain out of work until December 31, 2013. For any question or concerns please feel free to contact us.
>
> Thanking you in advance for the consideration given to my patient in this matter.
>
> Sincerely,
> Tracy Debiaso, MD
> Respondent's Brief - Exhibit F.

10. The Board supplied, and petitioner's counsel accepted, a Rice Notice notifying petitioner that her entitlement to a leave of absence would be discussed at its October 22, 2014 meeting (Petition ¶ 8). Petitioner did not appear. The Board again voted to rescind petitioner's leave of absence and voted not to pay sick days.

11. Petitioner was/is a member of the Board of Education in a neighboring district. Evidence supplied to Upper Deerfield indicates petitioner attended scheduled meetings of that Board, in her capacity as a board member, during July, August and September 2013, confirming that she was (apparently) not seriously disabled or ill.

12. The Board issued checks to petitioner every two weeks in the gross amount of $4071.45 (net $2349.08). Her last check or pay period was October 1, 2013, through October 15, 2013.

13. The Board contends that petitioner had, through inadvertence, continued to be paid through October 15, 2013. She has not been paid since this date.

14. Petitioner seeks payment of her salary from October 15, 2013, to November 30, 2013, by drawing down from her accumulated sick time of 121 days.

15. Petitioner officially retired on December 1, 2013. Petitioner avers that her sick time should be allocated as fifty-nine paid sick says from September 3, 2013, to November 30, 2013, leaving a balance of sixty-two accumulated unused sick days.

CONCLUSIONS

Sick leave with full pay for a minimum of ten school days per year is provided by statute for all persons regularly employed by a board of education. N.J.S.A. 18A:30-2 and -3. This includes accumulated sick time. Petitioner's bargaining agreement contains similar provisions. Sick leave is defined as absence from work for "personal disability due to illness or injury" or exclusion on account of a contagious disease. N.J.S.A. 18A:30-1. A board of education may require a physician's certificate to be filed with the secretary of the board of education prior to or in connection with approving a request for sick leave N.J.S.A. 18A:30-4.

Calling out sick when a staff member is not sick, is an abuse of sick time that is subject to discipline. State Board of Examiners v. Larry Schumacher, OAL Dkt. No. EDE 07396-03 (Decided 19, 2005); Adopted Comm'r of Ed., (October 13, 2005); In the Matter of the Tenure Hearing of Marcus Miller, School District of the City of Trenton, OAL Dkt. No. EDU 8409-86 (March 6, 1987), adopted, Comm'r. of Ed. (March 31, 1987). Absenteeism impacts morale as well as management's proper and efficient allocation of publically funded resources. Therefore management has an obligation to assure its staff, and the public, that sick time is not abused.

The process of requesting and verifying sick time requests was addressed, in part, in Hynes v. Board of Education, 190 N.J. Super. 36, (App. Div. 1983). Hynes was an expecting mother and tenured teacher that applied for paid sick leave-four weeks before the expected birth and four weeks following the actual date of birth, of her child. Her request was supported by a doctor's certificate.

The local board denied Hynes' request for paid sick leave because she "did not provide sufficient evidence of disability." The superintendent advised Hynes he would reconsider her request if she submitted to an examination by the school doctor. The superintendent indicated that sick leave could be granted if her doctor certified (1) the actual date when the claimed disability or illness started, (2) the nature of the illness or disability, (3) whether such illness or disability prevented the performance of duties as a

teacher during the time in question, (4) the treatment prescribed, and (5) the exact date of termination of such illness or disability. Hynes did not supply the requested certifications or submit to an examination by the school physician.

The Hynes court observed, "the statute does not say what the physician's certificate must contains if one is required." Id. at 41. The local board nevertheless demanded a certificate specifying the nature of the disability, notwithstanding her pregnancy. Pregnancy alone was not considered a disability or illness sufficient to be excused for the length time requested by petitioner, in the opinion of the local board.

The State Board recognized a presumption of disability, if the staff member supplied a physician's certification. The State Board reasoned that since Hynes was pregnant with a looming delivery date, and her physician certified as to her inability to work, she must be deemed presumptively disabled. The import from Hynes is that when a staff member supplies a doctor's certificate, they are presumptively disabled. The burden shifts to the Board to overcome the presumption. If the presumption is overcome, paid sick leave may be denied.

In the case at hand, petitioner seeks sick leave pay for the period from October 15, 2013, to November 30, 2013, based upon her claim that she was "disability due to illness or injury." The Board must overcome the presumption that petitioner was personal disability due to "illness or injury" by presenting its own proofs. If the Board is successful, the board may deny petitioner's request for sick leave and compensation during the relevant period. The Board may also file disciplinary or tenure charges for abuse of sick time. The Board may present its own medical evidence during a hearing and also seek discovery[2] from petitioner or her medical provider. Any medical

[2] When a client or litigant places their medical history at issue, it has been held that the patient/physician privilege, to a certain extent, is waived. Stempler v. Speidell, 100 N.J. 368 (1985); In re: PPA Litigation, 203 WL 22203734 (N.J. Super., Law Div. 2003). Moreover, private health information may be disclosed in conjunction with judicial or administrative hearings. 45 C.F.R. §164.512. The information may be requested through the discovery process, including use of interviews or subpoenas. The client must be notified of the request and be given an opportunity to respond. If information is disclosed, it still must be afforded appropriate protections. This includes making the PHI non-identifiable, redacting pertinent information, issuing a protective order, reviewing the documents in camera, or sealing the record. Accordingly, the Act provides both the litigants and the Court various options to receive useful and valuable information, while also protecting the litigants from unauthorized or inappropriate disclosure of their medical history.

information provided during this process may be submitted with a confidentially order or agreement.

The bargaining agreement provides that unused sick time is accumulated year to year (Bargaining Agreement - Article Fourteen; 14:1). See also, N.J.S.A. 18A:30-1 et seq. The daily rate of pay for sick days is more than the rate of pay for accumulated sick time pursuant to the bargaining agreement (Article Fourteen; 14:3). Unused sick days are paid to the employees upon retirement at the contractual rate negotiated by the bargaining unit. Manufactured or fictitious sick days may not be used in lieu of working. Sick time may not be "zeroed out[3]" prior to retirement (Article Fourteen; 14:3 – 14.7). Stated differently, staff members are paid more if they get paid for their sick time while they are still employed then if they collect their sick time as part of a retirement package, in accord with their bargaining agreement. The process of calling out sick to "zero out" accumulated sick time as part of a retirement strategy circumvents the bargaining agreement and puts more money in the employee's pocket. Indeed, if proven, it is a subterfuge of the educational statutes and bargaining process by utilizing fictitious sick leave for the purpose of enhanced compensation.

I **CONCLUDE** that the Board has a statutory right and a managerial obligation as a steward of a tax funded educational operation, to inquiry into sick leave requests it reasonably believes it is not supported by competent medical proofs or which might be an abuse of its sick-time policy. N.J.S.A. 18A:30-4.

Petitioner asserts that tenure procedures are required to invoke a pay stoppage related to sick time, citing N.J.S.A. 18A:6-10. I disagree. The purpose of the tenure laws is "to aid in the establishment of a competent and efficient school system by affording teaching-staff members a measure of security in the ranks they hold after years of service." Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 528-29 (App. Div. 1999). The tenure law prohibits the dismissal or reduction in compensation of a tenured staff member unless it results from inefficiency, incapacity, unbecoming

[3] "Zeroed out" suggests that a staff member will call out sick for an extended period to use up their accumulated sick time and be paid the higher rate rather than the lower reimbursement rate paid when they retire. This technique circumvents the terms of the bargaining agreement.

conduct, or other just cause, and then only after a hearing held pursuant to the tenure statute. But sick time falls under a separate statute. The board does not have to approve sick time beyond that which is annually provided for by law or bargaining agreement. N.J.S.A. 18A:30-4. If sick leave is denied by the board, no pay will be issued, pending appeal or grievance. The statutory structure indicates that a denial of paid sick time is not the legal equivalent of a tenure charge as it is not a dismissal or reduction in compensation. Tenure charges generally involve disciplinary charges, adjudications and/or penalties fitting the conduct. Tenured staff members are protected against frivolous or political retribution under the tenure laws. Management of sick leave is a ministerial responsibility incumbent upon most employers. It would be illogical to require the filing of tenure charges every time management denies a staff member paid sick leave.

STANDARD FOR SUMMARY DECISION

The OAL rules governing motions for summary decision are found at N.J.A.C. 1:1-12.5. These provisions mirror the language of R. 4:46-2 and the Supreme Court's decision in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant summary decision should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. I **CONCLUDE** that the cross-motions for summary decision must be **DENIED** because there are genuine issues of material facts in dispute.

I **CONCLUDE** that the remaining issues transmitted to the OAL have been resolved amicable by the parties, that the settlement was freely and voluntarily entered into with the assistance of counsel, and that all contested issue before the OAL are concluded.

ORDER

Based upon the foregoing, it is **ORDERED** that the cross-motions are hereby **DENIED**. Thereafter the parties agreed amicably resolve the remaining issues in this matter and agreed to submit the content or substantive rulings in the former **ORDER** to the Commissioner of Education for review, without filing exceptions.

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

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

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

December 11, 2014
DATE

W. TODD MILLER, ALJ

Date Received at Agency: December 11, 2014

Date Mailed to Parties:

/jb

DOCUMENTS CONSIDERED

For Petitioner:

Petition

Motion for Summary Decision, dated 4/23/14

Reply to Respondent's Opposition, dated 6/3/14

For Respondent:

Answer

Cross-Motion for Summary Decision, dated 5/22/14

Both Parties:

Settlement Agreement dated November 25, 2014

92-115

DIANE MALZONE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner filed an appeal on April 2, 2012 of the respondent's actions regarding her leave time, demanding that certain days of absence charged to her sick leave be re-characterized as days of absence due to injury on the job, and that her sick leave account be adjusted accordingly. The matter was transmitted to the OAL as a contested case, and a hearing was scheduled for July 31, 2014. On the day of the hearing, petitioner contends that the parties reached a settlement agreement, the terms of which were placed on the record. Respondent advised that on October 9, 2014, petitioner's counsel presented a proposed written settlement agreement, which was to be executed bilaterally, first by petitioner and then by respondent.

In December 2012, when no written settlement agreement had been submitted to the OAL, the ALJ issued an Order to Show Cause why the matter should not be dismissed for failure to prosecute. A hearing on the order to show cause was held on December 29, 2014, at which time petitioner's counsel was still unable to produce a signed settlement agreement and could provide no satisfactory explanation for same. Respondent subsequently requested dismissal of the matter. Accordingly, the ALJ ordered the instant matter dismissed with prejudice for failure to prosecute.

The Commissioner concurred with the ALJ that the matter is appropriately dismissed for failure to prosecute, and adopted the Initial Decision as the final decision in this matter.

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

March 13, 2015

Commissioner. Second, if an oral or written settlement contract exists, Superior Court is the forum in which petitioner may seek enforcement of same.

Accordingly, the Initial Decision of the OAL is adopted and the petition is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision 3/13/15

Date of Mailing 3/16/15

*This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO.EDU 05095-12
AGENCY DKT. NO. 85-4/12

DIANE MALZONE,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,
Respondent.

Nancy I. Oxfeld, Esq., for petitioner (Oxfeld Cohen, attorneys)

Richard J. Turano, Esq., for respondent (Buglione, Hutton & DeYoe, attorneys)

Record Closed: January 22, 2015 Decided: January 28, 2015

BEFORE **JAMES A. GERAGHTY**, ALJ:

The undersigned issued an Order to Show Cause, returnable December 29, 2014 at 10:00 a.m., why the matter should not be dismissed for failure to prosecute.

WHEREAS the parties appeared but petitioner had not submitted the settlement agreement formerly concluded on or about July 31, 2014, and, as of the return date of the show cause order, no such settlement agreement had been submitted to the OAL, and

WHEREAS petitioner could not articulate a reason why the settlement agreement has not been executed and submitted to the OAL, and respondent by letter dated January 22, 2015, requested dismissal of the pending matter, now, therefore, it is

ORDERED, that the instant matter is **DISMISSED WITH PREJUDICE** for failure to prosecute.

So **ORDERED**.

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

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

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

1/28/15
DATE

James A. Geraghty
JAMES A. GERAGHTY, ALJ

Date Received at Agency:

1/28/15
Laura Dardes
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: JAN 30 2015
jb

RON RODA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* challenge of respondent's determination to deny his application for teacher certification. Emergent relief was denied following a hearing on July 28, 2014, and the matter was subsequently returned to the OAL for a hearing on the merits. A telephone prehearing conference was scheduled for February 3, 2015, at which petitioner failed to appear. The matter was then returned to the Department of Education for disposition.

Upon review, the Commissioner found that: the record reflects that petitioner did not appear at the scheduled hearing, but did submit his explanation for his non-appearance in writing on February 5, 2015, *i.e.*, that he had been unavailable due to his work schedule; accordingly, if the ALJ – upon review of petitioner's explanation for his non-appearance – concluded that petitioner lacks good cause for his failure to appear and declined to reschedule the matter, an initial decision explaining the basis for that conclusion is required under *N.J.A.C.* 1:1-14.4(c). For this reason, the Commissioner determined that the matter must be remanded to the OAL pursuant to *N.J.A.C.* 1:1-18.7(a), for further action in accordance with *N.J.A.C.* 1:1-14.4(c).

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

Issued 3/16/15

OAL DKT. NO. EDU 9228-14
AGENCY DKT. NO. 102-4/14

RON RODA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

This matter was returned to the Department for disposition due to petitioner's failure to appear at a February 3, 2015 telephone prehearing conference. Pursuant to *N.J.A.C.* 1:1-18.7(a), the Commissioner remands the matter to the Office of Administrative Law (OAL) for further action in accordance with *N.J.A.C.* 1:1-14.4(c), for the reasons stated herein.

Within the time period specified in the Notice of Return-Failure to Appear issued by the Office of Administrative Law on February 10, 2015, petitioner sent the Department a letter regarding his failure to appear and referenced therein a fax sent to Administrative Law Judge (ALJ) Ascione's chambers that "gave reason" for same. Upon careful review of the record, it is apparent that petitioner called the ALJ's chambers on February 4, 2015 (one day after the scheduled telephone prehearing conference) regarding his failure to appear and explained that he had been working. A staff member then informed petitioner that he should submit his explanation in writing. In response, petitioner indicated that he couldn't fax a letter to chambers on that date because he was working, but that he would do so the following day. The record contains a fax from petitioner – received on February 5, 2015 – indicating he was unavailable due to his work schedule.

N.J.A.C. 1:1-14.4 governs the actions to be taken upon a party's failure to appear at any OAL proceeding. When a party fails to appear, the ALJ shall hold the matter for one day before taking any action. *N.J.A.C.* 1:1-14.4(a). If the ALJ receives an explanation from the non-appearing party within one day and concludes that the party lacked good cause for failing to appear, "the judge may refuse to reschedule the matter and shall issue an initial decision explaining the basis for that conclusion, or may reschedule the matter" and order sanctions at his discretion. *N.J.A.C.* 1:1-14.4(c)(2).

Here, the record reflects that petitioner was properly notified of the telephone prehearing conference scheduled for February 3, 2015, but failed to appear. The next day, petitioner contacted the ALJ's chambers by telephone to provide an explanation and was directed to submit his reasons in writing; he complied with that request. If – upon review of the explanation provided – the ALJ concluded petitioner lacked good cause for his failure to appear and declined to reschedule the matter, then an initial decision explaining the basis for that conclusion is required under *N.J.A.C.* 1:1-14.4(c)(2). Because an initial decision was not issued here, a remand is warranted.

Consequently, this matter is remanded to the Office of Administrative Law for further action in accordance with *N.J.A.C.* 1:1-14.4(c).

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/16/15

Date of Mailing: 3/16/15

94-15SEC

94-15

IN THE MATTER OF ARMENIO MONTEIRO, JR.,	:	
a/k/a TONY MONTEIRO,	:	COMMISSIONER OF EDUCATION
ELIZABETH BOARD OF EDUCATION,	:	DECISION
UNION COUNTY	:	

SYNOPSIS

The School Ethics Commission (Commission) found that respondent – a member of the Elizabeth Board of Education (Board) – violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act when he voted to reappoint Mendonca and Partners, LLC, as auditing firm for the Board. Respondent was engaged in a separate business partnership known as 147 Westfield Avenue, LLC, with Helder Mendonca – a principal member of the auditing firm – at the time he voted to reappoint Mendonca and Partners as auditor for the Board. The Commission recommended the penalty of reprimand in this matter.

Upon review, the Commissioner concurred that reprimand is the appropriate penalty for the violation found. Accordingly, the Commissioner directed that respondent be reprimanded as a school official found to have violated the School Ethics Act.

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

Issued March 16, 2015

AGENCY DKT. NO. 8-7/14A

SEC DKT. NO. C26-13

IN THE MATTER OF ARMENIO MONTEIRO, JR.,	:	
a/k/a TONY MONTEIRO,	:	COMMISSIONER OF EDUCATION
ELIZABETH BOARD OF EDUCATION,	:	DECISION
UNION COUNTY	:	

The record of this matter and the decision of the School Ethics Commission (Commission) have been reviewed. This matter involves an appeal of the Commission's June 25, 2014 decision finding respondent-Appellant Armenio Monteiro, Jr. (respondent) violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act by voting to reappoint Mendonca and Partners, LLC, as auditing firm for the Elizabeth Board of Education (Board) while he was engaged in a separate business partnership known as 147 Westfield Avenue, LLC, with Helder Mendonca, a principal member of the auditing firm.[1] The Commission recommended a penalty of reprimand for the violation. Respondent appealed the Commission's finding of a violation pursuant to *N.J.A.C.* 6A:4-1.3(c). Complainants Sammie Muhammad, Jineen Holmes, Amanda Leon and Brunilda Cruz (complainants) filed opposition, and respondent replied thereafter.[2]

In his appeal to the Commissioner, respondent argues that: the finding of a violation is not supported by the factual record; the Commission acted arbitrarily and capriciously; the

[1] The Commission's written decision summarily disposed of the matter pursuant to *N.J.A.C.* 6A:28-10.7(c)1 as the respondent admitted the material facts alleged in the complaint.

[2] Along with their opposition, complainants submitted a motion to strike respondent's preliminary statement from his appeal brief. Thereafter, respondent filed opposition. The Commissioner notes that *N.J.A.C.* 6A:4-2.8, which sets forth the requirements for formal briefs, does not preclude the use of preliminary statements.

Commission improperly interpreted *N.J.S.A.* 18A:12-24(c); and the penalty of reprimand should be voided. Because he held only a 10% interest in 147 Westfield Avenue, LLC[3], respondent contends that he did not have a direct or indirect financial involvement that would reasonably be expected to impair his objectivity or independence of judgment. In support thereof, respondent emphasizes that the Act requires financial interests greater than 10% to be reported on board member annual financial disclosure statements.[4] Since his interest was not a "disclosable interest," respondent claims that it cannot reasonably be expected to impair his objectivity or independence of judgment and urges the Commissioner to interpret *N.J.S.A.* 18A:12-24(c) "consistently with the financial reporting provisions of *N.J.S.A.* 18A:12-26."[5] (Respondent's brief at 9)

Complainants contend that the Commission's finding of a violation should be upheld and that the penalty of reprimand is appropriate. Since respondent admits he voted to reappoint Mendonca and Partners, LLC, while he and Helder Mendonca were business partners in 147 Westfield Avenue, LLC, complainants argue that the Commission's finding of a violation is not arbitrary, capricious or unreasonable. Also, citing School Ethics Commission, *Advisory Opinion A17-04*, dated July 26, 2004, complainants stress that the size of a financial interest is irrelevant when determining if there is "direct or indirect financial involvement" under *N.J.S.A.* 18A:12-24(c).

Upon a comprehensive review of the record, the Commissioner finds that the Commission's decision as to the violation of *N.J.S.A.* 18A:12-24(c) is supported by sufficient

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[3] 147 Westfield Avenue, LLC was sold on May 30, 2013. (Respondent's brief at 4)

[4] Under *N.J.S.A.* 18A:12-23, an "interest" is defined as the ownership or control of more than 10% of the profits, assets, or stock of a business, excluding the control of assets in a labor union. *N.J.S.A.* 18A:12-26a(4) requires interests to be disclosed annually.

[5] Respondent's reply, in large part, reiterates the arguments previously set forth in his appeal brief and before the Commission.

credible evidence and the respondent has not established that the decision was arbitrary, capricious or contrary to law.[6] *N.J.A.C.* 6A:4-4.1(a). The undisputed factual record supports the Commission's determination that respondent violated *N.J.S.A.* 18A:12-24(c) by voting to reappoint Mendonca and Partners, LLC, as auditing firm for the Board while engaged in a separate business partnership with Helder Mendonca, a principal member of the auditing firm. The size of respondent's interest in 147 Westfield Avenue, LLC is irrelevant. A small financial interest – or no financial interest at all – can nevertheless constitute direct or indirect financial involvement that might reasonably be expected to impair a Board member's objectivity or independence of judgment. *See Advisory Opinion A17-04, supra,* (employee lacked a financial interest in the firm, but nevertheless had an indirect financial involvement). Regardless of the exact size of respondent's interest, a reasonable member of the public might expect respondent's financial involvement with Helder Mendonca in 147 Westfield Avenue, LLC, to impair his objectivity or independence of judgment when he voted to reappoint Mendonca and Partners, LLC.

Although respondent asserts that *N.J.S.A.* 18A:12-24(c) should be interpreted to preclude interests not greater than 10% from constituting direct or indirect financial involvement, his argument is unpersuasive. The proper interpretation of a statute begins with its plain language. *See GE Solid State, Inc. v. Director, Division of Taxation*, 132 *N.J.* 298, 307 (1993). Here, the Legislature's use of the word "involvement" cannot be ignored. "Involvement" neither presupposes nor requires a financial "interest." *See Advisory Opinion A17-04, supra.* On the contrary, a financial "involvement" can encompass a broad scope of business affiliations and is distinguishable from an "interest" under the Act. The Commission's interpretation of *N.J.S.A.* 18A-12:24(c) supports a result consistent with the overall statutory scheme requiring "[B]oard members...[to] avoid conduct which

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[6] The Commission also found that the respondent did not violate *N.J.S.A.* 18A:12-25, 12-26 and 12-24(a) and (b).

is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated." *N.J.S.A.* 18A:12-22a; *School Ethics Commission v. Michael Kilmurray, Lacey Township Board of Education, Ocean County*, SEC Decision No. C12-94, decided February 24, 1998, at 3. ("The Legislature's findings and declarations reinforce the notion that the purpose of the Act is to develop standards that avoid not just unethical conduct, but also the perception thereof.").

As to the penalty imposed, the Commissioner also accepts the Commission's recommendation that a reprimand is the appropriate penalty in this matter – for the reasons expressed in its decision. Therefore, the Commission's recommended penalty will not be disturbed.

Accordingly, IT IS ORDERED that Armenio Monteiro, Jr. is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 3/16/15

Date of Mailing: 3/16/15

[7] This decision may be appealed to the Superior Court, Appellate Division, pursuant to P.L. 2008, c. 36.

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
ARMENIO MONTEIRO, JR. a/k/a/ TONY MONTEIRO, *ELIZABETH BOARD OF EDUCATION, UNION COUNTY*	:	**Docket No. C26-13**
	:	**DECISION SUMMARY DISPOSITION**

PROCEDURAL HISTORY

This matter arises from a complaint filed on May 28, 2013 by Sammie Muhammad, Jineen Holmes, Amanda Leon, and Brunilda Cruz, alleging that Armenio Monteiro, Jr., a/k/a/ Tony Monteiro, President of the Elizabeth Board of Education ("Board"), violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. The complaint specifically alleges that the respondent violated N.J.S.A. 18A:12-25 & 26 by failing to file and/or failed to disclose the requisite information on the annual statements as well as violated N.J.S.A. 18A:12-24(a), (b) and (c) of the Act. By letter dated June 11, 2013, the Commission notified the respondent that charges were filed against him and advised him that he had 20 days to answer the complaint. On July 3, 2013, respondent's attorney requested and was granted a brief extension of time to file a responsive pleading. Respondent filed a Motion to Dismiss in lieu of an Answer on August 7, 2013, alleging that the complaint was frivolous. Complainants filed a reply thereto on September 9, 2013, pursuant to N.J.A.C. 6A:28-8.2.

By letter dated September 10, 2013, the complainants and the respondent were notified that this matter would be scheduled for discussion by the Commission at its meeting on September 24, 2013 in order to make a determination regarding the respondent's Motion to Dismiss and allegation of frivolousness. At its meeting on September 24, 2013, the Commission voted to deny the respondent's Motion to Dismiss in its entirety and found the complaint not frivolous. The Commission advised the parties that the matter would be scheduled for a probable cause determination at a later date and directed the respondent to file an Answer on all counts of the complaint within 20 days of receipt of this Decision. On November 22, 2014, the respondent filed his Answer.

By letter of February 7, 2014, the parties were advised that the Commission would review the matter at its next regular meeting on February 18, 2014. Because of State closings due to inclement weather, the matter came before the Commission at its meeting on March 6, 2014. The Commission found probable cause to credit the allegation that the respondent may have violated N.J.S.A. 18A:12-24(c) in Count 3, but found no probable cause as to all other allegations; and voted to decide the matter by summary decision pursuant to N.J.A.C 6:28-10.7(c)1 since there was no genuine issue of material fact that would require an evidentiary hearing. The respondent was granted 20 days to submit a statement why he should not be found in violation of the School Ethics Act. After a short extension, the respondent filed his statement on April 28, 2014 and served a copy on the complainant, pursuant to N.J.A.C. 6A28-1.7. The parties were notified by letter of May 2, 2014 that the Commission would review the matter on summary disposition at the regular meeting scheduled on May 27, 2014.

At the meeting on May 27, 2014, the Commission reviewed the record and respondent's statement and determined that the respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act and recommended the penalty of reprimand.

SUMMARY OF THE RECORD

The remaining issue before the Commission is limited to the alleged violation of N.J.S.A. 18A:12-24(c) in Count 3 of the complaint when the respondent voted to reappoint Mendonca and Partners LLC (Mendonca) as auditor for the Elizabeth Public School District. The record is clear that the Mendonca firm (formerly Mendonca and Suarez, LLC) has served the District in this capacity since the 1999-2000 school year. The respondent does not dispute his vote although he asserts that it was unintentional.

The complainants contend that the respondent, though not a member of Mendonca, maintained a membership with the auditor and held an interest in a common property named 147 Westfield, LLC in which the respondent owned and operated a restaurant. The complainants aver that the respondent's vote for the Mendonca auditing firm was a clear conflict of interest because Helder Mendonca, a principal in Mendonca and Partners, LLC is the respondent's business partner in the property known as 147 Westfield Avenue, LLC. Moreover, the complainants aver that Helder Mendonca is also a signatory on the Mortgage and Assignment of the property located at 147 Westfield Avenue West. Consequently, respondent's affirmative vote to re-hire Mendonca violated subsection (c) of the Act.

The record shows that the respondent initially served on the Board between December 14, 2006 and November 20, 2008. In September 2012, the respondent was appointed as a member of the Board to fill an unexpired term, and then elected in November 2012 to serve a three-year term, which expires on December 31, 2015. The respondent argues in his statement that there is no factual basis to support this violation since during his terms of service he had no financial interest in Mendonca and no disclosable interest in 147 Westfield Avenue LLC since he did not own a share greater than 10% and did not derive income from the property in excess of $2000.

Moreover, although the respondent historically abstains from voting on resolutions for payment to the company, on the evening of the reorganization, the respondent became overwhelmed with running the meeting for the first time that he inadvertently engaged in the vote for Mendonca. He does not deny that he voted to retain the firm at the reorganization meeting. Finally, the respondent contends that he is not required to abstain from the vote and that his vote was not the critical vote to secure the appointment.

The respondent does not object to the resolution of this matter on a summary basis.

FINDINGS OF FACT

The Commission finds the following to be undisputed facts:

1. Since 1999-2000 school year, Mendonca and Partners, LLC (formerly Mendonca and Suarez, LLC) has served the Elizabeth School District as auditor uninterrupted for the past 15 years.

2. Respondent did not have an interest in Mendonca Partners, LLC.
3. Respondent was engaged in a partnership with Helder Mendonca, a principal in Mendonca and Partners LLC, in an enterprise known as 147 Westfield Avenue, LLC.
4. Helder Mendonca is also a signatory on the Mortgage and Assignment of the property located 147 Westfield Avenue.
5. The respondent first served the Board between December 14, 2006 and November 20, 2008 and was appointed in September 2012 to fill an unexpired term.
6. During all those times, the respondent abstained from voting to reappoint the Mendonca firm and also abstained from voting on payment to the firm for services rendered to the Board.
7. In November 2012, the respondent was elected to the Board to serve a three year term expiring December 31, 2015.
8. The respondent was sworn in on January 3, 2013 and elected to the office of Board President.
9. At the reorganization meeting, the respondent voted to reappoint Mendonca and Partners, LLC as auditor for the District and failed to abstain from the votes.

ANALYSIS

In cases involving the application of N.J.S.A. 18A:12-24(c), the Commission considers the language in N.J.S.A. 18A:12-24(c) which provides:

> c. No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family;

No longer is the focus on an interest greater than 10% or on income derived from a business exceeding $2000. Under subsection (c), these elements are irrelevant. Instead, the gravamen is whether the respondent has taken action in his official capacity in a matter where he, or a member of his immediate family had a direct or indirect financial **involvement** (emphasis added) that might reasonably be expected to impair his objectivity or independence of judgment or whether the school official has a personal involvement that is or creates some benefit to him. As the respondent points out in his statement, the Commission found a violation of N.J.S.A. 18A:12-24(c) where an indirect involvement might reasonably be expected to impair a school official's objectivity or independence of judgment. What "might reasonably be expected" is determined by what a reasonable member of the public would believe. (Statement, p.9) See I/M/O Patricia Haines, Haddonfield Board of Education, Camden County, Docket No. C07-00, (September 27, 2000), Commissioner of Education Decision,

Docket No. 389-00SEC (November 27, 2000) and School Ethics Commission Advisory Opinion, A17-04 (July 26, 2004).

The record establishes that the respondent engaged in a business partnership known as 147 Westfield Avenue, LLC with Heller Mendonca in which the respondent owned and operated a restaurant on that site. Further, the respondent was sufficiently familiar with the Mendonca firm since the respondent first sat on the Board in 2006 as the Mendonca auditing firm served the Board uninterrupted from 1999 to the present. This relationship was of such significance to the respondent that he voluntarily abstained from any votes to reappoint the firm or to pay for its services. The Commission determines that the respondent and Heller Mendonca were directly linked through this partnership. Under Haines, *supra,* because a reasonable member of the public might believe that this conflict borne of a financial involvement whether direct or indirect, might reasonably impair the respondent's objectivity or independence of judgment, the Board member should take no official action to benefit the firm and should recuse himself from all matters involving the firm. Failing to do so creates a justifiable impression among the public that their trust is being violated. SEC v. Michael Kilmurray, Lacey Township Board of Education, Ocean County, C12-94 (February 24, 1998).

Moreover, by taking official action in voting for Mendonca, the respondent has provided an additional financial benefit to the accounting firm where one of the named principals is in a separate partnership with this respondent Board member. Finally it is of no moment that the respondent did not intend to vote for the firm. The Commission has determined that it is the responsibility of a Board member to know the items to be voted on in any given meeting and to recuse himself from any vote in which he has a conflict at the time of the vote. See I/M/O Carmelo Garcia, Hoboken Board of Education, Hudson County, C41-05, October 24, 2006.

DECISION

Based on the foregoing, the Commission determines that the respondent, Armenio Monteiro, violated N.J.S.A. 18A:12-24(c) of the School Ethics Act when he voted to reappoint Mendonca as the auditing firm for the Elizabeth Board of Education when his business partner is a principal in that firm and recommends the penalty of reprimand.

PENALTY

The Commission recommends a penalty of reprimand, as it did in matters where a violation of N.J.S.A. 18A:12-24(c) was found and a comparable violation was endorsed. In recommending the penalty, the Commission notes that a reprimand was the appropriate penalty when it found that a personal involvement might reasonably be expected to impair the respondents' objectivity in voting to reappoint the auditing firm. I/M/O Richard Longo and Frank Sedaghi, Toms River Board of Education, Ocean County, C05-98 and C07-98 (October 26, 1998), Commissioner of Education Decision No 56-99SEC, decided March 4, 1999. The Commission also notes that a reprimand is the proper penalty where a Board member was unaware of the item on the agenda in which she has a conflict and inadvertently votes. I/M/O Sheri Scozzaro, Fairfield Twp. Board of Education, Essex County, C09-97 (November 25, 1997), Commissioner of Education Decision No. 17-98SEC, decided January 21, 1998.

Pursuant to N.J.S.A. 18A:12-29(c), this decision n shall be forwarded to the Commissioner of Education for review of the School Ethics Commission's recommended sanction. Parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of violation may file, within **13 days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4 within **30 days** of the filing date of the decision from which the appeal is taken. The filing date shall be three days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (13 days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender
Chairperson

Mailing Date: June 25, 2014

Resolution Adopting Decision – C26-13

Whereas, the Commission found probable cause to credit the allegation that the respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act; and

Whereas, at its meeting on March 6, 2014, the Commission voted to resolve this matter by summary decision, pursuant to N.J.A.C 6:28-10.7(c)1; and

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, and the respondent's statement; and

Whereas at its meeting on May 27, 2014, the Commission found that the respondent violated N.J.S.A. 18A:12-24(c) of the Act and recommended a penalty of reprimand; and

Whereas, the Commission reviewed the decision recommending a reprimand against Mr. Montiero and finds that the within decision accurately memorializes the Commission's findings of fact and conclusions of law;

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs it staff to notify all parties to this action of its decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that this Resolution
was duly adopted by the School Ethics
Commission at it public meeting on
June 24, 2014.

Joanne M. Restivo
Interim Executive Director
School Ethics Commission

96-15

IN THE MATTER OF THE TENURE HEARING :

OF FLORENCE RUFFIN HARRISON, : COMMISSIONER OF EDUCATION

STATE-OPERATED SCHOOL DISTRICT : DECISION

OF THE CITY OF NEWARK, ESSEX COUNTY. :

SYNOPSIS

Petitioning Board filed tenure charges of incapacity against respondent, a tenured teacher, and sought to terminate her employment with the district. Neither respondent nor any attorney acting on her behalf filed an answer to the petition following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.4(h), the allegations – which respondent has chosen not to deny – may be deemed admitted and are sufficient to warrant termination of the respondent from her tenured position. Accordingly, the Commissioner granted summary decision to the petitioner, dismissed the respondent from her tenured position in petitioner's school district, and forwarded a copy of this decision to the State Board of Examiners for review and action as that body deems appropriate.

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

ISSUED 3/13/15

AGENCY DKT NO. 7-1/15

IN THE MATTER OF THE TENURE HEARING	:	
OF FLORENCE RUFFIN HARRISON,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX COUNTY.	:	

For the Petitioner, Rita F. Barone, Esq.
No appearance by or on behalf of Respondent, Florence Ruffin Harrison

This matter was opened before the Commissioner of Education on January 12, 2015, through tenure charges of incapacity certified by Cami Anderson, State District Superintendent of the State-Operated School District of the City of Newark, together with supporting evidence against Florence Ruffin Harrison, a tenured teacher in the District's employ. The District provided respondent with written notice of such certification at the respondent's last known address, via Federal Express, sent on or about January 9, 2015. The District also served a copy of the tenure charges on the respondent's union representative.

On January 13, 2015, the Commissioner directed the respondent – via both certified and regular mail – to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the date such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*" and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. No reply to the tenure charges was received from or on behalf of respondent.

The certified tenure charges and statement of supporting evidence filed by the petitioner in this matter indicate that during the 2013-2014 school year, the respondent was scheduled for an Independent Medical Examination (IME) because the respondent's behavior called into question her ability to perform her duties as a teacher. The IME recommended a thorough neurological workup due to the fast deterioration of the respondent's cognitive ability and her incontinence. According to the IME, the respondent was not fit to return to work. As a result, the District placed the respondent on paid administrtative leave effective April 30, 2014. The District informed the respondent that, as a condition of her leave, she was required to keep the District informed of her status and efforts to return to a position in the District.

By letter dated July 21, 2014, the District advised the respondent that it had not received any report from her physician nor any communication from the respondent advising the District of her medical status. This letter also advised the respondent that she had been granted administrative leave in order to secure medical attention, and that she had an obligation to keep the District informed of her status. By letter dated July 25, 2014, the District again reiterated the conditions under which leave had been granted, and informed the respondent that disciplinary action would be taken if she did not provide the District with an update on her medical status. To date, the District has not received a response from the respondent.

Deeming the allegations to be admitted and noting that respondent has failed to respond to the charges certified against her, the Commissioner finds that the District's charge of incapacity against the respondent has been proven and that it warrants respondent's dismissal. The respondent's IME and her failure to abide by the terms under which she was granted administrative leave demonstrate that she is incapable of fulfilling the demands of her position as a teacher in the District. Accordingly, summary decision is hereby granted to the petitioner, and

the respondent is dismissed from her tenured position with the District. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/13/15

Date of Mailing: 3/17/15

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

#96-15SEC

96-15

JOHN J. HOFFMAN
Acting Attorney General of New Jersey
Attorney for New Jersey Department of Education,
School Ethics Commission
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, New Jersey 08625-0112

By: Caroline Jones
Deputy Attorney General
(609)633-8397
Caroline.Jones@dol.lps.state.nj.us

	STATE OF NEW JERSEY
	OFFICE OF ADMINISTRATIVE LAW
IN THE MATTER OF	
MATTHEW CONLON, WEST	OAL DOCKET NO. EEC 11175-2013N
MILFORD BOARD OF EDUCATION,	AGENCY DOCKET NO. C46-12
PASSAIC COUNTY	
	CONSENT ORDER

WHEREAS, Petitioner, New Jersey Department of Education, School Ethics Commission ("SEC"), and Respondent, Matthew Conlon("Respondent"), have mutually agreed to settle the above-captioned matter, with JOHN J. HOFFMAN, Acting Attorney General of New Jersey, by Caroline Jones, Deputy Attorney General, appearing on behalf of the SEC, and Drew Murray, Esq., appearing on behalf of Respondent; and

WHEREAS, this matter arose from the SEC's decision of June 26, 2013, finding probable cause to credit the allegations that Respondent violated N.J.S.A. 18A:12-24 (c); and

WHEREAS, the settlement of this matter shall not constitute precedent or be considered an admission of guilt in other pending or future litigation:

NOW, THEREFORE, the parties hereto agree to settle the above-captioned matter upon the following terms:

1. Respondent acknowledges that his actions constitute a violation of N.J.S.A. 18A:12-24 (c).
2. The parties agree that the SEC will recommend that the Commissioner impose the penalty of a reprimand.
3. The Commissioner agrees that he will adopt the SEC's recommendation and impose the penalty of a reprimand for the conduct described in the attached affidavit.
4. By accepting the penalty of a reprimand, Respondent agrees to waive any and all hearings to which he is entitled pursuant to N.J.S.A. 18A:12-29 and N.J.A.C. 6A:28-10.7, and Respondent further agrees that he will not oppose the reprimand.
5. The parties agree that this Consent Order fully resolves all issues between them arising from the SEC's June 26, 2013, Probable Cause Notice.

Date: 12-17-14

Drew Murray, Esq.
Attorney for Respondent

Date: 3/9/15

Caroline Jones
Deputy Attorney General
Attorney for Petitioner

Respondent, Matthew Conlon, is hereby reprimanded for the conduct described in the attached affidavit:

Date: 3-12-15

David C. Hespe
Commissioner of Education
As to penalty only.

AFFIDAVIT OF MATTHEW CONLON

I Matthew Conlon being duly sworn according to law upon his oath deposes and says;

1. I was elected to the Board of Education for the Township of West Milford at age 19 in April 2011.

2. My mother, Janet Conlon, has been and continues to be an employee of the school district.

3. My mother's status as a family member and an employee of the district precludes me from certain functions.

4. For example, I cannot vote or participate on the superintendent's renewal, evaluation, goals, bonuses, or any other contractual terms as the superintendent is considered to be my mother's superior.

5. Soon after I was elected I was told by the Board Attorney that I cannot participate in a search for a new superintendent until all internal candidates were removed from consideration.

6. I was also informed that I could vote on whether or not to hire a specific outside candidate as long as all internal candidates were no longer being considered.

7. On or about May 15, 2012 the Board listed agenda items XII part 1 and XII part 2. Item number 1 was to hire a new superintendent and item number 2 was to negotiate contractual terms.

8. Prior to the meeting I received notice from the School Board Association attorney and the New Jersey School Board Association that I could vote on item number 1, to hire the superintendent, but that I must abstain on item 2, confirming the negotiated contractual terms. Unfortunately, item number 1 also listed the superintendent's salary which is considered a contractual term.

9. I never intended to vote on the contractual term as evidenced by my abstaining on item number 2.

10. I acknowledge that my vote on item number 1 violated the New Jersey School

Ethics Act, N.J.S.A. 18A:24-12(c).

11. Moreover, and more importantly in the interest of justice and to save the taxpayers of West Milford the time, effort and money to prosecute this matter I will accept the penalty of a reprimand. This Affidavit will be part of the record. I intend to explain the conclusion at a future Board meeting, if the Board does not object.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

MATTHEW CONLON

DATED:

Sworn to before me this 12
day of December, 2014

Notary Public

SANDRA LEA BRIGHTLY
Notary Public
State of New Jersey
My Commission Expires Sept. 19, 2016

RECEIVED BY
CONTROVERSIES & DISPUTES
2015 MAR 11 A 10:52

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO Box 112
TRENTON, NJ 08625-0

JOHN J. HOFFMAN
Acting Attorney General

JEFFREY S. JACOBSON
Director

March 9, 2015

VIA Inter-Office Mail
M. Kathleen Duncan, Director
N.J. Department of Education
Bureau of Controversies and Disputes
P.O. Box 500
Trenton, NJ 08625-0500

Re: In The matter of Matthew Conlon, West Milford Board of Education, Passaic County
SEC Agency Dkt. No. C46-12

Dear Director Duncan:

At its meeting, the School Ethics Commission voted to adopt a consent order in the above-referenced matter. The signed consent order is enclosed for the Commissioner's review and signature.

Sincerely yours,

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: Caroline Jones
Caroline Jones
Deputy Attorney General

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
MEMORANDUM

PRIVILEGED ATTORNEY CLIENT CORRESPONDENCE

DATE: October 21, 2014

FROM: Caroline Jones, Deputy Attorney General

TO: Joanne Restivo, Executive Director, School Ethics Commission

SUBJECT: Settlement Proposal
I/M/O Matthew Conlon, W. Milford Board of Education
SEC Docket No. C46-12
OAL Docket No. EEC 11175-2013N

Procedural Background

This matter arises from a Complaint filed with the School Ethics Commission ("Commission") on October 23, 2012, by James J. Foody ("Complainant") against Matthew P. Conlon ("Conlon" or "Respondent"). The Complaint alleges violations of the School Ethics Act ("Act"), N.J.S.A. 18A:12-21 et seq. The Complainant asserted that Conlon's mother is an employee of the District. Her direct supervisor is the Business Administrator, who in turn reports to the Superintendent. At the time of the Complaint, Conlon was a minor who lived with his mother and father.

The Complaint alleges two violations of N.J.S.A. 18A:12-24(c). First, the Complaint alleges that Respondent voted on the school budget on March 27, 2012 in violation of the Act. Second, the Complaint alleges that Conlon voted on the appointment and salary of the Superintendent on May 15, 2012 in violation of the Act.

The Commission found probable cause to credit the second violation concerning Conlon's vote on the Superintendent's appointment only.

This matter was transferred to the Office of Administrative Law for a hearing. A hearing is currently scheduled before Administrative Law Judge Candido on November 21, 2014. Respondent has put forth this settlement offer in an attempt to resolve this matter without the need for a hearing.

Factual Background

After completing discovery and speaking with all of the relevant witnesses, the facts relevant to this matter are as follows:

Conlon's mother is an employee of the District. She is employed as a secretary in the Board business office. She reports directly to the School Business Administrator/Board Secretary, Barbara Francisco, who in turn reports to the Superintendent. Ms. Conlon's employment is dictated largely by her membership in a collective bargaining unit. At the time of the vote, Conlon was a minor and he still currently lives at home with his parents. He does not pay rent or assist financially in the support of the family home. He receives health insurance through his mother's plan and Ms. Conlon pays the premium. Conlon pays for his own schooling and his own vehicle payments. He relies upon himself for spending money. To that end, Conlon is guided by Advisory Opinion A06-12, issued on April 17, 2012, in which the Commission advised that it considered Conlon's mother to be included in the term "immediate family member" and that he should not participate in any vote that affected his mother's employment either directly or indirectly or risk a violation of N.J.S.A. 18A:12-24(c).

At the May 15, 2012 Board meeting, the agenda included two votes involving the Superintendent. Resolution XII(1) stated:

BE IT RESOLVED, the West Milford Township Board of Education appoints JAMES V. McLAUGHLIN, Ed.D., to the position of Superintendent of West Milford Township Public Schools, effective July 1, 2012, at the annual salary of $165,500.00.

Conlon voted on Part 1 of the resolution which passed unanimously.

Resolution XII(2) stated:

BE IT RESOLVED, the West Milford Township Board of Education approves a contract with JAMES V. McLAUGHLIN, Ed.D., Superintendent of West Milford Township Public Schools, effective July 1, 2012, through June 30, 2015.

Conlon abstained from voting on Part 2 of the resolution, which passed. The Superintendent's contract, including the salary term, was previously negotiated by a committee of the Board which did not include Conlon. Additionally the contact and salary were approved by the Executive County Superintendent ("ECS") prior to the vote.

The Business Administrator will testify that the vote was split in this manner as to avoid a conflict with Conlon voting on anything other than the appointment of the Superintendent. The Business Administrator will also testify in West Milford, the resolutions for appointment are often written in a manner that includes the salary amount. All Board members received an advance agenda the Friday before the Board meeting which included the proposed resolution with the salary language, although the name of the

candidate and the exact salary were blank because the contract had not yet been approved by the ECS. Once the ECS approved the contract and salary, Board members were issued a hand carry which included the resolution with the name and salary terms included. McLaughlin was not an in-house candidate, and there is no evidence that Conlon or Conlon's mother had any familiarity with McLaughlin as a candidate. Prior to the May 15, 2012 vote, both Conlon and the Business Administrator sought legal advice as to which matters Conlon should refrain from voting owing to his mother's employment in the district. The legal advice did not specifically opine on the exact language of the resolution, but advised that a vote on appointment was not a violation. Conlon contends that it was not his intent to vote on any contract or salary terms.

Proposed Terms of Settlement

A draft of Respondent's affidavit, which sets forth his settlement proposal and arguments in support of his proposal is attached for the Commission's consideration.

In his affidavit, Respondent admits that on May 15, 2012 he voted on agenda item XII(1). Respondent admits that a "strict interpretation" of the law concludes that his vote on item XII(1) was not consistent with the New Jersey Code of Ethics.[1] Respondent avers that he never intended vote on contractual term, as evidenced by his abstention from item number 2. Respondent is willing to accept a Reprimand for that conduct. Respondent further proposes that his affidavit be part of the record and that he be permitted to explain himself at a future Board meeting.

Analysis

It is important to note, that the Commission found probable cause in this matter prior to the Commission's decision in Carol Martinez v. Francis Albolino, C45-11 (June 27, 2012). In Martinez, the Commission reaffirmed that a Board member must avoid involvement in the Superintendent's employment issues, once the Superintendent is hired. Additionally, the Commission held that a Board member whose immediate family member is employed in the district may not participate in the search, selection and/or vote for a new superintendent irrespective of whether and to what degree the

---

[1] Please note that I have suggested to Mr. Conlon's attorney that the affidavit be modified to refer to the "School Ethics Act" rather than the "New Jersey Code of Ethics." Mr. Conlon's attorney has agreed to this change, although an updated version was not available at this time of this memo. The recommendations contained herein are with the understanding that this change will be made.

immediate family member is familiar with the candidate. Id. In doing so, the Commission vacated prior decisions that held that the hiring of a superintendent candidate unfamiliar to the Board member's family member was not a violation of the Act. Id. Because the Martinez respondents were guided by prior Commission opinions and decisions, the Commission did not find probable cause to credit a violation of the Act. The Martinez holding therefore was to be applied prospectively only.

Here, it is not alleged that Conlon's mother had any familiarity with McLaughlin. Therefore, under guidance and decisions prior to Martinez, Conlon would not be in violation of the Act for merely voting to hire Superintendent McLaughlin. Indeed, discovery has revealed that Conlon received legal advice to that effect, and it is the reason why the vote was split with a vote on the appointment preceding a vote on the new Superintendent's contract. Accordingly, the mere fact that Conlon voted to hire the Superintendent is not at issue as long as Martinez is not applied retroactively.

Therefore, the sole legal issue in this matter is whether Conlon's vote on the appointment resolution which included the language "at the annual salary of $165,500.00" is a violation of the Act, and if so, what penalty should be assigned. There is not prior guidance or decisions which are directly dispositive of this legal issue.

The Penalty Proposed

However, the proposed penalty of reprimand is consistent with the Commission's penalties in legally and factually similar cases. For example, in I/M/O Charles Carey, C33-08 (March 24, 2010), the Commission found a violation of N.J.S.A. 18A:12-24(c) when a board member voted to approve the salary for the Superintendent. The Board member's wife was employed as a secretary to the nursing office of the district's high school. As is the case in the instant matter, the Board member's family member did not report directly to the Superintendent, and the majority of the family member's employment terms were dictated by a collective bargaining agreement. The Commission voted for the penalty of reprimand, finding that such a penalty is consistent with prior matters where, as here, there was a "single instance of voting on matter where they were conflicted." Id. at 4 (citing numerous cases). In I/M/O Charles Carey, the Commission also distinguished School Ethics Commission v. Gunning, C15-93 (September 22, 1994), wherein the Commission recommended the penalty of censure when the board member voted on a salary for the Superintendent and his spouse was the Superintendent's confidential secretary, and not a member of a collective bargaining unit. The facts and circumstances that arise in this matter are factually and legally similar to the

Commission's prior matters where reprimand was found to be the appropriate penalty. Accordingly, the penalty of reprimand would likely be the result the Commission could expect at hearing.

Moreover, there are additional factors present here which in past practice the Commission has recognized as impacting the appropriate penalty. Documents obtained in discovery reveal that Conlon did receive legal advice regarding the issue of hiring the Superintendent which is consistent with the Commission's guidance prior to Martinez. See Martinez, supra; I/M/O John Harrison, Ewing Township Board of Education, C13-94 (December 14, 1995) Commissioner of Education Decision No, 78-96 (March 6, 1996)(Commissioner finding mitigating factors to decrease penalty from censure to reprimand). However, it could be counter-argued that this advice is not dispositive of the issue of a violation because the advice did not directly address the "at the annual salary" language. Additionally, Conlon abstained from voting on the Superintendent's contract giving credence to his assertion that he was not aware that he was at risk for a violation on the prior. The vote was a "single instance" of voting on the appointment with the salary language. See I/M/O Charles Carey, supra. Finally, Conlon's mother's employment is guided by her membership in a collective bargaining unit and she does not report directly to the Superintendent. See e.g. Advisory Opinion A10-00; A07-06.

Conclusion

Based upon the foregoing discussion and analysis, it is within the discretion of the Commission whether to accept Respondent's proposal to settle this matter for a reprimand.

COURTS PUBLIC ACCESS

ACMS Public Access: Case Detail

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
Commissioner

VENUE: **UNION** COURT: **LAW CVL** DOCKET #: **L 000105 15**
CASE TITLE : **GALLANTE VS ELIZABETH BOE ET AL**

CASE FILED DATE	: 01 09 2015	CASE TYPE	: 701 AC LIEU PR
CASE STATUS	: CLOSED	CASE INITIATION TYPE	: C COMPLAINT
DISPOSITION TYPE	: DISM W/PR	DATE DISPOSED	: 02 13 2015
DISCOVERY DATE	:	ARGUMENT REQST DATE	: 00 00 0000
CASE PARTY COUNT	: 004	JUDGMENT ENTERED	: NO
FIRST ANSWER DATE	:		
EXPECTD SERVICE DATE	:	ACTUAL SERVICE DATE	:
CONSOLIDATION TYPE	:	CONSOLIDATION STATUS	:
TRANSFER FROM VENUE	: TO	DATE TRANSFERRED OUT	:
LAST PROCEEDING TYPE	:	LAST PROCEEDING DATE	:
PENDING ACTION	:	PENDING ACTION DATE	: 00 00 0000
UNDISTRIBUTED AMOUNT	: 0.00	DEMAND AMOUNT	: 0.00
DF ATTORNEY/PRO SE	: NO DF HAS AN ATT	DENOVO INDICATOR	: NO

CMP DISPUTE RESOLUTN	: BAR PANEL	TITLE 59 INDICATOR	: NO
JURY REQUEST	: NO JURY	CASE IMPOUNDED	: NO
DATE ENTERED	: 01 12 2015		

Screen ID:CVM1019 **Copyrighted © 2012 - New Jersey Judiciary**
Session ID: 2AR6TP Case Count: 1
BUILD 2012.1.0.02.09 Timer Count down: 292

97-15

COMMISSIONER OF EDUCATION

IN THE MATTER OF THE ARBITRATION OF THE TENURE CHARGE	::	DOE DOCKET NO. 355-12/14
between	::	
STATE OPERATED SCHOOL DISTRICT, CITY OF CAMDEN	::	
Petitioner	::	**CONSENT AWARD**
and	::	
JOYCE MULLIGAN,	::	
Respondent	::	

BEFORE: MICHAEL J. PECKLERS, ESQ., ARBITRATOR

DATE OF HEARING: February 6, 2015

DATE OF AWARD: March 13, 2015

APPEARANCES:

For the Petitioner

Eric Milavsky, Esq., BROWN & CONNELLY LLP

For the Respondent

Amy Gillette, Esq., ZELLER & WIELICZKO, LLP

WHEREAS, the undersigned was appointed as the designated Arbitrator in this tenure matter; AND

WHEREAS, following the scheduling of hearings the parties entered into the attached LAST CHANCE AGREEMENT; AND

WHEREAS, a hearing was conducted telephonically on February 6, 2015, at which time the settlement was placed on the record, with the *Cardonick* criteria

articulated and satisfied, per *N.J.A.C.* 6A:3-5.6, with each paragraph read to Respondent, who acknowledged her understanding of and acquiescence to the same;

THEREFORE, the instant CONSENT AGREEMENT is entered in the case, with the terms of the LAST CHANCE AGREEMENT incorporated by reference herein, and forwarded to the Commissioner of Education for his approval.

Dated: March 13, 2015

MICHAEL J. PECKLERS, ESQ., ARBITRATOR

STATE OF NEW JERSEY
SS:
COUNTY OF HUDSON

ON THIS 13TH DAY OF MARCH 2015, BEFORE ME PERSONALLY CAME AND APPEARED **MICHAEL J. PECKLERS, ESQ.,** to be known to me to be the individual described herein, and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

NOTARY PUBLIC

OFFICIAL SEAL
ANGELICA SANTOMAURO
NOTARY PUBLIC - NEW JERSEY
My Comm. Expires July 29, 2019

LAST CHANCE AGREEMENT FOR JOYCE MULLIGAN

The Camden City School District ("the District") and Joyce Mulligan ("Mulligan") hereby enter into this Last Chance Agreement ("this Agreement").

WHEREAS, Mulligan is a tenured teacher for the District; and

WHEREAS, the District has filed tenure charges against Mulligan for chronic and excessive absenteeism, inefficiency, and other just cause; and

WHEREAS, the tenure charges are attached to this Agreement as Exhibit A and incorporated herein by reference; and

WHEREAS, Mulligan acknowledges the validity of the tenure charges and admits certain prior inefficiencies and attendance problems; and

WHEREAS, Mulligan has expressed a sincere desire to improve and would like to remain in the employ of the District; and

WHEREAS, the District would like to continue to employ Mulligan in accordance with the terms of this Agreement;

NOW, THEREFORE, the District and Mulligan agree as follows:

1. Mulligan shall serve a suspension without pay from the date the District certified the tenure charges (December 3, 2014) until the date Mulligan signs this Agreement.

2. Mulligan shall be reinstated at Camden High School, with the understanding that her assignment may thereafter change in accordance with the applicable collective bargaining agreement and New Jersey law.

3. The District shall withdraw its tenure charges against Mulligan without prejudice, and Mulligan shall remain in the employ of the District with all of the same rights and benefits to which she has been entitled to this point, subject to the following terms:

   (a) Absenteeism. Mulligan shall not be absent more than 10 days in any of the next five school years; provided, however, that District-approved professional development leave, District-approved bereavement leave, District-approved jury duty, and District-approved FMLA leave shall not count toward the 10-day limit. If, leaving aside such leave, Mulligan exceeds the 10-day limit in any of the next five school years, that shall constitute a material breach of this Agreement regardless of the reason(s) for the absences. Mulligan acknowledges and agrees that such a breach shall, in light of her prior attendance record and the fact that this Agreement signifies her last chance to correct this problem, constitute just cause for her permanent removal from employment.

(b) Inefficiency. Mulligan acknowledges the District may hereafter file tenure charges for inefficiency in accordance with applicable law. While the District shall not pursue tenure charges at this time, Mulligan acknowledges, agrees, and admits:

i. Her performance to this point has been at times inefficient.

ii. There is a genuine need for her performance to improve.

iii. This agreement signifies Mulligan's last chance to improve her performance.

iv. In the event the District decides or is required to file inefficiency tenure charges against Mulligan at any point hereafter, this Agreement shall be admissible in the resultant tenure proceedings and shall not in any way limit the scope of those proceedings.

4. This Agreement shall not in any way be construed as a limitation on the District's ability to file tenure charges against Mulligan in the future, nor shall it in any way limit the scope of such tenure charges. This Agreement shall be admissible in tenure proceedings, but shall not limit the evidence that the District is otherwise permitted by law to adduce in such proceedings. This Agreement acknowledges Mulligan's serious employment problems to date and provides Mulligan with one last chance to correct those problems; however, it does not in any respect restrict the District's rights or prerogatives.

5. Should any portion of this Agreement be deemed unenforceable, that determination shall not impair the validity and enforceability of the remainder of this Agreement.

6. Mulligan acknowledges that she has consulted with counsel regarding this Agreement and all implications thereof, and that she enters into this Agreement knowingly and with an understanding of her rights.

Joyce Mulligan

Joyce Mulligan

Dated: 2/4/15

Paymon Rouhanifard
State Superintendent
Camden City School District

Dated: 2/5/15

98-15

95-15

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
Commissioner

March 18, 2015

Michelle M. Smith, Clerk
Superior Court of New Jersey
Hughes Justice Complex
25 W. Market Street
6th Floor, North Wing
P.O. Box 971
Trenton, NJ 08625

Re: Request for Docketing of Judgment

Dear Ms. Smith:

In accordance with *N.J.S.A.* 2A:58-10, I am enclosing the March 16, 2015 Order of the Commissioner of Education finding that Sarit Young is subject to entry of a judgment on the docket of the court due to her failure to pay the tuition assessment ordered in the matter of *S.Y., on behalf of minor children, E.Y. et al. v. Board of Education of the Township of Wyckoff, Bergen County.*[1] By copy of this letter, I am advising Ms. Young, as well as counsel for the Wyckoff Township Board of Education, of the Commissioner's issuance of the enclosed Order.

If you require anything more, please contact this office at (609) 292-5706.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/DCS

Enclosure

c: Sarit Young (with copy of Order)
Stephen R. Fogarty, Esq. (with copy of Order)
State Law Library (with copy of Order)

[1] Please note that, although the case caption reflects only Ms. Young's initials, her full name is included within the body of the Commissioner's Order.

98-15

OAL DKT. NO. EDU 9946-09
AGENCY DKT. NO. 229-9/09

S.Y. on behalf of minor children, E.Y., ET AL.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WYCKOFF, BERGEN COUNTY,	:	ORDER
RESPONDENT.	:	

On December 15, 2014, a final agency decision was rendered in this matter, wherein the Commissioner granted summary decision to respondent Board, assessed petitioner $65,888.96 in tuition to compensate the Board for her children's period of ineligible attendance in the public schools of the district (for the 2007-2008 and 2008-2009 school years) pursuant to *N.J.S.A.* 18A:38-1, and dismissed petitioner's appeal. Commissioner Decision No. 484-14. The Board subsequently notified the Commissioner that petitioner has failed to comply with his decision and it requested that the Commissioner seek entry of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. Petitioner offered no reasons why the judgment against her should not be so docketed, although given an opportunity by this agency to do so.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Sarit Young is now subject to entry of a judgment by the court in the amount of $65,888.96, which represents the payment ordered at the conclusion of the contested case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/16/15

Date of Mailing: 3/18/15

99-15

OAL DKT. NO. EDU 6185-14
AGENCY DKT. NO. 84-4/14

A.S. and H.S. on behalf of minor children A.S. and N.S.,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONERS	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF ALPINE, BERGEN COUNTY,	:	
	:	
RESPONDENT.	:	

The above captioned matter, instituted by way of petition filed on April 1, 2014, was a challenge by petitioners to a residency determination made by the respondent board of education. After the respondent board filed its pleadings and the matter was transmitted to the Office of Administrative Law (OAL), but before the scheduled hearing took place, the parties settled their differences. They submitted to the OAL an executed "Stipulation of Dismissal with Prejudice" (Stipulation), and the Administrative Law Judge (ALJ) assigned to the case issued an Initial Decision ordering the parties to comply with the Stipulation.

Upon consideration of the record of this matter, the parties' Stipulation, and the ALJ's Initial Decision approving same, the Commissioner concludes that there is no remaining controversy to adjudicate, and dismissal of the matter is warranted.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/18/15
Date of Mailing: 3/18/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 06185-14
AGENCY DKT. NO. 84-4/14

A.S. AND H.S., ON BEHALF OF MINOR CHILDREN, AS.AND N.S.,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF ALPINE, BERGEN COUNTY,

Respondent.

Dennis J. Francis, Esq., for petitioners

Vittorio S. Lapira, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: January 23, 2015 Decided: February 6, 2015

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

On April 1, 2014, A.S. and H.S. parents of A.S. and N.S. filed a petition with the Department of Education requesting that A.S. and N.S. remain in their present placement at Alpine Public School District. The matter was transmitted to the Office of Administrative Law on May 21, 2014 and a hearing date was scheduled for January 25,

2015. Prior to the hearing the parties submitted a Stipulation of Dismissal with Prejudice.

I therefore, **ORDER** the parties comply with the stipulation of dismissal with prejudice.

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

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

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

January 6, 2015
DATE

MUMTAZ BARI-BROWN, ALJ

Date Received at Agency: 2-10-15

Date Mailed to Parties: FEB 11 2015

dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

RECEIVED
2015 JAN 23 P 12:43
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

FOGARTY & HARA, ESQS.
21-00 Route 208 South
Fair Lawn, New Jersey 07410
(201) 791-3340
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Attorneys for Respondent,
Alpine Board of Education
Our File No. 16/279

A.S. and H.S. on behalf of minor children, A.S. and N.S.,	:	Before the Commissioner of Education of the State of New Jersey
Petitioner,	:	**Agency Ref. No.:** 84-4/14 **OAL Dkt No:** *tbd*
vs.	:	
ALPINE BOARD OF EDUCATION,	:	**STIPULATION OF DISMISSAL WITH PREJUDICE**
Respondent.	:	

It is hereby stipulated and agreed by the undersigned that the above-captioned actions be and are hereby dismissed with prejudice and without costs to either of the parties, provided that nothing contained herein shall be interpreted as restricting the Alpine Board of Education from disenrolling A.S. and N.S. from the Alpine Public School District in the future if, upon reasonable inquiry and belief, it is determined that they are no longer domiciled in the Borough of Alpine.

By: _____
Dennis J. Francis, Esq.
Law Office of Dennis J. Francis
Attorney for Petitioners

Dated: 1-9-15

By: _____
Vittorio S. LaPira, Esq.
Fogarty & Hara Esqs.
Attorney for Respondent

Dated: 1-19-15

FOGARTY & HARA, ESQS.
21-00 Route 208 South
Fair Lawn, New Jersey 07410
(201) 791-3340
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Attorneys for Respondent,
Alpine Board of Education
Our File No. 16/279

RECEIVED
2015 JAN 23 P 12:43
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

A.S. and H.S. on behalf of minor children, A.S. and N.S.,	:	Before the Commissioner of Education of the State of New Jersey
Petitioner,	:	**Agency Ref. No.:** 84-4/14
	:	**OAL Dkt No:** *tbd*
vs.	:	
ALPINE BOARD OF EDUCATION,	:	**STIPULATION OF DISMISSAL WITH PREJUDICE**
Respondent.	:	

It is hereby stipulated and agreed by the undersigned that the above-captioned actions be and are hereby dismissed with prejudice and without costs to either of the parties, provided that nothing contained herein shall be interpreted as restricting the Alpine Board of Education from disenrolling A.S. and N.S. from the Alpine Public School District in the future if, upon reasonable inquiry and belief, it is determined that they are no longer domiciled in the Borough of Alpine.

By: _____
Dennis J. Francis, Esq.
Law Office of Dennis J. Francis
Attorney for Petitioners

Dated: 1-9-15

By: _____
Vittorio S. LaPira, Esq.
Fogarty & Hara Esqs.
Attorney for Respondent

Dated: 1-19-15

100-15

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

PETITIONER,

V.

PATRICE DALEY

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The Board filed a petition on July 8, 2014, requesting a declaratory ruling on the issue of removal of respondent Patrice Daley from her position on the Board of Education of the City of Trenton due to a conflict of interest. The matter was transmitted to the Office of Administrative Law (OAL) as a petition of appeal. Prior to a hearing in the matter, the respondent resigned from her position on the Board.

The ALJ found that, based on the foregoing, the respondent has resigned from her position on the Board, and the matter is now moot. Accordingly, the ALJ ordered the petition dismissed.

Upon review, the Commissioner concurred with the ALJ 's determination that the petitioner has resigned and the matter is therefore now moot. Accordingly, the Initial Decision was adopted as the final decision in this case, and the petition was dismissed.

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

Issued 3/18/15

OAL DKT. NO. EDU 12812-14
AGENCY DKT. NO. 166-7/14

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
PATRICE DALEY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the respondent, Patrice Daley, has resigned from her position with the Trenton Board of Education; therefore, the matter is now moot. Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein and the petition is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/18/15
Date of Mailing: 3/18/15

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 12812-14
AGENCY DKT. NO. 166-7/14

CITY OF TRENTON BOARD OF EDUCATION
Petitioner,
v.
PATRICE DALEY,
Respondent.

Mark G. Toscano, Esq., for petitioner (Comegno Law Group, PC, attorneys)

Patrice Daley, respondent, pro se

Record Closed: January 14, 2015 Decided: February 10, 2015

BEFORE **PATRICIA M. KERINS**, ALJ:

On July 8, 2014, petitioner Board of Education of the City of Trenton (Board) filed a petition for a declaratory ruling with the Department of Education, Bureau of Controversies and Disputes (Bureau), seeking the removal of Respondent Patrice Daley (Daley) from her position on the Board due to a conflict of interest. By letter of September 29, 2014, the Bureau determined to treat the petition as a petition of appeal and on October 3, 2014, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

By letter of September 3, 2014, Daley submitted a letter of resignation in response to the above filed petition. Petitioner did not deem that letter as sufficient proof of resignation as set forth in its letter to the Bureau of September 23, 2014. After assignment to me on November 24, 2014, for hearing the matter was scheduled for a telephone prehearing conference on January 7, 2015. At that telephonic conference Daley stated she had in fact resigned as she had set forth in her earlier letter. Petitioner acknowledged that fact and by letter of January 13, 2015, stated it had no objection to a dismissal of this matter as moot.

DECISION AND ORDER

Based on the foregoing, it is clear that as respondent had resigned her position from the Board of Education of the City of Trenton, the matter is moot. I therefore **ORDER** the within petition **DISMISSED**.

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

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

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

February 10, 2015
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency: February 10, 2015

Date Mailed to Parties: February 11 2015

cmo

ANDREA GOLAMY-SADIG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured teacher in respondent's employ for approximately nine years – appealed the determination of the respondent Board to withhold her 2013-2014 salary increment, alleging that the Board's actions were arbitrary, capricious and unreasonable. Petitioner was certified to teach kindergarten through eighth grade, but had always taught the upper grades until the spring of 2012, when she was reassigned to teach kindergarten. The Board contended that petitioner's increment was withheld for good cause pursuant to *N.J.S.A.* 18A:29-4. Petitioner asserted, *inter alia*, that she was not provided with mentoring or guidance to assist her adjustment to the kindergarten classroom.

The ALJ found, *inter alia*, that: a salary increment is a reward for meritorious service, not an entitlement; pursuant to *N.J.S.A.* 18A:29-14, a board of education may withhold, for inefficiency or other good cause, the scheduled increments of any staff member in any year; a school board's decision to withhold a salary increment is a matter of management prerogative and is entitled to a presumption of correctness; in challenging the loss of an increment, the petitioning party bears the burden of proof to demonstrate that the Board's action was arbitrary, capricious, or without reason; petitioner herein acknowledged that she had difficulty teaching kindergarten during the 2012-2013 school year, despite being certified to teach at this grade level; petitioner's argument that she did not have sufficient support to succeed was belied by her testimony detailing numerous examples of assistance provided to her, both prior to and during the 2012-2013 school year; and petitioner's formal and informal evaluations provide feedback detailing her failure to improve and/or perform at a satisfactory level. The ALJ concluded that petitioner failed to prove – by a preponderance of the evidence – that the Board's decision to withhold her increment was arbitrary, capricious or unreasonable. Accordingly, the ALJ denied petitioner's challenge to her increment withholding.

Upon independent review and consideration, the Commissioner concurred with the ALJ that the petitioner failed to sustain her burden of establishing that the Board's action was arbitrary, capricious unreasonable. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter.

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

March 18, 2015

OAL DKT. NO. EDU 14468-13
AGENCY DKT. NO. 203-8/13

ANDREA GOLAMY-SADIG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Andrea Golamy-Sadig, and the Jersey City Board of Education's (Board) reply thereto.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) – for the reasons thoroughly stated in the Initial Decision – that the petitioner failed to prove that the Board's decision to withhold her increment for the 2013-2014 school year was arbitrary, capricious or unreasonable. The Commissioner also finds the exceptions submitted by the petitioner to be unpersuasive. The petitioner's exceptions largely replicate the arguments advanced at the OAL, which were fully considered and appropriately addressed by the ALJ in the Initial Decision. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/18/15
Date of Mailing: 3/18/15

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 14468-13
AGENCY DKT. NO. 203-8/13

ANDREA GOLAMY-SADIG,

Petitioner,

v.

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

Respondent.

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

Jennifer Roselle, Esq., for respondent (Genova Bursn Giantomasi Webster, attorneys)

Record Closed: May 19, 2014 Decided: February 3, 2015

BEFORE **EVELYN J. MAROSE**, ALJ:

STATEMENT OF THE CASE

Petitioner, Andrea Golamy-Sadig, asserts that the Board of Education (BOE) of the City of Jersey City, Hudson County, was arbitrary, capricious and unreasonable when it withheld her salary increment for the 2013-14 School Year. The BOE asserts that petitioner's increment was withheld for good cause pursuant to N.J.S.A. 18A:29-4.

The New Jersey State Department of Education transmitted this matter to the Office of Administrative Law, where it was filed on October 9, 2013. A hearing was conducted on March 10, 2014. The record closed upon the receipt of written summations on May 19, 2014. Due to a voluminous caseload, the time for the issuance of this Initial Decision was extended to January 2, 2015. The record was re-opened on December 24, 2014, in connection with hearing exhibits and re-closed on January 16, 2015.

FACTUAL DISCUSSION AND FINDINGS

Testimony on behalf of the BOE

Robert Bower, principal, (Principal Brower) has been principal of Jersey City Public School #17 (P.S. #17) for three-plus years. Prior to being principal, he served as an elementary teacher, a high school teacher, and as a vice principal. Observing and evaluating teachers and non-instructional staff is part of his job responsibilities.

During Principal Brower's tenure as principal, petitioner initially taught math, science, and social studies to sixth- and seventh-grade students in P.S. #17. Toward the end of the 2011-12 school year, Principal Brower assigned petitioner to teach kindergarten for the 2012-13 school year. Principal Brower made the recommendation after concluding that petitioner had struggled teaching sixth and seventh grade and was not effectively teaching the N.J. ASK test subjects. Kindergarten is not a tested grade level.

Petitioner's new assignment coincided with adoption of a new curriculum for kindergarten, New Jersey Curriculum Common Core Standards (NJ Common Core) and the Reading Street Program—which is a method, tailored to each grade, for delivering components of the NJ Common Core to students. (R-A, R-B.) In late spring of 2012, petitioner, along with other teachers, was provided with mandatory professional development in the new curriculum and with follow-through professional development throughout the 2012-13 school year.

As part of the implementation of the NJ Common Core, a written curriculum guide was set forth by the District of Jersey City (District) and provided to teachers including petitioner. The curriculum guide detailed "everything"; that is, day-to-day and week-to-week where a child was expected "to be" and what a teacher was mandated to teach. The guide utilized CD's, videos, interactive technology, and boards. The curriculum was extremely detailed, to the point of advising a teacher how many minutes he or she should spend on each teaching component. Each grade-level teacher was mandated to follow the guide rather than create their own lessons and/or curriculum. The goal was to have instruction continuous and built on the prior day's assignment. While a teacher could chose to reinforce some lesson component, the teacher could not omit any teaching component.

The teachers, including petitioner, were provided with a Teacher's Edition of the program to assist them. The Teaching Edition detailed what texts to work on, what materials to use, what skills the texts were designed to develop, and what the strategic focus of a lesson was. It included a pacing chart, which clarified what time should be spent on each component. The program was so scripted that, if Principal Brower were doing an administrative walkthrough, each kindergarten teacher should be working on the same unit and skill at the same time. Principal Brower described the program as a "blueprint for success" for even a new teacher.

In addition to written material, the teaching staff of P.S. #17, including petitioner, receive multiple supports. Every September, Principal Brower provides each teacher with a school Handbook that, among other things, details school policies and procedures and how to maintain and record students' progress and performance. In addition, every day from 8:00 a.m. to 8:30 a.m., either Principal Brower or another District staff member conducts ongoing professional development, in grade level and/or across grade level. The District also offers two voluntary professional development programs for teachers. Every September the District has workshops, conducted from 4:00 p.m. to 6:00 p.m., that are designed for new teachers and for veteran teachers who need or desire further professional development. The District also provides a voluntary

Teacher Academy, which is conducted in the summer and in September, designed to provide development opportunities for teachers.[1]

Though grade-level teachers had identical mandatory lessons, each teacher was required to create a lesson plan book, which documented a weekly commitment to certain curriculum components. Each teacher was required to place his or her lesson plan book in a basket in the office on Monday morning. After review by an administrator, the lesson plan book would be returned to the teacher, sometimes with lesson plan recommendations, as another means of ongoing professional development.

By State mandate, each tenured teacher, including petitioner, receives a minimum of three evaluations annually. Formal evaluations include a pre-conference where expectations are detailed, the observation itself, and a post-observation conference wherein the evaluator discusses his observations, findings, and recommendations. At the end of the 2012-13 school year, Principal Brower recommended to his supervisors that, based upon petitioner's attendance, performance, and conduct, petitioner not receive an increment for the following school year. Student achievement in petitioner's non-tested grade level was not in any way a factor in Principal Brower's recommendation. (R-G.)

In support of his recommendation, Principal Brower noted that petitioner did not consistently and timely submit her lesson plans, though she was counseled to do so in professional development sessions and "written up" on at least four occasions for failing to submit or failing to timely submit her lesson plans. Principal Brower authored one of the four "write-ups," drafted on September 12, 2012, early in the school term. (R-D.)

Petitioner also failed to successfully progress through the mandated curriculum. Her failure was observed by and/or detailed on evaluations conducted by school administrators and district supervisory personnel, including Principal Brower. In addition, members of the administration, including Principal Brower, received numerous

[1] Principal Brower recommended that petitioner attend the Teacher Academy for the past three years. (R-G.)

complaints, from parents and school colleagues who questioned the behavior that they observed in petitioner's classroom. (R-E, R-G.)

During the 2012-13 school year, petitioner also did not meet her responsibilities to supervise students. For example, on one occasion, petitioner allowed her children outdoors for recess, while she remained in her classroom. Petitioner's colleagues who were outdoors with their classes approached her and reminded her of her duty to be outdoors with her class, as they were. Principal Brower later learned, from petitioner's inclusion teacher, of another incident when a child hit his head and suffered an injury, while petitioner was not supervising the child. After investigating the incident, Principal Brower concluded that petitioner had neglected her professional duty. When he discussed the incident with petitioner, she neither showed nor expressed any remorse. (R-F.)

Petitioner's performance throughout the term at issue was evaluated and discussed with her after both formal and informal evaluations. Principal Brower evaluated petitioner early in the 2012-13 school year. He observed her on October 23, 2012, and provided her with a verbal evaluation on November 14, 2012. (R-G.)

Principal Brower noted that, on the day of his observation, while petitioner's lesson plan book reflected a lesson that addressed all the mandated components of the district curriculum, her actual teaching that day was not in accordance with the written lesson in her teacher's plan. After considering all of his observations, he scored petitioner unsatisfactory in two of the domain areas for instruction and classroom environment, and in need of improvement for planning and preparation in student's learning.[2] He also noted areas where petitioner needed improvement or was not performing to at least a satisfactory level, and provided suggestions as to how her performance in those areas could be improved. Principal Brower personally modeled a lesson to assist petitioner. The Principal opined that some of his suggestions, like follow the District mandated lesson plans, were simple to implement. (R-G.)

[2] Principal Brower defined the term unsatisfactory as essentially completely unacceptable and the term in need of improvement as reflecting that there is something about the behavior being evaluated that is acceptable, even if only "by the lightest touch."

Principal Brower assigned specific colleagues to provide a support lesson for petitioner. He also ensured that petitioner was able to observe other grade-level teachers that were performing at a satisfactory or above level in an area where she needed to improve. Marsha Wassersman, reading specialist, and Kate Tyner, inclusion specialist, went into petitioner's classroom and made physical changes, such as seating and desk organization, to create an effective classroom environment. They also provided demonstration lessons, for multiple days, stressing the mandated pacing. Principal Brower further noted that petitioner still had the benefit of the ongoing professional development that was conducted daily from 8:00 a.m. to 8:30 a.m., to District professional development workshops, and to District program links.

Despite all the support/assistance that was provided to petitioner, before and after Principal Brower's formal observation, the informal and formal evaluations made by other members of the administration team continued to reflect that petitioner's performance and conduct was not satisfactory. Petitioner received formal evaluations by Joseph Cordero (assistant principal—pre-kindergarten through fourth grade), Margaret Cortelli (assistant principal—fifth grade through eighth grade), Elizabeth Goepel (language arts supervisor) and Jennifer Ambrose (science and social studies supervisor). Principal Brower received and reviewed copies of those evaluation as well as feedback about the informal observations that occurred. (R-G.)

Petitioner's class for the 2012-13 school years was composed of twenty-two students, three of whom were classified. She was assisted by a full-time aide. She also had the benefit of an inclusion teacher, essentially all of the time. When the first inclusion teacher assigned went out on maternity leave, another teacher was assigned to petitioner's class.

Principal Brower does not believe that there is a marked difference between instructing a sixth- or seventh-grade class and a kindergarten class and opined that, if petitioner needed some time to adjust to teaching kindergarten, the adjustment period would be minimal. Principal Brower further opined that being assigned to teach

kindergarten was a less demanding assignment than teaching the upper grades since kindergarten is a non-tested grade level.

Principal Brower stated that the mandated kindergarten curriculum was available online from the time that it was adopted, on or about March 29, 2012. Accordingly, the kindergarten curriculum could have been accessed online by petitioner from the time that he reassigned petitioner, in the spring of 2012, to teach kindergarten the following September. The curriculum was also definitely taught during the mandated kindergarten professional development training conducted before the end of the 2011-12 school year and available in written form for petitioner and other staff members in September 2012.

Joseph Cordero, assistant principal, (Assistant Principal Cordero) Jersey City Public School #17, has been employed by the District for twelve years. Prior to being appointed assistant principal, he served as a teacher, literary coach, data specialist, and in the Board of Education testing department.

Assistant Principal Cordero has direct responsibility for pre-kindergarten through fourth grade. He evaluates the teaching staff, is a liaison to the grade parents, and knowledgeable in pre-kindergarten through fourth grade curriculum. He is also in charge of building management, including the maintenance department and custodial staff. Since petitioner is a kindergarten teacher, he is, and was during the 2012-13 school year, her direct supervisor. He has observed her informally and formally.

Assistant Principal Cordero, who was sequestered during Principal Brower's testimony, also described the numerous opportunities for professional development provided to petitioner by the District. He detailed the ongoing professional development provided daily from 8:00 a.m. to 8:30 a.m. related to grade-level teaching and to other topics such as behavior management, which are of interest to multiple grade levels. He noted that numerous support personnel, including Principal Brower, Assistant Principal Cortelli, Catherine Tyner, crisis intervention teacher (CIT), as well as he were available for all staff, including petitioner. He is certain that petitioner received substantial support, and noted as an example that Ms. Tyner, who is an expert in behavior

management and special education, went into petitioner's classroom, gave her ideas and provided her with feedback designed to assist her teaching.

Assistant Principal Cordero described the Reading Street Program for kindergarten, noting that it was selected to provide consistent learning in a district where students frequently move from one school to the next. It is a blanket approach. The curriculum is "laid out for the teacher from Point A to Point Z. It tells the teacher what to do and when to do it. It gives the teacher time allocations. It defines the mandated teaching into components. It tells the teacher what materials are necessary—everything that is needed in order to teach a class." (R-B.)

During his daily walkthroughs, Assistant Principal Cordero observed petitioner's classroom to consistently be a scene of chaos, disorder, and loudness. The classroom was unorganized. Students did not appear to have direction nor did they appear to be acting in accordance with the mandated curriculum. For example, when the mandated curriculum required that they be sitting at their desks, they would be sitting at a rug area. Petitioner was also not consistently in line with the timeframes provided in the mandated curriculum nor was she teaching the required components. (R-E.)

Assistant Principal Cordero spoke to petitioner in an attempt to assist her in her pacing. He had the reading specialist go into her classroom on at least three occasions and model how to keep her on task. He also conducted grade-level meetings, that she and other kindergarten teachers attended, regarding lesson pacing. He noted that the mandated curriculum defines when you should be in a large group, in small groups, or when the children should be working independently. The structure, routine, and rules were designed so that all knew what was expected of them.

Assistant Principal Cordero was also responsible for reviewing teachers', including petitioner's, lesson plans. All teachers were required to drop their lesson plans into a basket at the school office each Monday. The lesson plans should be "pretty much verbatim" of the mandated curriculum. Though petitioner did submit lesson plans, she did not do so consistently in a timely manner. Even when she was spoken to regarding her failure to submit and later written up at least three times by him

for failing to submit on time, she continued to not submit the required plans in timely manner. (R-D.[3])

Assistant Principal Cordero authored petitioner's annual performance evaluation. In addition to his own informal and formal observations, he considered the observations of other administrators. He noted that her performance did not improve during the 2012-13 school year. She failed to follow the tasks as detailed on her lesson plans; she did not finish all components of the mandated curriculum; her class was not on task and within the prescribed time allotment; and her classroom was often in a state of chaos. He received complaints from parents, who were not happy with "what petitioner was doing." Parents were concerned that their students were not bringing home any homework and that they did not appear to be learning. In addition, the parents reported that their children told them that petitioner referred to the children as bad and/or that they were yelled at during the day. (R-G.)

Assistant Principal Cordero was also not satisfied with petitioner's attendance record. She was absent approximately seven days that school year and late on several occasions. Her attendance issues were addressed in her performance evaluations. (R-G.)

Petitioner's Testimony

Petitioner noted that she has been employed by the District for about nine years. She earned a B.A. in geology with a minor in finance and French and an M.A. in administration and supervision. She has also completed half the required courses for an M.A. degree in environmental engineering.

Though she was certified to teach kindergarten through eighth grade, petitioner had never taught kindergarten until recently. For one year, she taught eighth grade math in Lincoln Park. When she came to the District she was initially assigned to P.S. #41 for two and a half years and taught sixth-grade science. She resigned for personal

[3] When the assistant principal "wrote up" petitioner, in accordance with school procedure he sent a copy of the "write-up" to Principal Brower.

reasons, completed her master's degree and volunteered at her son's school before returning to teach for the District. She was assigned to Middle School #7 and taught sixth-grade math for three years. Thereafter, she was assigned to P.S. #17, where she initially taught sixth-grade science and social studies and "covered" seventh- and eighth-grade science and health classes.

Petitioner was advised by Principal Brower at the end of the 2011-12 school year that she was going to be teaching kindergarten in the 2012-13 school year. He did not advise her of any resources that she might have to her help transition to teaching her new grade level. Petitioner, on her own, sought out the kindergarten grade representative, Donna Marion Mason, and asked if there was anything that she should be looking over prior to the fall. The representative told petitioner that the District had changed the literacy program and that they would be starting a new program in September. Accordingly, there was nothing that Ms. Mason, had at the time of the request that would assist petitioner. Prior to the end of the school year, the District did send petitioner to a two-to-three-day workshop strictly on Reading Street.

Petitioner states that in the summer in order to prepare herself to teach kindergarten she consulted with a friend's daughter who taught kindergarten in a private school for seventeen years. The daughter lent petitioner some material and resources about kindergarten and discussed some of the things to expect and how to prepare. She also went online and looked at the Teaching Channel, and tried to speak to and reach out to people she knew who were used to teaching lower grades in an effort to prepare for her kindergarten assignment. She did not contact the District and/or pick up the Reading Street Curriculum Guide for Kindergarten. Petitioner was not aware that the curriculum was on site, or that she had she access to the curriculum online. Petitioner was aware that the District had materials online.

In early August, petitioner went to her assigned room in P.S. #17 and prepared her classroom. She again went to Ms. Mason and asked for teaching materials. Ms. Mason informed her that they were still waiting for written materials to arrive. Prior to the day when the students arrived, petitioner received the cumulative records of her class and was able to see a copy of the kindergarten Teacher's Edition of the

curriculum. She was not initially given her own copy of the Teacher's Edition or a copy of the Teacher's Edition to take home to read.

Once petitioner started the academic year, she found that teaching kindergarten was quite different than her prior teaching assignment. She had never taught language arts before and had to learn facets of language arts that she did not know existed. She also learned in the grade-level meetings that her room had to be arranged differently. She asked the grade-level representative many questions and the representative was very cooperative. Petitioner received the kindergarten grade-level curriculum in September 2012, three weeks prior to her evaluation and received other grade materials sporadically for the coming months.

Petitioner's classroom contained about twenty-seven or twenty-eight students during the 2012-13 school year. In addition to her three classified students, petitioner was assigned what she termed three "challenged learners," who had difficulty with the material because their parents did not speak English. Petitioner had an aide in her classroom, Mrs. Williams, and initially an inclusion teacher. The inclusion teacher was to modify and differentiate material for the three students with IEP's or 504's. Petitioner, her aide, and an inclusion teacher were all present at the time of her October evaluation.

Prior to being observed by Principal Brower, on October 23, 2012, no member of the administrative team, no supervisor, or other teacher visited petitioner to find out "how she was doing." Petitioner asserts that she was lacking directives on how to use six or seven of the forms that she was cited and downgraded for in her October evaluation. The forms were new to her and her colleagues. Petitioner also asserts that she was criticized for having the Teacher's Edition in her hand when she was teaching, yet she had been instructed to read directly out of the Teacher's Edition in the District Reading Street Workshop that she attended in late spring. Petitioner acknowledges that her pacing on the day of her October observation was not consistent with the mandated curriculum; however, she states the variation was caused that day as a direct result of a special or activity outside the classroom, which did not allow her to begin the curriculum until somewhere around 9:35 a.m. (P-1 & R-G.)

Petitioner acknowledges receiving a post-evaluation conference after Principal Brower's October observation. She decided to respond to the statements made in her evaluation through a written rebuttal rather than verbally discussing the evaluation with the principal. (P-1.) To petitioner, it was clear that Mr. Brower was not aware of the fact that the forms for which she was cited were not part of the new program and that the teachers had received no directives about them. She also stated that, since the program was new, none of the grade teachers initially knew how to even grade the first weekly test, whether on a rubric scale or as a percentage. Petitioner, who had never taught kindergarten, relied upon a kindergarten colleague with twenty years experience who suggested that they grade as they had last year until they received a directive from the District. In fact, the grade-level representative told them not to start Reading Street until October 2012, so petitioner has just begun to use the program near the time of the evaluation.

Petitioner described how she was unfamiliar with the different approaches to learning between the students in the upper grade and in kindergarten. For example, kindergarten students must be taught numerous classroom behaviors that required only a verbal command for students in the upper grade. She stated that kindergarten students had to be taught where to put their bag and when to put their bag in the designated spot. They needed help taking off their coats and had to be taught where to put their scarf, hat, and gloves. They had to be taught how to sit appropriately in a chair and how to walk from the chair over to the rug. She couldn't just say, "Let's go over to the rug" as she would with older students. Petitioner also noted that it was hard to keep to kindergarten students on task. Even one student requesting to go to the restroom would cause other students to get off task and make the same request. Petitioner estimates that it took her until November for the children's behavior to have some decorum and organization. However, she asserts that kindergarten students, in general, continue to require more verbal instruction and have a shorter attention span.

Petitioner acknowledged that the mandated curriculum did not require that she prepare unique teaching lessons. She stated that the program "is really scripted. You're just reading what is there. You're just repeating what is there. The program tells

you what to say, what words to use. Very little actual pedagogy is involved. You're just reading." (R-B.)

Petitioner agreed that in essence completing the Lesson Plan book just required copying the curriculum from Reading Street. She asserts that she submitted her lesson plans and that none were returned to her as unsatisfactory. In response to the four write-ups about not timely handing in her plan book, petitioner acknowledged that on one occasion she did not hand in her Lesson Plan book. However, on the other three occasions where she was written up, she handed in her Lesson Plan book, but submitted it late because of a problem with her printer. On those three occasions, she asserts that she also e-mailed the Lesson Plan book but was told that it had to be submitted in hard copy. Petitioner states that she provided the Lesson Plan book in hard copy, by the end of the day when it was due in the morning. (R-D.)

As to the October observation, petitioner does not agree that Principal Brower observed a group lesson. She states that he observed a small group session where individual weaknesses were addressed. Petitioner also states that during that day the children's behavior reflected their reaction to a change in the positioning of the teaching staff. Previously, petitioner would be the only teacher in front of the class, so the studies would focus on petitioner. The teaching assistant would be in the back by her desk. On the October observation day, both petitioner and the teaching assistant were in front of the class and speaking concurrently. If a child misbehaved while petitioner was speaking, the assistant would say something to the child. (R-G.)

Petitioner agreed that after her first evaluation, Ms. Tyner, the CIT "person," and Ms. Wasserman, the literary coach, came into her room as a team. They rearranged the room to make it more conducive to the Reading Street program. They modeled how to get the children to and from the rug. Ms. Tyner modeled the "Get Ready to Read" first section of the day and Ms. Wasserman modeled another "Get Ready to Read" section, perhaps language or grammar conventions. On another occasion, Ms. Wasserman came in "solo." After petitioner told her that she really needed help with teaching writing to kindergartners, Ms. Wasserman arranged for petitioner and Ms. Wasserman to sit in on a writing lesson conducted by a veteran kindergarten teacher.

On another occasion, Sean Healey, a special education specialist, came into petitioner's room and made some suggestions regarding the tendency of her classified students to touch everything on petitioner's desk and the teacher's assistant's desk. Petitioner, along with other staff members, also had an opportunity to hear Mr. Healey speaking in general on the inclusion of special education students in a classroom.

Petitioner acknowledges that she had a full-time aide in her classroom except for the aide's daily morning and evening breaks and lunch time. She also had an inclusion teacher assigned to her classroom in September. She states, however, that after one month, the inclusion teacher took maternity leave. The substitute provided, though wonderful with the children, had no kindergarten experience and no special education experience. It was not until the end of the Thanksgiving holiday that the designated inclusion teacher returned and remained assigned to her classroom throughout the year. She noted, however, that on about twenty-six days of the school year the inclusion teacher was re-assigned, either part or all of the day, to other classes and so not available to petitioner.

Petitioner states that there were two, not one, "courtyard incidents." On one occasion, petitioner was the only teacher with the class at the time of recess. Her teaching assistant was at lunch and the inclusion teacher had been reassigned to cover another class earlier that day. Of her twenty-eight students, three students' behavior did not merit going out to recess. Petitioner allowed the remaining twenty-five students to go into the courtyard for recess, knowing that there were two other teachers in the courtyard with their classes. Petitioner posted herself at the door of her classroom, which led directly to the courtyard. She was able to see both the courtyard and the classroom. On that day, no injury occurred. On another day, petitioner remained in the classroom working with report card grades while her teaching assistant and the inclusion teacher were supervising the class while they had recess in the courtyard. It was on that day that one of her children obtained a very bad gash. Blood was running down the child's head. Petitioner put a compress on his head, took him to the nurse, and wrote up the incident. The inclusion teacher and teaching assistant remained with the class. (R-F.)

Petitioner states that there was never a problem last year with student homework and she cannot recall ever being told by Assistant Principal Cordero of any parental concerns. She did not keep track of the number of times that the assistant principal came into her classroom over the course of the school year, but estimates that he likely came in twice a month. He never said anything constructive or designed to help her. Instead, he made comments to let her know what she was not doing. For example, "You have to have the kids in their seats."

Based upon the evidence presented at the hearing, and the opportunity to observe the witnesses and assess their credibility, I **FIND** the following **FACTS**:

Petitioner was certified to teach kindergarten through the eighth grade. She was reassigned from teaching the upper grades to kindergarten in the spring of 2012. She had never taught kindergarten previously.

Petitioner received mandated training in the spring of 2012, and follow-up training during the 2012-2013 school year. She, along with other kindergarten and school staff, also received daily professional development every morning from 8:00 a.m. to 8:30 a.m. In addition, after a less-than-satisfactory classroom observation in October 2012, petitioner received recommendations/training from the principal, vice principals, and other members of the administration team. Among other things, they modeled lessons for her, rearranged her room, and arranged for her to observe experienced kindergarten teachers.

With the exception of possibly twenty-six days of the school year, petitioner had a full-time aide and inclusion teacher in her classroom. While it is noted that the inclusion teacher did take a maternity leave of approximately forty days, petitioner was assigned a substitute inclusion teacher who, though not trained in special education, was described by petitioner as "wonderful with the children."

Petitioner acknowledges that on at least two occasions, she did not accompany her class to the courtyard for recess. On one of those occasions, she remained at the

door of her classroom, where she could alternately supervise the three students that remained indoors and those who were having recess. On that occasion, she also relied upon two other teachers, who had their classes in the courtyard for recess to supervise her class, though the two teachers never agreed to supervise petitioner's class while they had their own classes to supervise. On another occasion, petitioner remained in the classroom working on report card grades. Petitioner's aide and the inclusion teacher were with the class in the courtyard.

Both the District and petitioner testified that on one occasion, when petitioner was not with the children in the courtyard, a child was injured. Petitioner states that the injury occurred while her inclusion teacher and aide were with the children. The District states that the injury occurred when the class was outside in the presence of two other teachers who had not agreed to supervise the class. Neither party presented another witness to the two courtyard incidents at the hearing.

The District asserts that petitioner did not meet her professional responsibilities as to putting her Lesson Plan book in the basket in the office on Monday morning. She was "written-up" on four occasions regarding failing to timely submit her Lesson Plan for review. Petitioner denies not meeting her professional responsibilities as to her Lesson Plan submission, except for one occasion when she did not submit her Lesson Plan. While she acknowledges that on three days her Lesson Plans were submitted at the end of the day rather than in the morning, she asserts that her late submission should have been excused since she had a problem with her printer.

The District states that petitioner was denied her increment, in part, because of her attendance. Petitioner presented no evidence nor denied the District's testimony that she was absent on approximately seven occasions and late on several occasions. The District noted petitioner's need to improve her attendance on her performance evaluations.

The District asserts that petitioner's performance was unsatisfactory during the 2012-13 school year. It submits four evaluations that detail the reasons that petitioner was not rated satisfactory. Two of the evaluators testified at the hearing, Principal

Brower and Assistant Principal Cordero. Two of the evaluators did not testify at the hearing and thus the statements on their evaluations were hearsay.

Judicial rules of evidence do not apply to administrative agency proceedings, except for rules of privileges or where required by law. N.J.R.E. 101(a)(3); DeBartolomeis v. Bd. of Review, 341 N.J. Super. 80, 82 (App. Div. 2001); N.J.S.A. 52:14B-10(a) and N.J.A.C. 1:1-15.1(c). Hearsay is admissible subject to the "residuum rule," which mandates that the administrative decision cannot be predicated on hearsay alone. There must be a residuum of legal competent evidence in the record to support it. Weston v. State, 60 N.J. 36, 51 (1972). In assessing hearsay evidence, it should be accorded "whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability." N.J.A.C. 1:1-15.5(a).

While I cannot give as much weight to the evaluations performed by staff members that did not testify at the hearing, the statements made on those evaluations are consistent with the statements by the principal and vice president on their evaluations and I will admit those evaluations into evidence. In fact, petitioner herself testified as to difficulties that she had in teaching during the 2012-13 school year and to her need to ask colleagues questions regarding her assignment and to seek and/or accept assistance from the administrative team. The only rebuttal that she represented was as to the accuracy of the evaluation that she received related to Principal Brower's October 2012 evaluation.

Principal Brower credibly testified that the denial of petitioner's increment was not limited to her October 2012 evaluation. He further ensured that she had numerous opportunities to improve. He personally made recommendations as to where she needed to improve and had members of the administration go into her classroom to assist her in making improvements and modeling teaching components.

LEGAL ANALYSIS AND CONCLUSIONS

A salary increment is a reward for meritorious service, not an entitlement. N. Plainfield Educ. Ass'n v. Bd. of Educ., 96 N.J. 587, 593 (1984). Any board of education may with withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year. N.J.S.A. 18A:29-14. A local school board's decision to withhold a salary increment is a matter of management prerogative and is entitled to a presumption of correctness. Fogerty v. State-Operated Sch. Dist. of Jersey City, 97 N.J.A.R.2d (EDU) 439; Kaska v. Bd. of Educ. of Trenton, 95 N.J.A.R.2d (EDU) 55. Nevertheless, a school board cannot withhold a salary increase from tenured employee with according that employee the minimum procedural due process. See Basile v. Bd. of Educ. of Elm Park, 1 N.J.A.R. 199 (Dept of Educ. 1980). A teaching staff member is responsible to supervise her students. Even brief failures to appropriately supervise students justifies disciplinary action. In re Tenure Hearing of Pariano-Keyser, EDU 11405-09, Initial Decision (March 15, 2010), http://njlaw.rutgers.edu/collections/oal/.

A teaching staff member is entitled to appeal the loss of increment. N.J.A.C. 6A:3-4.1. If the action of the board of education is challenged the petitioning party bears the burden of proof to demonstrate by the preponderance of the evidence that the board of education's action was arbitrary, capricious or without reason. Kopera v. Bd. of Educ. of W. Orange, 560 N.J. Super. 288 (1960).

Petitioner acknowledges that, during the 2012-13 school year, she had difficulty teaching kindergarten. However, while she always taught upper grades, kindergarten is a grade level that she was certified to teach. While she argues that she did not have sufficient support to succeed, her own testimony details numerous examples of the assistance that was given to her, prior to and during the 2012-13 school year.

Petitioner had three formal evaluations. One evaluation was in October, which was early enough to give her notice of areas in which she needed to improve. Though she submitted a written rebuttal to that evaluation, she had two additional formal evaluations and numerous informal observations with feedback detailing her failure to

improve and/or perform at a satisfactory level and containing detailed recommendations to improve.

Petitioner also acknowledges that on several occasions she did not timely submit her Lesson Plans. Her assertion that she had difficulty printing her Lesson Plan because of a problem with her printer is not supported by any credible evidence nor does it support three occasions of not timely submitting her Lesson Plans.

Petitioner also acknowledges that on more than one occasion, she was not in the courtyard supervising her class during their recess. No evidence was submitted that petitioner was permitted to delegate her duty to supervise to other teachers in the courtyard with their classes, to her aide, and/or to the inclusion teacher. In fact, the responsibilities of the inclusion teacher were limited in connection with the three classified students in her class. The fact that petitioner might have been performing academic tasks during that recess period also does not excuse her failure to supervise her class while they were in the courtyard. Her grading responsibilities could have been performed at another time. The three students, who petitioner wished to discipline, could have been disciplined in a different manner or at a different time. For example, petitioner could have required that they stay after school. As a result of petitioner's choice of discipline, her attention was divided. In fact, one of petitioners' students was injured when she was not supervising her class during recess.

I **CONCLUDE** that petitioner failed to prove, by a preponderance of the evidence, that the District's decision to withhold her increment was arbitrary, capricious and unreasonable. Having seen no credible evidence of the exact amount of days that petitioner was absent or late, her attendance bears no part in my decision.

ORDER

It is **ORDERED** that petitioner's challenge of the withholding of her increment for the 2012-13 school year is hereby **DENIED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

Feb. 3, 2015
DATE

EVELYN J. MAROSE, ALJ

Date Received at Agency: Feb. 3, 2015

Date Mailed to Parties: FEB -5 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

kep

APPENDIX

WITNESSES

For Petitioner:

Andrea Golamy-Sadig

For Respondent:

Robert Bower

Joseph Cordero

EXHIBITS

For Petitioner:

P-1 Rebuttal of Formative Observation, Conducted 10/23/12

For Respondent:

R-A Curriculum Guide—Elementary Language Arts/Science/Social Studies (Reading Street), Grade Level—Grade K

R-B On week sample of Teacher's Guide for NJ Common Core, Kindergarten Teacher's Edition

R-C Withdrawn

R-D May 13, 2013, April 19, 2013, and February 24, 2012, memorandum to petitioner about Plan Books/Lesson Plans

R-E Memorandum from Assistant Principal Cordero to petitioner, dated January 29, 2013, regarding Lesson Plans

R-F Memorandum from Principal Brower to petitioner, dated May 16, 2013, about Conduct Unbecoming

R-G Evaluations Dated—May 23, 2013, March 5, 2013 (admitted for the limited purpose of indicating that petitioner received the evaluation), December 12, 2012 (admitted for the limited purpose of indicating that petitioner received the evaluation), and October 23, 2012 & Tenured Teacher Candidates for Teacher

Academy, June 2012 (admitted for the limited purpose of indicating training/support available to petitioner)

102-15

102-15R

OAL DKT. NO. EDU 16579-14
(16626-13 ON REMAND)
AGENCY DKT. NO. 259-10/13

BRIAN DORAN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, FRANK FERRARO, KEARNY SUPERINTENDENT AND NEW JERSEY STATE DEPARTMENT OF EDUCATION CRIMINAL HISTORY REVIEW UNIT,	:	
RESPONDENTS.	:	

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

Upon review, the Commissioner approves the Agreement terms and adopts the Initial Decision as the final decision in this case, with the following acknowledgement. The Agreement has been fashioned by petitioner, the Kearny Board of Education and the New Jersey Department of Education. Prior to the execution of the Agreement, petitioner withdrew his claims against respondent Ferraro by way of a letter dated October 14, 2014 from petitioner's counsel to the Administrative Law Judge assigned to the case.

Thus, the proposed settlement resolves all issues between all remaining parties to the litigation. Accordingly, the matter is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/18/15

Date of Mailing: 3/18/15

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 16579-14

Agency Docket No.259-10/13

(ON REMAND EDU 16626-13)

BRIAN DORAN,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, FRANK FERRARO[1], KEARNY SCHOOL SUPERINTENDENT AND NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,

Respondents

Michael S. Doran, Esq. on behalf of petitioner

Jennifer Roselle, Esq., on behalf of respondent Kearny School District

Caroline Jones, Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: January 23, 2015 Decided: January 30, 2015

BEFORE **JOANN LaSALA CANDIDO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on December 16, 2014, on remand, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. This matter was initially assigned to the undersigned on or about December 2013 under OAL Docket Number EDU 16626-13. After several conferences were conducted the parties reached a resolution in this matter and the undersigned issued an Initial Decision approving the settlement on October 24, 2014. However, the Commissioner remanded the matter to the OAL by Order dated December 9, 2014 which states:

> "Examination of the record of this matter, the Initial Decision and the "Settlement Release" (Agreement, reveals neither the signature of the attorney for respondent Kearny Board of Education, which attorney is the Board's duly authorized representative in litigation, nor, in the alternative, a copy of a resolution by the Kearny Board of Education approving the settlement and bestowing authority on a specific individual to execute and bind the Board to the settlement. Further, the Department of Education's consent to the agreement must be evidenced by the signature of the Deputy Attorney General representing it in these proceedings. . . ."

A telephone prehearing was conducted on January 7, 2015 during which time the parties discussed the Commissioner's order remanding this matter back to OAL. On January 22, 2015 OAL respondent's counsel submitted correspondence from the Kearny Board of Education which re-approved a resolution approving the execution of a settlement agreement in this matter, which is attached hereto for reference. Additionally, on January 23, 2015 petitioner's counsel submitted an updated signature page to the Settlement Agreement as executed by Deputy Attorney General Caroline Jones, as well as a letter, dated October 14, 2014, withdrawing the request for a hearing as to respondent Frank Ferraro as well as a separation agreement between the Kearny Board of Education and Frank Ferraro which specifically includes a waiver of claims against the Kearny Board of Education.

Having reviewed the contents of the Commissioner's Order, the updated signature page reflecting the signature of Deputy Attorney General Caroline Jones, and the resolution approving the execution of the Settlement Agreement, I **FIND**:

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[1] Attached is a separation agreement between the Kearny Board of Education and Franck Ferraro which specifically includes a waiver of claims against the Kearny Board of Education and petitioner is not seeking relief from him. Hence, Mr. Ferraro is not an interested party in this matter.

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

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

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

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

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

January 30, 2015
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency:

FEB -5 2015

Date Mailed to Parties:

ljb

2-5-15

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

BRIAN DORAN

BRIAN DORAN

DATE:

KEARNY BOARD OF EDUCATION

BY:

DATE:

NEW JERSEY DEPARTMENT
OF EDUCATION, CRIMINAL
HISTORY REVIEW UNIT

Carl Carabelli

BY: CARL CARABELLI
DATE: 1/21/2015

Caroline Jones

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF
NEW JERSEY

By: CAROLINE JONES
DEPUTY ATTORNEY GENERAL

Attorney for Department of Education

DATE: 1/21/15

SETTLEMENT AND RELEASE

2015 JAN 22 P 12:00

This Settlement Agreement and Release (hereinafter "Agreement") is entered into on this ____ day of _____, 2014, by and between Brian Doran, by and through his attorney, the Kearny Board of Education (the "Board"), and the New Jersey Department of Education, Criminal History Review Unit, ("Criminal History") (collectively, the "Parties").

WHEREAS, Doran was hired as a custodial staff member by the Board on or about April 1, 2003;

WHEREAS, as part of the hiring process, Doran submitted to a criminal history background check required of all public school employees;

WHEREAS, at the time of his hire, Doran disclosed certain offenses which may have disqualified him from employment with a public school district;

WHEREAS, at the time of his hiring, the Board hadnot received notice from Criminal History advising of Doran's eligibility for employment in a school district;

WHEREAS, approximately seven (7) years after the time of Doran's initial employment, Doran's brother, James Doran, became a member of the Board;

WHEREAS, Doran's brother continues to serve as a member of the Board;

WHEREAS, Mr. James Doran has recused himself from all discussions involving the within matter;

WHEREAS, in or around summer of 2013, it was discovered the Criminal History clearance was not in Doran's personnel file;

WHEREAS, on or about September 5, 2013, Doran was placed on a paid leave of absence to allow him time to provide proof of his eligibility for employment with the Board;

WHEREAS, on or about September 6, 2013, Criminal History notified Doran that he was disqualified from employment based on information Doran's criminal history;

WHEREAS, the September 6, 2013 correspondence from Criminal History provided that Doran had "14 days ... to challenge the accuracy of" the determination;

WHEREAS, on or about September 16, 2013, the Board unanimously voted to continue Doran's suspension with pay pending the filing of tenure charges;

WHEREAS, by correspondence dated September 18, 2013, Doran served timely written notice to Criminal History challenging the accuracy of the information upon which the disqualification was based;

WHEREAS, in response to Criminal History's notification of disqualification Doran also filed a Petition of Appeal with the Department of Education, which is docketed as Agency Docket Number 259-10/13, alleging *interalia*, that the disqualification by Criminal History and Doran's termination was improper;

WHEREAS, on or about October 10, 2013, Doran was granted relief in the form of an expungment order of the disqualifying offenses;

WHEREAS, in the interest of cost savings and uncertainty associated with litigation of this matter, the Parties wish to enter into a voluntary settlement agreement;

NOW THEREFORE, in consideration of the mutual covenants contained herein, the Parties agree to the following terms in resolution of the pending Petition of Appeal.

1. Doran will withdraw his pending appeal docketed before the Department of Education as Agency Docket Number 259-10/13, with prejudice, against all the Parties.
2. The Board shall provide to Doran the necessary documentation so that he may submit to a criminal history review unit background check. Doran shall, within 30 days of the execution of this agreement by the Parties, schedule an appointment for the criminal history review unit background check. Doran shall not assume employment status during the time the criminal history review unit background check being performed.
3. If the criminal history review unit determines that Doran is eligible for employment with a public school in the State of New Jersey, the Board shall process Doran's return to work as soon thereafter as is practicable. The terms of Doran's reemployment shall be

governed by the applicable collective negotiations agreement and the individual employment contract annexed hereto. This includes, but is not limited to, placement on the salary guide at the rate of $66,019 per year, subject to all applicable taxes and deductions; eligibility for health benefits; AFLAC and/or credit union membership eligibility; and any other applicable terms and conditions of employment.

4. If the criminal history review unit determines that Doran is disqualified for employment with a public school in the State of New Jersey the terms of Paragraph 3 above shall not apply, the contract attached hereto is null and void, and Doran shall have no entitlement to reinstatement, backpay, or employment with the Board as a result of this Agreement.
5. The making of this Agreement is not intended to be, nor shall it be construed as an admission that any of the Parties violated any federal, state or local law, statutory or decisional, ordinance or regulation, or any express or implied contract of employment, or breached the public policy of the State of New Jersey, or committed any wrong whatsoever.
6. This Agreement shall not be offered, used or considered as evidence in any proceeding except to the extent necessary to enforce the terms of this Agreement or to challenge an alleged breach of the Agreement.
7. This Agreement is expressly conditioned upon agreement of all the parties to this Agreement and the approval of the Commissioner or Education and/or his designee.
8. **Doran agrees to unconditionally and forever release and discharge the Board and Criminal History, and each and all of their current, former and future parents, subsidiaries, affiliated entities and successors, and each and all of their respective shareholders, officers, directors, employees, agents, attorneys, and insurances, of and from any and all debts, claims, liabilities, demands, and causes of action of every kind, nature and description, whether known or unknown, including but not limited to, any claim for salary, severance, benefits, bonuses and any other form of compensation, claims for personal injury, breach of contract, negligent or intentional misrepresentation, negligent or intentional infliction of emotional distress, defamation, wrongful termination, and any claims under federal, state or local laws, including but not limited to the New Jersey wage and hour laws, the New Jersey Wage Payment Law, the New Jersey Law Against Discrimination, the New**

Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Constitution, the common law of the State of New Jersey (including, but not limited to Pierce claims") the Family and Medical Leave Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964, the Equal Pay Act, the Fair Labor Standards Act, and the Lilly Ledbetter Fair Pay act of 2009, which Doran has or may have or could assert against the Board as of the date on which this Agreement is signed, including but not limited to any claims arising out of or connected with Doran's employment or separation of employment, the Board, excluding any claims Doran may have for unemployment insurance benefits, state disability compensation, and/or a charge filed with the US Equal Employment Opportunity Commission challenging the validity of the waiver of rights under the Age Discrimination in Employment Act and the pending Notice of Tort Claim that was filed with the Board.

9. Doran agrees that he was afforded up to twenty-one (21) days in which to consider and sign this Agreement. Doran has had the opportunity to and has had the terms of this Agreement reviewed by an attorney of his choosing. Once the Agreement is signed, acceptance may be revoked within seven (7) days by so notifying the Board. TO BE EFFECTIVE, DORAN'S RESCISSION MUST BE IN WRITING AND DELIVERED TO COUNSEL FOR THE KEARNY BOARD OF EDUCATION, JENNIFER ROSELLE, ESQ., GENOVA BURNS GIANTOMASI WEBSTER LLC, 494 BROAD STREET, NEWARK, NEW JERSEY, 07102, EITHER BY HAND OR BY MAIL WITHIN THE 7-DAY PERIOD; IF SENT BY MAIL, THE RECESSION MUST BE: (1) POSTMARKED WITHIN THE 7-DAY PERIOD; (2) PROPERLY ADDRESSED TO COUNSEL FOR THE KEARNY BOARD OF EDUCATION; AND (3) SENT BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED. If not otherwise revoked, this Agreement will become effective on the eighth (8th) day following execution by the parties and approval by the Commissioner of the Department of Education.

10. This Agreement is binding on the parties but does not establish practice or precedent and cannot be relied upon for any purpose other than enforcement of the terms contained herein.
11. This Agreement shall be governed by the laws of the State of New Jersey and any action to enforce this Agreement shall be brought in the State Court of the State of New Jersey.
12. The terms of this Agreement may not be modified, except by written agreement signed by the parties.
13. This Agreement may be executed by the parties hereto in one or more counterparts, and each fully executed counterpart shall be deemed an original. Any facsimile copy of an executed signature page hereto shall be deemed an original signature page for all purposes.
14. This Agreement constitutes the entire agreement between the parties and there are no additional oral or written agreements, understandings, representations or promises that vary from the terms of this Agreement. None of the Parties, their agents, their representatives nor their attorneys have made any additional oral or written agreements, understandings, representations or promises to the other party or anyone else regarding the terms of this Agreement other than those contained herein.
15. By signing this Agreement, Doran states that:

    a. He has read the Agreement;

    b. That he agrees with the terms of this Agreement; and

    That he has been afforded an opportunity to consult with a union representative and/or attorney prior to executing this Agreement.

IN WITNESS WHEREOF, and intending to be legally bound hereby, Brian Doran, the Kearny Board of Education, the New Jersey Department of Education, Criminal History Review Unit have executed the foregoing Settlement and Release.

BRIAN DORAN

BRIAN DORAN

DATE: 9/25/14

KEARNY BOARD OF EDUCATION

BY:

DATE:

NEW JERSEY DEPARTMENT
OF EDUCATIONCRIMINAL
HISTORY REVIEW UNIT

BY: Carl H. Caruselli

DATE:

EMPLOYMENT CONTRACT- NON TENURED AGREEMENT

It is agreed between the Kearny Board of Education, in the County of Hudson, party of the first part, and, BRIAN DORAN, party of the second part, that said Board of Education has employed and does hereby engage and employ the said party of the second part to work in the public schools, under the control of said Board of Education from the _____ day of ,_____,___ at the salary of $66,000 to be paid in 52 equal weekly installments.

It is further agreed that the said party of the second part shall begin service on the _____ day of _____ : that the said party of the second part shall hold an appropriate Fireman's License within 180 days of the date of hire, and that said person shall exhibit the license to the Plant Operations Manager of the school district.

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

It is fully understood by the party of the second part, that this contract is offered in accordance with article VII, section V, of the agreement between the Kearny School Employees" Association (K.S.E.A.), and the Kearny Board of Education (K.B.O.E.) 2011-2014 contract.

The party of the second may terminate this contract upon written notice to the K.B.O.E. The K.B.O.E. shall maintain all rights afforded to it under the law with respect to the continued employment of the party of the second.

Dated this _____,day of _____,_____ Board of Education of the Town of Kearny in the County of Hudson.

_____
PRESIDENT

_____
EMPLOYEE

_____
BUSINESS ADMINISTRATOR/
BOARD SECRETARY

CERTIFIED TO BE A TRUE COPY OF THE RESOLUTION AS IT APPEARS IN THE MINUTES OF THE OCTOBER 20, 2014 REGULAR MEETING OF THE KEARNY BOARD OF EDUCATION

BY: _____
Business Administrator/Board Secretary

The following resolution was moved by Mrs. Sherry and seconded by Ms. Lindenfelser:

APPROVAL OF SETTLEMENT AGREEMENT IN THE MATTER OF FRANK FERRARO

Be It Resolved: That the Kearny Board of Education hereby approves the settlement between the Board of Education and Frank Ferraro, as per the attached Agreement.

On roll call, the following votge was recorded: Mr. Doran, "aye", Mr. Leadbeater, "aye", Mrs. Paris, "aye", Mr. Plaugic, "aye", Mrs. Sherry, "aye", Mr. Viscuso, "aye", Ms. Lindenfelser, "aye", President Mc Donald, "aye".

There being eight votes in the affirmative, the motion was carried.

KENNETH J. LINDENFELSER, ESQ.
570 Kearny Avenue
Kearny, New Jersey 07032
Telephone: 201/998-9500
Fax: 201/997-4557
Attorney for Petitioner, Board of Education
of the Town of Kearny, Hudson County

2015 JAN 22 P 12:00
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

IN THE MATTER OF THE TENURE HEARING OF FRANK FERRARO, SCHOOL DISTRICT OF THE TOWN OF KEARNY, HUDSON COUNTY	BEFORE THE ARBITRATOR GERARD G. RESTAINO Agency Dkt. #232-8/14 **STIPULATION OF SETTLEMENT**

STIPULATION OF SETTLEMENT

WHEREAS, the Board of Education of the Town of Kearny ("Board of Education" or "District") certified and filed tenure charges with the Commissioner of Education against the Superintendent of Schools, Frank Ferraro ("Mr. Ferraro"), on or about August 25, 2014, a copy of which charges and Certificate of Determination are attached hereto; and

WHEREAS, the Commissioner of Education transmitted the tenure charges to Gerard Restaino, Arbitrator; and

WHEREAS, Mr. Ferraro filed a Motion to Dismiss the Tenure Charges in Lieu of an Answer and has filed an Answer to the tenure charges; and

WHEREAS, the parties through their respective counsel, participated in settlement discussions and negotiations; and

WHEREAS, a hearing was scheduled to begin on October 28, 2014; and

WHEREAS, the Board has had a full opportunity to investigate this mater, and based upon that investigation, has determined that this Stipulation of Settlement is fair and just, and causes the least disruption to the District in that witnesses will not be taken away from their normal responsibilities, that the settlement avoids the uncertainty of litigation and an expensive hearing process and a possible appeal, and that Mr. Ferraro has raised defenses and objections to the charges which may be meritorious, and that there is good cause which warrants this Stipulation of Settlement; and

WHEREAS, the Board has determined that is in the best interests of the District, and the public at large to resolve the dispute existing between the Board and Mr. Ferraro in that the long-term cost to the District may exceed the cost of settling the matter in the near term, and a settlement provides stability in terms of certainty in leadership of the District; and

WHEREAS, Mr. Ferraro intended to file a civil action premised upon alleged "whistleblowing" in connection with action taken by the Board against him; and

WHEREAS, the parties have determined it to be in their respective best interests to resolve the

case and come to an agreement with respect to the issues presented in this matter and prevent further litigation; and

WHEREAS, the Board has determined that it is in the best interest of the District, and the public at large, to retain the present leadership to provide stability, certainty, and order within the District now and in the future and to avoid a disruption of the administration which would have an adverse impact upon the children of the District; and

WHEREAS, the Board believes that the prosecution of the tenure charges will divert significant financial resources, time and key staff from the mission of the District;

NOW THEREFOR, the parties have agreed to resolve this matter under and subject to the terms outlined in this Stipulation of Settlement.

AGREEMENT

The parties to this Agreement, intending to be legally bound, agree as follows:

1. Upon the execution and approval of this Stipulation of Settlement, the Board of Education hereby withdraws the tenure charges with prejudice, and Mr. Ferraro agrees to the dismissal of same.

2. By executing this Stipulation of Settlement, Mr. Ferraro hereby resigns from his position with the Board effective November 1, 2014. This agreement serves as Mr. Ferraro's resignation of the Chief School Administrator position in the Kearny School District and the Board of Education of the Town of Kearny. It is understood and agreed that Mr. Ferraro's resignation is conditioned upon the Board's formal approval hereof, the Board's fulfillment of the terms hereof, and the

Arbitrator's approval hereof, consistent with *N.J.A.C.* 6A:3-5.6. By approving this agreement, the Board agrees to waive the 90-day notice provision in the parties' employment contract dated December 10, 2012 said contract is terminated effective November 1, 2014 by mutual agreement of the parties, subject to the arbitrator's approval of this agreement.

3. In consideration of Mr. Ferraro's resignation, release of claims, and in consideration of his employment contract rights, the Board agrees as follows:

(a) The Board shall pay Mr. Ferraro his salary retroactively from August 14, 2014 through November 1, 2014; ($34,895.82);

(b) The Board shall pay Mr. Ferraro the sum of $20,937.48 for tendering his resignation effective November 1, 2014 and for a waiver of other valuable rights and claims;

(c) The Board shall pay Mr. Ferraro $12,884.60 for his unused vacation days in accordance with the parties' employment contract;

(d) The Board shall make all necessary payroll deductions and/or withholdings from the foregoing amounts for federal and state taxes and for pension contributions, as appropriate. The payments to Mr. Ferraro shall be made by the Board on or before December 1, 2014.

4. In accordance with Executive Order 11, in response to requests for information about Mr. Ferraro's employment, the Board shall indicate the dates of his employment and the fact that he resigned in good standing from the District. Nothing hereto shall prevent Mr. Ferraro from obtaining letters of reference from former and/or current members of the Board. The Board agrees that it shall not make any disparaging statements in public about Mr. Ferraro's character or performance as Superintendent and Mr. Ferraro shall not make any disparaging comments in

public about the Board.

5. The Board and Mr. Ferraro agree to release each other from any and all claims which they have now, or may have in the future against each other relating to Mr. Ferraro's employment with the Board. Excepted from this release are any rights Mr. Ferraro may have to COBRA benefits in accordance with Federal Law, and/or any rights he has under the Teachers Pension and Annuity Fund Act and/or any claim to a breach of this agreement.

6. The parties understand that this Stipulation of Settlement is contingent upon the approval of Gerard Restaino, Arbitrator. It is understood and agreed that, in the event such approval is not granted, then this Agreement shall be null and void and that the parties shall retain all rights they had prior to their execution of this agreement.

7. The parties warrant that they have entered into this Stipulation of Settlement voluntarily, without any duress or undue influence and that, by entering into this agreement, each party waives their right to a hearing and disposition on the merits of the tenure charges.

8. Mr. Ferraro agrees that he shall not file suit against the Board for an alleged violation of the Conscientious Employee Protection Act.

9. The Board agrees that it shall not bring any additional tenure charges against Mr. Ferraro and agrees that it shall take no further action against his New York SDA certificate.

10. Mr. Ferraro agrees to unconditionally and forever release and discharge the Board, its successors, and all of its respective officers, directors, employees, agents and attorneys of and from any and all debts, claims, liabilities, demands, and causes of action of every kind, nature and description, whether known or unknown in connection with Mr. Ferraro's employment as Superintendent, including but not limited to, any claim for salary, severance, benefits, bonuses and any other form

of compensation, claims for personal injury, breach of contract, negligent or intentional misrepresentation, negligent or intentional infliction of emotional distress, defamation, wrongful termination, and any claims under federal, state or local laws, including but not limited to the New Jersey wage and hour laws, the New Jersey Wage Payment Law, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Constitution, the common law of the State of New Jersey (including, but not limited to Pierce claims") the Family and Medical Leave Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964, the Equal Pay Act, the Fair Labor Standards Act, and the Lilly Ledbetter Fair Pay act of 2009, which Mr. Ferraro has or may have or could assert against the Board as of the date on which this Agreement is signed, including but not limited to any claims arising out of or connected with Mr. Ferraro's employment or separation of employment with the Board, excluding any claims Mr. Ferraro may have for unemployment insurance benefits, state disability compensation, and/or a charge filed with the US Equal Employment Opportunity Commission challenging the validity of the waiver of rights under the Age Discrimination in Employment Act. The exceptions contained in paragraph 5 shall also apply to the releases in this paragraph.

11. Mr. Ferraro agrees that he was afforded up to twenty-one (21) days in which to consider and sign this Agreement. Mr. Ferraro has had the opportunity to and has had the terms of this Agreement reviewed by an attorney of his choosing. Once the Agreement is signed, acceptance may be revoked within seven (7) days by so notifying the Board. TO BE EFFECTIVE, MR. FERRARO'S RESCISSION MUST BE IN WRITING AND DELIVERED TO COUNSEL FOR

THE KEARNY BOARD OF EDUCATION, KENNETH J. LINDENFELSER, ESQ., 570 KEARNY AVENUE, KEARNY, NEW JERSEY 07032, EITHER BY HAND OR BY MAIL WITHIN THE 7-DAY PERIOD; IF SENT BY MAIL, THE RECESSION MUST BE: (1) POSTMARKED WITHIN THE 7-DAY PERIOD; (2) PROPERLY ADDRESSED TO COUNSEL FOR THE KEARNY BOARD OF EDUCATION; AND (3) SENT BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED. If not otherwise revoked, this Agreement will become effective on the eighth (8th) day following execution by the parties and approval by the Board.

12. Mr. Ferraro understands and agrees that the Commissioner of Education may refer this matter to the State Board of Examiners for possible action against his certificate.

IN WITNESS WHEREOF, the parties acknowledge their agreement to these terms by their signatures below:

FOR PETITIONER, KEARNY BOARD OF EDUCATION

Bernadette McDonald, Board President

Date: 10/20/14

Kenneth J. Lindenfelser, Esq.
Counsel for Petitioner, Board of
Education of the Town of Kearny

FOR RESPONDENT, FRANK FERRARO

Frank Ferraro

Date: 10/20/2014

Andrew Babiak, Esq.
Counsel for Frank Ferraro

CERTIFIED TO BE A TRUE COPY OF THE RESOLUTION AS IT APPEARS IN THE MINUTES OF THE JANUARY 13, 2015 SPECIAL BOARD MEETING OF THE KEARNY BOARD OF EDUCATION

BY: _____

Business Administrator/Board Secretary

SETTLEMENT AGREEMENT

Proposed Resolution

Resolved: *That the Kearny Board of Education approves the submission of the settlement agreement in the matter docketed before the Office of Administrative Law as Doran v. Kearny Board of Education, et. al, OAL DKT. NO.: EDU 16626-2013N to the Commissioner of Education.*

Pursuant to the December 9, 2014, remand order from the Commissioner of Education, the Board hereby clarifies that Bernadette McDonald is authorized to execute this agreement on behalf of the Board.

This agreement is conditionally executed and implementation is specifically conditioned up approval of the Commissioner of Education. Absent approval by the Commissioner of Education this resolution and approval of the agreement shall be null and void.

105-15

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
TRENTON, NEW JERSEY

IN THE MATTER OF ARBITRATION)
)
of)
) OPINION
JENNIFER FILO) AND
MORRIS-UNION JOINTURE COMMISSION) AWARD
NEW PROVIDENCE, NJ (UNION COUNTY))
)
and)
)
AGENCY DOCKET NO. 334-11/14)

Before: Prof. Robert T. Simmelkjaer, Esq.
Arbitrator

APPEARANCES

FOR THE COMMISSION

Robin T. McMahon, Esq., Cleary Giacobbe Alfieri Jacobs, LLC

FOR THE RESPONDENT

Timothy Smith, Esq., Caruso Smith Picini, P.C.
Nicholas Poberezhsky, Caruso Smith Picini, P.C.

ALSO PRESENT

Andrea Marmolejos, Principal
Roselouise Nappi Holz, UniServ Field Representative

STATEMENT OF THE CASE

This case arises pursuant to the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ ACT" or the "Act"), N.J.S.A. 18A:6-16, effective August 6, 2012. The Tenure Employees Hearing Law N.J.S.A. 18A:6-10 et seq. was amended by P.L. 2012 C.26.

On November 14, 2014, the Morris-Union Jointure Commission (hereinafter the "Commission") submitted to David C. Hespe, Acting Commissioner, New Jersey Department of Education, the following: (1) Tenure Charges Against Jennifer Filo, (2) Certificate of Determination, and (3) Proof of Service. Two (2) charges were filed against the Respondent: (1) Unbecoming Conduct, and (2) Other Just Cause. The Commission requested that Commissioner Hespe "deem the charges sufficient to warrant dismissal or reduction in salary and refer the case to an arbitrator in accordance with the Tenure Employees Hearing Law."

On December 1, 2014, the Respondent, Ms. Jennifer Filo ("Filo") filed her Written Statement of Evidence, denying the charges and maintaining, inter alia, that "these charges should be dismissed so that an excellent teacher can continue her service to the students and the parents of this district."

By letter dated December 12, 2014, Ms. M. Kathleen Duncan, Director, Bureau of Controversies and Disputes, New Jersey Department of Education, advised the parties as follows:

> Please be advised that, following receipt of respondent's answer on December 2, 2014, the above-captioned tenure charges have been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary. Accordingly, on this date, they are being

referred to Arbitrator Robert T. Simmelkjaer pursuant to N.J.S.A. 18A:6-16 as amended by P.L. 2012. c. 26.

The Charges, dated October 28, 2014, are as follows:

FIRST CHARGE
(Unbecoming Conduct)

1. The MUJC is a public educational agency that was established pursuant to N.J.S.A. 18A:46-25 (repealed, P.L. 2007, C. 63) for the primary purpose of providing services for students with disabilities. Currently, the MUJC consists of twenty-nine member school districts.

2. The MUJC operates two Developmental Learning Centers that provide a public school program for students with autism or autistic like behaviors who have been referred to the MUJC by their district of residence. More than 250 children attend the Centers, which are located in New Providence and Warren, New Jersey.

3. Ms. Jennifer Filo (hereinafter "Filo") is a tenured teacher employed by the MUJC. She received a standard certificate as a teacher of the handicapped in September 2006, whereupon, the MUJC hired her to serve in that capacity. Filo had previously worked for the MUJC, initially as a substitute teacher starting in November 2005 and, as of January 23, 2006, a teacher assistant.

4. Though employed on a ten-month basis, Filo elected to work during the MUJC's extended school year ("ESY") program in 2014, which ran from June 24 through August 7, 2014. During that time, she engaged in a pattern of corporal punishment within the meaning of N.J.S.A. 18A:6-1, as follows:

   a. On or about June 27, 2014, during integrated speech, she was extremely aggressive with student **HM,*** pulling back the student's fingers and wrists, causing her to cry;

   b. On multiple occasions, she twisted student MC's wrist to one side, while simultaneously bending it severely back, in order to control his behavior;

   c. On or about August 4, 2014, while student MM was in the cafeteria for breakfast, Filo stood over him, twisting and bending back his wrist, and on other occasions, she would twist and bend back his wrist in order to get him to move or sit down;

*** Erroneously listed as "MH" in Specification 4(a).

d. On more than one occasion, when restraining students CW or BK, she shoved a table against the student's stomach, longer and more forcibly than necessary;

e. When student MM would swing his arms, trying to hit others nearby, she would swat back at him with an appropriate hit;

f. During a vocational task, when MM swung at her, Filo used a wooden clipboard, not just to block his hit, but to repeatedly hit his knuckles and hands, which later became red and swollen;

g. On or about August 1, 2014, Filo withheld breakfast from students MC and MM because they had not finished their morning schedule;

h. Once, when student HM refused to get up off the floor, Filo bent HM's fingers back in order to make her comply;

i. On one occasion when student TH grabbed Filo's arm and dug his nails into it, Filo bent back TH's fingers with more force than necessary to get him to release her;

j. On or about June 27, 2014, when student CW was acting aggressively in a bathroom stall, Filo held CW's hands and unnecessarily bent her fingers backwards; and

k. When Filo and another staff member were holding student MC, each by one of his arms, because he had become agitated, Filo unnecessarily twisted MC's arm back, and on another occasion, when the student was walking in the hallway and threw his lunch, Filo bent his arm back to punish him.

5. During the ESY program, Filo engaged in other inappropriate behavior, as follows:

   a. Filo screamed at students on a daily basis; and

   b. More than once when students were aggressing toward one another, she encouraged them to hit back.

6. During the 2013-2014 regular school year, Filo also engaged in inappropriate conduct, as follows:

   a. Filo yelled at students and mimicked their autistic-like behaviors, on one occasion, by cupping and screaming directly into the ear of a student BO, causing him to cry.

b. She made derogatory comments to students RM and MH, asking them if they were stupid or an idiot;

c. With regard to student MH, who would play with vocational task items as though they were airplanes, Filo would frequently knock them off the table and onto the floor and make the student pick them up, sometimes forcibly prompting him to do so; and

d. On several occasions, she continued to feed RM, or allowed a teacher assistant to do so, to the point where he was in visible distress, crying or vomiting.

7. The duty of a teacher requires a degree of self-restraint and controlled behavior that oftentimes is not requisite to the other occupations and professions. As evidenced by the incidents described above, Filo has failed to exercise the degree of self-restraint commensurate to her position, has shown herself to be unfit to continue serving as a teacher, and has engaged in unbecoming conduct, warranting her immediate dismissal.

8. Filo's continued presence in the classroom represents a danger to the safety and well-being of her students.

9. Accordingly, and by letter dated August 26, 2014, the MUJC Superintendent notified Filo that with the concurrence of the Board President, the Superintendent was suspending Filo with pay, pending further notice.

WHEREFORE, the Morris-Union Jointure Commission demands the dismissal of Jennifer Filo based upon her unbecoming conduct in accordance with the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 *et seq.* as amended by P.L. 2012, C.26.

SECOND CHARGE
(Other Just Cause)

10. The MUJC incorporates the foregoing allegations as though fully set forth at length herein.

11. Whether or not her behavior constitutes corporal punishment prohibited by N.J.S.A. 18:6-1, Filo's conduct, as hereinabove alleged, constitutes just cause for her immediate dismissal and relinquishment of her tenure status.

WHEREFORE, the Morris-Union Jointure Commission demands the dismissal of Jennifer Filo for other just cause in accordance with the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 *et seq.*, as amended by P.L. 2012, C.26.

PROCEDURAL HISTORY

A hearing in the instant case was held on February 13, 2015, February 23, 2015, February 26, 2015, and February 27, 2015 at the Commission's offices in New Providence, New Jersey.

At the hearing, the parties were given ample opportunity to present their respective positions, including testimonial and documentary evidence, and the cross-examination of witnesses. The parties were represented by counsel and the hearing was transcribed. The record consists of two (2) Joint Exhibits, forty-one (41) Commission Exhibits and twenty-one (21) Union Exhibits. The Respondent submitted a post-hearing audio transcription. In addition, the parties submitted post-hearing briefs dated March 11, 2015. The evidence so submitted as well as the arguments of the parties has been considered by the Arbitrator in his award and accompanying opinion.

STATEMENT OF FACTS

The Charges pertain to the 2013-2014 school year and the extended school year ("ESY") program, which ran from June 24th to August 7, 2014. At all times relevant, Ms. Filo was employed as a teacher of the handicapped. During the 2014 ESY, Filo taught at the Commission School known as the Developmental Learning Center ("DLC") in Warren, NJ. During the 2013-14 school year, she was assigned to the DLC in New Providence.

The Commission's students tend to be more on the severe end of the autism spectrum, including a large group of non-verbal students who were not able to focus and needed lots of physical prompting to do their work. The class was also comprised of aggressive students and students who could become violent. There were eight (8) students in the Respondent's ESY class – all but two of whom were non-verbal. "Of the same eight students, all had some aggressive behavior, but only CW posed a physical threat," according to Ms. Anclien. (Tr. @ 21).

The Commission called as witnesses three of the four teacher assistants, who were assigned to Ms. Filo's ESY class, and a speech teacher for some of the children in the class, namely: Kelly Anclien, Danny LoBello, Karen Romero and Speech Therapist Sandra Furia. With respect to the 2013-14 school year, the Commission called Melissa Olesky, Audrey Weiss, and Jennifer Ferraioli.

The Respondent testified on her own behalf. She also called as witnesses Tom McNamara, Blanca Sadik, Julie Gardner, Damon Murtha, Latonia Hall, Cynthia Vaillant, and Andrea Marmolejos. Ms. Sadik, a teacher assistant in the Respondent's class during the 2013-14 school year, was terminated by the Commission in October 2014 based on conduct similar to that alleged against Ms. Filo.

THE CHARGES

I. Extended School Year (June – August 2014)

Specification 4 (a): On or about June 27, 2014, during integrated speech, she was aggressive with student HM, pulling back the student's fingers and wrists, causing her to cry.

Commission Position

Ms. Kelly Anclien ("Anclien") testified that on or about June 27, 2014, during integrated speech, Filo was extremely aggressive with HM, a female student, for approximately twenty to thirty minutes, pulling back the student's fingers and twisting her wrists extremely hard, causing the student to cry. "So Danny LoBello and Jen physically tried to escort her to the table and she was, you know, being refusing and trying to get away and she even pushed back from the table several times and then she flopped to the floor at this point...but HM was on the ground and Jen went right over to her and took – intertwined her fingers, bent back her wrist and like twisted her and just keep going on with this. I mean speech lasts 30 minutes, it was throughout the entire speech session, and over this hurtful aggression continued." (Tr. @ 26). Anclien observed Filo kneeling, holding back HM's arms and toward the end of the episode, Filo was mimicking the "raspberry noise" made by HM. (Tr.@ 105-106).

According to Anclien, HM had not acted aggressively toward Filo prior to the Respondent's physical response. Anclien believed that HM was being hurt because "immediately upon this behavior HM is crying and at that point when Jennifer had let go of HM's hand." (Tr. @ 28). Neither Anclien nor Filo took HM to the nurse.

Danny LoBello ("LoBello") testified that he observed this incident while serving as a Teacher Assistant. He testified that at one point on June 27, 2014 he observed HM on the ground and Filo attempting to stop HM from picking up hair off the ground and placing it onto her, HM's head. In LoBello's recollection, the incident occurred on August 1st, while he was working with MC (male). "And Jen was attempting to stop that but when she was doing that she got down on her knees and that's when she grabbed her hands to get her to stop and she did again the same twisting motion. And then HM made out a little squeal, she was upset and that is exactly what happened." As he recalled, "...she has made that sound prior but you can see in her face it was definitely like pain."(Tr. @ 126-27).

Teacher Assistant Karen Romero testified that she was not in the classroom when the incident began, but when she returned from lunch between 1:30 and 2:00 p.m. she saw Filo and HM sitting on the floor, Indian-style, with HM crying. HM was slapping at Filo, windmill-style, while Filo mimicked her behavior ("just raspberried her back when HM raspberried her"). (Tr. @ 194).

Speech Therapist, Sandra Furia, saw HM flop on the floor, and Filo try to get her up, as HM was crawling away and crying. Furia did not observe the entire incident. "The only thing I could see was HM trying to get away from her, Jen following her and she did stop her a few times." (Tr.@ 339). The teacher assistants had attempted to get HM to join the group at the table for integrated speech.

Whereas Anclien testified that "everything had to be painful from the fingers all the way through" and that HM was "crying" and "wailing out," neither

she nor LoBello took HM to the nurse. (Tr. @ 29). As she put it, "I think I was just in such distress over what occurred, I totally forgot about the nurse."

Respondent Position

For her part, the Respondent focused on the length of time Anclien described the incident entailed, to wit, the "[e]ntire episode of bending back these wrists had to be a minimum of 20 minutes." Filo denied following HM around the classroom and denied bending back her wrists. She recalled the incident as one where she blocked the forehead of HM as HM attempted to bite her. (Tr.@ 892).

Opinion

In the Arbitrator's opinion, notwithstanding the failure of Anclien or LoBello to take HM to the nurse, or report the incident to the authorities, Specification 4(a) has been proven by a preponderance of the credible evidence. The Respondent's description of her effort to block HM and her general denial of the allegation is insufficient to overcome the testimony of two (2) credible eyewitnesses.

Specifications 4b-4k, 5a

> (4b) On multiple occasions, Ms. Filo twisted student MC's wrist to one side, while simultaneously bending it severely back, in order to control his behavior.
>
> (4k) When Filo and another staff member were holding student MC, each by one of his arms, because he had become agitated, Filo unnecessarily twisted MC's arm back, and on another occasion, when the student was walking in the hallway and threw his lunch, Filo bent his arm back to punish him.

Commission Position

Anclien testified that during the ESY, Filo, intermittently, but on multiple occasions would bend and twist the hands of MC, a male student. In order to prevent MC, who had a tendency to bite his hands, from injuring himself Filo "would stand next to him and she would bend and twist his hands. It was I think her way or means of trying to gain control and make him stop." (Tr. @ 30). Anclien testified that she observed this conduct "at least five or six times throughout the summer." (Tr. @ 107). On one such occasion, McNamara was present, standing on one side of MC while Filo stood on the outside. Anclien was uncertain if McNamara could observe what Filo was doing to MC's wrist. (Tr. @ 107, 109, 113).

Romero was present on one occasion when McNamara and Filo were restraining MC. To prevent MC from biting himself, McNamara held one of his arms down while Filo twisted MC's other arm and bent his arms. (Tr. @ 183-84).

Respondent Position

Respondent called McNamara as a witness. He testified that he did not observe Filo do anything improper. He acknowledged that he was concentrating on what he was doing and not on what Filo was doing or where her hands were in relation to MC. (Tr. @ 645-646). Filo denied the allegation. (Tr. @ 886). She described MC as a "hand biter" who would "attempt to bite you or grab at you or push the table or throw a task." To control him "myself and somebody else would hold his arms down until he was calm." (Tr. @ 861).

(4c) On or about August 4, 2014, while student MM was in the cafeteria for breakfast, Filo stood over him, twisting and bending

back his wrist, and on other occasions, she would twist and bend back his wrist in order to get him to move or sit down.

Commission Position

Anclien testified that during the morning of August 4, 2014 she was seated at a table in the school cafeteria feeding a student. At one point, she turned and saw Filo standing over student MM at the next table bending his wrist and twisting it. (Tr. @ 38-39). Anclien also observed Filo use the tactic to get MM to stand up off the track to leave. Filo threw a sweatshirt over MM's wrist, which Anclien interpreted as an attempt to hide what she was doing to MM's wrists. (Tr. @ 40).

. Furia testified regarding this incident of August 4, 2014. She saw Filo standing behind MM, holding his arm and pulling it back. She did not observe MM striking out at Filo, and no children were seated near him. (Tr. @ 326-327).

(4d) On more than one occasion, while restraining students CW or BK, she shoved a table against the student's stomach longer and more forcibly than necessary.

Anclien testified that on two separate occasions, that when Filo used a table to restrain student CW, a girl, and one occasion, student BK, a boy, she "forcefully shoved the table into them really hard." (Tr. @ 32-33). Anclien did not observe any physical injury to the students although they appeared hurt. Neither student was taken to the nurse. In Anclien's view, the teacher who engaged in the restraint was responsible for taking the student(s) to the nurse.

LoBello assisted Filo in holding the table against CW during one of the two restraints. It was Filo rather than LoBello who pushed the table against CW. CW had been restrained because she tried to hit someone in the room. Anclien

offered to help, but Filo and LoBello said that they were fine. LoBello testified that he was unable to see what Filo was doing. (Tr. @ 128).

> (4e) When student MM would swing his arms, trying to hit others nearby, she would swat back at him with an inappropriate hit.
>
> (4f) During a vocational task, when MM swung at her, Filo used a wooden clipboard, not just to block his hit, but to repeatedly hit his knuckles and hands, which later became red and swollen.

When MM was not seated, he had a tendency to swat his arms at anybody passing him. Anclien testified that Filo would swat back in retaliation at MM when he displayed this behavior. (Tr. @ 35-36). On one of these instances, MM was doing a vocational task, and whenever Filo would hand him a block or figurine, MM would swat at her. Every time he'd swat Filo, she smacked his knuckles really hard with a clipboard – ten possibly fifteen times. Later that day, Anclien noticed that MM's knuckles were swollen and red. (Tr. @ 35-36) (C. Ex. #4). Filo denied repeatedly hitting MM's knuckles with a clipboard. (Tr. @873).

> (4g) On or about August 1, 2014, Filo withheld breakfast from students MC and MM because they had not finished their morning schedule.

Anclien testified that on the morning of August 1, 2014, Filo did not have MM and MC, a female student, join their classmates for breakfast in the cafeteria. Breakfast is from 9:00 to 9:30 a.m. Sometime after 10:00 p.m., Anclien noticed that MM's breakfast bag was full. When she asked Filo if she should give MM the bag, Filo allegedly responded that "MM and MC were not going to get their breakfast until they finished their tasks on their own." (Tr. @ 43).

When Romero returned to the classroom shortly thereafter, Anclien related the situation to her. At this point, Romero gave MC her breakfast. (Tr. @ 117).

Romero recalled the incident. After the fire drill, she returned to the classroom and saw MC holding her breakfast bag. When she noticed that MC had not eaten, she mentioned this aloud, with Anclien providing Filo's reason. Romero testified that she said she did not care whether Ms. Filo had a problem with it, but she was giving the student her breakfast and that food may not be withheld here. "I was like well, no, so I gave MC (female) her breakfast. It was like if Jen has a problem with it she can tell me something. I'm taking responsibility for it." (Tr. @ 191).

Ms. Furia corroborated this incident in part when she testified that on August 1, 2014, she was providing speech services to MM. She entered the class and asked Filo for a reinforcer to which Filo responded that MM had not eaten his breakfast. At this point, Furia took the breakfast from Filo and gave it to MM. (Tr. @ 324, 326).

Respondent Position

Filo recalled the incident as one where MC (female) "brings her breakfast in, she takes it out, she sits at her desk, she does her morning work, then she eats breakfast. That morning she was highly agitated, she came in very, very upset and I told her to finish the small task that she had in front of her and then she could put it aside instead of finishing her morning work like she usually does

and she could have her breakfast. It was literally sitting right in front of her..." (Tr. @ 875-876).

> (4i) On one occasion when Student TH grabbed Filo's arm and dug her nails into it, Filo bent back TH's fingers with more force than necessary to get him to release her.

Commission Position

In July 2014, LoBello observed Filo bend and twist TH's fingers back with more force than necessary. (Tr. @ 122, 161). He recalled that TH was engaging in behavior, stood up and started to go after Filo. TH dug his nails into her. LoBello demonstrated at the hearing that Filo was "able to twist, just hold his wrist behind him. TH's reaction was "he looked like he was in pain, his facial, he didn't make a sound or anything but his facial expression." (Tr. @ 123).

Also in July 2014, LoBello testified that he saw Filo engage in similar conduct with CW. CW had become aggressive and was starting to go behind her desk. He testified:

Q. And can you demonstrate again with Ms. Marmolejos what you observed for the record?
A. It was pretty much the same thing, like CW grabbed her pretty hard. She was able to kind of get her hand. I can't exactly – she was able to get her fingers more and she was squeezing her fingers a little bit upturn, I guess.
THE ARBITRATOR: Twisting them to the outside?
THE WITNESS: Yes, yeah. (Tr. @ 125).

LoBello testified that this method of restraining students was inconsistent with their training. "Staff are trained to break a student's hold without hurting oneself or the child and the technique does not involve bending or even holding a student's fingers." (Tr. @ 125).

(4j) On or about June 27, 2014, when student CW was acting aggressively in a bathroom stall, Filo held CW's hands and unnecessarily bent her fingers backwards.

Ms. Romero recalled that as CW began acting out, screaming and kicking, she and Filo pushed CW into a bathroom stall and closed the door. CW shook and kicked the door. Ms. Romero told Filo to push the button in the bathroom for help. Filo instead "put her hands over the door and grabbed the student's hands and twisted her hands back...she grabbed her hands and bent them backwards to try to get her hands off the door." (Tr. @ 178-179).

(4k) When Filo and another staff member were holding student MC, each by one of his arms, because he had become agitated, Filo unnecessarily twisted MC's arm back, and on another occasion, when the student was walking in the hallway and threw his lunch, Filo bent his arm back to punish him.

In continuing her testimony on this incident, Romero testified that students were going to lunch on this day when TH threw his lunch box – a soft container – into the air. She recalled that Filo grabbed his hands and bent them backwards in punishment. TH was not engaging in aggressive behavior at the time other than throwing his lunch box. (Tr. @ 186-188).

5(a) Filo screamed at the students on a daily basis.
5(b) More than once when the students were aggressive toward one another, she encouraged them to hit back.

Ms. Anclien recalled two occasions in July 2014 when Filo encouraged students to be aggressive toward one another. One occasion involved MM and TH. On the day in question, TH had become agitated during a speech session. He threw his water bottle at the ceiling and approached MM. As TH did this, Filo,

according to Anclien, encouraged MM to hit TH. "TH grabbed MM and the aides had to intervene to remove TH." (Tr. @ 40-42).

On the other occasion in July, MM had gotten up from his table and walked over to where CW was sitting. Filo encouraged MM to hit CW even though CW was known to be physically capable of hurting someone. (Tr. @ 41-42).

Ms. Romero testified that Filo encouraged MM to "hit" or "get back" at another student, TH. (Tr. @ 188-189).

Ms. Furia also observed Filo encourage TH and MC to fight. (Tr. @ 322-323). She reported her observations to the principal in a report dated September 5, 2014. (R. Ex. #J).

Romero recalled that Filo was loud in the classroom and would yell at the students. (Tr. @ 192). Ms. Audrey Weiss and Ms. Melissa Olesky also testified about Filo's yelling during the 2013-14 school year.

Respondent's Position

In her defense to the specifications, the Respondent has focused on the failure of Anclien, LoBello and Romero to report instances of what they considered to be improper conduct on Filo's part to the principal, DYFUS, or other authorities. Although on cross-examination, Anclien acknowledged that the abuse she observed had made her "wrestle with her moral conscious," she did not come forward until August 4, 2014. The Respondent argues that Anclien's reason for not reporting Filo for her alleged deviation from school restraint

policies, based on her concern that she might lose her job, constituted a "weak excuse" given whistle-blower protections.

Similarly, LoBello is criticized for "not reporting the alleged incidents to anyone and providing information to the administration when he was called into the office." Reviewing the Commission policy on "Reporting Potentially Missing or Abused Children," LoBello acknowledged that if he "witnessed something inappropriate" he was supposed to call DYFS. (Tr. @ 131) (C. Ex. #26). LoBello had also attended Harassment, Intimidation and Bullying ("HIB") training every year. LoBello's testimony that "he didn't know if necessarily (his) job would be safe" if he reported "seeing a tenured teacher physically abuse students."

Romero also admitted that she failed to report the incidents, "hoping" that HM would report the incident to her parents. Furia testified on cross that she neither reported Filo until August 5, 2014 nor Ms. Sadik despite her awareness of the district's policies regarding abuse of children, corporal punishment and physical restraint. (Tr. @ 354).

None of the District's witnesses (LoBello, Anclien, Romero) took any of the students who they believed were being abused by Filo to the nurse.

With respect to the specific charges for forcibly pushing a table against the students CW or BK to provide a restraint (4d), the Respondent relies on the testimony of LoBello that "the desk is always pressed up against the cabinet because it was like a natural barrier, L shape." (Tr. @ 145). LoBello further testified that he and Filo had used this restraint each time using their feet to anchor the desk; "[l]asting [no] more than a minute or two before she stood up.

(Tr. @ 146). McNamara's testimony is relied upon that Filo held the table in a manner that was not pressing against CW or was harmful.

The Respondent deems significant LoBello's testimony on cross that while he was aware of his reporting responsibilities, he was "unsure of whether I should report it" (i.e., the excessive force Filo had used to get TH to release her) because "she is a tenured teacher. I am just a TA, job security. He continued:

Q. And you don't think that if you observed more force than necessary being utilized that you were required to ensure that there was a reporting?
A. Can you repeat that?
Q. You don't think you had an obligation to report that activity, so you were unsure whether or not excessive force was used?
A. No, I was unsure of whether I should report it.
Q. Why is that?
A. Like I said before she is a tenured teacher, I am just a TA, job security. I didn't know what the repercussions were if I was wrong in that sense. I know what I saw but I didn't – I don't think I felt that my word wasn't as strong as a tenured teacher. I don't think they would believe me over a tenured teacher, that was my thought, that was the thinking behind not reporting it, so that's why I am unsure.

(Tr. @ 163).

Filo deems supportive of her position McNamara's testimony that during the 2014 ESY when he visited Filo's class two-three times a week for 45 minutes to an hour and he observed no incidents of corporal punishment. He observed her interact with students on approximately three to five occasions without seeing her pull back the wrists or fingers of CW, HM or any other student. He didn't see her swat back at MM or attempt to hit him with a clipboard, withhold food from MM or encourage other students to hit each other. (Tr. @ 610, 620-621, 625).

Similarly, Damon Murtha, a speech language specialist, who visited Filo's class 3-4 hours per week during the 2014 ESY did not observe her abuse any students. (Tr. @ 786-88).

The Respondent denied all of the allegations. Filo denied twisting or bending the fingers or wrists of any students (4a, 4b, 4c). She admitted blocking HM with her body when he fell to the floor to prevent her from engaging in further misbehavior but denied pulling her fingers and wrists back (4h). Filo testified that she removed CW's fingers from the bathroom door in order to dislodge her from the stall door, but denied bending them backwards or using excessive force (4j).

Filo corroborated the testimony of McNamara that she moved a table to prevent CW from hitting another student and when she observed the table was touching CW, she moved the table back (4d). (Tr. @ 866-867).

Opinion

A. Specifications 4(d) and 5(a)

The Arbitrator dismisses Specification 4(d). The testimony of LoBello and McNamara corroborates the Respondent's testimony that the table was pushed against or toward CW in a manner to provide a restraint. The table acted as a "natural barrier" preventing CW from leaving the corner to act aggressively toward other students. The credible testimony of LoBello that he and Filo had performed this maneuver several times without harming CW is sufficient to dismiss this (4d) specification. The Arbitrator is persuaded that any physical contact made with CW using the table was inadvertent.

The Arbitrator also dismisses Specification 5(a). Although there is evidence that Filo occasionally spoke to the students in a loud voice, there is no evidence that she did this on a daily basis during the ESY.

B. Specifications a-c, e-k, 5(b)

With respect to the several other specifications, the Arbitrator is persuaded that they have been proven by a preponderance of the credible evidence. The testimony of Anclien, LoBello, Romero, and Furia collectively established that on more than one occasion, Filo twisted the students' wrists, bent their fingers back and inflicted pain as punishment. A preponderance of evidence established that Filo on June 27, 2014 during the ESY pulled back HM's fingers and wrists, on multiple occasions during the ESY bent MC's arm, and used excessive force to dislodge CW's fingers from the door of a bathroom stall. On or about August 4, 2014, she twisted and bent back the wrists of MM, during a vocational task swatted back at MM when he swung at her, used a clipboard on one occasion to hit his knuckles and hands, and bent back TH's fingers to get him to release her after he dug his nails into her arm

In addition, the evidence established that Filo withheld the breakfast of MC and MM on August 1, 2014. Anclien, Romero, and Furia testified credibly that Filo withheld their breakfast to force them to complete their tasks. Anclien and Furia testified credibly that Furia encouraged students to fight back and hit each other.

Given the weight of the testimonial evidence supporting the foregoing specifications, Filo's general denials constitute an insufficient defense.

The Commission has met its burden of proving that the conduct of the Respondent during the 2014 ESY was unbecoming that of a teacher in that the evidence established a pattern of corporal punishment of students that was excessive and unnecessary either for the purpose of self-defense or for the protection of persons or property. (See, N.J.S.A. 18:6-1). The fact that none of the witnesses to Filo's abusive conduct took the students to the nurse for treatment, notified the principal regarding their observations, or called in abuse allegations to DYFS does not, in the Arbitrator's judgment, detract from their credible testimony at the hearing regarding the specifications.

The Respondent's defense to the specifications, other than her general denial, relies upon the testimony of witnesses who were either not in the classroom or who intermittently taught in the classroom as therapists. Although the Arbitrator has credited the testimony of McNamara regarding specification (4d), which was corroborated by the testimony of LoBello, the fact that he was occasionally in Filo's classroom, approximately 3-5 times per week for a maximum time period of three hours, diminishes the probative value of his testimony regarding the remaining specifications. The testimony of McNamara that he never saw Filo pull back the wrists or fingers of CW, HM or any other student leaves open the probability that this misconduct occurred when he was not present. Therefore, the Arbitrator finds the testimony of the teacher assistants, who were in the Respondent's classroom on a daily and hourly basis, more probative on these specifications.

Similarly not probative of the proven specifications (4a- c, e - k and 5b) is the testimony of Mr. Murtha, a speech therapist, who visited Filo's class 3-4 hours a week during the 2014 ESY. Here again, Murtha's testimony that he did not observe Filo mistreat any of her students constitutes a limited sample of the Respondent's total classroom performance and as a result entitled to less evidentiary weight than the collective and credible testimony of Anclien, LoBello and Romero regarding the specifications.

In contrast to the Respondent's witnesses, other than McNamara, the Arbitrator has accorded more evidentiary weight to the testimony of Furia, a speech therapist, who also visited Filo's classroom sporadically, but gave specific testimony regarding the incidents she observed. She credibly corroborated the testimony of Romero regarding Filo's withholding of MM's breakfast on August 1, 2014 and observed Filo encourage two students, MM and TH, to physically attack each other. On August 4, 2014, she testified that Filo twisted MM's hands backwards while he was seated at a table during breakfast.

C. Fear of Retaliation/Failure to Report Abuse

The Arbitrator credits the testimony of the Commission witnesses who gave fear of retaliation or losing their jobs as their reason for not reporting their observations of student abuse before being called in by the principal. Although Anclien, LoBello, Romero and Furia all acknowledged that they were aware of the District's abuse policies, the Anti-Bullying Act, and that pursuant to state law they were required to report such abuse to DYFS, their principal or immediate supervisor, the Arbitrator is persuaded that they had a genuine, albeit unfounded

belief, that the reporting of any abuse incidents could redound to their detriment. As Anclien put it, "there's a lot of things that just don't go right in the world." (Tr. @ 65). At one point, Anclien testified that she approached Filo and said to her that her conduct appeared to be against school policy and encouraged her to be mindful of her actions with the students. Anclien's warning to Filo did not result in a report to the administration and her expectations that Filo would change did not materialize.

Similarly, LoBello testified that he "didn't know if necessarily [his] job would be safe" if he reported seeing a tenured teacher physically abuse students. (Tr. @ 128). Also, Romero testified that she didn't report the incidents out of a fear of getting fired because "I don't know, I just didn't." (Tr. @ 219).

Notwithstanding the whistleblower-type protections afforded those who report abuse under the law, and their protection against retaliatory termination under state laws and district policies, which the witnesses acknowledged, the evidence supports a finding that the untenured teacher assistants had a legitimate fear that reporting Filo would put their jobs at risk. Irrespective of whether the witnesses harbored an unreasonable fear of retaliation and by failing to report violated the Commission policies themselves as well as their legal duty to report, the Arbitrator is persuaded that this aspect of their conduct is properly separated from their credible testimony regarding the specifications. The Arbitrator discerns no nexus between their fear of retaliation when observing the Respondent's misconduct and their willingness to testify when confronted by their principal and the Commission officials.

D. Personality Conflicts

The Arbitrator found no evidence to support the Respondent's assertion that any of the witnesses who testified against her regarding the August 2014 ESY charges were biased due to a personality conflict, adverse supervisor-subordinate relations, or other performance issues. Anclien denied ever being reprimanded by Filo, having a personality conflict with her, or receiving any negative feedback about her performance. (Tr. @ 48, 86). LoBello denied having a personality conflict with Filo or receiving a reprimand regarding his performance. He did not resent her authority as the teacher and followed her orders. (Tr. @ 128, 164).

The Respondent, in her testimony, provided no evidence to support her claim that a personality conflict or her role as supervisor motivated the three teacher assistants to falsely testify against her.

E. Credibility

The Arbitrator is disinclined to apply the "false in one false in all" principle to the testimony of Ms. Anclien. While she may have misconstrued the time frame during which the table appeared to come in contact with CW, the incident undoubtedly occurred. McNamara's testimony that a cabinet blocked the physical contact with CW and lasted only a minute or two as opposed to Anclien's recollection of 20-30 minutes persuades the Arbitrator that she embellished or misremembered this incident; however, for the remainder of her testimony, there is corroboration by LoBello, Romero, Furia and others that Filo

twisted the wrists and bent back the fingers of students on multiple occasions as a form of corporal punishment.

With respect to the alleged discrepancy in Romero's testimony regarding the restraint of MC (5b), McNamara testified that he couldn't see what Filo was doing with her hands on the other side of MC. (Tr. @ 645-646).

F. Joint Compression Defense

In her Statement of Evidence and during her testimony, Filo has defended the specifications that she bent the fingers and twisted the wrists of several students by claiming that she was using a technique she referred to as "deep joint compression." She testified that she was taught the technique by an occupational therapist, employed by the Commission. She described it as follows:

Q. Now once again I just want to make sure we have it for the record, you talk about the fingers, what did you mean by compression because I felt, I don't think you articulated it.

A. Compression is when you're pushing against either side of the joints to make the joints compress and then instead of pulling back you would release so it was a natural release. (Tr. @ 881).

Q. The Arbitrator asked you what you referred to the pressure technique and you said deep pressure. But in your statement you refer to it as quote and you have quotes around it deep joint compression, right?

A I performed both deep pressure and deep joint compression.

Q. And the one you were taught by or trained by one of the occupational therapist, which one was that?

A. Both.

Q. So it was both deep joint compression. How is deep joint compression different from the other technique?

A. Deep joint compression you're creating impact to the joint whereas

pressure you're impacting the muscles. (Tr. @899)

In the Arbitrator's opinion, the Respondent's claim that the witnesses misinterpreted what they observed as bending back fingers and twisting wrists because she was engaged in deep joint compression or deep pressure was discredited by the testimony of Ms. Audrey Weiss, an occupational therapist.

Ms. Weiss disputed the Respondent's claim in her answer that she had engaged in "deep joint compressions" involving MC and TH. In demonstrating the joint compressions used by occupational therapist, Weiss displayed a gentle squeezing and tugging, distinguishable from the twisting of the wrist and bending back of the fingers described by the witnesses to Filo's conduct. Filo could not recall the name of the occupational therapist who had taught her the joint compression technique and no expert witness testified on her behalf.. (Tr. @ 863-864, 900-901) Weiss further testified that unless the student's IEP authorizes a teacher to use compressions or brushing techniques, it is not appropriate for a teacher to use them.

There is also no evidence that the restraint techniques used by Filo on the students were part of the Crisis Prevention Intervention ("CPI") or SCIP training she received under the auspices of the Commission. Clearly, the teacher assistants received such training and would have recognized approved restraints, holds and control positions to manage aggressive behavior had Filo used them. (C. Exs. #17, 18).

II. The 2013-2014 School Year

Specifications (6a,b, c & d)

Commission Position

Ms. Melissa Olesky ("Olesky"), teacher assistant in the Respondent's class from October 25, 2013 until June 19, 2014, testified that she went to New Providence – DLC Principal Julie Gardner just four days after being assigned to Filo's class to report name calling. (Tr. @ 234-235, 293). She subsequently met with the superintendent on September 17, 2014 and offered to write up what she had observed during the 2013-2014 school year. She omitted from her report to the superintendent that Filo had referred to two students as an "idiot" and "retarded." (R. Ex. #H). On the second day of her cross-examination, Olesky recalled that the incident where Filo had allegedly referred to Student RM as an "idiot" did not occur until January 2014, between 9:00 and 9:15 a.m. and therefore beyond the scope of the instant charges. While Olesky admitted that she may have mixed up the incidents when reporting to Gardner, she reiterated that the incidents had occurred. (Tr. @ 229, 302).

Ms. Olesky testified that she did report an incident to Gardner where Filo mimicked a student's autistic behavior and yelled into his ear. She also complained about Filo's and Sadik's belittling treatment of her as well as their inappropriate conduct toward the students. (Tr. @ 285, 234-235; R. Ex. #4). In her statement to Dr. Janet Parmalee, dated September 19, 2014, Olesky wrote, inter alia, the following:

> For example, on one occasion, within those four days of me being placed into the room, at the back kidney table where vocational

> schedules are being done by all four students, Jennifer Filo, was involved with a student (B.O.); she inappropriately mimicked the noise and hand gesture the student was making at the time, proceeding to take it to the next level and imitate him while screaming it into his ear. (At times, this particular student engages in inappropriate noise as a stim). Within those four days, on a separate school day, during academics in the morning, staff member (Blanca Sadik), was working with student (M.H.), staff member abruptly and inexcusably screamed within close proximity of students ear to, in my opinion, force him to listen more effectively. Which in my opinion, is completely unprofessional and unacceptable. In addition, there were several times in which both staff members (Jennifer Filo and Blanca Sadik), would intentionally throw students vocational tasks, during afternoon schedules, off of the kidney shaped table and onto the floor to make student pick each piece up, simply because student was playing with the pieces inappropriately.
>
> For example, student (M.H.) would occasionally fly his voc task pieces, mostly the plastic large sized nuts and bolts, as if they were airplanes. Instead of intervening professionally, both at different times would intentionally take their one hand and slide it across the table abruptly to knock over all the pieces of the task, and say to the student "You want to fly your task, then fly them all the way over there". Of course, I immediately intervened and picked up the pieces of the task as well as the voc bin myself. That was not well liked by the two of them (J.F. and B.S.), but I did not mind the disrespectful whispers they spoke of me while I was present, in the months following...

In addition to mimicking the hand flapping and vocalizations of BO, Olesky recalled a second incident where BO threw an empty plastic bin and hit Filo with it. In response, Filo, according to Olesky, took BO's fingers and attempted to bend them back as he did the same thing to her. (Tr. @ 232-233, 295-296). Olesky did not report this incident to Gardner.

Ms. Olesky testified that on occasion, Specification 6(d), she observed Filo continue to feed RM although he was visibly distressed. (Tr. @ 309).

Despite working as an aide in the District for nine months and familiarizing herself with the District's student abuse policies, including physical restraint and corporal punishment, Olesky did not report any of the alleged incidents. She also did not take BO to the nurse when Filo screamed into his ear so loud that his own ears hurt and BO began to cry.

Olesky testified that when she reported the BO and MH incidents to Gardner, she was "crying hysterically" while requesting a transfer from Filo's classroom. (Tr. @ 239). Gardner informed Olesky that there were no additional positions available at the time. Following her transfer request around Thanksgiving 2013, Olesky did not make any complaints about Filo to Gardner.

Ms. Audrey Weiss, Occupational Therapist, testified that during her sessions in Filo's class during 2013-2014, Filo would mimic the autistic behavior of students and sometimes yell at them. She observed Filo mimic BO's behavior, repeating his stimming noises loudly in his ear. Ms. Weiss saw Filo do this twice. (Tr. @ 413-414).

Finally, on cross, Weiss testified that Filo had been aggressive with the children, both verbally and physically. (Tr. @ 430).

Respondent Position

Respondent relies on the testimony of Gardner that when Olesky requested a transfer in October 2013, she did not report any instances of abuse, but rather her personal mistreatment by Filo and Sadik. (Tr. @ 663-665).

The Respondent further relies on the testimony of Sadik, who was present in the classroom, that neither Olesky nor anyone else ever complained to her.

The fact that Gardner, to whom the student abuse was allegedly reported, took no action persuades Respondent that Olesky's allegations are false. Respondent argues that "[h]ad there been any truth to her account, one must surmise that the Commissioner would likely have disciplined Ms. Gardner for failing to follow-up on Ms. Olesky's allegations, but she testified that no such discipline was imposed."

Opinion

With the exception of Specification 6(a), which was corroborated by Weiss, the Arbitrator dismisses the remaining specifications preferred against Filo under Charge I by the Commission for the 2013-2014 school year. In support of Specification 6(a), Weiss testified credibly that Filo mimicked the behavior of BO, by repeating his stimming noises loudly into his ear.

Specifications 6(b), (c) and (d), which rely exclusively on the testimony of Olesky, are dismissed. The testimony of Principal Gardner that Olesky did not report these allegations to her when requesting a transfer from Filo's classroom in October 2013 combined with evidence that Olesky's testimony is biased due to the resentment she harbored against Filo and Sadik for their treatment of her convinces the Arbitrator that the Commission has not met its burden of proof regarding these specifications. Although the Arbitrator discounts the testimony of Sadik, who was terminated by the Commission and accused of misconduct similar to that of Filo, Olesky's statement that she was "not well liked by the two of them (J.F. and B.S.), but I did not mind the disrespectful whispers they spoke to me while I was present in the months following" coupled with Gardner's

testimony that she had no recollection of Olesky's report of student abuse in October 2013 persuades the Arbitrator that the remaining Specifications, which lack corroboration, should be dismissed.

III. Respondent's Additional Defenses

Having found a preponderance of evidence that the Commission has met its burden of proof with respect to Charge One, Specifications 4a-4k, 5(b) and 6(a), the Arbitrator considers the Respondent's defenses for the purpose of either dismissing any of these specifications on procedural grounds or mitigating the penalty sought by the Commission.

The Respondent has argued that "[d]eficiencies in the Commission's investigation compromises integrity of evidence" and apparently warrants the dismissal of the charges and specifications. The Respondent contends:

> The number and sheer magnitude of these proven-false allegations raises serious concerns that the Commission's handling of its investigation was systematically flawed and corrupted the testimony of its witnesses. A number of the witnesses testified that they were present with other staff members when questioned as part of the Commission's investigation, openly discussing their accounts of what transpired together. They were also handed prepared certifications, drafted by Ms. McMahon, to sign, which often times contrasted markedly with the fact summaries they themselves typed. The certifications also tended to contain more allegations than what was reported in the witness's personally-typed statements, and the notes taken during their interviews.

As an example of the deficiencies permeating the Commission's investigation, the Respondent alludes to the testimony and statement of Ms. Furia. According to the Respondent, the statement Furia prepared on September 5, 2014, "memorializing the alleged inappropriate conduct she witnessed" omitted "the supposed incident in which she accused Ms. Filo of

mimicking HM's movements while she was on the floor crying, as well as the incident where Ms. Furia was scratched during her initial therapy session with MM...The same applies to Ms. Romero's certification, which contains rather serious allegations – specifically, that Ms. Filo bent TH's hand and encouraged TH and MH to aggress each other – that were suspiciously left out of her original personally-typed statement."

The Respondent, through her cross-examination of several Commission witnesses, and in her opening statement, has argued that the Commission and its counsel engaged in improper conduct. Counsel for the Respondent in his opening statement stated: "It is rather unprecedented with respect to manipulation, influencing, and tampering of witnesses... I know it is not really right to bring it to you, but during the course of this proceeding... there's been testimony to the effect uniformly from almost every witness ... that counsel for the Commission has met with all of the fact witnesses together on at least two occasions and during those meetings everybody was asked to share their versions of the events, together, not in isolation." (Tr. @ 276).

On the other hand, Commission counsel responds that "[d]espite engaging in repetitive and prolonged cross-examination, Respondent's counsel never established any manipulation, influencing or witness tampering, or anything close to it, at least not on the part of the commission or its counsel."

During Anclien's cross-examination, she testified:

Q. During any of these meetings, okay, particularly the one a month ago and then the one with Ms. McMahon, the superintendent, were you ever given any information other than your personal knowledge of what you observed particularly with regard to what any of the

other teachers assistants or teachers, may have had to say about my client, were you told what anybody else said?"
A. No. (Tr. @ 70).

Later, she responded to the question, "[A]t any point during your meetings, have you acquired any knowledge of what other witnesses to this matter may have told the superintendent or told the principal, are you aware of their testimony? Anclien acknowledged that "yes, at our last meeting I was given everyone's testimony, including Ms. Filo's, a copy of that." (Tr. @ 71). Anclien further testified that she was given a packet, including the statements of Romero, LoBello, Olesky and Furia. She testified that she was allowed to take the statements home and "I read them just last night before coming." (Tr. @ 82).

At the end of the meeting in September 2014, where all of the Commission's witnesses were present, Commission counsel told them "what the process would be like, we were being told because we all had questions of what to expect." (Tr. @ 73). With respect to her conversation with Romero, Anclien testified:

Q. When did you speak to Karen Romero?
A. I guess February 1st, I just texted her saying I wonder if we will have school tomorrow, do you think that the thing is still on, she said yes, it should still be on even if school is canceled.
Q. You didn't have any conversation with Karen whatsoever about her statement, her account of this incident or her presumed testimony at the time of the proceeding, nothing about the facts of this case?
A. No, I mean we are still in a classroom together, so we really don't talk about this but we may have asked each other a question her or there. Honestly I can't recall what they were, you know.
Q. Question about what may have happened, what her understanding was of what happened way back, things like that?
A. Like I might have said I remember this happening, were you there that day, you know, something like that.
Q. Did you have those types of discussions with any of the other witnesses other than Karen?

A. No. (Tr. @74).

Anclien testified that she prepared one statement in August 2014 at the behest of Principal Marmolejos. (R. Ex. #B). In September 2014, she typed up a more detailed statement based upon what she could recall. (R. Ex. #C). Approximately one month prior to her testimony on February 13, 2014, she met with Commission counsel and the superintendent.

LoBello presented his handwritten statement, dated 9/8/14. On December 7, 2014, LoBello prepared a certification with the assistance of Commission counsel. (C. Ex. #6). Between September and December 2014, he met with Commission counsel and Marmolejos along with the other witnesses. He then testified:

Q. Where did that meeting take place?
A. It was either in Andrea's office or in there was like a conference room.
Q. Were there any other attendees to that meeting, sir?
A. It was the other TAs that were in the classroom, so it would be Karen and Kelly, and I believe Sandy was there.
Q. And you guys were all participating in the same meeting together?
A. Yes.
Q. And you folks were all providing your accounts in the presence of the others in terms of, you know, what your observations were of the incidents in question?
A. Yes.
Q. Who was overseeing or directing that meeting, sir?
A. It was Robin and Andrea...
Q. This meeting you just talked about with all witnesses there, did you have any after that but prior to today?
A. I believe so, yes.
Q. And when was that subsequent meeting, sir?
A. I don't know, I don't have a date for you.
Q. Who were the attendees at that meeting?
A. I believe it was the same.
Q. Where did that take place?
A. Conference room.

Q. And once again all the attendees including the fact witnesses provide their accounts in the presence of the other witnesses?
A. Yes.
Q. At any point in time were you given the statements of the other witnesses, the written statements that other witnesses had provided to the Commission?
A. Yes.
Q. When was that done, sir?
A. I don't have a date for you.
Q. Do you still have them as you sit here today?
A. Those papers?
Q. Yes.
A. I am sure I do, I don't know where I placed them. I don't know exactly where they are.
Q. At any point in time in preparation for today's proceeding did you have occasion to review the statements of the other witnesses?
A. No, I did not.
Q. After you were given them you never read them?
A. No.
Q. At any point in time during these meetings, did either counsel for the Commission or anybody within the administration address with you the issue of not reporting what you had observed?
A. No, I don't believe so.
Q. At any point in time other than during the course of the meetings that you just spoke of, did you have occasion to have conversations with any of the other aides or staff members who were present in the classroom during any of the incidents that are in question here?
A. We worked together so of course we are going to have contact.
Q. With respect to the fact –
A. Did we meet outside and talk about it?
Q. Not necessarily meet. Did you have any occasion to speak?
A. No.
Q. Either on the phone?
A. No.
Q. Not about the facts?
A. No, no, we kept to ourselves in respect to that. (Tr. @ 155-159).

The Respondent has focused on the discrepancy between Romero's statement "I was not there for the incident with HM" and her certification that on June 27, 2014 "when I returned to the classroom after lunch, Ms. Filo was on the floor with HM. The student was crying hysterically. Ms. Filo copied HM's

behaviors, hitting her back and forth when an open hand slap like a two year old and making raspberries when HM made that sound." (R. Ex. #F; C. Ex. #8) (Tr. @ 204-205). In the Arbitrator's opinion, Romero credibly clarified the discrepancy by testifying that she was present for part of the 6/27/14 incident with HM.

Romero recalled the meeting with McMahon, Marmolejos and Parmalee as "We had our statements and we were just told to review them and we just talked about what was going to happen with the trial and stuff like that." Later, she received a packet with a copy of Filo's statement/certification. At a prior meeting, "individual staff members spoke of what they recollected during the summer." (Tr. @ 217-218).

The crux of the Respondent's claim of "witness tampering" is that the Commission and/or its counsel improperly influenced the testimony of its witnesses so that they testified in a manner other than their best recollections of what they observed. Despite extensive cross-examination of Anclien, LoBello and Romero by Respondent's counsel regarding their initial statements to the principal in August and September 2014, subsequent certifications in December 2014, and attendance at a hearing preparation meeting in or about January 2015, the Arbitrator discerns no evidence that the Commission's witnesses altered their testimony to add allegations that they did not personally observe, received information from the Commission or its counsel to bolster their testimony, or as a result of meetings attended by the witnesses significantly deviated from their original accounts.

Although the witnesses received the certifications of the other Commission witnesses as well as the certification of Ms. Filo and provided their accounts of the alleged incidents to each other, they did not change their statements or amend their certification. For example, LoBello, who received the packet of witness certifications, testified that he did not read them or communicate with any of the other witnesses before testifying at the hearing. Ms. Anclien denied receiving any information about what the other witnesses may have said. Romero testified on cross-examination that neither Commission counsel nor anyone else suggested that she "put things in your statement that were untrue." (Tr. @ 221). To the extent that discrepancies can be discerned they were clarified as in Romero's case or corroborated by the testimony of other witnesses. With respect to Furia's omission from her statement that Filo mimicked HM's movements on the floor while he was crying, Anclien, LoBello and Romero, along with Furia, corroborated the particulars of the June 27, 2014 incident. There is no specification alleging that during ESY Filo mimicked HM's behavior while he was on the floor.

IV. Penalty

Having found no evidence of a procedural irregularity or an appearance of an impropriety that would warrant the dismissal of any charges or specifications on procedural grounds, the Arbitrator reiterates his finding that the Respondent, with the exception of the charges dismissed, committed the misconduct set forth in the Commission's tenure charges. Unlike a procedural irregularity that was

outcome determinative or harmful to the interest of the Respondent, the Commission's investigation and witness preparation were not problematic.

The Commission has met its burden of proof by a preponderance of the credible evidence that Ms. Filo engaged in conduct unbecoming or other just cause manifested in a pattern of corporal punishment and excessive force prohibited by Commission policy and state statute.

The Commission has cited the New Jersey Supreme Court's decision of the "unbecoming conduct" standard to tenure charges as follows:

> Unbecoming conduct...has been defined as conduct "which has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998) (citation omitted). Unbecoming conduct may include "any conduct which adversely affects the morale or efficiency of the [department.]" Ibid. (citation omitted). The touchstone of the determination lies in the certificate holder's "fitness to discharge the duties and functions of one's office or position." In re Grossman, 127 N.J. Super. 13, 29 (App.Div. 1974). In re Young, 202 N.J. 50, 66 (2010).

Whereas the Respondent has argued that "a number of the accusations made against Ms. Filo would not constitute 'unbecoming conduct' as contemplated by the TEACHNJ ACT even if found to be true," the Arbitrator notes that the charges sustained, as opposed to those alluded to by the Respondent of raising her voice to students, mimicking their behavior, or throwing task pieces on the floor, encompass a pattern of inflicting corporal punishment, including the twisting of students' wrists and bending back their fingers. Moreover, in the Arbitrator's opinion, Filo's unbecoming conduct also entails the withholding the breakfast of MC and MM as punishment (Specification #4g), mimicking the autistic-behavior of student BO while repeating his stimming

noises loudly in his ear (Specification #6a), using a wooden clipboard to hit the knuckles and hands of MM (Specification #4f) and encouraging students to fight with each other (Specification #5b).

The Arbitrator has dismissed Specification #4d. The Arbitrator has not sustained the specification (5a) that charged Filo with raising her voice, namely, "scream[ing] at students on a daily basis" or Specifications 6b, 6c and 6d.

As the Commission correctly asserts, the "use of physical force by a teacher to maintain discipline or to punish infractions constitutes conduct unbecoming a public employee." See, In re Fulcomer, 93 N.J. Super. 401, 421 (App. Div. 1967). "Such conduct can adversely affect the morale or efficiency" of the public entity, the Jointure Commission in the instant case, and has "a tendency to destroy public respect for... [public] employees and confidence in the operation of [public] services." See, In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

Both parties agree that "the touchstone is fitness to discharge the functions of one's office or position." In re Grossman, 27 N.J. Super. 13, 29 (App. Div.). Clearly, a teacher who engages in the corporal punishment of her students has forfeited the right to continue in position requiring public trust.

Although there is case law which recognizes the difficult task a teacher must perform in managing students with disabilities, particularly students with autistic behaviors prone to physical aggressive and verbal outburst, the Respondent's training and certification ostensibly prepared her to management student acting out behaviors without resort to physical force.

Whereas Respondent argues that "it is quite possible that the other staff members, who were not teachers, either exaggerated or misinterpreted her actions," the Respondent produced a paucity of evidence to support this contention. With the exception of Anclien's testimony regarding Specification 5(a), where she exaggerated or misperceived the time period Filo pulled back MM's fingers, the other teacher assistants credibly testified that they observed corporal punishment being inflicted on HM and other students. Their experience as teacher assistants averaged 7 years, they all received CPI and SCIP training in physical restraints and collectively considered Filo's conduct excessive despite their failure to report.

In her defense, Filo was unable to provide any plausible explanation as to how her massage-type pressure could have been misconstrued as excessive force. For example, in describing the technique she use in blocking HM's forehead as HM attempted to bite her – a technique that Anclien purportedly misconstrued – Filo admitted that this was not a technique she acquired from her CPI training. (Tr. @ 893). Filo recalled that she had learned the "tactile or vestibular sensory input" from an occupational therapist at the DLC, whose name she couldn't recall. At no point in applying her deep joint pressure on MC, which she described as akin to a massage, did Filo validate the technique with her supervisors. She never requested retraining, clarification in the use of physical restraint or additional guidance in controlling student behavior. Filo admitted that none of the training she received sanctioned bending back fingers or twisting wrists.

In the absence of any evidence that the teacher assistants collectively misconstrued what they observed Filo doing when she bent back fingers and twisted wrists to obtain student compliance, the Arbitrator is compelled to conclude that she engaged in a pattern of corporal punishment as distinguished from an isolated incident. This behavior constitutes conduct unbecoming or other just cause warranting the removal of the Respondent's tenure. With the exception of the CW and BK specifications, the Respondent's misconduct has been accurately summarized by the Commission as follows:

> 1) HM (pulling back fingers and wrists); 2) MC (twisting his wrists to one side, while simultaneously bending it severely back, and unnecessarily twisting and bending his arm back; 3) MM (twisting and bending back his wrists, using a wooden clipboard to repeatedly hit his knuckles and hands and swatting back at him when he swung his arms at others ... 6) HM (bending her fingers back; 7) TH (bending his fingers back).

In addition to the foregoing misconduct, the preponderant evidence also sustained specifications where Filo encouraged students to hit back at each other, where she mimicked their autistic behaviors, and an incident where she withheld breakfast as punishment.

In the aggregate, the Arbitrator concludes that the Respondent has displayed unbecoming conduct incompatible with the professional standards required of teachers who serve as role models and hold positions where "they teach, inform and mold attitudes and influence the opinions of pupils." See, In re Tenure Hearing of Cotto, EDU 7420-97 (May 10, 2000). Teachers have been dismissed for inflicting physical, mental and emotional punishment. Similar to Respondent here, the teacher in In re Tenure Hearing of Smith, EDU 2838-92

(May 12, 1993) "dug her nails into the student's arms, shoved her into a seat on two occasions and made her stand in the corner from 9:15 until lunch time."

The Arbitrator concurs with the Commission in finding that dismissal is the only appropriate penalty for the Respondent's unbecoming conduct. The gravity of her misconduct, her use of excessive force, and the absence of extenuating circumstances render her unfit to teach. The Respondent's lack of remorse for her use of excessive force and failure to acknowledge that any of her conduct was inappropriate militate against the imposition of a lesser penalty such as a suspension coupled with retraining.

Although the Arbitrator is cognizant of the stressful conditions under which the Respondent has worked as a teacher of autistic students, her experience and training necessitated that she maintain her composure at all times. As Superintendent Parmalee aptly put it, "We cannot guarantee what our students learn and how they progress academically with us ... I have to guarantee our staff does not purposely hurt our kids. I have to guarantee that."

In the final analysis, the Arbitrator concludes that dismissal is the only appropriate penalty that will safeguard the students, ensure accountability for proven misconduct, and serve to deter a similar deviation from the requisite standards.

NOW THEREFORE, as the duly selected Arbitrator, having heard the evidence presented, I hereby issue the following:

AWARD

(1) The Commission proved Charge 1 (Conduct Unbecoming), Specifications 4a-4c, 4e-4k, 5b and 6a and Charge 2 (Other Just Cause).

(2) The Arbitrator dismisses Charge 1, Specifications 4d, 5a, 6b, 6c and 6d.

(3) The Respondent, Jennifer Filo, shall be dismissed from her tenure position with the Morris-Union Jointure-Commission.

Robert T. Simmelkjaer
March 22, 2015 Robert T. Simmelkjaer

STATE OF NEW JERSEY}
COUNTY OF BERGEN} SS

I, Robert T. Simmelkjaer, affirm that I have executed this instrument as my Award in Agency Docket Case No. 334-11/14 sustaining tenure charges as set forth above.

Robert T. Simmelkjaer
March 22, 2015 Robert T. Simmelkjaer

10615

Pursuant to Referral By the Commissioner of Education
State of New Jersey
Before Timothy J. Brown, Esquire

In the matter of:

The Tenure Hearing of	:	
Edward Newton	:	
	:	**Agency Docket No. 276-9/14**
State Operated School District of the	:	
City of Newark, Essex County	:	

Decision and Award

Appearances:

On behalf of the State Operated School District of the City of Newark, Essex County:
Ramon Rivera, Esquire
Shana Don, Esquire
Scarinci Hollenbeck
1100 Valley Brook Ave.
P.O. Box 790
Lyndhurst, NJ 07071

On behalf of Edward Newton:
Robert Pickett, Esquire
Pickett & Craig
80 Main Street, Suite 430
West Orange, NJ 07052

Introduction

This matter arises from tenure charges submitted on or about September 24, 2014 by the State Operated School District of the City of Newark (the School District or the District) based upon inefficiency pursuant to N.J.S.A. 18A:6-10. N.J.S.A.18A:6-11, N.J.S.A. 18A6-17.3 and N.J.S.A. 6A:3-5.1 against Edward Newton (Respondent) and an December 22, 2014 referral of the tenure charges to the undersigned by the New Jersey Department of Education, Bureau of Controversies and Disputes pursuant to N.J.S.A. 18A:6-17.3c. The hearing in the matter was conducted on February 10, 17 and 24, 2015 in Newark, New Jersey. At the hearing all parties were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. Respondent Newton was present for the entire hearing and testified on his own behalf. At the close of the hearing on February 24, 2015 the parties elected to submit written closing argument, upon the receipt of which by the arbitrator on March 13, 2015 the matter was deemed submitted.

This Award is made following my careful consideration of the entire record in the matter, including the under-sign's observations of the demeanor of all witnesses.

Issues

The issues presented in this matter may be accurately stated as follows:

> Has the District met its burden of establishing the truth of its tenure charges against Respondent, and if not, what is the appropriate remedy?

The Tenure Charge

The tenure charge in this matter are based upon inefficiency pursuant to N.J.S.A. 18A:6-10. N.J.S.A.18A:6-11, N.J.S.A. 18A6-17.3 and N.J.S.A. 6A:3-5.1 and states:

CHARGE ONE: INEFFICIENY

During the period from September 2012 to the present, Respondent has demonstrated an inability to completely and responsibly execute her duties as a teacher in the following manner:

a. The Respondent has failed to implement curricular goals and objective(s).
b. The Respondent has failed to design coherent instruction.
c. The Respondent has failed to assess student learning.
d. The Respondent has failed to create an environment of respect and rapport.
e. The Respondent has failed to manage student behavior.
f. The Respondent has failed to manage classroom procedures.
g. The Respondent has failed to establish a culture of learning.
h. The Respondent has failed to communicate clearly and accurately.
i. The Respondent has failed to use questioning and discussion techniques with flexibility and responsiveness.
j. The Respondent has failed to engage students in learning.
k. The Respondent has failed to provide feedback to students.
l. The Respondent has failed to attain student achievement that meets or exceeds performance benchmarks.
m. The Respondent has failed to reflect on teaching.
n. The Respondent has failed to contribute to the School and District.
o. The Respondent has failed to grow and develop professionally.
p. The Respondent has failed to demonstrate promptness and attendance.

Respondent

Respondent has a New Jersey middle school math certification and obtained tenure in or about 2010. He has taught math and science at the elementary and middle school level in the District since 2006 and taught at Lincoln Elementary school from 2008 until the instant tenure charges. At Lincoln, Respondent taught as a classroom teacher in math and science for three years, and more recently as a math problem solving teacher and classroom math teacher. Prior to the 2012-2013 school year Respondent received annual evaluations of satisfactory or proficient. Respondent received Annual Summative Evaluation ratings of "Partially Effective" for the 2012-2013 and 2013-2014 school years. As a result of his receiving ratings of Partially Effective for two consecutive years, the District filed the instant inefficiency tenure charge.

Testimony

Lincoln School Principal Debora R. Weaver

Principal of Lincoln School Debora R. Weaver testified that during the 2012-2013 school year Respondent was evaluated pursuant to the District's 2012-2013 "Framework For Effective Teaching." The Framework includes five "competencies" for which teachers are evaluated: (1) Lesson Design and Focus; (2) Rigor and Inclusiveness; (3) Culture of Achievement; (4) Student Progress Toward Mastery and (5) Commitment to Personal and Collective Excellence. The Framework contemplates that teachers will be evaluated through evidence; evidence of three general types; (a) what can be observed, (b) what cane be seen in artifacts and (c) what can be seen in quantitative data. Teachers

may receive ratings at four levels in each competency: Highly Effective, Effective, Partially Effective and Ineffective. Both administrators and teachers received significant and continuing training on the evaluation tool, according to Weaver.

The 2012-2013 Framework provided the following "main components" of the teacher evaluation process under the Framework:

1. Goal-setting meeting and IPDP creation – recommended
2. Partial Period Observation(s) – recommended
3. Pre-Observation Conference(s) – recommended
4. Formal observation(s) – required
5. Post-Observation Conference(s) – required
6. Mid-Year Review – strongly recommended
7. Annual Evaluation – required

The 2012-2013 Framework also provided that tenured teachers "must have a minimum of one (1) formal observation, though the district recommends that all teachers be observed at least 3 times, whether formally or informally," and that a post observation conference "must be held within ten (10) calendar days following the formal observation." The Framework further provides that the time frame for the post-observation conference "may be extended due to the absence of either the observer or the teacher."

Weaver explained that the District's 2013-2014 "Framework" contained some modifications from the previous year. The 2013-2014 Framework continued to have the same five competencies and four ratings. However, the Framework modified the number of observations required for a tenured teachers so that all tenured teachers were required to have three observations and that teachers on a Corrective Action Plan (CAP) were required to have at least one additional observation and that at least one of the observations of a teacher subject to a CAP must have been performed by someone other

than the individual who performed the other observations of the teacher. Under the 2013-2014 Framework, teachers with a CAP were required to have at least two short observations and at least two long observations. All observations must be followed up by a post-observation conference within ten working days of the observation and at least one observation must have a pre-observation conference. Finally, midyear conferences were required for teachers on a CAP and all teachers were to receive an annual evaluation.

The 2013-2014 Framework also provided that any teacher who received an annual summative evaluation rating of Partially Effective or Ineffective in the 2012-2013 school year must have a CAP in the 2013-2014 school year. The Framework specifies that a CAP should be developed in the beginning of a school year through a collaborative process between the teacher and supervisor.

Weaver testified that during the 2012-2013 school year she performed observations in her school from grade three down and that grade four and up were performed by her Vice Principal Kishanda Montes. As a result, Weaver did not perform any observations of Respondent during the 2012-2013 school year. But, she testified, she reviewed and approved the observations performed by Montes, including the vice principal's observations of Respondent.

In school year 2013-2014 Weaver performed one short observation of Respondent on April 9, 2014 and held a post observation conference with the teacher. She testified that she rated Respondent as Effective with a score of 11 for the observation. Weaver also testified that she recommended the instant tenure charges against Respondent. Weaver testified that she made the recommendation because:

> This is the second year of him being rated partially effective. And we provide a lot of support in our building, and he only

> had one effective observation in that two-year period. And he just wasn't having the positive impact on the students. The lessons - - the areas of his CAP had not really demonstrated growth over some time for someone whose CAP had been basically the same for - - that time. And his competency areas that were – that were weak were the ones that really are the catalyst of a classroom, classroom management and effective planning. And those are like the backbone of a good lesson over time. And we provided, I believe, as – an abundance of support, and it was not consistently being implemented or evident in the classroom.

In terms of the support provide Respondent, Weaver explained, Respondent attended numerous collaborative meetings of teacher teams, the school did a year-round professional development book study on "Teach Like a Champion," the school used "The Skillful Teacher," gave Respondent specific references to pursue in his CAP and asked him to do the follow-ups to demonstrate such. Despite such efforts, Weaver testified, Respondent did not show improvement over the two years at issue and in her opinion there was no more the District could have provided Respondent within reason that could have helped him improve his performance.

Vice Principal Kishanda Montes

Kishanda Montes was Vice Principal of Lincoln School during the 2012-2013 and 2013-2014 school years at issue here and testified that she performed observations and evaluations of Respondent in both school years. In the 2012-2013 school year Montes performed two observations of Respondent a mid-year evaluation and an end-of-year (Annual) evaluation. She testified that Respondent was offered and received a significant amount of professional development during both school years on a group basis as well as from her on an individual basis.

Montes identified professional development attended by Respondent on September 4, 5, 18, 2012. She conducted a partial period (or short) observation of Respondent on October 24, 2012 and testified that the lesson did not go well as the "do now" portion of the lesson intended as a first-five-minutes warm up became the entire lesson. According to Montes many of the students were not paying attention and were carrying on their own conversations throughout the lesson. Montes testified that it is her practice to hold a post observation conference after every teacher observation and that she did so in this case with Respondent. Montes gave Respondent a "Partially Effective" rating for the observation.

Respondent attended "collaborative meetings" with groups of teachers involving ANET data analysis on October 24 and November 7, 8 and 15, 2012. Montes testified that she invited Respondent to an individual December 4, 2012 conference with the Vice Principal to share her observations and support targeted to Respondent's needs; in this case primarily lesson planning and class management.

On December 19, 2012 Montes conducted a formal announced observation of Respondent. The related "Formal Observation Form" reflects that a pre-observation conference was held with Respondent on December 17, 2012 and that the December 19, 2012 observation was an hour and twenty minutes in length. Montes gave Respondent an "Ineffective" rating for the observation. The form also reflects that the post-observation conference was held on January 17, 2013.

Respondent attended another collaborative meeting relating to data on February 7, 2013. Montes also testified that Respondent received quarterly Data Artifacts-Feedback addressing his particularly needs and directing that he analyze why a lesson had not been

effective, develop an instruction plan to re-teach the lesson and thereafter submit a reassessment analysis reflecting whether students learned as a result of the re-teaching. According to Montes, Respondent did not submit a reassessment.

Respondent attended February 12 and 26, 2013 collaborative meetings on how to write lesson plans, particularly focused upon writing plan objectives.

Respondent received a mid-year evaluation from Vice Principal Montes on March 8, 2013 in which he received an overall rating of Partially Effective. Montes noted that in competency 1, Lesson Design and Focus, Respondent had submitted only 10% of the required lesson plans for cycles 1 and 2. According to Montes, Respondent would claim he had the plans in his head and would not submit them in writing for her review. As plans are the "heartbeat of teaching" Montes explained, if she receives written plans she is better able to help the teacher plan better lessons; she can help with objectives, components, pacing, review, assessment and feedback. If she can't review plan, she can't give feedback, Montes testified.

Respondent attended collaborative meetings on April 4, 8 and 17, 2013 involving data analysis; an area Montes testified was Respondent's strength.

In his annual summative evaluation and conference in June 2013 Respondent received a Partially Effective. According to Montes, Respondent did not show any improvement in competency number 1 relating to lesson-planning since his March 2013 midyear evaluation.

In the 2013-2014 School year Respondent was on a CAP, a plan that was initially authored by Respondent and revised following review – particularly of the "Professional Growth Plan" - and input by the Vice Principal based upon the teachers 2012-2013

summative evaluation, Montes testified. Among other things, the CAP included Action Steps for both the teacher and Montes relating to improving Respondent's lesson planning and classroom management. Montes explained that Respondent had expressed a desire to have his own culture in a class, rather than being required to observe other teachers in other classes and teaching an elective subject as he had taught problem solving in the 2012-2013 school year. As a result, Montes explained, Respondent was assigned an eight grade class that he taught 100% of the time and he was no longer requested to do as many extra duties such as back-up test coordinator so that he could focus upon his teaching and CAP.

Vice Principal Montes took an active roll in mentoring Respondent relating to lesson planning. She instructed him to submit his Unit plans to her for review prior to his developing lesson plans, directed Respondent to have three weeks of his lesson plans to her in advance, offered him written resources for his review and a template for lesson plans and informed him that he should request a meeting with Montes and she would schedule a conference if he needed "a refresher." Montes also sent Respondent a number of emails reminding the teacher when his plan submissions were late. As was the case in the 2012-2013 school year, Respondent attended numerous faculty meetings and collaborative meetings for professional development purposes, including such meetings on September 4, 5, 17 and 23, October 28, November 21, and 22, 2013, January 29 and March 24, 2014.

Montes conducted an unannounced, Long Observation of Respondent on or about September 25, 2013 and a post observation conference with the teacher on or about

October 15, 2013. For this observation Respondent was given an overall rating of Ineffective.

Montes explained that on December 2, 2013, after first quarter report cards had closed, she emailed Respondent and asked him what he believed were the issues that resulted in so many failing grades in his class. In response, Respondent wrote back that the students had a "lack of understanding" in positive and negative numbers and decimal operations, "incomplete responses to questions, linkage of prior knowledge to current content problems and careless mistakes. " In his view, Respondent further wrote, "[s]tudents have demonstrated a lack of commitment in their learning, homework return rate is low." Thereafter Montes and Principal Weaver met with Respondent, reviewed his grade book, and gave recommendations for implementing "power teacher" and ideas on establishing an assertive plan for classroom behavior strategies and getting parents involved. On December 6, 2013 Montes assigned Respondent to observe a "Corrective Instruction Lesson" by another teacher and to provide a list of his "noticing and wonderings" that would be discussed at his next conference with Montes.

Montes conducted a short, announced observation of Respondent on January 6, 2014. Pre-observation and post-observation conferences were held. Montes testified that she noticed some progress in Respondent's lesson design, focus and culture, but that he nevertheless still had a Partially Effective rating overall.

In his mid-year evaluation Respondent was rated Partially Effective. It was noted in the Competency 1 Section of the evaluation that Respondent was not adjusting his lessons to different types of learners and had submitted only 25% of written lesson plans. Thereafter, Montes testified, they paired Respondent with another teacher so that

Respondent could benefit from that teacher's abilities in culture and achievement and Respondent could share his abilities in data analysis.

Montes conducted an announced long observation of Respondent on February 28, 2014. Pre and post observation conferences were held. For this observation Respondent received a rating of Ineffective. Montes recalled that she held a post-observation conference with Respondent right after the observation and she asked Respondent to self-evaluate his own performance and that when he did such Respondent gave himself a Partially Effective rating.

Montes evaluated Respondent for his annual 2013-2014 school year summative evaluation and gave Respondent a rating of Partially Effective. Montes testified that Respondent had been given a wealth of information throughout the school year to help him improve; information on lesson plan design, classroom management, professional reading materials, collaborative meetings and frequent one-on-one conversations with administrators. Notwithstanding that Respondent was given significant support throughout the year, Montes testified, Respondent had shown only small growth during the 2013-2014 school year in some competencies and he had not reached effectiveness in any of the areas in which he needed to improve.

Respondent's Testimony

Respondent testified that in his view his December 2012 formal observation was done in a way that did not reflect the overall composition of the class; who the students were in terms of being very challenged and having discipline issues. According to Respondent, the students were not up to the grade level in math and that made it difficult

to teach an effective grade level class. Additionally, Respondent noted, there was another visitor in the classroom during the observation – a parent of a student – and he had not been informed that such would be the case before the observation. In terms of the behavior of the students that day, Respondent observed, they were indifferent to the presence of either a parent of the school's vice principal; they behaved poorly regardless.

Respondent testified that he thought his October 15, 2013 long evaluation was a "got you kind of evaluation." Again, to understand his circumstance one has to consider the background of the students in the class, Respondent explained, and this class was composed of regular math students and special education students but without teacher assistants (at least until towards the second half of the year). Like the class of the year before, this class had very low skills in math.

Respondent testified that he attended staff development days and other meetings where subjects relating to teacher effectiveness were taught and that he found the sessions helpful.

In regard to his short observation of January 6, 2014, and resulting Partially Effective rating, Respondent testified that he disagreed with the rating explaining that he believed he had done well and applied all the techniques and concepts that should have been applied, and that this class of students was a relatively good performing class.

For the February 28, 2014 observation, Respondent testified, "that was not my day" and he recalled telling Vice Principal Montes that he had tried something new and it was the worst day he had in his class.

Respondent recalled that his next observation was on April 9, 2014 when he was observed by Principal Weaver and that he was satisfied with the class; the students

followed instructions and were engaged. He received an Effective rating for this observation. When describing the class on April 9 and the rapport with the students that day, Respondent testified that it was a very interesting class.

> And quite a few times Mrs. Montes herself had come to my class and found a similar dialogue taking place and has jumped into teaching. You know, she saw we were having a good rapport. We were going through the steps, different concepts. The class became so interesting she would have joined in and, if I'm not overstating now, she practically took over the class, you know, and it has happened a couple of times. So generally, I follow on the patterns of what was reported on April 9th.

According to Respondent, he does not think the observations of his teaching performed by Montes were fair, that in his opinion she did not give the right recognition to the fact that there were troubled students in the school and that the challenge of the students is not addressed by blaming the teachers. He testified that he does not believe he received the support necessary for him to be an effective teacher. He further testified that had he provided Montes his lesson plans on a timely and consistent basis such would not have been a help to him as "the content of the lessons that I delivered were not my weakness. My weakness that was identified was student behavior…"

Positions of the Parties

Petitioner / District

The District argues that it is appropriate under TEACHNJ for it to consider Respondent's 2012-2013 evaluation as well as her 2013-2014 evaluations as they were performed pursuant to an evaluation rubric established consistently with the statute and NJ Department of Education (Department) guidance. In this regard, the District asserts,

the District was one of eleven school districts approved to participate in the Department's 2011-2012 teacher evaluation pilot program. As a result, the Department of Education allowed the District to begin using a new "framework" and new rating system on a "pilot" basis to evaluate teacher performance in the 2011-2012 school year. The framework and new rating system was then used throughout the entire district in the 2012-2013 school following the adoption of a related Memorandum Of Agreement (MOA) between the District and Teacher Union and passage of TEACHNJ. The District made a few minor modifications to its framework to comply with Department of Education requirements and again applied the framework to teachers in the 2013-2014 school year. As a result, Respondent was subject to evaluation under the 2012-2013 framework and the 2013-2014 framework.

Contrary to the assertion of Respondent, the District argued, it implemented its 2012-2013 evaluation rubric in a timely manner to be effective under governing law. In this regard, TEACHNJ establishes "deadlines" by which certain requirements must be met. Thus, the statue required school districts to institute pilot programs to test their new evaluation rubrics by January 31, 2013, **at the latest**. N.J.S.A. 18A:6-123(d) ("Beginning **no later than** January 31, 2013, a board of education shall implement a pilot program..."). (Emphasis added). Here, the District did just that; it implemented a pilot program with Department of Education approval in the 2011-2012 school year – thereby complying with the requirement that its pilot program be instituted "no later" than January 31, 2013.

Similarly, the District continued, TEACHNJ required all New Jersey public school districts to develop "evaluation rubrics" to assess the performance of their

teachers, and established a deadline to obtain approval for their "rubrics" from NJDOE by December 31, 2012. The District complied with that mandate. The District adopted an evaluation rubric – a rubric approved by the Department - as part of a performance evaluation system known as the Newark Public Schools Framework for Effective Teaching to be implemented beginning in the 2012-13 school year. To inform its teachers and school administrators of the new Framework and to provide guidance on its implementation, the District conducted training and published a Guidebook to the Framework for use in 2012-2013. The Framework clearly describes the new "levels of performance" as highly effective, effective, partially effective and ineffective.

The District further argued that it complied with the deadline established by the Act that school districts implement their evaluation rubrics by the beginning of the 2013-2014 school year **at the latest**, citing N.J.S.A. 18A:6-123(e) ("[b]eginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric"). Again, the District asserted, the District complied with the statute and implemented its framework containing the evaluation rubric for the 2012-2013 school-year; an implementation date that predated the 2013-2014 deadline set by statute. Nothing in TEACHNJ nor any regulations, the District maintained, provides that evaluations performed in 2012-2013 in accordance with an adopted, approved rubric are to be treated differently from those performed in 2013-2014, for purposes of triggering tenure charges under N.J.S.A. 18A:6-17.3.

Considering the plain meaning of the statute's language and the guidance and actions of the Department of Education, the District argued, neither the statue nor the DOE required school districts to; (a) treat the 2012-2013 school year, and only 2012-

2013, as a "pilot" year and (b) wait a year to implement their evaluation rubrics if the rubrics had been adopted and approved earlier.

Consequently, the District asserted, its efficiency charges against Respondent are appropriately considered by the arbitrator under TEACHNJ.

Respondent's attempt to have the charges dismissed on procedural grounds is inappropriate, the District maintained. In this regard, the District argued, it is the Commissioner of Education who is solely authorized to determine the sufficiency of the evaluation process and resulting tenure charges. N.J.S.A. 18A:6-16. Thus, a dispositive motion by a teacher subject to tenure charges based upon the failure of a board of education to follow the evaluation process may only be made to the Commissioner prior to the referral to an arbitrator.

Once it is found that the tenure charges are sufficient, based upon appropriate criteria and a referral is made to an arbitrator, an arbitrator's authority is confined to a determination of the following: (a) whether or not the employee's evaluation failed to adhere substantially to the evaluation process; (b) whether there was a mistake of fact in the evaluation; (c) whether the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, or discrimination, or; (d) whether the board of education's actions were arbitrary and capricious. N.J.S.A. 18A:6-17.2. Therefore, whether the District acted in compliance with law in filing charges based upon the 2012-2103 school year has been answered in the affirmative by the Commissioner of Education and is outside the scope of the arbitrator's authority.

Moreover, the District asserted, the statute does not contemplate that arbitrators will have the authority to interpret the statute or to evaluate the legislative intent of the Act. That authority is the courts.

Considering all of the evidence presented at the hearing, the District argued, it has met its burden of supporting the charge. The teacher evaluations conducted within the District in 2012-2013 were valid, effective, and "counted" for all purposes, including to support tenure charges such as those presented here, as were the evaluations conducted in the 2013-2014 school year. Respondent's contention to the contrary should be rejected.

The arbitrator's authority under TEACHNJ is limited to a determination of whether the approved evaluation system contained in the District's Framework was "substantially" adhered to when applied to Respondent. In this regard, the relevant evidence offered at hearing by the District including the total number of observations conducted each school year, and voluminous other evidence and testimony of witnesses establishes the Respondent's inefficiency as a tenured teacher to children. The Respondent was offered a collaborative CAP Process and extensive professional development opportunities and recommendations.

Alternatively the District continued, should the rubric of N.J.S.A. 18A:6-17.2 be found not to be the appropriate criteria under which to judge the evidence in this matter, the District has met its burden under the long-established efficiency standard of the preponderance of credible evidence. That standard requires that the District offer evidence that would lead a reasonably prudent person to conclude that the Respondent is an ineffective educator. Considering the totality of the circumstances here, including the testimony of the District's witnesses and evaluations a reasonable person could

concluded that the ineffectiveness of Respondent as an educator is sufficient to revoke his tenure protections.

The tenure charges are appropriately before the arbitrator and the District has met its burden of supporting its charges and Respondent has failed to rebut the District's case by establishing that; (a) the employee's evaluation failed to adhere substantially to the evaluation process, (b) there was a mistake of fact in the evaluation, (c) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, or discrimination or (d) that the board of education's actions were arbitrary and capricious. Under such circumstances, the District concluded, Respondent's employment as a tenured teacher within the District should be terminated.

Respondent

The tenure charges against Respondent must be dismissed, Respondent argued, as they unlawfully rely upon evaluations performed during the 2012-2013 school year. In enacting TEACHNJ the Legislature clearly intended the 2012-2013 school year to serve as a "pilot year" for all administrators and teaching staff members in assessing teaching effectiveness. See N.J.S.A. 18A:6-123. Under TEACH NJ, it was not until the 2013-2014 school year that the statute was deemed to be in full force and effect and was the first year that evaluations would count for purposes of tenure charges. Try as it might, Respondent maintained, the District cannot avoid that simple and obvious reality and fact. The purpose of 2012-2013 pilot-year was to train certified teaching staff members and evaluators on the District's evaluation instruments and procedures, and for the Department of Education ("DOE") to prepare and finalize its regulations, which later

became known as Achieve NJ and which did not become effective until October 2013. The pilot nature of the 2012-2013 school year is further supported by the obvious fact, Respondent asserted, that the implementing regulations were not even promulgated until after the 2012-2013 school year had concluded. Additionally, such a conclusion is further supported by the Department of Education's own guidance on the questions. Thus, in its "Educator Evaluation Frequently Asked Questions (FAQ)" previously published on its web-site in answer to the question "Will summative ratings "count" this year (2012-13) toward tenure decisions?" the Department of Education stated:

> A: No- the only item "on the clock" is the mentorship year for new teachers. No evaluation outcomes in the 2012-13 school year will impact tenure decisions. 2013-14 is the first year where the statewide system will be in place, and the first year when summative rating "clock" (for teachers needing to be rated at least effective for two of three years) will start.

Although the Department FAQ statements were informal in nature and may not rise to the status of regulation, the Respondent argued, the Department's statements nevertheless represent the practical interpretation of the statute by the agency charged with instructing local governmental units on how they were to comply with the new law. As such, Respondent maintained, there is judicial precedent to support Respondent's assertion that the DOE FAQ guidelines should be given substantial deference.

Respondent further argued that numerous recent decisions of arbitrators relating to motions to dismiss efficiency charges filed by the District[1] support its position that the evaluations performed by the District on Respondent during the 2012-2013 year are not

[1] In the Matter of Sandra Cheatham; In the Matter of Neil Thomas; In the Matter of Elena Brady; In the Matter of Charles Coleman; In the Matter of Lorraine Williams; In the Matter of Sandra Brienza; In the Matter of Leonard Yarborough; In the Matter of Ursula Whitehurst; In the Matter of Ratiba Ahmed; In the Matter of Toni Lenzand In the Matter of Leslie Johnson.

appropriately considered for purposes of efficiency tenure charges. In those cases Respondent asserted, arbitrators held that the charge affecting their respective Respondent alleging inefficiency pursuant to N.J.S.A.18A:17.3 was insufficient and/or premature because the TEACH NJ Act was not enacted until August 2012 and not implemented until October 2013, and further because the District presented no evidence that it was somehow exonerated from the requirements of Act.

The inapplicability of the 2012-2013 evaluations to charges of inefficiency are further established by the absence of a School Improvement Panel (SIP) during the 2012-2013 school year. Again, Respondent maintained, the District must be in compliance with all requirements of TEACH NJ as established by the Commissioner of Education and/or Department of Education as a precondition for considering annual summative evaluations as a basis for filing efficiency tenure charges. As the schools in which Respondent was assigned in the 2012-13 and 2013-14 school years did not have SIPs for those entire years, Respondent asserted, the District was out of compliance with TEACH NJ and, consequently, his 2012-13 and 2013-24 evaluations may not be used as a basis to file tenure charges.

Respondent argued that considering N.J.S.A. 18A: 6-17-3(c) provides:

> Notwithstanding the provisions of N.J.S.A. 18A: 6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a of this section, the commissioner shall examine the charge. The individual against whom the charges are filed shall have 10 days to submit a written response to the charge to the commissioner. The commissioner shall, within five days immediately following the period provided for a written response to the charges, refer the case to an arbitrator and appoint an arbitrator to hear the case, unless he determines that the evaluation process has not been followed.

And further provides that where a District has filed tenure charges alleging inefficiency premised upon teacher evaluations, but has failed to follow the evaluation development process required by TEACH NJ, the Commissioner may dismiss the tenure charges or simply forward them to an assigned Arbitrator for further assessment of a District's compliance with the evaluation requirements of the TEACHNJ Act. As a result, Respondent asserted, if a matter has been referred to an assigned Arbitrator, then the Arbitrator must have the authority of the Commissioner and is charged with the responsibility to assess a District's compliance with the evaluation and assessment requirements of the TEACHNJ ACT. If the assigned Arbitrator finds that the Petitioner District has failed to follow the evaluation requirements or is deficient for any reason, the Arbitrator is obliged to dismiss the tenure charges. Here, it is undisputed that the District failed to abide by the evaluation process set forth in the TEACHNJ ACT and accordingly, the tenure charges against Respondent must be dismissed.

In conclusion, Respondent argued, the Petitioner School District is unable to cite any legal authority and evidence that would permit the Arbitrator to simply ignore the plain and unambiguous language of the relevant statute and regulation. The District's compliance with the portions of TEACHNJ relating to the establishment and approval of evaluation procedures is a prerequisite to proceeding with Inefficiency Charges and any finding to sustain those charges, Respondent asserted. Accordingly, Respondent's 2012-2013 summative evaluation is not properly the subject of consideration by either the Commissioner or the Arbitrator in this case. Moreover, Respondent argued, if said evaluation is not subject to consideration, then the District's tenure charges are facially deficient in that it includes only one (1) summative evaluation (for the 2013-2014 school

year), as opposed to the two consecutive dannual evaluations required by TEACH NJ. Likewise the evidence is clear that (1) the Petitioner District failed to provide Respondent with the required minimum three (3) observations during the 2012-2013 school year even assuming that year was not a "pilot" year for the District and (2) that the Petitioner District failed to provide the Respondent with the required fourth observations in the 2013-2014 school year based on his CAP status. As such, the tenure charges at issue should be dismissed consistent with the procedural defects identified and with other arbitration rulings involving this Petitioner School District.

Moreover, Respondent continued, Respondent's evaluations "failed to adhere substantially to the evaluation process." In this regard, even if the 2012-2013 summative evaluation could be considered for tenure purposes, the District failed to comply with its own evaluation system – the 2012-2013 Framework - that was in effect for that school year. In this regard Respondent argued, the record reflects that Respondent did not receive the minimum number of formal observations required by the District's evaluation system. Thus, Respondent maintained, the evidence establishes that rather than the three observations required, Respondent was given to only one formal observation during that school year; a December 19, 2012 observation that did not include a mandatory pre-observation conference at all or a post-observation conference within the time period provided for such. Similarly, when the 2013-2014 school year is considered, the District again failed to observe Respondent the minimally required number of times. As required by the 2013-2014 Framework, because Respondent was subject to a CAP he should have been given at least four observations. He was not, Respondent asserted. Considering that (1) the school did not have an established School Improvement Panel during the 2012-

2013 school year, (2) the District's evaluation rubric for that year had not been approved by the Department of Education, (3) Respondent was not given the required observations in either of the two school years at issue and (4) for some of the observations that were performed the District failed to provide Respondent with a post-observation conference within the time prescribed for such; thus rendering the observations null and void, Respondent concluded, the District has failed to support its tenure charges against Respondent and they should be dismissed.

Discussion

The Referral of the Matter to the Arbitrator

By letter dated December 22, 2014 from the State of New Jersey Department of Education the parties were notified that:

> ...following receipt of Respondent's answer on October 10, 2014, the above-captioned tenure charges have been reviewed pursuant to **N.J.S.A. 18A:6-17.3c**; upon review the Commissioner is unable to determine that the evaluation process has not been followed, and accordingly, on this date, the case is being referred to Arbitrator Timothy J Brown, Esq. as required by statute.

(Emphasis added)

No motions were referred to the Arbitrator by the Commissioner.

Respondent's Argument Relating to the Arbitrator's Authority

Respondent asserts that the tenure charges should be dismissed, because the District has not complied with certain requirements of TEACH NJ relating to the promulgation, approval and implementation of the District's evaluation process; requirements including piloting/testing, approval and establishment of an evaluation

rubric, teacher improvement processes and SIPs; and the application of such for a minimum of two school years - none of which school years may have occurred prior to the 2013-14 school year. As part of his argument, Respondent asserts that at least two post-2012-13 school year summative evaluations are a "prerequisite" for; (a) the Commissioner of Education to refer an efficiency case to an arbitrator for hearing and (b) the jurisdiction of an arbitrator to hear and consider tenure charges alleging inefficiency.

Sections 23 and 25 of TEACHNJ

Sections 23 of TEACHNJ, among other things, establishes the extent of the authority of arbitrators relating to their consideration of, and rendering decisions upon, charges of teacher inefficiency. In this regard, Section 23 provides:

> 23. a. In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:
> (1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
> (2) there is a mistake of fact in the evaluation;
> (3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or
> (4) the district's actions were arbitrary and capricious.
>
> b. In the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.
>
> c. The evaluator's determination as to the quality of an

employee's classroom performance shall not be subject to an arbitrator's review.

d. The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.

e. The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case. The arbitrator shall render a written decision within 45 days of the start of the hearing.

Sections 25 of TEACHNJ, concerns the responsibilities of superintendents, boards of education and the Commissioner of Education in evaluating and processing charges of inefficiency. Section 25 of the Act provides:

C.18A:6-17.3 Evaluation process, determination of charges.
25. a. Notwithstanding the provisions of N.J.S.18A:6-11 or any other section of law to the contrary, in the case of a teacher, principal, assistant principal, and vice-principal:
(1) the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency whenever the employee is rated ineffective or partially effective in an annual summative evaluation and the following year is rated ineffective in the annual summative evaluation;
(2) if the employee is rated partially effective in two consecutive annual summative evaluations or is rated ineffective in an annual summative evaluation and the following year is rated partially effective in the annual summative evaluation, the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency, except that the superintendent upon a written finding of exceptional circumstances may defer the filing of tenure charges until after the next annual summative evaluation. If the employee is not rated effective or highly effective on this annual summative evaluation, the superintendent shall promptly file a charge of inefficiency.

b. Within 30 days of the filing, the board of education shall forward a written charge to the commissioner, unless the board determines that the evaluation process has not been followed.

c. Notwithstanding the provisions of N.J.S.18A:6-16 or any

> other section of law to the contrary, upon receipt of a charge pursuant to subsection a. of this section, the commissioner shall, within five days immediately following the period provided for a written response to the charges, refer the case to an arbitrator and appoint an arbitrator to hear the case, unless he determines that the evaluation process has not been followed.
>
> d. The only evaluations which may be used for purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L.2012, c.26 (C.18A:6-117 et al.).

TEACHNJ Grants Only Narrow Authority to Arbitrators in Inefficiency Cases

Considering the above-quoted language of TEACHNJ, I am not persuaded by Respondent's argument. Section 23 of TEACHNJ establishes the authority of arbitrators in cases presenting questions of efficiency. Section 25 establishes the authority of the Commissioner of Education in cases presenting questions of efficiency. Section 25 c. (18A: 6-17-3(c), (ii)) grants the Commissioner of Education authority to make one of three determinations upon receipt of a charge of inefficiency filed under Section 25 a.; the Commissioner may (1) determine the evaluation process has been followed and refer the case to an arbitrator, (2) determine the evaluation process has not been followed and dismiss the charges, or (3) determine that based upon the submissions of the parties the Commissioner cannot conclusively determine one way or the other whether the evaluation process has been followed and consequently cannot determine that the evaluation process "has not been followed." Where the Commissioner refers a matter to an arbitrator, as the Commissioner has done here, after concluding that he cannot determine that the evaluation process has not been followed, I am of the view that the statute affirmatively directs the arbitrator to "hear the case" pursuant to Section 23 of the

Act. Section 25 is focused upon the authority of superintendents, boards of education and the Commissioner and with perhaps the exception of the assignment of a case to an arbitrator to "hear the case" nothing in Section 25 grants authority to arbitrators.

Considering the specifically described authority of arbitrators contained in Section 23 of the Act and the absence of any similarly enabling language in Section 25, I am persuaded that Section 25 does not confer authority upon the arbitrator to step into the shoes of the Commissioner and determine whether the District has complied with statutory requirements in the promulgation and implementation of the District's evaluation process.[2] In this regard, it is widely recognized that an arbitrator's authority is defined by the mutual grant of authority by the parties or, as in this matter, by statute. In either event the authority of an arbitrator is only as broad as the authority granted. In the instant matter, I am of the view that the authority grant to me by statute as arbitrator is limited. Considering the pointed and narrow grant of authority to me in Section 23 of the ACT, the statute offers me no authority to consider and rule upon the District's compliance or non-compliance with provisions of the statute governing the promulgation and establishment of evaluation rubrics, SICs, CAPs, mentorship programs, etc. The Act assigns such tasks to the Commissioner.

The Commissioner's referral of this matter to me was specifically pursuant to TEACHNJ Section 25 (N.J.S.A. 18A:6-17.3c) and no other Section of the Act, and grants me the narrow authority to determine the case under the provisions of Section 23 and no other.

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[2] In this latter regard, I note that the reference in Section 25 d. to the portions of the Act concerned with the promulgation and establishment of evaluation rubrics, like the other portions of the section, is addressed to the activities of superintendents, boards of education and/or the Commissioner, not arbitrators.

The District Has Met Its Burden Under Section 23 of TACHNJ

Of the four permissible areas of arbitrator consideration identified in Section 23 of the Act, I find there is plainly insufficient or no evidence in the record to establish that: (a) there is a mistake of fact in Respondent's 2012-13 or 2013-14 evaluations, (b) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law or (c) the District's actions were arbitrary and capricious. Based upon the arguments of the parties, the determinative issue here is whether or not Respondent's evaluations; "failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan." Contrary to the argument of Respondent, I find that the District adhered substantially to the District's 2012-2013 and 2013-2014 evaluation processes, including the corrective action plan adopted for Respondent in the 2013-2014 school year.

The Observation and Evaluations Process contained in the District's 2012-2013 Framework identified both required and recommended elements. The required elements for tenured teachers such as Respondent included one formal, full-period observation and Post-Observation conference within 10 calendar days and an Annual Evaluation. The process also included elements that were "Optional," "Recommended" and "Strongly Recommended." Thus, goal-setting conferences early in the school year were "recommended," partial period observations were "strongly recommended," pre-observation conferences were "optional" and mid-year review conferences were "strongly recommended." The record establishes that with regard to its evaluation of

Respondent in the 2012-2013 school year the District substantially adhered to the evaluation process. Respondent was given a partial period observation on October 24, 2012, a long observation on December 19, 2012, a mid-year evaluation on March 18, 2013 and an annual evaluation. Although the evidence established that the post-December 19, 2012-observation conference may have been delayed beyond the ten calendar days provided in the Framework, I do not find that any such delay or other minor deviation from the directives of the Framework materially affected the outcome of Respondent's 2012-2013 annual summative evaluation. This is particularly so under circumstances where, as here, the District also performed a short observation of Respondent and provided him a mid-year evaluation, thereby plainly doing more than the minimum required by the evaluation process.

The Observation and Evaluations Process contained in the District's 2013-2014 Framework required that Respondent, having received a Partially Effective for his 2012-13 annual summative evaluation, must have a CAP, and that teachers with a CAP must have at least two short observations and at least two long observations, at least one observation must be completed by a different observer, post-observation conferences after each observation, at least one pre-observation conference, a mid-year review conference and an annual evaluation. I find that with regard to its evaluation of Respondent in the 2013-2014 school year the District substantially adhered to the evaluation process. Respondent was given two short and two long observations not all performed by the same observer, had a corrective action plan that was the product of a collaborative effort between Respondent and vice principal Montes, received a mid-year evaluation and conference and an annual evaluation. Moreover, throughout the two years

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Agency Docket No.299-10/14

IN THE MATTER OF TENURE CHARGES

AGAINST

RESOPONDENT DARLENE BARNES

BY

STATE-OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY

Appearances before Arbitrator David L. Gregory:

For the School District: Mr. Albert C. Buglione, Esq.
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Arbitration Hearing Dates: February 10, 13, 24, 26, and 27, 2015
Date of Arbitrator's Completion of Receipt of Post Hearing Briefs: March 18, 2015
Date of Arbitrator's Completion of Receipt of Reply Briefs: March 24, 2015
Date of Arbitrator's Decision: March 24, 2015

INTRODUCTION, PROCEDURAL HISTORY, AND FINDINGS OF FACT

On September 3, 2014, James Smith, the District's Executive Director for School Security, timely filed the Charges with Dr. Donnie W. Evans, the State District Superintendent. I was appointed the Arbitrator. The transcribed hearings occurred in a conference room at the District offices on February 10, 13, 24, 26 and 27, 2015. The parties filed extensive interim briefs on sophisticated issues of justiciability. The parties were superbly represented, and had full opportunity to be heard. All witnesses testified under direct and cross examination. At the parties' mutual request, they filed briefs and reply briefs. I completed receipt of post-hearing briefs on Wednesday, March 18, 2015 and of reply briefs on Tuesday , March 24, 2015. Upon my December 19, 2014 letter request to the Office of the Commissioner of the Department of Education on behalf of the parties' attorneys' extensive trial commitments, the due date for my Award was extended to Friday, March 27, 2015.

There are 19 Charges consuming three dozen pages in the record, on the theme of "conduct unbecoming." The spirit of the legislative intent favors prudential economy in these arbitration proceedings. Ergo, rather than retype the Charges verbatim herein, the Charges are incorporated by reference in their entirety into my Decision.

The Charges span a kaleidoscopic spectrum. They portray Respondent as an accomplished, congenital liar who uses her elusive and calculating prevarications to shrewdly facilitate and enhance her ominous multiple identities for illicit, fraudulent financial gain.

Respondent's lawyer finds the District's malicious profile of Respondent pernicious and wholly ludicrous.

The heart of the matter in this Arbitration involves Respondent's deeply problematic interactions with Teacher Albania Fermin on February 11, 2014 and, especially, with the minor/infant/juvenile 13 year old female student "NC" on February 21, 2014.

The student returned to the computer room in Public School 20 to retrieve her book bag. Respondent was the only other person present at the beginning of the incident at issue. Respondent inquired of NC to present some identifying item from the bag to Respondent before taking the book bag. NC did not comply and, instead, bolted for the door, only to be impeded in her desired egress by Respondent. Within the next few minutes, NC and Respondent were punching and slapping one another. Other than the two pugilist combatants, there were no eyewitnesses to the entire contretemps a la fisticuffs.

Security Officer Gena Warren arrived on the scene within a few minutes. She very credibly testified that she witnessed Respondent repeatedly push NC a distance of approximately fifteen feet backwards to, and ultimately downwards onto the top of, the table. Instructional Aide Ovid Armstrong also credibly testified that he, like Officer Warren, also saw Respondent repeatedly push NC backwards onto the table by restraining NC's arms. Officer Warren and Aide Armstrong are the closest anyone other than Respondent or NC came to being an eyewitness to the entire episode. I find Ms. Warren and Mr. Armstrong were both very credible witnesses.

NC's primary objective was to flee the computer room with book bag in hand, whereas Respondent's primary objective was even more immediate---to grasp NC's wrists in order to restrain NC from landing any further slaps or punches.

NC testified at the Arbitration hearing. I found her relatively forthright, but not entirely credible. She apparently does well in math, science, and computer classes, with B grades in some of these favorite subjects some of the time. NC regrettably is not a novice in the de facto "Fight Club," having herself been twice suspended for earlier indulgence in/resort to the "sweet science." I find it more likely than not that NC indeed told Respondent that NC's mother would be coming to the school for the express purpose of "beating [Respondent's] ass." To date, the mother has yet to appear, and NC remains living with her grandmother. Until the events at issue in February of 2014, Respondent, with the better part of a decade of service, had no labor relations disciplinary history of record with the District.

ANALYSIS AND DISCUSSION

On February 27, 2015, Mr. Albert C. Buglione, Esq., representing the District, conducted one of the more effective cross-examinations I have observed in my thirty two years as a labor and employment arbitrator. Respondent initially and untruthfully contended "I never touched her [NC] at all."(Tr/193, 218/Feb. 27)

I find Respondent's testimony to the contrary. She steadfastly adhered to her own directly opposite, and internally mutually exclusive, testimony---unless, of course, it was not

opportune for Respondent to do so. Her absolute testimony that she "never touched NC at all" was completely inconsistent with her claims of self defense, including her endeavor to pin NC's wrists to the surface of the large wooden utility table perhaps 7 to 10 feet inside the doorway of the school's computer room. Respondent surmises that NC collapsed onto the table due to gravitational inexorability, and not due to any push from Respondent.

By her own testimony on cross-examination, Respondent admitted the essence of Charges 1-4: e.g., Charge 2: "CONDUCT UNBECOMING A TEACHING STAFF MEMBER (Inappropriate Physical Contact/Assault upon a student [NC] on February 21, 2014 in the classroom.)"

Respondent claims that she was acting in her own necessary self defense against the recalcitrant, insubordinate aggressor NC. (Tr/ 195,220/ Feb 27). Respondent sets forth the unusual remedy that she seeks at page 27 of Respondent's post hearing brief : "This is a strange case because Ms. Barnes does not want to return as a teacher for the Paterson School System. She cannot because she has been found to be permanently disabled by the Social Security Administration...Accordingly, Respondent Barnes requests that you issue your award in a manner as if she was seeking to return to teach at the District."

I find relatively little of Respondent's key testimony credible with respect to the salient facts pertaining to Charges 1-4. According to Respondent , things occurred "too fast" for her to consider and formulate a nonproblematic alternative approach.

Furthermore, on Mr. Buglione's cross-examination of Respondent, it is Respondent, not NC, manifesting all of the behaviors of the prototypical aggressor of tort and criminal law :

Q. " Why don't you [Respondent] just run out into the hallway? If she [student NC] is backing up, why aren't you running out into the hallway?

A. It never occurred to me that I needed to run out into the hallway.

Q. But she's backing up and you're walking forward. You had the opportunity to retreat and you didn't; isn't that correct?

A. No."

This colloquy between crossexaminer Buglione and the cross-examined Respondent continues for several more pages of the transcript. Rather than ameliorate or rehabilitate any small part of Respondent's intransigence, Respondent's contradictory testimony infects other major components of Respondent's defense.

I find that the District has met its burden of proving Charges 1-4, 9, 12, and 18 (e.g., CONDUCT UNBECOMING A TEACHING STAFF MEMBER, Inappropriate Physical Contact/Assault upon a student in the classroom , February 21, 2014.)

I find that the District has also met its burden of proving Charge 4, CONDUCT UNBECOMING, in bullying, abuse, harassment, and intimidation of a co-worker. Albania Fermin was a completely credible witness. She testified very credibly about her understandable apprehensions regarding the intimidating, bizarre conduct and statements of

Respondent. Respondent's February 11, 2014 barricading of Ms. Fermin in the restroom while haranguing her throughout, having prefaced the weird episode by stating aloud that Respondent realized Respondent's conduct was indefensible, is far from the friendly meeting of cordial colleagues around the proverbial water cooler.

I find insufficient evidence that the District has met its burden of proving Charges 5-8, 10 -11, and 13-17, and 19. I emphasize that this is not the failure or the fault of the District or any of its employees, administrators, agents, or attorneys. Rather, the governing legislation compels expeditious presentation and conclusion to these proceedings. The District simply did not have enough time available to develop fully these particular Charges. The underlying facts in these Charges demonstrate chronic miscommunications (Charges 6, 7, 8, 11) and a variety of allegations, none of which are central to this case. For some of the Charges (e.g., Charge 10), there is virtually no pertinent fact or legal context whatsoever .

Respondent has due process rights. This compels the District to set forth with specificity the particulars in each of the Charges. Absent such information forthcoming from the District as the custodian of the record from the outset, Respondent's constitutional right to an effective defense may be vitiated. Respondent's lawyer insightfully labels the redundant piling on of the panorama of Charges a variation of the "because the District believes that because they say it is so then it is so" ipso facto." (Respondent posthearing brief at 1) This does not allow the District to dictate where she may live or travel, or to open her interactions with the police ex post facto (e.g.. Charges 13-17) to the searching eye of the District. For decades, the United States Equal Employment Opportunity Commission has been

understandably wary of employers using arrest records or credit histories as purported justifications for adverse preemptive or punitive actions against employees.

Assuming arguendo that the District proved all Charges, Respondent contends nevertheless that her seniority, the principle of progressive discipline, and no prior similar incident in her record preclude a six month suspension, let alone discharge. Respondent cites, inter alia, Paterson v. Vincenti (Arbitrator Howard Edelman, June 11, 2014)(six month suspension without pay imposed a second time rather than discharge, anger management classes, psychiatric examination with return to work clearance imposed for numerous intemperate and vulgar outbursts); and, Perez (Arbitrator Timothy J. Brown, December 11, 2014). (Charges dismissed, when District failed to establish the truth of the "conduct unbecoming" charge re: an equivocal "touching" or "grabbing" of wrist of student by teacher)

Not surprisingly, the District cites several cases sustaining discharge in the first instance of assault. I find the cases cited by the District more to the point than the authorities cited by Respondent. I find that Respondent had every opportunity to walk away from, rather than to hotly pursue, the student, and Respondent did not do so---the classic decision of the aggressive civil tortfeasor and the criminal perpetrator to continue trading punches and slaps. In such circumstances, discharge in the first instance is fully in accord with progressive discipline, due process, and just cause.

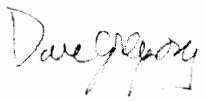
AWARD

For all of the reasons set forth above, I find that the District has met its burden of proving Charges 1-4, 9, 12, and 18. Those proven Charges are sustained and shall be added to Respondent's official record.

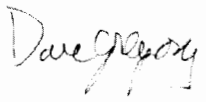
Respondent is hereby released, and discharged for proven just cause from the tenured teaching staff of the Paterson School District.

For all of the reasons set forth above, I find insufficient evidence necessary to prove Charges 5-8, 10-11, 13-17, and 19. Those Charges are dismissed.

So Ordered,



David L. Gregory, Arbitrator



I, David L. Gregory, affirm that I have executed this document as my Decision and Award in this matter on this 24th of March, 2015.

NJARBPATERSONBARNESMARCH2015

108-15

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

IN THE MATTER OF THE TENURE HEARING OF BRUCE REISMAN

SCHOOL DISTRICT FOR THE BOROUGH OF MANVILLE, SOMERSET COUNTY	:	**Agency Dkt No. 10-1/15**
Petitioner	:	
	:	
and	:	**AWARD APPROVING SETTLEMENT**
BRUCE REISMAN	:	
Respondent	:	

Before: Carol F. Laskin, Esquire, Arbitrator

APPEARANCES:

For the Petitioner
David B. Rubin, Esquire

For the Respondent
Arnold Mellk, Esquire
Mellk O'Neill

On January 16, 2015, the Manville Board of Education ("Board") referred certified tenure charges against teaching staff member Bruce Reisman. On February 2, 2015, Respondent Reisman answered the tenure charges. After review, the Department of Education appointed the undersigned, pursuant to *P.L. 2012, c.26* to hear and evaluate the tenure charges.

The parties, determining to amicably resolve all disputed claims and severe their employment relationship entered into a Settlement Agreement and General Release, attached hereto as

Exhibit A. Attached hereto as Exhibit B is the Resolution adopted by the Board at its meeting on March 10, 2015 approving the settlement, certified by Board Administrator/Board Secretary Kimberly A. Cleeland. Therein, the parties submitted the Settlement Agreement and General Release for my review, seeking approval.

The New Jersey Administrative Code contains procedures for filing Controversies and Disputes with the Commissioner of Education, *N.J.A.C 6A:3-1.1,et seq.* The new Subchapter 5 applies to *Charges Under the Tenure Employee's Hearing Act. N.J.A.C. N.J.A.C. 6A:3-5.6* addresses *withdrawal, settlement, or mooting of tenure charges.* Section (a), identifies the criteria a panel arbitrator must review prior to approving any settlement, as follows:

> 6A:3-5.6 **Withdrawal, settlement, or mooting of tenure charges**
>
> (a) Once tenure charges are certified to the Commissioner, they may be withdrawn or settled only with approval. Any proposed withdrawal or settlement, whether submitted to the Commissioner or to the arbitrator, shall address the following standards established by the State Board of Education in the matter entitled *In re Cardonick,* State Board decision of April 6, 1983 (1990 *School Law Decisions (S.L.D.)* 842, 846):
>
> 1. Accompaniment by documentation as to the nature of the charges;
>
> 2. Explication of the circumstances justifying settlement or withdrawal;
>
> 3. Consent of both the charged and charging parties;

4. Indication the charged party entered into the agreement with a full understanding of his or her rights;

5. A showing the agreement is in the public interest; and

6. If the charged party is a teaching staff member, a showing the teaching staff member has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

Reviewing the instant Settlement Agreement in light of the Administrative Code, I ***find*** *N.J.A.C. 6A:3-5.6(a)(1),(3),(4),(6)* are addressed in the verbiage of the Settlement Agreement. Moreover, the Board's articulation evidencing the circumstances justify settlement and the agreement is in the public interest is persuasive. (See *N.J.A.C. 6A:3-5.6(2)(5)*). Accordingly, based upon this review, the attached executed Settlement Agreement is, hereby ***APPROVED***.

DATED: 3/24/15

Carol F Laskin
CAROL F. LASKIN, ESQUIRE

STATE OF NEW JERSEY:

COUNTY OF CAMDEN:

I CERTIFY that on 3/24/15 CAROL F. LASKIN, personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as his or her act and deed.

DATED: 3/24/15

Lynda A Green
NOTARY PUBLIC

LYNDA A GREEN
ID # 2316329
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires June 28, 2019

Settlement Agreement and General Release

Whereas, Bruce Reisman ("Reisman") is a tenured teaching staff member employed by the Manville Board of Education ("the Board"); and

Whereas, the Superintendent of Schools has filed tenure charges against Reisman, dated December 9, 2014, which charges were certified by the Board on January 13, 2015; and

Whereas, the parties wish to amicably resolve disputed claims, and are desirous of severing their employment relationship on the terms set forth herein;

Now, Therefore, Be It Agreed, as follows:

1. **RETIREMENT** Reisman shall retire from employment as a public school employee in the State of New Jersey effective on or before July 1, 2015, at which time his employment with the Board shall cease in all respects, and shall promptly file with the appropriate pension authorities, and diligently process, all documentation required to effectuate this result. In the event that Reisman's retirement does not take effect by July 1, 2015, for any reason, this Settlement Agreement shall be deemed an irrevocable notice of resignation effective as of that date, which the Board, by execution hereof, hereby accepts. The Board acknowledges and agrees that it will fully and promptly comply with its obligations to provide the Department of the Treasury, Division of Pensions and Benefits, with any documentation necessary to facilitate the processing of Mr. Reisman's application for retirement.

EXHIBIT A

2 **LEAVE OF ABSENCE** Reisman shall be placed on a paid leave of absence, retroactive to February 27, 2015, with salary at the level he was being paid as of the commencement of the 2014-2015 school year, with benefits, through the conclusion of the 2014-2015 school year in June 2015. No adjustment shall be made to Reisman's salary regardless of the outcome of pending contract negotiations with the Manville Education Association. In the event that Reisman secures alternate employment for all or any part of the period prior to July 1, 2015, during what otherwise would have been the school day had he not been on a leave of absence, the Board's financial obligations hereunder shall be mitigated by any income received by Reisman in connection with said alternate employment. Reisman shall be obligated to notify the Superintendent of Schools in writing in the event that he secures such alternate employment.

3. **FORBEARANCE FROM DISCIPLINARY PROCEEDINGS** The Board shall withdraw the tenure charges currently pending against Reisman, with prejudice, and forbear from any other disciplinary proceedings against him; provided, that nothing herein shall affect any of the Board's reporting responsibilities pursuant to N.J.A.C. 6A:9B-4.4(a). The Board acknowledges that no such obligation will take effect until subsequent to the date of Reisman's retirement.

4. **OLDER WORKERS BENEFIT PROTECTION ACT** This Agreement and General Release shall be subject to Reisman's right to rescind pursuant to the Older Workers Benefit Protection Act, 29 626(F)(1)(G), within seven (7) calendar days after the signing of this Agreement. If Reisman does not rescind his letter of

resignation and this Agreement within seven (7) calendar days of the signing of them, his resignation and this Agreement shall be binding and irrevocable. To comply with the Older Workers Benefit Protection Act of 1990, this Agreement advises Reisman of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Agreement as follows:

a) Reisman fully understands the terms and conditions of this Agreement;

b) Reisman has been advised to consult with an attorney to review the Agreement;

c) Reisman specifically waives his right to pursue any claims under the Age Discrimination in Employment Act;

d) Reisman does not waive any rights or claims under the Age Discrimination in Employment Act that may arise after the date the waiver is executed.

e) Reisman is receiving consideration above and beyond anything of value to which he already is entitled;

f) Reisman has been given at least twenty-one (21) days within which to consider this Agreement.

g) Reisman has seven (7) days from the date of the execution of this waiver to revoke it.

5. **RELEASE** Reisman hereby releases, waives and forever discharges any and all past, present or future claims that relate to any action that predates this Agreement that he may have against the Board, including but not limited to, any and all claims for back pay or any other claim related to his absence from work and/or his employment with the Board. Reisman acknowledges that he has had the opportunity to consult with legal counsel and representatives of his choice regarding this Agreement prior to executing it; and that he represents that he has read this Agreement and fully understands them and agrees

to be bound by them. Reisman also acknowledges that he has been given a reasonable period of time within which to consider this settlement and the terms of this Agreement prior to executing them.

6. **CONFIDENTIALITY** This Agreement shall remain confidential to the maximum extent permitted by law and neither party shall disclose the terms of this Agreement to third parties. A copy of this Agreement shall not be maintained in Reisman's personnel file, nor shall a copy of the tenure charge documents remain in the file

7. **EMPLOYMENT REFERENCES** Responses to any inquiries as to Reisman's employment with the Board, including but not limited to, job reference inquiries shall be limited to an acknowledgment of his position, length of employment with the Board and his retirement.

8. **ENTIRE AGREEMENT** This Agreement contains the entire agreement and understanding between the parties and constitutes a full and final agreement on any and all issues relating to this matter, except that the parties reserve their right to enforce this Agreement, if necessary.

9. **CHOICE OF LAW** This Agreement shall be governed by the laws of the State of New Jersey.

10. **SEVERABILITY** If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

11. **BINDING EFFECT** The parties shall be bound by the terms and conditions of this Agreement, finding it to be in the best interests of the public, consistent with public policy, fair and equitable under all circumstances surrounding this matter.

12. **APPROVAL** The terms and conditions of this Agreement and are subject to ratification and approval by the Board at a duly convened public meeting, and by the Arbitrator to the extent required by law.

13. **NO ADMISSION OF LIABILITY** The parties' entry into this Agreement shall not constitute nor shall it be interpreted as an admission of wrongdoing or guilt, or liability in any manner on either of the parties' part. Any such obligation or liability on either party's part is expressly denied. The parties have entered into this Agreement solely to compromise disputed claims.

14. **OPPORTUNITY TO CONSULT WITH COUNSEL** The parties acknowledge that each has been given the opportunity to consult with an attorney or a representative of their own choosing with respect to this Agreement and reviewed with their attorney or representative all the terms and conditions of this Agreement prior to executing this Agreement. Each party signs this Agreement freely and voluntarily and without coercion or duress. The parties further acknowledge that they fully understand the duties and obligations enumerated herein and have been informed of their legal rights and obligations.

15. **COBRA** Nothing contained within this Agreement and General Release shall alter Reisman's rights to continuation of health

insurance through Federal law, i.e. the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA") upon separation from employment with the Board.

16. **EXECUTION IN COUNTERPARTS AND FACSIMILE SIGNATURES** This Agreement may be executed in two (or more) counterparts each of which, when executed and delivered shall be deemed to be an original, and of which counterparts, taken together, shall constitute one and the same agreement. An original signature transmitted by facsimile shall be deemed to be an original for purposes of this Agreement and for the accompanying letter of resignation.

17. **NO REENTRY** Upon acceptance of this Agreement by the Board, Reisman shall not enter school district buildings or grounds for any reason, nor shall he attend any school district-sponsored function or activity regardless of where it is held.

MANVILLE BOARD OF EDUCATION

Dated: 3/10/2015

BY: _____
HEDI ALLES, PRESIDENT

Dated: 3/4/2015

_____
BRUCE REISMAN

MANVILLE PUBLIC SCHOOLS

410 Brooks Boulevard
Manville, New Jersey 08835

Anne R. Facendo
Superintendent of Schools
Phone (908) 231-8500 x8545
Fax (908) 707-3963

Kimberly A. Clelland
Business Administrator /Board Secretary
Phone (908) 231-8500 X 8504
Fax (908) 704-0510

Ms. Alles moved the following:

B-1 BE IT RESOLVED that the Board of Education approves a settlement of tenure charge proceedings involving Employee #5651 known to the Board, pursuant to the terms of a written Settlement Agreement which the Board President is hereby authorized to execute.

The motion was seconded by Mr Agans and approved by unanimous roll call vote as follows:

AYES: Mr. Agans, Ms. Alles, Mr. Cornelson, Mrs Harabin, Mrs. Liszczak, Mrs. Lombardino, Mrs. Lukac, Mr. Panfile Mrs. Wiedwald

I certify that this is a true, full and correct copy of the resolution adopted by Manville Board of Education at its meeting on March 10, 2015.

Kimberly A. Clelland
Business Administrator/Board Secretary

EXHIBIT B

113-15L

113-15

State of New Jersey

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

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

March 23, 2015

Catherine Merino Reisman, Esq.
Freeman, Carolla, Reisman & Gran
19 Chestnut Street
Haddonfield, NJ 08033

Board Secretary
Elizabeth Board of Education
Mitchell Building
500 North Broad Street
Elizabeth, NJ 07207

Re: *L.H. and L.S. on behalf of minor child, L.S. v. Board of Education of the City of Elizabeth, Union County, Agency Dkt. No. 354-12/14.*

Dear Parties:

Upon review of the petition of appeal filed in connection with the above-captioned matter, and based upon the board's failure to submit an answer to the petition, I have determined to grant summary decision in favor of petitioners.

On December 8, 2014, petitioners filed a petition of appeal pursuant to *N.J.A.C.* 6A:3-8.1 *et seq.* claiming that L.S. was entitled to attend school in the District in accordance with *N.J.S.A.* 18A:38-1 *et seq.* A copy of the petition of appeal was served upon the board secretary via facsimile on December 10, 2014, together with an acknowledgment of filing and notice that an answer to the petition was due within 20 days. *N.J.A.C.* 6A:3-1.5. Because the board failed to respond to the initial notice, a second notice was sent to the board secretary on January 8, 2013, via certified and regular mail, clearly indicating that – absent receipt of an answer to the petition of appeal within 10 days – each count in the petition would be deemed admitted and this matter could be decided on a summary decision basis, *N.J.A.C.* 6A:3-1.5(e). Third and fourth such notices were sent to the board secretary, via certified and regular mail. To date, no answer has been filed on behalf of the board.

Accordingly, petitioners' claim that L.S. is entitled to attend school in the District pursuant to *N.J.S.A.* 18A:38-1 *et seq.* is deemed admitted by the board. The board is hereby ordered to continue to admit L.S. into its public school system, free of charge, so long as there is no change in circumstances that would alter that entitlement.[1]

Sincerely,

David C. Hespe
Commissioner of Education

C: County Superintendent

[1] This decision may be appealed to the Superior Court, Appellate Division pursuant to *P.L.* 2008, *c.* 36.

114-15

AGENCY DKT NO. 259-9/14

IN THE MATTER OF THE TENURE HEARING	:	
OF LULAR JONES, SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
THE TOWNSHIP OF ORANGE,	:	DECISION
ESSEX COUNTY.	:	

The record of this matter and the proposed settlement agreement and general release have been reviewed. Upon such review, the Commissioner finds that the proposed settlement is consistent with established standards governing settlement of tenure matters. *N.J.A.C.* 6A:3-5.6. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement. A copy of this decision shall be forwarded to the State Board of Examiners.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/24/15

Date of Mailing: 3/26/15

115-15ASEC

AGENCY DKT. NO. 3-3/12A
SEC DKT. NO. C03-14 (C25-08 on remand)

MELINDO PERSI,	:	
COMPLAINANT,	:	
V.	:	COMMISSIONER OF EDUCATION
DANIEL WOSKA, TOWNSHIP OF BRICK BOARD OF EDUCATION, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the decision of the School Ethics Commission (Commission) have been reviewed. On November 25, 2014, Respondent-Appellant Daniel Woska (respondent) filed an appeal of the Commission's October 28, 2014 decision with the Commissioner of Education pursuant to *N.J.A.C.* 6A:4-1.3(c).[1] The Commission found that the respondent violated *N.J.S.A.* 18A:12-24.1(e)[2] of the Code of Ethics for School Board Members because he was found to have taken private action that had the potential to compromise the Brick Township Board of Education (Board), and recommended a penalty of reprimand.

In his appeal to the Commissioner, the respondent argues that the Commission's application of *N.J.S.A.* 18A:12-24.1(e) to the facts in this matter is contrary to law. The respondent maintains that his issuance of the *Rice* notice to the Interim Superintendent Melindo Persi (Persi or complainant) was not a private action because the newly appointed Board ratified the prior issuance of the *Rice* notice at the reorganization meeting of April 29, 2008. It is not the act of the *Rice* notice being sent which Persi objects to; rather, it is his termination by the majority of the Board. The respondent also

[1] This matter includes a protracted procedural history that was fully outlined in the Commission's October 29, 2014 decision and will not be repeated here.

[2] *N.J.S.A.* 18A:12-24.1(e), states "I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board."

argues that even if the issuance of the *Rice* notice to Persi was a private act, the action did nothing to compromise the board in violation of *N.J.S.A.* 18A:12-24.1(e). The respondent points out that the full Board voted on Persi's termination, and as such it was the Board's action that resulted in the litigation regarding Persi's contract.

Additionally, the respondent contends that no penalty should be imposed given the unique circumstances in this case. The respondent stresses that the Commissioner's June 17, 2014 decision expressly acknowledged that no statute or regulation defined the power of who may issue a *Rice* notice to a superintendent.[3] The respondent reasonably believed in 2008 that he possessed the authority to request that a *Rice* notice be issued so that he would be in a position to voice his views on the subject of Persi's employment at the Board meeting. Up until the Commissioner issued the June 17, 2014 decision, there was no authority that required a *Rice* notice to a superintendent be issued by either the Board president or the full board. Therefore, that decision constitutes new law that should be applied prospectively and not retroactively to the respondent.

In reply, the complainant argues that the Commission's decision is supported by sufficient credible evidence in the record and is consistent with previous long standing decisions. The complainant maintains that the respondent failed to provide any basis to establish that the Commission's decision is arbitrary, capricious or contrary to law, and in fact the respondent's brief in support of the current appeal is duplicative of the brief filed by the respondent in April of 2013. The complainant also points out that the respondent did not appeal the Commissioner's June 17, 2014 decision with regard to who is able to request a *Rice* notice. As such, any arguments that challenge the legal issues determined in the June 17, 2014 decision should be deemed moot and irrelevant. With respect to the penalty, the complainant contends that this matter does not consist of unique circumstances as alleged by the

[3] Pursuant to the Appellate Division's instructions on remand, the Commissioner considered the issue and found that a single board member is without authority to direct issuance of a *Rice* notice to the chief school administrator of a district. Rather, that authority lies with the president of a district board of education or a majority of the full membership of a district board of education. *Melindo Persi v. Daniel Woska, Township of Brick Board of Education, Ocean County*, Commissioner Decision No. 260-14A, decided June 17, 2014.

respondent. Rather, the penalty of a reprimand is consistent with other cases cited in the Commission's October 29, 2014 decision which related to a violation of *N.J.S.A.* 18A:12-24.1(e), and should be upheld.

Upon a comprehensive review of the record, the Commissioner finds that the decision of the Commission as to the determination of a violation of *N.J.S.A.* 18A:12-24.1(e) is supported by sufficient credible evidence, and the respondent has not established that the Commission's decision is arbitrary, capricious or contrary to law.[4] *N.J.A.C.* 6A:4-4.1(a). The evidence in the record fully supports the Commission's determination that the respondent's private action which involved discussions with three members-elect resulting in the respondent becoming the new Board President – coupled with his plan to terminate Persi's employment contract and to appoint Assistant Superintendent Ceres to Persi's position as Superintendent without the Board's knowledge – were beyond the scope of duties and responsibilities of a board member, and constituted a violation of *N.J.S.A.* 18A:12-24.1(e).[5] Moreover, the respondent's private action compromised the Board because it resulted in significant litigation over Persi's contract. As a result, the Commissioner finds that the Commission's determination that respondent violated *N.J.S.A.* 18A:12-24.1(e) was not arbitrary, capricious or contrary to law.[6]

The Commissioner also accepts the Commission's recommendation – for the reasons expressed in the Commission's decision – that a reprimand is the appropriate penalty in this matter. In so ruling, the Commissioner is satisfied that, in recommending a penalty for the violation it found, the

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[4] The Commissioner is also in accord with the Commission's determination that the respondent did not violate *N.J.S.A.* 18A:12-24.1(c) and (d).

[5] The Commissioner is mindful that in a footnote in the Commission's February 29, 2012 decision the Commission noted that it "does not find respondent's actions relative to Ms. Ceres, as set forth in the factual findings herein, are sufficient to base a finding of a violation of the Code of Ethics for School Board Members." The Commissioner can only surmise that that finding was limited to the discussions with Ms. Ceres, not the combination of private action by the respondent that amounted to a violation of *N.J.S.A.* 18A:12-24.1(e).

[6] In the Commission's February 29, 2012 decision, the Commission found that the respondent violated *N.J.S.A.* 18A:12-24.1(e) when he took private action which had the potential to compromise the Board by unilaterally directing that a *Rice* notice be issued to Mr. Persi without consulting the Board President or the Board as a whole. The Commission determined that the remand did not direct a review of that finding and as such the Commission did not further discuss that finding in the October 29, 2014 decision. The Commission instead noted that its prior ruling on that issue remains undisturbed. The Commissioner is also in accord with the Commission's determination that the respondent violated *N.J.S.A.* 18A:12-24.1(e) for the reasons stated in the Commission's February 29, 2012 decision.

Commission fully considered the nature of the offense and weighed the effects of aggravating and mitigating circumstances. Contrary to the respondent's assertion that there should be no penalty because the Commissioner's June 17, 2014 decision with respect to who has the authority to issue a *Rice* notice to a superintendent is being retroactively applied to him, the Commissioner emphasizes that it was not just the respondent's unilateral issuance of the *Rice* notice in 2008 that was a violation of *N.J.S.A.* 18A:12-24.1(e). The respondent's private action that involved private discussions with newly elected board members, and his plan to have Persi terminated and Ms. Ceres take over without the full Board's knowledge also constituted a violation of *N.J.S.A.* 18A:12-24.1(e). Therefore, the Commission's recommended penalty of a reprimand in this matter is fully supported by the record and will not be disturbed.

Accordingly, IT IS hereby ORDERED that Daniel Woska is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 3/24/15
Date of Mailing: 3/27/15

[7] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.

116-15

OAL DKT. NO. EDU 8005-14
AGENCY DKT. NO. 117-5/14

Y.P., on behalf of minor child, L.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The record, settlement agreement (Agreement), and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner observes that the Superintendant signed the settlement agreement on behalf of the Board. The Agreement was not signed by the Board's attorney, who is the Board's duly authorized representative in litigation, nor does the file contain a copy of the Board's resolution approving the settlement and designating the Superintendent to sign the agreement on its behalf. Therefore, the Commissioner cannot approve the within Agreement in its present form.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Agreement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/27/15
Date of Mailing: 3/27/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8005-14
AGENCY DKT. NO. 117-5/14

Y.P. ON BEHALF OF L.P.,
Petitioner,
v.
TOWNSHIP OF MONROE BOARD OF EDUCATION, GLOUCESTER COUNTY,
Respondent.

Y.P., petitioner, pro se

Katrina Geary, Esq., for respondent (Trimble & Armano, attorneys)

Record Closed: February 9, 2015 Decided: February 13, 2015

BEFORE **SARAH G. CROWLEY**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 26, 2014, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement, and have prepared a Settlement Agreement dated January 28, 2015, indicating the terms thereof, which is attached and fully incorporated herein, (J-1).

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

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

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

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

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

February 13, 2015
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: February 13, 2015

Date Mailed to Parties: February 17, 2015

/cb

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 Settlement agreement, received February 9, 2015

118-15

In the Matter of

Rinita Williams
and
State-Operated School District
of the City of Newark
in the County of Essex, NJ

Re: Tenure Charge of Inefficiency
Agency Docket Nos. 241-8/14 and 17-1/15

Opinion and Award

Tia Schneider Denenberg, *Arbitrator*

APPEARANCES

FOR THE DISTRICT:

Teresa L. Moore, *Riker Danzig Scherer Hyland & Perretti LLP*

FOR THE RESPONDENT TEACHER:

Genevieve Murphy-Bradacs, *Zazzali, Fagella, Nowak, Kleinbaum & Friedman*

BACKGROUND

This dispute initially concerned charges of inefficiency, dated July 22, 2014.[1] They were brought against tenured teacher Rinita Williams under Section 25 of the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), N.J.S.A. 18A:6-17.3. as follows:

CHARGE: INEFFICIENCY

Respondent has been rated Partially Effective and Ineffective in two respective annual summative evaluations, as follows:

1. Respondent was rated Partially Effective in her 2012-13 annual summative evaluation.

[1] For ease of reference the arbitrator has cited the date on which each document was created rather than the date on the DOE stamp. In this matter there is no allegation of failure to comply with time limits.

2. Respondent was rated Ineffective in her 2013-14 annual summative evaluation.

WHEREFORE, Respondent has shown that she is unfit to discharge the duties and functions of the position in which she holds tenure in the School District, and she should be dismissed.

Accompanied by a statement of evidence, the charges were served on the teacher on August 4, 2014.[2] The teacher filed a position statement, dated August 11, 2014, alleging that "procedural deficiencies...render the instant charges inappropriate...particularly in light of the fact that full implementation of the new teacher evaluation system did not even begin until September of 2013" [at p. 2]. The teacher also alleged failure to respect her FMLA and workers' compensation leave status, as well as retaliation by her supervisors for filing disability and discrimination complaints.

In a letter dated August 28, 2014, the district notified the teacher that tenure charges were being certified to the New Jersey State Commissioner of Education and that she was suspended without pay for 120 days, effective August 29. At the same time, the file was forwarded to the commissioner, and copies were sent to the teacher and her attorneys. The district asserted that

> the only question to be determined by the Commissioner is whether the School District has followed the evaluation process. See N.J.S.A. 18A:6-17.3(c); N.J.A.C. 6A:3-5.1(c)(6). We respectfully submit that the Commissioner should determine that the School District has complied fully with all required evaluation procedures. In 2012-13, in accordance with regulatory provisions in effect during that school year, Respondent received three formal observations and an annual summative evaluation. In 2013-14 a corrective action plan was developed collaboratively and implemented; that school year Respondent received four observations, a mid-year evaluation, and an annual summative evaluation.

The teacher filed a letter brief, dated September 5, 2014, asking the commissioner to dismiss the charges and grant "a motion seeking the same as well as a stay in transmitting the matter to an arbitrator." Included in the pleading was an answer to the charges, that asserted:

> The implementation of the District's 2012-13 Teacher Evaluation Guidelines and procedures related thereto were part and parcel of a "pilot program" and, as such, summative evaluations relating to that school year may not be utilized by the District for purpose of seeking or bringing tenure charges against Teachers, including, but not limited to Ms. Williams relating thereto.

On September 15, the parties were advised by the commissioner that

> following receipt of respondent's answer on September 8, 2014, the...tenure charges have been reviewed pursuant to N.J.S.A. 18A:6-17.3c; upon review the Commissioner is unable to determine

[2] This ruling takes into account the complete record, which includes numerous submissions. In the interest of economy, not all submissions will be identified individually or summarized.

> that the evaluation process has not been followed and accordingly, on this date, the case is being referred to Arbitrator Tia Schneider Denenberg as required by statute.

After consulting with the parties via e-mail and conference call, the arbitrator was granted a two-week extension by the commissioner for the purpose of allowing them to elaborate their positions in regard to the teacher's preliminary motion. The parties agreed to schedule three days of hearing—on November 12, 13, and 14—in the event that the case went forward and to establish a timetable for the required pre-hearing information exchange.

The teacher maintained that the arbitrator was now the designee of the commissioner, which implied that the procedure is governed by New Jersey administrative law precepts, including limited opportunity for parties to respond to each other. On October 17, the arbitrator notified the parties by e-mail as follows:

> Under the traditional principles of arbitration and the AAA rules, I am obliged to ensure the parties have a full and fair opportunity to be heard. In keeping with that responsibility, the District will be permitted to submit a brief reply.

The teacher was also afforded an opportunity to submit an additional reply.

On November 5 the arbitrator informed the parties in another conference call that she would take the preliminary motion under advisement and that the hearings would proceed as scheduled, since there was no mutual agreement to adjourn. During the call, the teacher requested that the arbitrator conduct an initial review of the case as the commissioner's designee. The request was rejected on the ground that it was inconsistent with the role of arbitrator.

In its responses to the motion, the district had argued that if the Section 25 claim were dismissed, the allegations should revert to a non-mandatory tenure removal charge under Section 8. The district withdrew that contention in its opening statement [Tr., p. 14].

Hearings were held in this matter on November 12, 13, 14 and 19. The following witnesses testified under oath or affirmation:

For the District (Petitioner):

Viveca Williams,[3] Principal of 13th Avenue/Dr. MLK School

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[3] Viveca Williams was hired in August, 2012, as Chief Innovation Officer (CIO), or as the "second hand to the principal." She became interim principal on January 13, 2013, and principal at the end of the school year [Tr., pp. 172-173]. Even though her roles varied over time, she is identified throughout this opinion as Principal Williams to avoid confusion with the teacher, Rinita Williams.

Simone Rose,[4] Vice-Principal
LaShanda Gilliam,[5] Vice-Principal

For the Teacher (Respondent):

Rinita Williams,[6] Teacher
Latifa Graham,[7] Teacher

At the district's request, a transcript was taken. Following the hearing (December 22, 2014), the district asked that the arbitration be held in abeyance in order to take account of an amended charge being filed against the teacher:

> Please be advised that the principal of 13th Avenue School has filed an Amended Notice of Tenure Charge of Inefficiency against Respondent Rinita Williams. The amended charge includes the charge of inefficiency previously filed, served, and submitted to the Commissioner of Education; and on which you have completed an arbitration hearing; and it adds another count of inefficiency pursuant to N.J.S.A. 18A:6-1 1 and N.J.S.A. 18A:6-16.
>
> We expect that the Amended Notice of Tenure Charge of Inefficiency will be treated as a new filing, and, accordingly, Ms. Williams will have an opportunity to respond before the charge is considered by the Superintendent and the Commissioner, prior to its referral to arbitration. We therefore respectfully request that this matter be held in abeyance, pursuant to N.J.A.C. 6A:3-5.5(b), so the Amended Notice of Tenure Charge may be properly considered in accordance with applicable statutory provisions.

The next day, the teacher signaled opposition to this motion:

> The present charge before you was filed pursuant to N.J.S.A. 18A:6-17.3 (Section 25 of the Act), which applies in cases of alleged inefficiency. That is the only charge before you and no additional amended charge has been transmitted to you by the Commissioner. Therefore, the amended charge is not

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[4] This is her third year as vice-principal at 13th Avenue School. She also served as vice-principal in another Newark school for one year [Tr., p. 452].

[5] Ms. Gilliam became an administrator in November, 2006, at Vailsburg Middle School and remained there when that school closed and reopened as Ivy Hill Elementary School. She went to 13th Avenue School in August, 2009 [Tr., pp. 745-746]. In SY 2012-2013 she supervised preschool, kindergarten, and first and second grades. In SY 2013-2014 Ms. Gilliam supervised grades four and five [Tr., p. 747]. She assisted Principal Mackey in training teachers in each of the five competencies in SY 2012-2013 [Tr., p. 749].

[6] Rinita Williams began employment with the District in 1998 and taught at several schools. Her classes included Pre-K, kindergarten, first grade, second grade (as lead teacher), third grade, and fourth grade. She holds a K-5 Certification [Respondent Brief, p. 4]. She was a substitute teacher for three years [Tr., p. 702].

[7] Ms. Graham has been employed by NPS for sixteen years, teaching in a variety of schools including five years at MLK and at MLK/13th Avenue for 2012-2013 as a first grade teacher [Tr., pp. 662-663].

relevant to the proceeding before you, is entitled to no action or consideration on your part (indeed consideration of the District's request would be grossly improper since no amended charge has been transmitted to you by the Commissioner) and the only conceivable relevance of the District's amended charge is to demonstrate that the District is keenly aware that the present charge lacks merit and should be dismissed. I also believe that the District is attempting to prevent the Respondent from being returned to the payroll, as is required after tenure charges have been pending for 120 days. Once these "new" tenure charges are filed, the District will claim that Ms. Williams should be suspended without pay again.

The District's actions are unconscionable. On the first day of the hearing, on the record, the District's counsel specifically withdrew its request that this matter be "convert[ed]" into a "non-mandatory tenure charge claim of inefficiency." (T14). And yet now, after 4 days of hearings and after the submission of post-hearing briefs, the District is attempting to amend the charge to do just that, while also asking you to refrain from deciding this case while it attempts to sneak in through the back door what it could not get in through the front. This is tantamount to plaintiff's counsel advising the trial judge after a week-long trial - while the jury is deliberating - that she has filed an amended complaint before another judge, and that therefore she is requesting that the jury be told go home. Obviously, something so absurd would never be countenanced in any court of law. Nor should it be permitted here.

As the arbitrator in this case, it is respectfully submitted that you are empowered, as is a judge, to decide all issues that arise in this matter, both procedural and substantive. Accordingly, please treat this letter as a formal motion to preclude the District from amending its tenure charges against Rinita Williams at this late date. Accordingly, and in light of the foregoing, it is respectfully requested that you issue an order restraining the District from filing any amended tenure charges against Ms. Williams, and that a decision on the pending motion to dismiss, and on all the substantive aspects of the tenure charge, issue expeditiously.

The submission of corrected transcripts, briefs and attachments was completed on December 26, 2014. The district provided scanned copies of all exhibits on a CD. In view of the complexity of the record and the time taken to complete it, the arbitrator was granted two additional extensions by the commissioner. The award became due on March 30, 2015.

On January 22, 2015, the teacher's counsel wrote the arbitrator as follows:

Today I received an email from Ms. Moore, a copy of which is enclosed, indicating that the District is filing amended tenure charges against Ms. Williams with the Commissioner of Education. I am writing to apprise you of this most recent development, as well to briefly respond to Ms. Moore's most recent letter-brief, dated January 16, 2015, in which she reiterates her request that you stay your decision and opposes Ms. Williams' motion seeking an order precluding the District from filing amended charges against her.

Based upon Ms. Moore's January 22, 2015 email, it is readily apparent that the District does not intend to wait for your ruling on Ms. Williams' motion for an order precluding the District from filing an amended charge. It is also clear that the District does not plan to move before you, the Arbitrator in this case, to amend the charge. Instead, it seeks to circumvent the law - and your authority in this case - by simply moving ahead with its plan to file amended charges with the Commissioner, despite the fact that it has no legal authority to do so. Candidly, I'm not surprised, given that each of the District's actions to date, individually and collectively, demonstrate a belief that it is above the law,

and that it is entitled to do whatever it wants, whenever it wants, in pursuit of its unjust and pathological quest to remove Ms. Williams (and many others) from tenured employment.

Given this most recent development, I am reiterating my request that you issue an order precluding the District from filing amended charges against Ms. Williams. After 4 days of hearings and the filing of numerous post-hearing briefs, the record is closed. The proper time to request leave to amend would have been prior to the hearing in this matter, and such a request should have been directed to you, the arbitrator appointed by the Commissioner to dispose of this matter, who is the only person to whom such a request can properly be made. See Elkouri & Elkouri, How Arbitration Works (6th Ed. BNA) at p. 294 (citing John Wiley & Sons v. Livingston 376 U.S. 543, 557 (1964) for the proposition that when "the subject matter of a dispute is arbitrable, 'procedural questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.'"). Moreover, on the first day of the hearing, on the record, the District's counsel specifically withdrew its request that this matter be "convert[ed]" into a "non-mandatory tenure charge claim of inefficiency." (T14).

The District bizarrely claims that Ms. Williams will not be prejudiced by its amendment of the charges because "[t]he Amended Charge is based on the identical evidence that the School District presented at the hearing." (See Letter from T. Moore dated January 16, 2015 at 1). Nothing could be further from the truth. Ms. Williams undertook her defense of the charges against her within the confines of the extremely limited defenses that were available to her under Section 25 of the Act. For example, under Section 25, Ms. Williams is statutorily precluded from offering evidence that her classroom performance did not warrant the ratings she was given. Had she in fact been the subject of tenure charges brought pursuant to Section 8, she would have presented additional evidence and raised additional defenses to counter such charges. An amendment at this stage would rob Ms. Williams of her opportunity to do so. Obviously, it would be absurd to permit Ms. Williams to be prejudiced in this manner simply because the District now has buyer's remorse over its prior litigation strategy.

Moreover, as the vast majority of arbitrators have now ruled, even if the District had timely and properly moved before you to amend its charge, the amendment should have been denied as futile, as inefficiency charges can only be brought, if at all, pursuant to Section 25 of the Act. To the extent the District seeks to rely upon Henchey, Thomas, and Whitehurst, it is clear that such reliance is misplaced. These cases involved charges that were initially pled in the alternative and did not involve what amounts to unilateral action by the District amending the charge after the hearing has been concluded and the record has closed. Accordingly, these cases have absolutely no bearing on the present issue.

In light of the above, Respondent respectfully requests that the Arbitrator take swift action to preclude the District from certifying these amended charges, which, I am told, are being filed today. Such an order is necessary and appropriate, particularly since, should the Commissioner allow these amended charges to proceed, there is no guarantee that the District will not take the position - or that the Commissioner will not so find - that the amended charges should be transmitted to, and decided by, an entirely different arbitrator.

As the arbitrator in this case, it is respectfully submitted that you are empowered to take such action. Accordingly, and in light of the foregoing, it is respectfully requested that you issue an order restraining the District from filing any amended tenure charges against Ms. Williams, and that a decision on the pending motion to dismiss, and on all the substantive aspects of the tenure charge, issue expeditiously.

On January 22-23, the district reported by e-mail that it had certified "amended" charges to the DOE and had "requested that the amended charge be assigned to you as a matter of case management." The district asked for a conference call that would include Ms. Duncan, but the teacher objected to her participation. On January 26, the arbitrator informed the parties that a conference call was unnecessary. On January 31 the undersigned arbitrator issued an interim award:

> The petitioner's request to hold this matter in abeyance is denied. The arbitrator retains jurisdiction for the purposes of resolving any and all disputes regarding the tenure charges brought against respondent by SOSD of Newark for school years 2012-2013 and 2013-2014.

The arbitrator wrote the parties on February 13, 2015, as follows:

> On February 6, 2015, I was notified by Ms. Duncan of the Bureau of Controversies and Disputes that I have been appointed to hear and decide a second matter involving Ms. Williams. At the same time, Ms. Duncan informed the parties that the new matter has been docketed "as new charges...and which are being processed with respect to Charge Two, Section 8 inefficiency charges only, [and] are being referred to Arbitrator Tia Schneider Denenberg to handle as she deems appropriate."
>
> Therefore, I am combining the two matters into a single case for the school years 2012-2013 and 2013-2014. I plan to issue one decision. Each party may submit an additional letter brief of no more than 5 pages by February 20, 2015.
>
> I also acknowledge receipt of various emails and the following documents:
>
> (1) Copy of letter from Genevieve M. Murphy-Bradacs to Ms. Duncan, dated February 5, 2015, enclosing a copy of Respondent's Answer to Amended Tenure Charges.
>
> (2) Letter from Ms. Murphy-Bradacs to the arbitrator, dated February 6, 2015, requesting that her pending motion, seeking an order barring the filing of amended charges be treated as a motion to dismiss. In support of this motion, Respondent relies upon all prior submissions, as well as the post-hearing brief.
>
> (3) Letter from Ms. Moore to the arbitrator, dated February 10, 2015, in response to Ms. Murphy-Bradacs' letter in No. 2 above.
>
> With respect to No. 2, I am granting the respondent's request to consider her submission as a motion to dismiss.
>
> By copy of this letter, I am asking the Commissioner to consider the due date for the consolidated case to be March 30, 2015, which is the extended due date of Docket No. 241-8/14.

The parties each filed a timely letter brief.

At the hearing, Principal Williams testified to the school's troubled history:

> It's a pre-K to eight school located in the west ward of Newark, New Jersey. When I arrived to 13th Avenue, it was known as a RENEW school, RENEW meaning that they closed 13th Avenue because 13th Avenue was a failing school, and they closed Dr. MLK School...because that was considered a failing school as well. The superintendent reopened 13th Avenue, combining both schools, 13th Avenue and Dr. MLK School into one school [Tr., pp. 19-20].

In August, 2012, the school "had to rehire 80 percent of the teachers. They had to be new teachers that were brought to the school to impact and help improve student achievement in the school altogether" [Tr., p. 20]. The teachers were asked to work extra hours, the witness recounted, in order to augment student learning time:

> ...[S]tudies have shown that when students have opportunities to have after-school programs, that they are successful in their academics and they care about that, economics, and also having an opportunity to give teachers more time to teach. One of the things that we were focusing on was developing social and emotional learning for students.... [W]e implemented curriculum that helped teachers and students improve the relationships within the class among each other, among each other in the classroom, to build their relationships. In addition, we had a couple of new curriculums, such as math and focus, which was a math curriculum; expeditionary learning, which was a reading curriculum and core knowledge, which was a reading curriculum for grades K through two, and our creative curriculum program for preschool, preschool teachers as well.
>
> We also had the opportunity to have our teachers sign something called an extended work agreement, which states that as you are working at 13th Avenue, you are committing to staying past 3:05, so basically the teachers finished at 4:05. You are committing to attending Saturday retreats.... But the goal was so that we can impact student achievement during the course of the day in academics, and in improving social and emotional supports as well [Tr., pp. 20-21].

During the entire period at issue, the students failed to perform well academically. The school needed to be "on the move or better, and we are not there as yet.... Our goal was to hire great teachers to impact and help us to move the students of 13th Avenue Dr. MLK to be future doctors, lawyers, teachers, etcetera" [Tr., p. 22]. Principal Williams estimated that there were 50 teachers, five administrators and "close to 120 staff members" at the school [Tr., p. 23]. The enrollment was "800 to 830. Our school is very transient at times, so our numbers kind of fluctuate " [Tr., p. 20]. The principal maintained that

> my number one role is one to support teachers and coach teachers, and help them...with what they do in the classroom to help students. It's to help provide them professional development. It's to help them think about and reflect about their practices and what they do on an everyday basis, and to help them become highly effective and effective teachers, and to move ineffective and partially effective teachers to the next level where they're able to help students in the classroom [Tr., pp. 24-25].
>
> In addition to that, I'm responsible for not only coaching teachers but also giving evaluations, giving observations to teachers, giving observations to my vice principal or my other administrators in the building, also providing feedback to the teaching assistants as to how they are doing in the classroom. My responsibility is also to take a look at curriculum and see how the curriculum is helping to impact instruction in the classroom, to help move students to -- so that we are a school on the move and they're better at what they're doing to be better readers, writers and mathematicians [Tr., pp. 25-26].

At the beginning of SY 2012-2013, Principal Williams testified the NPS "Framework for Effective Teaching, Teacher Observation and Performance Evaluation, A Guidebook for Teachers and Administrators" [Joint Exhibit 60] was issued to all teachers. The guidebook

> talked about what the process would be, how teachers would be observed, when would they be observed, what were the time lines as it pertains to observations, mid-year conferences, end-of-year conferences, that all teachers received, and all teachers had to sign that they received it during that time as well [Tr., p. 32].

The guidebook included the "Framework for Effective Teaching Rubric," which called for rating teachers as Highly Effective, Effective, Partially Effective, or Ineffective in five competencies:

> Competency 1: Lesson Design and Focus
> Competency 2: Rigor & Inclusiveness
> Competency 3: Culture of Achievement
> Competency 4: Student Progress Toward Mastery
> Competency 5: Commitment to Personal and Collective Excellence
> [Joint Exhibit 60]

The first four competencies would be rated on the basis of observations conducted throughout the year. The fifth competency would reflect the teacher's cumulative performance and would appear only in the mid-year review and end-of-year evaluation. A mid-year review conference was not required but was strongly recommended as

> an opportunity for the administrator to discuss the teacher's progress toward student, classroom, school, and district performance goals as well as the implementation and alignment of the professional standards for teachers.
>
> * * *
>
> The mid-year ratings are formative ratings, rather than summative. The mid-year ratings serve as one piece of evidence for the Annual Review Ratings and as an important element of formative feedback for the teacher.
>
> [Id., pp. 22-23]

The fifth competency rating may add points for highly effective teaching or subtract points for poor attendance and lateness. For tenured teachers one formal observation was required, followed by a post-evaluation conference within ten calendar days [Id., pp. 21-22]. A performance review "must be completed for each teacher on an annual basis. This evaluation is a summative statement which incorporates the data and evidence gathered throughout the year" [Joint Exhibit 60, p. 23].

Administrators were trained in the rubric before the school year began, the principal said:

> ...[B]etween the first week and the second week of my employment, all of the administrators in the district had to attend a professional development for three days, given by Mitch Center, who was one of the assistant superintendents in Newark Public Schools [Tr., p. 37].

Vice-Principal Gilliam said that post-observation conferences were important, because

> every time a teacher is observed on a particular competency, you do sit with them at the post-conference, you're relating all your conversations to the actual rubric and things that they saw you do in that rubric and some things you need to do to be effective there. So every time you observe, you're going back to the rubric. You're going back to look at the language again; and what did I do and what can I do to make effective there? Did I do that? What was the evidence of what I did, and how can I be better? So you are constantly talking about the framework. It's the guideline to the conference [Tr., p. 757].

She also explained the significance of an announced observation and pre-observation conference, which was not required until 2013-3014:

> The purpose is to plan with the teacher. Usually at a pre-conference the teacher will talk with you about a lesson she wants you to do, you can plan a lesson with them. The teacher is only required to have I think one pre-conference a school year, but the rest can be unannounced [Tr., pp. 791-792].

But the framework makes clear that struggling teachers are owed more attention:

> Pre-Observation Conferences are especially recommended for:
>
> * * *
>
> • Struggling teachers to focus on particular areas of growth
>
> [Joint Exhibit 60, p. 20, Tr., pp. 792-793]

Teacher Rinita Williams was rehired in August, 2012, as part of the school's reorganization and assigned to kindergarten. She began with a 90-day improvement plan, which was a carry-over from the previous school year, when a different evaluation model had been in place.[8] Principal Williams, who was then the CIO, said that "administrators would observe to see...how she was moving student performance within that 90 days, and then determine...what their next steps would be" [Tr., pp. 43-44]. Ms. Gilliam said that only Ms. Mackey who created the plan would have the authority to determine if it was mastered [Tr., p. 811].

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[8] The teacher maintains that the plan was inadequate as well as incomplete: Previously, the district had utilized the Charlotte Danielson evaluation model. According to Vice-Principal Gilliam, "there was a vast difference in [the Framework for Effective Teaching] as opposed to the Charlotte Danielson evaluation" model. The Danielson rubric focused on "the teacher and what the teacher had to do," while the Framework focused on "what the students had to do." Accordingly, it was necessary for teachers to be trained on the framework. However, Ms. Graham testified that teachers did not receive training in all of the competencies [Respondent Post-Hearing Brief, p. 6]. The 90-day plan received in evidence [Joint Exhibit 41], according to Ms. Gilliam, was incomplete and had no signature page [Tr. p. 761]. The district had provided the plan to its counsel in that form.

Table A, below, indicates observations and evaluations of the teacher during SY 2012-2013:

Table A—SY 2012-2013

Date	Observation Type	Evaluator	Rating	Exhibit No.
09/25/12	Partial	Vice-Principal Gilliam	Partially Effective	Joint 2
11/16/12	Partial	Vice-Principal Gilliam	Partially Effective	Joint 3
11/19/12	Formal	Special Assistant Barbara Evans	Partially Effective	Joint 4
01/02/13	Formal	Vice-Principal Gilliam	Partially Effective	Joint 5
06/7/13	Annual Evaluation	Vice-Principal Gilliam	Partially Effective	Joint 6

On January 13, 2013, Principal Mackey was terminated.[9] Viveca Williams assumed the role of interim principal. By the end of the school year, Principal Williams recalled, the teacher was placed in a Corrective Action Plan (CAP) developed by Vice-Principal Gilliam, because she had been rated Partially Effective in the annual (summative) evaluation [Joint Exhibit 7].

Ms. Graham, who was a first-grade teacher in SY 2012-2013, said that she did not apply initially for a position in the reorganized school but received a phone call in late August, inviting her application. She believed that the school "didn't have the proper number of teachers [and] were just calling people who were still employees on the placement list." She hesitated: "There was a lot of hearsay around the district: No, don't go there" [Tr., pp. 663-664]. After she was hired by Principal Mackey

> there was like supposed to be like a two-week orientation for the school, but the majority of that two weeks was spent like looking for furniture for classrooms. The classroom I was assigned to was formally a world language class. I had to get rid of all materials, find tables and chairs for my students. I taught first grade at Martin Luther King. It was told to us if we were assigned to the 13th Avenue School, that the materials we had already would more than likely follow. But when we got there, we couldn't find the materials. We looked all in the basements. We couldn't find them.... I thought they would be somewhere at 13th Avenue School. I thought it's a good fit for me to go there because now I'll have the first-grade materials, but they were not there.... I was left with a classroom that didn't have any age-appropriate materials. The only things that I had that were age appropriate were the things I had, you know, just from my years of teaching, things I had in my basement. Basically, I had to bring in all the supplies that I needed [Tr., pp. 664-665].

[9] December 1, 2014, e-mail from district counsel to the arbitrator and teacher's counsel.

Other teachers experienced similar difficulties, according to Ms. Graham. A co-worker's classroom

> was used as a storage room, and like I actually helped her move...the old, big file cabinets and furniture. We were actually moving the furniture ourselves. And then...we didn't have any curriculum materials....In this summer, for two days, they sent the K to two teachers [to] start training for Core Knowledge. We were told this was the program that the district was going to be utilizing for literacy. However, when we returned to the school, we were told this school will not be utilizing that program.... Over the course of the next couple weeks, we saw the materials in the building for the Core Knowledge, but we were not given access to that. Instead, we were given a list. We were given a two-page list. It was e-mailed to us with random topics. We were told spend two weeks on one topic. It was like a skill and strategy; two weeks on a skill, one week strategy, vice versa.... [T]here was nothing to go with it. You had to go online and research. And the same thing for the math. The district had adopted Everyday Math, but we didn't have any tools. We were told use the Common Core standard, and while we know that textbooks are not...used not like a Bible, you use them as a supplemental resource, we had nothing to go with. Everything was Googling topics and trying to figure out what went with the topics. Some of the topics, when we would Google them, you would find material, it would say this is usually a skill that is not taught at the first-grade level...they were very obscure. And this is expected from pre-k...all the way to eighth grade. So whatever pre-k three was doing, first grade, second grade, all the way to eighth, she wanted the same skills and the same strategy taught. At some of these levels, you can't even find materials for these skills and strategies. Some of them, we didn't have a clear understanding [Tr., pp. 665-667].

Ms. Graham found the process frustrating, because

> you didn't really know what to do. Then when you would do the lesson plans, you know, it became to the point you would do them and then it's, like, not right. We would submit them to our immediate administrator. We were told we weren't doing them correctly. And then we were told to do them again when the next set would be due, and we were asked to do them a month in advance. It became [very] frustrating to complete that much work, and you didn't have resources. A lot of times we didn't get our prep periods or we would miss our prep periods, so you would find yourself at home, you're up all night. Very stressful. Some teachers after the Christmas break didn't even return. Some teachers left before the Christmas break. It was a constant turnover of teachers. Even within our team, one teacher who had been with the district several years, she quit like maybe in November, so it was very frustrating for teachers at that school [Tr., pp. 667-668].

Ms. Graham also testified that Principal Mackey brought in her own curriculum:

> ...a reading foci which focused on a skill of the week and a strategy of the week. So for instance, you had to talk about main idea, characters, setting, the synthesis, the various things that dealt with literacy and actually implement it into stories with your students and create your own lesson plans [Tr., p. 607].

She was forced to find materials on the Internet:

> We had to rely on pulling from the internet, pulling lesson plans and utilizing the books that we may have had in our classroom to correlate with the type of skill or strategy that we were focusing on. Say, for instance, it was "The Three Little Pigs." We would talk about -- we were dealing with setting.

> We would review the setting of the story, characters, location, plot, various things of that nature, so...we were almost curriculum developers ourselves [Tr., p. 609].

Other NPS schools had implemented Core Knowledge at the beginning of the school year. In January, when Principal Mackey departed and Viveca Williams became interim principal,

> all the materials we were denied access to, they showed up. The math curriculum, we got the Everyday Math books. We got the Core Knowledge. We started to get the Core Knowledge units. And what was interesting is that our school...had a different pacing than the rest of the district's because we were so behind the other schools. So like some of the topics we actually had to skip over because our kids weren't going to get the chance to be exposed to those topics because we missed so many months of the program.... It's...what every first grader should know and every third grader should know.... [W]hat they did in kindergarten will connect to first, it was a new program, but -- or what they did in the first domain might come in handy in the third domain. But we had to skip. They went through and they picked out the ones probably my kids skipped and the kids could still move through, because our pacing definitely would be different from the rest of the district [Tr., pp. 669-670].

Ms. Rinita Williams said that the materials were gradually distributed to teachers, but that there was not enough to go around:

> We were able to get boxes that were stored in the basement of the school or found containing the resources, workbooks that we needed to implement this Core Knowledge, that everyone in the district kept talking about.... It took a very long time. Due to the fact that there were two instructional specialists, if I can remember, that were just really literally rolling a cart around to each classroom. We had to sign for them.... [W]e had to share a lot of the materials. We were short a lot of things, so we didn't have full what they call full resource kits [Tr., pp. 610-611]

Ms. Graham recalled receiving some training in the Framework for Effective Teaching during the school year but understood that other schools had more extensive training in August, 2012:

> I remember at 13th Avenue, like once, when that first-week period...2012-2013, we started...to discuss it at one staff meeting, but then we never discussed it anymore. We never discussed it. We never -- even within a framework, I never received my observation back from my immediate supervisor, so we never discussed, like, where I was and how it fit into the framework. I think we only got to it in a staff meeting. We only focused on the first domain,[10] and then I don't think we discussed it anymore.... But I do know that a lot of other teachers in the district stated that they went to a big formal training, but we had no knowledge of that training at 13th Avenue School.... We were never given those training dates [Tr., pp. 671-672].

She attended training on competency one, conducted by Ms. Mackey and Ms. Gilliam in the media center. However, "on some of the training days, the K to two teachers, we were not there because we were sent to the district for the Core Knowledge" [Tr., 673-674].

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[10] Under the previous evaluation plan competencies were referred to as domains, according to Ms. Gilliam [Tr., p. 761].

Ms. Gilliam explained that

> Core Knowledge is a curriculum that is Common Core aligned.... But the goal, as a state is, that teachers are well-versed in the Common Core standard, and they can read a standard and apply instruction without heavily being based on the curriculum. Any curriculum used has to be Common Core aligned, so Core Knowledge was a new curriculum because the prior curriculums were not Common Core aligned, so it's a Common Core aligned curriculum [Tr., p. 815].
>
> * * *
>
> Ms. Mackey was adamant about teachers becoming well-versed in the standard. She wanted them to learn the standards verbatim and learn how to read them and apply practices. Because in this state, there are assessments that have to be given to scholars when they get to third and fourth grade, and there's certain Common Core standards that have to be mastered and taught. And if you're following the curriculum step by step, you may not necessarily cover all of the standards, so you go to the standards to pick what lessons you're going to teach. If they happen to appear in the curriculum, that's fine, but you are relying on the standard, not so much the curriculum. And if you don't know the standards all the way, you might be inclined to rely heavily on the curriculum and you have to base everything statewide on the standard first and only. The curriculum is a resource for it, and it will help you, but you have to know the standards. You have to know the standards [Tr., pp. 816-817].

In SY 2013-2014 a revised framework was adopted to take account of new regulations as well as the district's experience in the prior year. A mid-year review was required for teachers who were subject to a CAP:

> **Pre-Observation Conference (required for at least one observation)**
>
> Announced observations may start with a pre-observation conference; at least one announced observation each year must have a pre-conference. The pre-observation conference should occur within seven days before an observation. We recommend that for non-tenured teachers and teachers with a CAP, this pre-observation conference take place before a long observation. During this conference, the teacher and observer discuss the planned lesson, including lesson objectives, instructional strategies, anticipated outcomes, assessments such as quizzes and tests, resources, unique class characteristics, specific areas of growth to look for, etc. During this pre-observation conference, the observer can ask guiding questions to help the teacher consider the planned learning experience or suggest possible alternatives to enhance the lesson before it is delivered.
>
> Teachers may upload artifacts such as their lesson plan in the BloomBoard system prior to the pre-observation conference. The most important questions to answer in a pre-observation conference are:
>
> - Is the teacher clear on what students should know and be able to do by the end of the class?
> - Are the strategies and objectives aligned to the standards?
> - Are the strategies the teacher is planning to use likely to ensure student mastery?
> - How will the teacher know whether the students mastered the content?
> - Has the teacher considered all students in the planning?
> - Is there anything in particular the teacher would like feedback on as part of the observation?
>
> * * *
>
> **Post-Observation Conference (Required)**
>
> Following an observation—whether long or short, announced or unannounced—the observer must meet with the teacher to reflect on the lesson together. This reflection process is the centerpiece of

> professional growth, refinement of instruction, and continuous improvement. The post-observation conference must take place within 10 teaching staff member working days after the observation (though it is recommended within 3 days of the lesson in order to provide timely feedback).
> [Joint Exhibit 61, pp. 19-20, 23]

BloomBoard was introduced as

> a fully-functional performance evaluation and professional development management platform. BloomBoard is a web-based tool that allows schools to keep track of goal-setting documents, short and long observations, mid-years, and annual evaluations all in one place online. Every teacher and school administrator in the district will have a BloomBoard account and will be logging in to the system on a regular basis [Joint Exhibit 61, p., A.10].

BloomBoard also automatically alerts teachers to scheduled conferences, such as a pre-observation conference with an evaluator [Tr., pp. 144-146].

Teacher Williams was assigned to a first-grade class, the principal testified:

> She told me [in SY 2012-2013] she wanted to remain at 13th Avenue, and she was interested in an upper grade, and she asked me if she could teach second grade. We didn't have any vacancies for second grade. I had some for first grade, and I said, "It would be great if you could go to first grade."... [H]er classroom was a beautiful classroom that was set up. It was a classroom that was set up that if I had my child, just bringing my child in was very warm, engaging, and that's something that was amazing that she was able to do, bulletin boards, you know, set up beautiful for children, and really, they were great. Hearing her ask that question, I said, you know, "I want you to go to first grade," and she said she wanted to go to first grade as well. [Tr., pp. 45-48].

Table B, below, lists observations and evaluations of the teacher during SY 2013-2014. Because there were four changes of assignment during the year, as well as a workers' compensation absence and other periods of disability, those factors are included for context.

Table B—SY 2013-2014

Date	Event	Evaluator	Rating	Exhibit No.
09/19/13	Formal Observation and Post-Observation Conference	Vice-Principal Rose	Partially Effective	Joint 9
10/06/13	Off the job ankle injury—Intermittent FMLA leave and 504 accommodation (limited walking, elevator use)			Tr., pp. 635-636, 643-644
10/09/13	Observation Followup	Vice-Principal Rose		Joint 10
10/22/13	Formal Observation	Vice-Principal Rose	Ineffective	Joint 11
10/28/14	Post-Observation Conference			
11/18/13	Reassigned to teach social studies and science to first-grade class			Tr., pp. 675-676

12/10/13	Reassigned to teach reading and math to at-risk 8th-grade class two periods a day (Not certified for 8th grade). Four periods daily first-grade social studies and science (effective 12/11/13).			Respondent 36.a
12/11/13 (Shown as 12/12/13 on evaluation)	Short Observation	Principal Williams	Partially Effective	Joint 12
1/13/14 (shown as 1/13/16)	Post-Observation Conference for Dec. 11			
01/15/14	Reassigned guided reading K, 4th and 5th; also two periods daily 8th grade guided reading			Tr., p. 678
01/31/14	Mid-year review	Principal Williams	Ineffective	Joint 13
03/03/14	Injured by 8th grade student			Tr., p. 648
04/30/14	Return to work (last three days intermittent FMLA, remainder workers' comp)			Joint 39
04/30/14	Short Observation	Principal Williams	Partially Effective	Joint 14
05/15/14	Annual Evaluation and Post-Observation Conference for April 30	Principal Williams	Ineffective	Joint 16

An observation was conducted on September 19, 2013, by Vice- Principal Rose, who was responsible for the first grade. Evaluated on the first four competencies, the teacher received six points, which amounted to an overall rating of Partially Effective. A post-observation conference was held the same day. When the vice-principal and the teacher signed the evaluation, on September 23, the teacher was placed in a revised CAP. The program became more focused, the principal said, because the district "got smarter...it really talks about what are the action steps that you're going to use in order to support the teacher" [Tr., p. 55]:

> [W]e're looking at what the teacher's action steps are going to be, and how will the administrator support her in achieving those at that time, and what will be the metrics that will be used. So we learned that it is better to be more concise, because if we give a teacher that we know requires a lot of support so many things to work on, she's not able to identify what the primary areas is that she needs to work on, so that's why we developed another CAP in the beginning of the school year [Tr., p. 54].

A second formal observation was conducted on October 22 by Vice-Principal Rose. The teacher was awarded only four points, which translated into an overall rating of

Ineffective [Joint Exhibit 11]. The teacher attended a post-observation conference with the principal and vice-principal on October 28. A few days later (November 1), the teacher requested in writing a transfer to another school:

> The school is not a good "fit" for me. I am unable to receive a fair and objective evaluation. This has now become uncomfortable for me and my career. In addition, my 504 accommodations have not full[y] been met at my school and has caused a physical setback in my foot healing completely.
>
> [Joint Exhibit 31]

Neither of the two administrators was immediately aware of the request, because transfer is normally a human resources function of the central office. Principal Williams said, "I was not informed that [the teacher] was requesting a transfer from the school. She never asked or said anything to me to release her from the school at any time" [Tr., 84].

Principal Williams described the support given to the teacher:

> [W]e had embedded once a week professional development and coaching, where they actually came into classrooms and gave feedback to teachers on the different areas where they needed to be improved upon....But my master teacher would go in and offer supports, and also...do demonstration lessons for the first grade teacher.... She did demonstration lessons in the new CK curriculum.... Core knowledge curriculum, showing them how they can become more effective in the rubric. So as a school, we identified there were two competencies we needed to work on as it pertained to teacher performance. We needed to work on questions and tasks, rigorous tasks for our students in all areas, and then also how do we provide feedback and ensure that students are mastering the objective and mastering the grade level content that you're providing for them. So at this particular point, my coach went in, Miss Rose went in to observe and give support on things that she needed to do. At this time, there were different things that were reported to me and different things that I saw. It was reported to me that they would walk into a classroom and Miss Williams was on the phone. Children were running all over the classroom. They were not engaged in a morning meeting, which we've told all teachers that your morning meeting needs to be complete by nine o'clock. We've opened the school earlier so that breakfast didn't take away from morning meeting, and it was an opportunity for teachers and students to bond and learn about each other [Tr., pp. 68-70].

On November 18 the teacher was involuntarily reassigned to "provide social studies and science to two first-grade classes" [Tr., p. 67]. One of the classes was taught by Ms. Gooden, the school's math coach or master teacher. The reassignment was necessary, the principal said, "because there was no instruction going on for the first graders, and we needed to act quickly until we were able to get someone in that particular classroom at that time" [Tr., p. 68].

On December 5, the principal visited the classroom that Teacher Williams shared with Ms. Gooden [Joint Exhibit 34]:

> I observed Miss Williams sitting at a desk, working in a box of some sort, and...some children were watching a movie, some kids were running around the classroom. When I came in, I asked Miss Gooden, I said, "Miss Gooden, are you leading the lesson at this time?" She said, "No, I've just pulled this child here for independent practice so that they can complete their work." When I asked Miss

> Williams, she said to me, "Oh no, we made the decision," referring to her and Miss Gooden, "that we were going to split the class and I was going to teach my lesson and Miss Gooden was going to teach her lesson."...I asked Miss Gooden if this was the decision that they came to based upon what she shared with me. Miss Gooden said absolutely not, that she was providing a small group instruction. Miss Williams never said anything to her about splitting the class. So at this point, first off, all teachers know that we do not watch any movies, particularly Christmas movies.... I've said it at numerous staff meetings. I've sent emails that that is not effective practices in our building. Children can watch movies at home, they do not watch it at school, unless there is a connection that allows the teacher to provide a snippet of five minutes or less to connect to the lesson. In this case, the students were watching the movie and they were not engaged in a lesson at all at this particular time.... I wrote her up for neglect of duty because she was not instructing.... I wrote her up for conduct unbecoming for lying to the principal, because when I come in and I ask you what's taking place and you tell me that, oh, you and the other teacher made a decision to split, that is conduct unbecoming. You do not lie. And this would be the second time that she had lied to me about something she was doing inside her classroom. The first time was with the email, when she said she was doing -- she was checking -- she was doing attendance, when I could clearly see that her email was up on the screen...That was during one of my walk-throughs in the morning, and I did not write her up for that. But now this would have been the second time where she had lied to me, not telling the truth [Tr., pp. 84-86].[11]

On December 10, an e-mail from Ms. Rose to Principal Williams reflected another change in the teacher's assignment. Attached was

> the revised schedule for the 8th grade class that includes Ms Marlene Davis and Ms Rinita Williams. Both teachers will be assisting the lead teachers (Clanton and Ferrara) during the designated block with small group instruction: guided reading groups and project-based learning groups. Both teachers have signed for and have copy of their new schedule and will begin tomorrow 12/11/13.
>
> [Respondent Exhibit 36.a]

Although Teacher Williams lacked certification to work with eighth-grade students, she was assigned two periods a day in that capacity [Respondent Exhibit 36.b].

On December 11, the first day of the new assignment and a new schedule, the principal conducted an unannounced observation. The principal found the teacher giving a science lesson, involving beetles. The teacher had to

> send the students to another classroom to go get the beetles and bring them back so she could provide this instruction to the students at this time, so it's almost last minute. I know I'm supposed to be doing social studies, but I'm not doing that. You know what, I'm going to pull this science lesson so let me send someone over. That's what's lacking and why this is not effective. But she starts off having the students list some of the things that beetles have, and the students were instructed to copy off of the chart paper. She mentions a couple of vocabulary words during that particular time. Some students drew beetles. Some students played with the dead beetles during that particular time. But at the end of the lesson, what did they take away from what they learned? What new did you teach them? What was the whole focus and premise of the lesson based upon what you were supposed to plan for them, that they're able to take away? And that is not evident in this lesson [Tr., p . 98].

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[11] The teacher was never charged with conduct unbecoming.

Other deficiencies, according to the principal, were the absence of an agenda on the board and the lack of a lesson plan. As a result of the observation, the teacher received six points, which amounted to a rating of "Partially Effective."

Teachers were expected to post lesson plans on a specially designated website that the principal termed

> an opportunity for the staff, for me as an administrator to observe what's taking place, and to kind of have an idea what this teacher's planning and how she's going to deliver her lessons. So I can give feedback and support her on what things she should change or what things that she's doing well. There are no lesson plans that are submitted [by Teacher Williams]. I can go and find her name, click on it, look for the date, can't find a lesson plan for Miss Williams [Tr., p. 93].

The principal could not recall seeing plans from the teacher in the previous two years, even though she had scheduled sessions to help her prepare them [Tr., pp. 94-95]. However, evaluators Rose and Gilliam testified that the teacher did in fact provide them with lesson plans [Tr., pp. 561, 800-801].

Another observation was scheduled for December 19 [Plaintiff Exhibit 5]. Ms. Rose testified that she had given the teacher through BloomBoard about a month's notice of a pre-observation conference on December 18. Ms. Rose received an e-mail reply, "saying she did not want me. She did not feel comfortable with me...observing her any more" [Tr., p. 477]. Neither the conference nor the observation was rescheduled.

A conference was held on January 13, 2014, to discuss the December 11 observation [Joint Exhibit 12]. On January 31 the teacher met with Principal Williams and Vice-Principal Rose for a mid-year review and rating [Joint Exhibit 13]. She was rated Ineffective. On March 3, the teacher was injured by a student in the eighth-grade classroom and missed almost two months of work while recovering.

On April 30, the day that she returned to work after the lengthy absence, the teacher was observed by the principal—unannounced—in a fourth-grade guided reading class. The teacher was rated Ineffective at the post-observation conference on May 15 [Joint Exhibit 14], and on that occasion her annual evaluation rating was declared to be the same.

After her annual evaluation, the teacher was observed on another occasion by Ms. Jackson, an outside Peer Validator (evaluator) and rated Ineffective [Joint Exhibit 15]. The report form was computer generated by Bloomboard and bore no signature. Ms. Jackson did not testify, and her rating played no part in the summative evaluation, according to the principal. [Tr., pp. 139-142].

DISCUSSION

TeachNJ was signed into law on August 6, 2012, and became effective on August 12. AchieveNJ, the procedure for evaluating teachers followed. When fully implemented, the legal framework created by these enactments would require a superintendent to file a charge of inefficiency if a rating of Partially Effective in one year is followed by a rating of Ineffective in the following year. The new scheme diminished a tenured teacher's allowable defenses against removal and provided for a forum of arbitral review whose scope was relatively narrow,[12] as outlined in a state publication:[13]

> TEACHNJ clearly defines the criteria that arbitrators may consider in rendering their decisions. Specifically, the arbitrator may only consider the following four aspects:
>
> - Whether the evaluation failed to adhere to the evaluation process.
> - There is a mistake of fact in the evaluation.
> - The charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination, or other conduct prohibited by State or federal law.
> - The district's actions were arbitrary and capricious.
>
> [TEACHNJ Guide (Updated 6-14), p. 6]

In order to resolve this dispute, the arbitrator has addressed below the three salient issues.

I. Is a Charge of Inefficiency in SY 2012-2013 Valid Under Section 25?

The teacher whose removal is being sought received ratings of Partially Effective and Ineffective in SY 2012-2013 and SY 2013-2014 respectively. The district maintains that filing a charge thus was mandatory. The teacher, however, denied that performance in SY 2012-2013 could be a basis for removal, since the new evaluation system was not yet fully formed. Poor ratings during a trial period should not count, the teacher maintains.

Determining procedural rules for removal under a complex statute has been a considerable task. Many aspects of the new system were ill-defined, challenging stakeholders to devise a suitable scheme for evaluation. At various points in the transition to the new framework, DOE has attempted to deal with ambiguities by issuing "guidance"documents and delivering less formal advice by means of websites, letters to districts, and press releases.

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[12] Tenure cases previously were decided by administrative law judges.

[13] The teacher noted: "This procedure is substantially different from the procedure for filing tenure charges alleging 'incapacity,' 'conduct unbecoming,' or 'other just cause,' which is set forth in N.J.S.A. 18A:6-16 and N.J.A.C. 6A:3-5.1(b). Letter Brief, October 10. 2014, fn. 2.

Local approaches to evaluation that would be consistent with the law have been fostered. Stakeholders in each district were encouraged to create Teaching Practice Evaluation Instruments. A three-year, statewide effort was planned, beginning before TeachNJ was even enacted. It involved a "pilot year" (SY 2011-2012) for some school districts, including Newark. Pilot status was announced by DOE in a press release on September 1, 2011:

> 10 districts have qualified to participate in Excellent Educators for New Jersey (EE4NJ) teacher evaluation pilot program over the course of the 2011-12 school year.... An eleventh District, Newark, will also participate in the pilot through a separate grant.
>
> [District Submission, October 3, 2014]

Larisa Shambaugh, Executive Director of Strategic Initiatives in the Newark district's Talent Office, oversees implementation of the process to "evaluate the teaching performance of NPS teachers," according to the requirements of TEACHNJ [Id.]. The certification issued by Ms. Shambaugh on September 29, 2014, stated: "In the 2011-12 school year, seven NPS schools participated in a 'pilot' of a new teacher evaluation system."

The parties agree that removal was not to be based on evaluations during the pilot year (SY 2011-2012). The dispute focuses on the next school year (2012-2013), when the legislature and DOE were still shaping the new system. In that period, minimum standards for evaluations were supplemented. The DOE Evaluation Pilot Advisory Committee (EPAC), a group of stakeholders who joined in a consensus-based process, was tasked with defining "best practice" under TEACHNJ in order to guide each district in refining its evaluation procedure. The arbitrator takes judicial notice of EPAC's Interim Report (2011-2012), which specified the goals of the project:[14]

> Based on the recommendations offered in the March 2011 Educator Effectiveness Task Force Report, the Department launched a teacher evaluation pilot program in the fall of 2011. This project was designed to enable the experiences of pilot districts to inform the development and implementation of the evaluation system to be launched statewide. Having successfully applied for grants through a competitive Notice of Grant Opportunity (NGO), 10 districts were selected to participate in the pilot program, splitting $1.1 million in funds. Newark Public Schools also participated in the pilot using funding provided by another grant. In addition, 19 schools receiving federal School Improvement Grant (SIG) funds were required to participate.[15]

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[14] The interim report was cited [at p. 5] in the final EPAC report (2013), which was submitted in argument by the district on October 10, 2014 [Exhibit C].

[15] Seven NPS Schools were listed as SIG Schools: Newark Central High School, Dayton Street School, Newark Vocational High School, Malcolm X. Shabazz High School, Brick Avon Academy, Barringer High School, and West Side High School [Appendix A, p. 29].

All participating districts were instructed to adopt the following elements of a teacher evaluation system during the 2012-13 school year:

- Thorough training of evaluators and teachers in effective teaching practices based on professional standards;
- Annual teacher evaluations that include multiple observations and result in clear, actionable feedback for improvement;
- Multiple measures of teacher practice and student performance, proven to be valid and reliable, with student academic progress or growth as a key measure;
- A summative rating that combines the scores of all the measures of teaching practice and student achievement;
- Four summative rating categories that clearly differentiate levels of performance; and
- A link from the evaluation to professional development opportunities that meet the needs of educators at all levels of practice [p. 7].

The EPAC report acknowledges that building a proper evaluation mechanism would be time-consuming and that full implementation would not be achieved until 2013-2014. Under the heading "Extension of the Pilot Program and Implementation Timeline," the report recorded that

> EPAC members provided ongoing input on pilot implementation and preparation for statewide rollout. Several concerns surfaced repeatedly in the course of the year. These included local districts' capacity for meeting heightened expectations for educator evaluation, broad stakeholder input into local evaluation decisions, and the timing of full implementation. In early spring 2012, the Department decided that the timeline for statewide implementation of the new evaluation system should be extended. In addition, the Department decided that a second year of pilot implementation would be valuable to ensure the success of the new evaluation model. Both of these decisions were codified in the TEACHNJ Law enacted in the summer of 2012. *According to Peter Shulman, Assistant Commissioner, Division of Teacher and Leader Effectiveness, this course correction was made in large part due to the feedback received via the EPAC from pilot districts and EPAC members. The decision to extend (and expand) the pilot program into 2012-13 and push back full implementation to 2013-14 was met with universal acclaim by EPAC members.* One commented that she was "impressed when the EPAC pressed for the extended year and the Department took the recommendation [Emphasis added, pp. 21-22]."

The report's conclusion offered the following caution:

> While the theory behind the evaluation initiative is sound, it is clear from the deep work of the EPAC and the Cohort One pilot districts that the task of bringing these goals to fruition is difficult and complex. Even with an extended implementation timeline, *an extra year of piloting, and additional districts engaged in trial runs of a new system,* this work is just beginning and promises to present challenges for years to come [Emphasis added, p. 28].

By December 31, 2012 (SY 2012-2013), all public school districts, including NPS, had to develop and obtain approval for the rubric, which is the

> specific tool for use in implementing the Framework for Effective Teaching in observations or evaluations. Depending on the rubric, it may include competencies, indicators, and descriptors that specify what each competency and indicator looks like in practice at different levels of performance.

[NPS Framework for Effective Teaching: A Guidebook for Teachers and Administrators, 2012-2013, Appendix A: Glossary of Terms, p. 30]

In short, SY 2012-13 was seen as a time for refining and establishing the new evaluation procedure. A variety of deadlines were set to occur during the course of that school year for

- finalizing evaluation rubrics (December 31, 2012—extended until January 31, 2013, for some districts)
- promulgating regulations (March, 2013)
- putting regulations into effect (October, 2013)

EPAC's final report noted: "The Department recognizes that statewide implementation of AchieveNJ in SY13-14 is just one step on the path to improving student achievement in New Jersey" [p. 43]. This sentiment was echoed in the DOE Guide to the TEACHNJ Act: "The law mandates statewide implementation of stronger, more rigorous evaluation systems starting in the 2013-2014 school year" [TEACHNJ Guide (Updated 6-14) p. 3].

The district maintains that it had taken advantage of SY 2011-2012, designated as a pilot year, to fine-tune the new evaluation system. By the summer of 2012, according to Ms. Shambaugh, the evaluation instrument (the rubric) was complete, evaluators were trained in its application, and a guidebook for teachers and administrators had been made available. In September the district applied for DOE approval, which was granted the next month [Shambaugh Certification, September 29, 2014, Exhibit C]. Therefore, the district argues, its program was not merely preliminary but fully functional when the teacher was evaluated in SY 2012-2013. The district considers that the ratings were valid grounds for removal under Section 25.

Nevertheless, in a well-reasoned decision involving Newark schools (*Whitehurst*), Arbitrator Simmelkjaer carefully analyzed the statutory language and its context, concluding that SY 2012-2013 "was intended as a test year in preparation for the 2013-14 school year wherein all tenure related issues, including the establishment of the criteria for completing evaluations and observations...would be implemented" [at p. 39]. He noted that state officials had described SY 2012-2013 as "a planning and capacity building year" [at p. 46]. The undersigned arbitrator concurs with the Simmelkjaer analysis.

This decision and others in the same vein are supported by the foregoing review of the historical record, which demonstrates that the state's educational planners strove to introduce the new tenure removal framework incrementally over a period of years, allowing stakeholders to assess the innovations and make necessary adjustments. The

EPAC report cautioned districts against rushing the process and encouraged them to first improve metrics for judging teacher performance. Each district was empowered to develop its own approach, adapting the law to conditions on the ground. Experimentation did not necessarily end with SY 2011-2012, the initial pilot year.

The wisdom of incrementalism was evident in the deviations from the evaluation process that marred the tenure removal effort at the 13th Avenue/MLK School in SY 2012-2013. In opting to begin the charge in that year, the school clearly acted prematurely. It was in the throes of reorganization, striving to meld two failed schools into a single coherent entity. Students were performing poorly, and there was turnover of leadership.

Teachers were recruited hurriedly and thrust into conditions that bordered on chaotic. They were abruptly handed assignments for which they were ill-prepared. Key curriculum materials were not even shared with teachers until mid-January—that is, after the observations of Teacher Williams had been completed. She received no more support than other teachers, according to the principal, even though a 90-day improvement plan had been imposed on her.

Although not required by regulation until the next school year, pre-observation conferences and announced observations were regarded as important by the district for assisting struggling teachers. Yet the benefits of these measures were denied to Teacher Williams. The circumstances thus demonstrate that the school was not ready to properly carry out its responsibilities under the new tenure removal framework in SY 2012-2013.

The year was also marked by other irregularities, including the following:

- All the observations of the Teacher Williams were incomplete, were labeled draft or near final draft. In the annual evaluation she is referred to in one place by the wrong name [Joint Exhibits 2-6].
- Academic performance data to benchmark student learning was lacking.

II. Did the Evaluation in SY 2013-2014 Meet the Requirements of Section 25?

The arbitrator's interim award retained jurisdiction for the purpose of resolving any and all disputes regarding the tenure charges brought against the teacher by SOSD of Newark for SY 2013-2014. The teacher's evaluation rating for that year was Ineffective. Having provided the parties with a full and fair opportunity to present evidence and argument, the arbitrator finds that the evaluation failed to adhere to the prescribed process in SY 2013-2014, because it was replete with arbitrary and capricious actions that materially affected the outcome by placing the teacher at a distinct disadvantage.

Lack of an Announced Observation. AchieveNJ mandates at least one announced observation each year, and the district's framework emphasizes the utility of announced observations for struggling teachers. The record demonstrates that announced observation provides crucial support in planning and executing a teacher's responsibilities. Yet the principal acknowledged the lack of an announced observation for Teacher Williams in SY 2013-2014.

A pre-conference had been scheduled for December 18, 2013, but it was cancelled because the teacher had filed various complaints against Ms. Rose, who had been her evaluator. There was no attempt to reschedule a pre-conference or an announced observation [Tr., pp. 270, 689], and no satisfactory rationale for the omission has emerged.

The district offered two questionable explanations. First, it asserted that the teacher sought the cancellation [Brief, p. 22], but she merely objected to Ms. Rose as the evaluator. By the time Principal Williams conducted the unannounced observation on December 11, she was aware of the cancellation; nothing precluded her from conducting the pre-conference herself on December 18 and following with the announced observation scheduled for December 19 [Tr., 479, Plaintiff Exhibit 5].

Second, the principal pointed to the teacher's attendance record, which she regarded as substandard.[16] She contended that persistent absenteeism ruled out rescheduling of the pre-conference and announced observation. She testified that on the day the teacher

> was scheduled for the announced observation, she was absent, so there was no way we could conduct an announced observation if you are absent on the day we're telling you we're coming to observe you. The other thing is, too, is that she had quite a few absences throughout the school year. So it was pretty much we had to—you know, when she was there was the opportunity when we had to come in and work and give feedback during that particular time [Tr., p. 167].

In recommending to Superintendent Anderson that both the initial tenure charge and the second charge be brought, Principal Williams sent letters (identical and undated) that included the following sentences:

> Ms. Williams did not receive an opportunity to have a pre-conference prior to an observation because of her absences. Every time a pre-observation conference was scheduled she would be absent on that date [Joint Exhibit 1 and Attachment one in the second tenure charge submission].

[16] Points were deducted for absences and tardiness in the teacher's annual Summative Evaluation.

Among the teacher's interrogatories, which were certified by Principal Williams in November, 2014, is a somewhat different explanation:

> 9. How many announced observations (short or long) did Respondent receive during the 2012-2013 and 2013-14 school years, respectively?
>
> ***
>
> Answer: ....The School District responds: Vice Principal Simone Rose scheduled an announced observation for Respondent for December 18, 2013. The observation did not occur because Respondent objected to Ms. Rose evaluating her since Respondent had filed a complaint against Ms. Rose.
>
> [Respondent Exhibit 38]

The district argued:

> As to 2013-14, an announced observation was scheduled for December 18, 2013 but was cancelled at Respondent's request and was not rescheduled. (V. Williams, T270; Rose, T479.) It would be unreasonable to conclude that a lack of one announced observation was arbitrary or capricious, or materially affected her summative evaluation for that year.
>
> [Petitioner Brief, p. 22]

Nevertheless, the shifting reasons for ignoring the teacher's right to at least one announced observation for the year are less than compelling. The notion that it was not worthwhile to schedule a pre-conference and announced observation because the teacher would be absent is presumptuous, to say the least. Given the assignment changes to which the teacher was forced to adapt during the year, the possibility that the observation would have significantly improved her evaluation results cannot be lightly dismissed. Eliminating the prescribed observation must be viewed as a serious failure to adhere to the evaluation process .

Unannounced Observation on Return from Extended Leave. The teacher returned from almost two months of leave on April 30, 2014, and was greeted with an unannounced observation early that day. A teacher normally could expect to be allowed time to discover what had happened in her absence and determine the priorities for resuming her workload. An observation at the very moment she returns from a lengthy absence seems calculated to catch a teacher before she has re-acclimated herself to the classroom and gotten her bearings. In this instance, the teacher discovered that her teaching materials were not organized in the way she left them, and the classroom appeared

> almost like ransacked, because the teacher who I shared it with, she had gone out on a family leave like weeks before, so the classroom was open, and it was just being utilized. I don't even know what was happening while I was gone, because when I came back, it was just me in the classroom, and there was just stuff everywhere [Tr., p. 679].

Moreover, although the district contends that she was never evaluated while teaching eighth grade, the teacher has argued persuasively in her post-hearing brief that she was indeed rated for that ability:

> In the certified answers to interrogatories provided by Principal Williams in this case (R-38), Principal Williams claimed that although Ms. Williams was not certified to teach 8th grade, "Respondent was never observed in Room 330 for the purposes of evaluation." (R-38 at 11, Answer to interrogatory no. 21). However, this is not true. In Ms. Williams' annual summative evaluation Principal Williams stated the following under "evidence based growth areas" in connection with Ms. Williams' rating for Competency 3:
>
> Ms. Williams provided guided reading instruction to students in 8th grade, and was not clear with expectations to students. As a result, students walked out of class, ran away from her while she transitioned them to her classroom. There were no consequences established with students, and behavior earning system was not used or established with students. As a result of norms not followed and established by teacher and students, classroom community was negative.
>
> (J-16A at 5). As a result, Ms. Williams was rated "partially effective" in this competency. Id. Accordingly, and contrary to Principal Williams' claim, Ms. Williams was evaluated in connection with her instruction of the 8th grade students, despite the fact that she was not even certified to teach this grade.
>
> [Brief, at pp. 13-14]

The annual evaluation for SY 2013-2014 also was deficient because it was not based on student achievement data. The administrators gave conflicting testimony about which data could be utilized. The principal suggested that data from her SY 2012-2013 kindergarten students could somehow provide a basis for evaluating student mastery the next year. But there was only one student in common, not many, as the principal asserted [Tr., p. 824]. Finally, as in SY 2012-2013, extraordinary support from the school, other than the CAP, never materialized. The reassignments actually kept her from other sources of support: the accompanying change of preparation period prevented her from attending Turnaround for Children workshops and other professional development activities provided to her grade-level colleagues [Tr., 691-692].

Multiple Involuntary Re-Assignments. During SY 2013-2014, the teacher received four classroom re-assignments, involving various age groups and subjects. The most detrimental to the teacher was the assignment, beginning on December 11, to teach eighth-grade math, even though she lacked certification for that grade and considered herself ill-equipped to deal with older students who chronically misbehave. In the class she was asked to teach, the students were so lacking in self-control that they required escorts to the bathroom. Sadly, her concerns were validated by the subsequent physical injury she suffered at the hands of a student. The principal manifestly believed the teacher to be exaggerating her injuries, even though they qualified for workers' compensation, and

regarded her a malingerer, despite a lack of concrete evidence. Those groundless views contributed to an unfavorable impression of the teacher's abilities and efforts.

An unannounced observation in December, 2013, is emblematic of the district's prejudicial approach. The principal faulted the teacher for not putting December 12 on the board for a first-grade class. That date could not have been correct, however, because the teacher's attendance record shows that she was absent on December 12, as the principal conceded in her testimony [Tr., p. 226, Joint Exhibit 39]. The observation must have taken place on December 11, the day she learned of the re-assignment . It was the principal who mistook the date but the teacher who was blamed for poor performance.

It is noteworthy that, on a day when she was already under stress from an unexpected change of assignment to a higher grade, she was also subjected to an unannounced observation in a lower-grade class. The new arrangement entailed a physical obstacle: her two eighth grade classes (Period Three and Period Six) were on a different floor than the lower grades, and her ankle was injured. Although she was allowed to use the elevator as a disability accommodation, changing classrooms quickly was difficult.

The post-conference for this observation did not occur until January 13, so that shortly after gaining the feedback her assignment changed again. On January 15 she was ordered to teach guided reading to four different grades, including two eighth-grade periods. As a result, the mid-year summary evaluation (January 30) occurred amid drastic disruption of her schedule. She testified

> [E]very time I was getting ready to get into like a groove of teaching the kids, getting to know them, starting to get the day rolling, I was immediately switched to another role, so I never got an opportunity to master or be effective, I should say, in that particular role because it seemed like a couple weeks, a couple months later, I was changed into another role. So I pretty much felt like I was just—just out there, kind of just feeling my way through; you know, along with other things that were happening at the same time. But focusing on what you just asked me, I just felt like I never got a chance to master—to become the effective or highly effective teacher that I feel that I am capable of being [Tr., pp. 678-679].

III. Can the Charge Be Amended and Brought Under Section 8?

In *Whitehurst*, Arbitrator Simmelkjaer declined to consider under Section 8 a charge of inefficiency that had been brought originally under Section 25, because the two provisions were asymmetrical in their purpose and procedure:

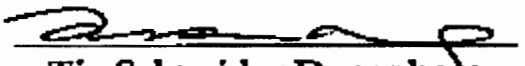
> [H]ad the Legislature intended that a teacher charged with inefficiency for two consecutive years, with ineffective or partially effective ratings on their annual summative ratings, be evaluated utilizing two different and asymmetric evaluation procedures—one consistent with Section 25 of

> TEACHNJ and the other consistent with Section 8, N.J.S.A. 18A:6-16— it had the wherewithal to provide the appropriate statutory language. In the absence of such language, the Arbitrator is compelled to dismiss the charge [at p. 50].

Similarly, Arbitrator Brent held in *Thompson*, another Newark case, that he could not "permit a charging party to add a new cause of action that was not included as part of the original tenure charge" [at p. 6], because "[p]leading two separate causes of action, each invoking different standards of proof, requires adequate prior notice." He reasoned that it would be a denial of due process to allow the district to "materially increase the exposure of the Respondent to culpability and penalty by adding a cause of action during the hearing phase of a tenure charge proceeding, and certainly not after the record has been closed" [at p. 7]. The undersigned arbitrator agrees with these holdings and therefore must reject the concept of rehabilitating[17] the charge as an Article 8 claim.

CONCLUSION

For the reasons discussed above, and after considering the arguments and the entire record, the arbitrator concludes that all charges against the teacher must be dismissed.



Tia Schneider Denenberg
Arbitrator

DATED: March 30, 2015

[17] The district agreed at the hearing not to present an Article 8 claim, recognizing the difficulty of arguing from two different statutory grounds simultaneously.

In the Matter of the Tenure Hearing of

Rinita Williams
and
State-Operated School District
of the City of Newark
in the County of Essex, NJ

Re: Tenure Charge of Inefficiency
Agency Docket No. 241-8/14 and 17-1/15

Award of Arbitrator

The undersigned arbitrator, having been appointed, pursuant to P.L 2012, c 26, to hear and decide the above-captioned matter, rules as follows:

With respect to Agency Docket No. 241-8/14 and Agency Docket No. 17-1/15, the charges against the teacher are dismissed for the reasons given in the accompanying opinion. The teacher shall be reinstated with full back pay and benefits to another NPS school.

Tia Schneider Denenberg
Arbitrator

DATED: March 30, 2015

I, Tia Schneider Denenberg, do hereby affirm that I am the individual described in and who executed this instrument, which is my award.

Tia Schneider Denenberg
Arbitrator

State of New York
County of Columbia

On this 30th day of March, 2015, before me personally came and appeared TIA SCHNEIDER DENENBERG, to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed the same.

Ralph Peters Hubbell, Jr.
Notary Public State of New York
No. 4793303
Qualified in Dutchess County
Commission Expires October 31, 2015

119-15

119-15LM

State of New Jersey
DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

March 31, 2015

Michael I. Inzelbuch, Esq.
Santander Bank Building – 2nd Floor
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Caroline Jones, DAG
Office of the Attorney General
Department of Law and Public Safety
Division of Law
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625-0112

Re: *Center for Education v. New Jersey Department of Education, OAL Dkt. No. EDU 14525-14, Agency Dkt. No. 280-9/14.*

Dear Counsel:

I have reviewed the materials submitted by the Department of Education on March 27, 2015 that include a request for interlocutory review of ALJ Schuster's Order of March 26, 2015 requiring the Department to disclose certain documents, and a request for emergent relief in the above-captioned matter.[1]

Upon review, I find that any further proceedings in this matter shall be stayed pending review of the Department's request for interlocutory review. Pursuant to *N.J.A.C.* 1:1-14.10 (h):

> An agency head's determination to review interlocutorily an order or ruling shall not delay the scheduling or conduct of hearings, unless a postponement is necessary due to special requirements of the case, because of probable prejudice, or for other good cause. Either the presiding judge or the agency head may order a stay of the proceedings, either on their own or upon application.

[1] Pursuant to *N.J.A.C.* 6A:3-1.6(d), once a matter has been transmitted to the OAL, any subsequent motion filed with the Commissioner "shall" be forwarded "for determination by the OAL in accordance with applicable rules of the OAL." Accordingly, no decision will be made at the present time on the motion for emergent relief by the undersigned.

In light of the fact that the documents that are the subject of ALJ Shuster's March 26, 2015 Order have already been released to the Center for Education, it is necessary to stay the proceedings to prevent any potential prejudice that may be derived from the entry of the those documents into evidence at the next scheduled hearing date of April 1, 2015. A determination as to whether the Department's request for interlocutory review will be entertained cannot be made until the request is evaluated after both parties have an opportunity to submit the materials outlining their respective arguments, and the Assistant Commissioner who will be making that determination has until April 6, 2015 to do so. Therefore, due to the special requirements in this case, it is necessary to preserve the status of the case pending the outcome of the request for interlocutory review.

Accordingly, this matter is hereby stayed pending the review of the Department's request for interlocutory review.

IT IS SO ORDERED.[2]

Sincerely,

Peter Shulman
Assistant Commissioner[3]

c: County Superintendent
State Law Library
OAL Clerk
John Schuster, III, ALJ

Via Facsimile and Regular Delivery

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

[3] This matter has been delegated to the undersigned Assistant Commissioner pursuant to *N.J.S.A.* 18A:4-34.

121-15

OAL DKT. NO EDU 17091-14
AGENCY DKT. NO. 372-12/14

M.B.W. on behalf of minor child N.H.W.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/01/15

Date of Mailing: 4/02/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 17091-14
AGENCY DKT. NO. 372-12/14

M.B.W. ON BEHALF OF N.H.W.,
Petitioner,
v.
BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,
Respondent.

Sean M. Benoit, Esq., for petitioner (Disability Rights New Jersey, attorneys)

Stephen J. Mushinski, Esq., for respondent (Parker McCay, attorneys)

Record Closed: March 3, 2015 Decided: March 4, 2015

BEFORE **SARAH G. CROWLEY**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 30, 2014, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement, and have prepared a Stipulation of Settlement received on February 11, 2014, indicating the terms thereof, which is attached and fully incorporated herein, (J-1).

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

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

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

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

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

March 4, 2015
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: March 4, 2015

Date Mailed to Parties: March 4, 2015

/lam

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 Stipulation of Settlement, received February 11, 2015

J-2 Board Resolution, received March 3, 2015

Disability Rights New Jersey
Sean M. Benoit, Esq. – NJ Attorney ID # 002162010
210 South Broad Street, Third Floor
Trenton, New Jersey 08608
Tel.: (609) 292-9742
Attorneys for Petitioner

M.B.W., on behalf of minor child, N.H.W. Petitioners, v. RANCOCAS VALLEY REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, Respondent.	**BEFORE THE COMMISSIONER OF EDUCATION** OAL DOCKET NO. EDU: Agency Ref. No.: 372-12/14 **STIPULATION OF SETTLEMENT**

WHEREAS, M.B.W. o/b/o N.H.W. (hereinafter "Petitoners") live within the jurisdiction of the Rancocas Valley Regional High School District Board of Education (hereinafter "District")., and

WHEREAS, the District is the local educational authority with the responsibility of providing Petitioners with a thorough and efficient education; and

WHEREAS, Petitioners have filed a petition of appeal before the Commissioner of Education regarding the District's discipline of Petitioners, and

WHEREAS, the District and Petitioners have engaged in settlement discussions; and

NOW, THEREFORE, the Parties desire to settle the Proceedings in an amicable way, they hereby agree as follows:

1. N.H.W. will be placed at the Burlington County Alternative High School (BCA) for the remainder of the 2014-2015 school year.

2. At the end of the 2014-2015 school year, the District shall hold a meeting with N.H.W.'s mother, M.B.W., to discuss N.H.W.'s placement for the 2015-2016 school year, including the possibility of having N.H.W. return to the Rancocas Valley Regional High School if he does well behaviorally at BCA.

3. Respondent and Petitioners each hereby verify, affirm, and represent that they have had the opportunity to discuss the terms of this Agreement with counsel and that they are fully satisfied with the advice and representation provided by their counsel. Both Parties fully acknowledge that they are entering into this agreement knowingly, freely, voluntarily, without coercion and not under the influence of anything or anyone.

4. In exchange for the consideration set forth herein, the Petitioners dismiss, release, and discharge the District from any and all claims asserted, and which could have been asserted, whether known or unknown, in the Proceedings, arising out of acts or omissions occurring through the date of this Agreement, including, but not limited to, claims concerning an alleged denial of a free and appropriate public education, special education services, homebound instruction, independent evaluation, out of district placement, discrimination, inappropriate discipline, reimbursement for educational costs, reimbursement for medical/counseling services, compensatory education, and damages or injuries to N.H.W. As used in this Agreement, the term "District" means: the Rancocas Valley High School Regional School District Board of Education, its current or former elected or appointed officials, administrators, employees, attorneys, agents, servants, representatives, predecessors and successors, insurance carriers, and all other persons or entities for whom any of the above have been or may be legally responsible.

5. Petitioners represent that they have sole authority, as N.H.W.'s parents, to enter into this Agreement.

6. The Parties mutually waive any claims for attorney's fees with the understanding that each Party shall be responsible for their own fees and costs, including physicians', experts', and attorneys' fees and costs, incurred in connection with this dispute, to the extent applicable. No party shall be deemed a "prevailing party."

7. This Agreement shall be interpreted, enforced, and governed under the laws of the State of New Jersey. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any Party. The Parties agree and acknowledge that this Agreement is the product of mutual draftsmanship and any rule of law requiring that it be construed against the drafter shall not apply.

8. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof, and supersedes all prior written or oral and all contemporaneous oral agreements, understandings and negotiations. This Agreement may only be amended in writing by way of a document signed by all Parties.

IN WITNESS HEREOF, the parties have set their hands this 29 day of January 2015.

Emily Capella, Superintendent
Rancocas Valley Regional High School District
Respondent

Date: 2-2-2015
February 2, 2015

Migdalia Biscomb-Williams
M.B.W. o/b/o N.H.W., Petitioner

Date: 1-29-15

MRS. EMILY CAPELLA
Interim Superintendent/Principal

MRS. LISA GIOVANELLI
Business Administrator
Board Secretary

RANCOCAS VALLEY REGIONAL HIGH SCHOOL
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MOUNT HOLLY, NEW JERSEY 08060

Telephone: (609) 267-0830
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MR. WILLIAM BOOTH
Assistant Principal

MRS. LETITIA BRANIN
Assistant Principal

MR. CHRISTOPHER MYERS
Assistant Principal

MR. RONALD WENCE
Assistant Principal

February 24, 2015

I, Lisa Giovanelli, certify that the following resolution is a true and accurate copy of the resolution adopted by the Rancocas Valley Regional High School Board of Education on February 2, 2015.

RESOLVED; on motion by Mr. Alaimo, seconded by Mr. Hollowell, the Board of Education approved the Stipulation of Settlement with M.B.W. on behalf of minor child N.H.W. and Rancocas Valley Regional High School Board of Education.

On a roll call vote the following was recorded:

Mr. Alaimo - yes
Mr. Fueger – yes
Mr. Hollowell – yes
Mr. Minus-Vincent - yes
Mrs. Solan - yes

The motion was carried.

LISA GIOVANELLI
BUSINESS ADMINISTRATOR/BOARD SECRETARY

LG:lh

123-15

CHARLOTTE EVANS,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – employed for many years as a teacher in respondent's school district, prior to her promotion to the position of "acting vice principal" in April 2011 – filed an appeal asserting that her tenure status gave her entitlement to other vice principal positions in the district after her position was eliminated in a reduction in force (RIF) in June 2013. Petitioner contended that the district later hired non-tenured candidates for vice principal positions at other district schools, and claimed she should have been offered one of these position because of her tenure status. The respondent filed a motion for summary decision, asserting that petitioner had never earned tenure in the position of vice principal. Petitioner never filed an answer to the respondent's motion.

The ALJ found, *inter alia,* that: there are no material facts at issue herein, and the matter is ripe for summary decision; petitioner has been employed by the Board since 1998, but was only promoted to the position of vice principal in April 2011; petitioner did not obtain the necessary provisional certificate for the position of vice principal until May 2012; petitioner's vice principal position was eliminated as part of a RIF in June 2013; petitioner did not complete the requirements for tenure in the position of vice principal, as she did not serve the required two year residency. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the case.

Upon comprehensive review, the Commissioner concurred with the ALJ's determination that the petitioner has not proven the allegations in her appeal. Accordingly, the summary decision was granted to the respondent and the petition was dismissed.

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

Issued 4/02/15

OAL DKT. NO. EDU 192-14
AGENCY DKT. NO. 286-11/13

CHARLOTTE EVANS,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
RESPONDENT.	:	

The controversy now before the Commissioner was instituted by way of a petition alleging that petitioner's tenure rights were violated when respondent abolished the vice-principal position she had held, reassigned her to a teaching position, and hired "less senior" personnel to serve in vice-principal positions in other district schools. Respondent answered by way of a motion for summary decision, which motion petitioner never answered.

In its motion, respondent alleged that petitioner had never earned tenure in the position of vice-principal. More specifically, respondent contended that although petitioner had been issued a provisional certificate in May of 2012 -- which allowed her to serve as a vice-principal – she did not complete the two-year "residency" which is a prerequisite to earning a standard certificate. *See, N.J.A.C.* 6A:9-12.5(d). In fact, she served only one year in the position after she obtained her provisional certificate, which is insufficient to obtain tenure. *See, N.J.S.A.* 18A:28-6; *Spiewack v. Board of Educ. of Rutherford,* 90 *N.J.* 63, 73 (1982). Having earned no tenure in the vice-principal position in respondent's district, petitioner had no greater rights to obtain open vice-principal positions than did other qualified, non-tenured applicants.

Taking the facts set forth in the petition as true, and noting that no papers were submitted by petitioner to rebut the facts recited in respondent's motion, the Administrative Law Judge (ALJ) assigned to the case in the Office of Administrative Law (OAL) found that the facts supported respondent's position that petitioner had never completed the requirements for standard certification for the position of vice-principal as she had served in the position only one year after obtaining her provisional certificate. Thus, she had not achieved tenure in that position and could not claim the benefits which attend same. The ALJ concluded that respondent was entitled to summary disposition, and the petition should be dismissed.

Upon review of the record and Initial Decision of the OAL, the Commissioner concurs that petitioner has not proven the allegations in her appeal. Accordingly, summary disposition is granted to respondent and the petition is dismissed with prejudice.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 4/02/15

Date of Mailing: 4/02/15

[1] This decision, as the final decision of the State administrative agency, may be appealed to the Superior Court, Appellate Division pursuant to *N.J.S.A.* 18A:11-3 and *N.J.A.C.* 6A:3-7.6.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 192-14
AGENCY DKT. NO. 286-11/13

CHARLOTTE EVANS,
Petitioner,
v.
CITY OF CAMDEN STATE-OPERATED SCHOOL DISTRICT, CAMDEN COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioner

Edward D. Milavsky, Esq., for respondent (Brown and Connery, attorneys)

Record Closed: January 21, 2015 Decided: February 25, 2015

BEFORE **ROBERT BINGHAM II**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On November 21, 2013, petitioner Charlotte Evans, whose position was abolished by respondent, filed a petition of appeal with the Department of Education ("DOE") asserting that her tenure status gives her an entitlement to the position of vice principal that respondent filled with non-tenured staff. The DOE transmitted this matter

as a contested case to the Office of Administrative Law ("OAL"), where it was filed on January 7, 2014. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. On February 4, 2014, respondent filed a motion for summary decision. In the absence of any opposition filed by petitioner, a telephone conference was held on May 8, 2014, followed by a letter from petitioner's attorney, dated May 9, 2014, indicating that despite respondent's motion, petitioner did not wish to withdraw her appeal. By letter order dated May 16, 2014, petitioner was to file a response to respondent's summary-decision motion no later than May 23, 2014, and a hearing date was scheduled for November 18, 2014.

By letter dated October 29, 2014, respondent confirmed that no valid opposition to its motion had been submitted, and reiterated its entitlement to summary decision. A telephone conference was held on November 18, 2014, and petitioner's attorney, who candidly described many unsuccessful attempts to reach petitioner, agreed that either a response or a withdrawal of appeal would be submitted by November 21, 2014. The record closed as of January 21, 2015, the time for such further submission having passed, and none having been filed.[1]

FACTUAL DISCUSSION

Petitioner began working for the district in 1998 (P-A) and was promoted to the position of acting vice principal on April 11, 2011 (P-B). In May 2012 she obtained a provisional certificate for the position of vice principal (P-C) and began serving a mandatory two-year residency under the provisional certificate (P-D). However, she failed to complete the residency and never obtained a standard certificate. She thus served in the vice-principal position only under the provisional certificate until June 30, 2013, when the district abolished her position, following a reduction in force, and reassigned her. Petitioner subsequently appealed, asserting that her tenure status gives her an entitlement to the position of vice principal that respondent filled with non-tenured staff. (Petition of Appeal.)

[1] The record was held open for an additional sixty days, ensuring more than ample time for petitioner to respond.

I **FIND** as **FACT**, only for the purpose of deciding respondent's motion for summary decision, the above uncontested evidence.

LEGAL ANALYSIS AND CONCLUSION

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits that may have been filed with the application, show that there is no genuine issue of material fact and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact that can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary-judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536 (citation omitted).

Here, the question is whether petitioner has a tenure entitlement to the vice-principal position that respondent filled with non-tenured employees. Respondent correctly argues that to obtain tenure, a school employee must, among other things, hold the appropriate certificate. Zimmerman v. Bd. of Educ. of Newark, 38 N.J. 65, 72 (1962). In that regard, a school employee's service under a provisional certificate does not count toward the accrual of tenure unless the employee ultimately obtains the standard certificate while serving in the position. Ruiz v. Bd. of Educ. of Fort Lee, No. A-4443-11 (App. Div. July 8, 2013), <http://njlaw.rutgers.edu/collections/courts/>; Jackson v. State-Operated Sch. Dist. of Camden, EDU 14058-13, Initial Decision (Feb. 21, 2014), aff'd, Comm'r (April 10, 2014), <http://njlaw.rutgers.edu/collections/oal/>.

Here, petitioner only held a provisional certificate, and never obtained a standard certificate for the position of vice principal. At no point did she complete the applicable requirements for that certificate. Accordingly, as she never obtained the required standard certificate, she did not obtain tenure. Though her attorney's letter references the possibility that the failure to obtain the standard certificate was not her fault, that assertion is not supported by either a certification or other competent evidence. And, in any event, as accurately stated by respondent, the fact remains that petitioner never fully qualified for tenure in the vice-principal position.

Therefore, I **CONCLUDE** that there is no genuine issue of material fact, and respondent is entitled to summary decision as a matter of law.

ORDER

Accordingly, I hereby **ORDER** that respondent's motion for summary decision is **GRANTED**, and the petition of appeal is **DISMISSED WITH PREJUDICE**.

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

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

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

February 25, 2015
DATE

ROBERT BINGHAM II, ALJ

Date Received at Agency: 2/26/15

Date Mailed to Parties: 2/26/15

/lam

APPENDIX

EXHIBITS

For Petitioner:

None

For Respondent:

Certificate of Edward D. Milavsky, Esq.

R-A Petitioner of Appeal

R-B Human Resources Administrative Leave Ratification

R-C State of New Jersey Provisional Certificate

R-D Memorandum of Understanding

WITNESSES

For Petitioner:

None

For Respondent:

None

124-15

J.M., on behalf of minor child, T.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF TINTON FALLS, MONMOUTH COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

SYNOPSIS

The petitioning parent, J.M., appealed the decision of the respondent Board that certain acts of the head cheerleader coach, Meredith McGee, did not constitute harassment, intimidation or bullying (HIB) as those terms are defined under New Jersey's Anti-Bullying Bill of Rights, *N.J.S.A.* 18A:37-13 *et seq.* The petitioner sought a finding that McGee did engage in acts of harassment, intimidation, bullying and retaliation, and that the coach be relieved of her coaching duties. During the pendency of the appeal, the Board notified the Office of Administrative Law and the petitioner that McGee had been relieved of her coaching duties effective September 25, 2013. The Board subsequently moved for summary decision, contending that the case had been mooted by the removal of McGee as a coach. The ALJ issued an Initial Decision in the matter on December 12, 2013, finding the matter moot and granting summary decision to the Board. On January 23, 2014, the Commissioner remanded the matter to the OAL for proceedings to resolve petitioner's allegations regarding McGee's actions and whether the Board properly conducted an HIB investigation.

On remand, the ALJ found that: the Commissioner will not substitute his judgment for that of a local board, whose exercise of its discretion may not be disturbed unless shown to be arbitrary, capricious or unreasonable; the petitioner bears the burden of proof by a preponderance of the credible evidence; petitioner herein presented no credible evidence that the Board acted in an arbitrary manner; and it has not been established that McGee's actions were motivated either by any actual or perceived characteristic such as, *inter alia*, race, religion, gender, sexual orientation, or mental or physical disability. The ALJ concluded that the petitioner has not met her burden of proof that the Board acted in an arbitrary manner in determining that McGee's actions did not constitute HIB, and recommended dismissal of the petition.

Upon a comprehensive review of the record, the Commissioner concurred with the ALJ's determination that the Board was not arbitrary, capricious or unreasonable in finding that McGee's conduct did not constitute HIB. Accordingly, the Initial Decision was adopted as the final decision in this matter and the petition was dismissed.

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

Issued 4/02/15

OAL DKT. NO. EDU 1131-14
(EDU 7871-13 ON REMAND)
AGENCY DKT. NO. 96-5/13

J.M., on behalf of minor child, T.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF TINTON FALLS, MONMOUTH COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

This controversy returns to the Commissioner following a remand to determine whether conduct displayed by Meredith McGee (the district's former cheerleading coach) constituted harassment, intimidation or bullying (HIB) under the Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13 *et seq.* (Commissioner's Decision No. 39-14, decided January 23, 2014)

In accordance with the Commissioner's remand, a hearing was held at the Office of Administrative Law (OAL) on January 9, 2015. The Administrative Law Judge (ALJ) issued his Initial Decision on February 23, 2015. Because the exceptions submitted by J.M. lack any indication of service upon either respondent or the ALJ as required by *N.J.A.C.* 1:1-18.4, the Commissioner did not consider them in rendering his decision. *Muench v. Bd. of Examiners*, OAL Dkt. No. EDU 08369-06, Commissioner's Decision No. 9-07, decided January 9, 2007.

Upon a comprehensive review of the record[1], the Commissioner concurs with the ALJ – for the reasons stated in his decision – that petitioner failed to sustain her burden of establishing that the Board acted arbitrarily, capriciously or unreasonably in finding that

[1] The record of this matter does not include a transcript of the January 9, 2015 hearing.

McGee's conduct did not constitute harassment, intimidation or bullying under *N.J.S.A.* 18A:37-13 *et seq.*

Accordingly, the Initial Decision is adopted as the final decision in this case, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 4/02/15

Date of Mailing: 4/02/15

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01131-14
AGENCY DKT. NO. 96-5/13
(ON REMAND EDU 07871-13)

J.M. ON BEHALF OF T.M.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWN OF TINTON FALLS, MONMOUTH COUNTY,
Respondent.

J.M., petitioner, pro se

Patricia Reilly, Esq., for respondent (Wolff, Helies, Spaeth & Lucas, attorneys)

Stephen B. Hunter, Esq., for Meredith McGee-D'Alessio (Detzky, Hunter & DeFillippo, attorneys)

Record Closed: January 9, 2015 Decided: February 23, 2015

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the mother of T.M., alleges that her daughter was subject to acts of harassment, intimidation or bullying (HIB) by a teacher and cheerleading coach in

violation of the New Jersey Anti-Bullying Law, N.J.S.A. 18A:37-13 et seq. The Board of Education of the Town of Tinton Falls (District) conducted an investigation and determined that the teacher's conduct did not constitute HIB. Petitioner seeks an order reversing the Board's determination.

The Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on June 7, 2013. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A hearing was held on January 9, 2015 and the record closed on that date.

FACTUAL DISCUSSION

Tony DeOrio testified on behalf of the District. At all times relevant, he was the Athletic Director for the District. In 2012, Meredith McGee was the head Cheer Coach for the high school cheerleading program. In September 2012, DeOrio received complaints regarding McGee which included her tone when addressing members of the cheer team, excessive use of her cell phone and tending to her young child while supervising the cheer team. These complaints were discussed with McGee and an Action Plan was developed to address the concerns (R-1). DeOrio conducted an annual evaluation of McGee and rendered an evaluation report on February 17, 2013 (R-3). While McGee was found to meet performance standards, DeOrio commented on the complaints made against her. He wrote, "You did receive a reprimand for circumstances that involved how you chose to communicate with your athletes during a practice. Although your intention was to use upperclassmen to demonstrate how the girls looked during their performance, a few took this as an insult." (R-3, page 3). The Action Plan and the annual evaluation became part of McGee's personnel record. None of the complaints made against McGee, which gave rise to the creation of the Action Plan, alerted the District to a concern that would trigger an HIB investigation. The complaints in September 2012 did not allege any HIB violation. In November 2012, DeOrio was made aware of an allegation of bullying by McGee towards four female students. This complaint was turned over to the District's HIB specialist, Brian Evans.

Brian Evans is an Assistant Principal and HIB specialist for the District. He received HIB training through the New Jersey Principals and Supervisors Association. All staff members receive mandatory HIB training and the HIB policy is in the student handbook. Mr. Evans received HIB Complaint Number 158 from the school principal on December 3, 2012. This complaint alleged HIB by Ms McGee against four cheerleaders, including T.M. He conducted an investigation and interviewed the four girls. As a result of the interview process, several concerns were brought up by the students. The girls felt that giving freshmen the opportunity to be on the varsity squad was unfair since they had not "paid their dues" (R-4). The girls also believed that the coach had her "favorites" on the team and those girls received preferential treatment (R-4). The coach set up a demerit system wherein girls were given demerits for dressing improperly, coming to practice late or leaving early. Two of the complaining cheerleaders felt this system was unfair and the coach's "favorites" would not get demerits (R-4). One particular event that all of the complaining cheerleaders described involved a practice before the Band Dance. The coach had the varsity captains point out the mistakes that the junior varsity (JV) cheerleaders were making in front of the whole group. The varsity captains demonstrated those mistakes and the four complaining cheerleaders felt they were being made fun of (R-4).

After concluding his investigation, Mr. Evans felt that the coach should not have had the captains point out the JV team's flaws and could have found a more positive way to have them learn the routine. Although he felt that these methods were not the best way to handle the situation, Evans determined that none of the coaches or the varsity captains' actions constituted bullying (R-4). He felt that the girls he spoke with were truthful and forthcoming. He submitted his investigation report to the Superintendent on January 4, 2013 (R-4).

After the parents received his report, Evans was asked to amend his decision and consider additional facts brought to his attention by the parents relating to an incident that occurred in the parking lot. It was alleged that McGee placed the safety of students at risk while operating her vehicle in the school parking lot in a further act of retaliation. Evans reviewed the surveillance video recording of the incident in question and found no safety issue to exist. Furthermore, Mr. Evans could not determine from

the video if McGee was involved in the parking lot incident. After reviewing the additional facts, Mr. Evans did not amend his decision. He did not receive any investigation reports from any other administrator and was not aware of prior complaints that parents had made against Ms. McGee. Mr. Evans stated he conducted his investigation in accordance with the state regulations.

Meredith McGee-D'Alessio (McGee) also testified in this matter. She has been employed with the District since 2007 as a Special Education teacher and has also taught drama classes. She started as a cheerleading coach in 2007 and coached for the Middletown Township School District prior to 2007. She is also a certified personal trainer.

In the fall of 2012, McGee was the only cheerleading coach as no one applied for the assistant coaching position. T.M., an eleventh grade student at the time, was on the JV cheer team. She was also on the JV team the year prior. There were approximately forty-eight students on the cheer team. Students were selected for either varsity or JV based on scores they received from three outside judges at a tryout. She did not take part in judging the tryouts or picking the teams. The tryouts were judged by certified teachers or other cheer coaches from outside the district. McGee prepared an evaluation form and provided it to each judge. The evaluation form was broken down into six different categories and sixteen subcategories. Each judge would evaluate the students based on the sixteen subcategories using a scale from one to five with five being the highest score for each subcategory (R-5). If a student had a total score over a predetermined amount of points, she would be asked to participate on the varsity team. Students scoring under that predetermined score would be entitled to participate on the JV team. The students were assigned numbers so that the judges did not know their names or ages. All students did the same routine at tryouts. Ms. McGee was not involved in the tabulation of the final scores for tryouts. This was the process used for the winter sports tryouts that took place in November 2012. At the November 2012 tryouts, T.M. did not score high enough to make the varsity squad.

In September 2012, her athletic director, Tony DeOrio, approached McGee about complaints made against her by some of the parents of students on the cheer team.

She was never advised which parents complained about her. These complaints resulted in an Action Plan being prepared to address the concerns of the parents (R-1). She discussed the Action Plan with DeOrio and agreed to its terms. From the time she was informed by her athletic director that parents had complained about her until the winter tryouts took place, McGee did not know which parents made the complaints. She was not involved in the tryout process or the determination that T.M. did not make the varsity squad for the 2012-2013 winter season.

As a result of this incident and the ongoing criticism she received from some of the parents, McGee agreed not to return as Cheer Coach after the spring 2013 season. This was a mutual decision between her and the District. She was not fired from the position but felt victimized and agreed not to coach the team. She considered the team a family and was always concerned for the best interest of the students. McGee continues to teach Special Education for the District. During the relevant time relating to this case, McGee was also a member of the School Safety Committee but was not involved in the HIB investigation against her and did not have access to the complaints filed against her.

Dr. Charles Ford, Superintendent for the District for the past six years, explained that McGee was a member of the School Safety Committee. This committee discusses safety procedures and ways to improve them. They do not review HIB complaints and do not get involved with HIB investigations. HIB complaints are handled by the School Safety Team which is headed by Brian Evans. McGee is not a member of the School Safety Team and would not have access to information regarding the complaint filed against her.

From September to December 2012, Dr. Ford had many meetings with J.M. and other parents to discuss concerns about the way the cheer team was being run. On October 22, 2012, he received an email from J.M. expressing her concern over the events that occurred at the Band Dance practice (JM-H). He relayed this concern to Mr. DeOrio but did not consider it a violation of HIB as no accusation was made at that time that this incident amounted to a violation of HIB. He was later advised by the County Department of Education that the October 22, 2012 email should have been treated as

an HIB complaint. It was not until December 2, 2012 that J.M.'s allegations were considered to be an HIB complaint against McGee. He referred this complaint to Mr. Evans and directed him to conduct an investigation pursuant to the District's HIB policy. Dr. Ford reviewed Mr. Evans' findings and relayed them to the Board of Education.

J.M. appealed Mr. Evans' determination that McGee had not violated the District's HIB policy to the Board of Education. The Board of Education reviewed the matter and conducted its own investigation at a subcommittee meeting on January 29, 2013. The subcommittee was not composed of a quorum of the full Board of Education so no minutes of the hearing were recorded. Dr. Ford was not present at the January 29, 2013 hearing and did not participate in those proceedings. The full Board of Education affirmed Mr. Evans' findings based on the subcommittee's recommendation and J.M. appealed to the Monmouth County Department of Education. On November 8, 2013, the Monmouth County Board of Education rendered its Investigation Findings and Determinations for J.M.'s appeal (R-7). The County Department of Education found that the District failed to investigate the HIB complaint in a timely manner in accordance with the statute (R-7, page 6). Specifically, the County Department of Education found that documentation shows that J.M. reported potential bullying by McGee on October 22, 2012, but an HIB investigation was not initiated. Once the investigation was conducted, however, the County Department of Education determined that all timelines in the Anti-Bullying Bill of Rights were followed (R-7, page 7). The County Department of Education found no evidence that McGee retaliated against the students whose parents complained and that she did not violate any of the provisions of the Anti-Bullying Bill of Rights (R-7, page 7).

J.M. testified on behalf of T.M. T.M. graduated from the high school in May 2014 and is now in college. She wants to put this whole issue behind her and does not wish to relive the events that occurred in 2012 and 2013. As a result, T.M. was not present and did not give testimony at this hearing. J.M. asserted that the District mishandled the HIB investigation from the very beginning, did not interview all of the witnesses and covered up McGee's actions to protect her. It is her belief that McGee retaliated against T.M. and other students because parents stepped forward and complained about McGee. This retaliation was exhibited in the coach casting dirty looks at students,

mocking them at practice and cutting them from the varsity team. The Board of Education did not conduct a thorough enough investigation and should have permitted the parents to speak at the appeal hearing held by the subcommittee. The appeal conducted by the Monmouth County Department of Education was also tainted because Dr. Ford is friendly with the individuals that conducted the investigation on behalf of the County. J.M. is seeking a finding that McGee violated the District's HIB policy and should be terminated.

FINDINGS OF FACTS

Having carefully considered the relevant evidence, including the testimony, and observed the demeanor of the witnesses, I **FIND**:

In September 2012, certain parents, including J.M., complained to the District regarding McGee. These complaints included her tone when addressing members of the cheer team, excessive use of her cell phone and tending to her young child while supervising the cheer team. The complaints were discussed with McGee and an Action Plan was developed to address the concerns.

HIB specialist Brian Evans received HIB Complaint Number 158 from the school principal on December 3, 2012. This complaint alleged HIB by Ms. McGee against four cheerleaders, including T.M. He conducted an investigation and interviewed the four girls. As a result of the interview process, several concerns were brought up by the students. The girls felt that giving freshmen the opportunity to be on the varsity squad was unfair since they had not "paid their dues" (R-4). The girls also believed that the coach had her "favorites" on the team and those girls received preferential treatment (R-4). The coach set up a demerit system wherein girls were given demerits for dressing improperly, coming to practice late or leaving early. Two of the complaining cheerleaders felt this system was unfair and the coach's "favorites" would not get demerits (R-4). One particular event that all of the complaining cheerleaders described involved a practice before the Band Dance. The coach had the varsity captains point out the mistakes that the JV cheerleaders were making in front of the whole group. The

varsity captains demonstrated those mistakes and the four complaining cheerleaders felt they were being made fun of (R-4).

After concluding his investigation, Mr. Evans felt that the coach should not have had the captains point out the JV team's flaws and could have found a more positive way to have them learn the routine. Evans determined that none of the coaches or the varsity captains' actions constituted bullying (R-4).

J.M. appealed Mr. Evans' determination that McGee had not violated the District's HIB policy to the Board of Education. The Board of Education reviewed the matter and conducted its own investigation at a subcommittee meeting on January 29, 2013. No minutes of the hearing were recorded. The full Board of Education affirmed Mr. Evans' findings based on the subcommittee's recommendation and J.M. appealed to the Monmouth County Department of Education. On November 8, 2013, the Monmouth County Board of Education rendered its Investigation Findings and Determinations for J.M.'s appeal (R-7). The County Department of Education found that the District failed to investigate the HIB complaint in a timely manner in accordance with the statute but once the investigation was conducted, all timelines in the Anti-Bullying Bill of Rights were followed (R-7, page 7). The County Department of Education found no evidence that McGee retaliated against the students whose parents complained and that she did not violate any of the provisions of the Anti-Bullying Bill of Rights (R-7, page 7).

Ms. McGee was not involved in the tabulation of the final scores for tryouts that took place in November 2012. She is still employed by the District but is no longer coaching the cheerleading team. T.M. graduated from the District in May 2014.

LEGAL ANALYSIS AND CONCLUSIONS

Petitioner challenges the determination of the Board of Education of the Town of Tinton Falls that the conduct of Meredith McGee-D'Alessio, Head Cheerleading Coach, towards T.M. did not constitute harassment, intimidation or bullying.

New Jersey enacted the Anti-Bullying Bill of Rights Act to "strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying" occurring both on and off of school grounds. N.J.S.A. 18A:37-13.1(f). Definitions relative to adoption of harassment and bullying prevention policies are found in N.J.S.A. 18A:37-14, which states in part:

> "Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> > (a) a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
> >
> > (b) has the effect of insulting or demeaning any student or group of students; or
> >
> > (c) creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

Tinton Falls' HIB Policy #5131.2, "Prohibiting Harassment, Intimidation and Bullying," essentially mirrors the New Jersey law (R-8). Additionally, the Policy also sets forth a detailed process by which complaints are investigated to see whether an action meets the definition of HIB as set forth in the Policy and Act. (Ibid.)

Petitioner alleges that the HIB investigation was conducted improperly. She asserts that Evans failed to interview witnesses who observed McGee harass and demean T.M. Petitioner further asserts that McGee retaliated against T.M. and other students because parents stepped forward and complained about McGee. This retaliation was exhibited in the coach casting dirty looks at students, mocking them at practice and cutting them from the varsity team. Petitioner urges this tribunal to conclude that the HIB investigation was conducted improperly and therefore the determination should be reversed.

The Board argues that incidents of HIB must be based on a distinguishing characteristic and substantially disrupt or interfere with the orderly operation of the school or the rights of students. Further, the incident must have physically or emotionally harmed the student, insulted or demeaned the student, or created a hostile educational environment for the student. The Board asserts that petitioner has failed to show that T.M. was mistreated by McGee based on her race, gender or any other characteristic. Moreover, petitioner has not shown that T.M. was insulted or demeaned, or that she was physically or emotionally harmed.

Respondent urges this tribunal to conclude that the Board was not arbitrary, capricious or unreasonable in its determination that the HIB investigation was conducted properly and that McGee's conduct did not constitute HIB. Therefore, the Petition of Appeal should be dismissed.

The Commissioner of Education will not overturn the decision of a local board in the absence of a finding that the action below was arbitrary, capricious or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008) (citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966)), adopted, Comm'r (April 7, 2008), <http://njlaw.rutgers.edu/collections/oal/>. Further, the Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). New Jersey courts have held that "[w]here there is room for two opinions,

action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Thus, in order to prevail, the petitioner must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it. T.B.M., supra, EDU 2780-07, Initial Decision (February 6, 2008), <http://njlaw.rutgers.edu/collections/oal/>; see W.C.L. and A.L. ex rel L.L. v. Tenafly Bd. of Educ., OAL Dkt. No. EDU 3223-12 (2013) (The petitioner challenged the school board's decision that a student committed an act of HIB. The administrative law judge (ALJ) found that the board's actions were consistent with the letter and spirit of the law and were not taken in bad faith or in disregard of the circumstances. The ALJ concluded that the petitioner failed to establish that the board's actions were arbitrary, capricious or unreasonable. The Commissioner affirmed the ALJ's decision to dismiss the petition of appeal.); J.M.C. ex rel A.C. v. E. Brunswick Bd. of Educ., OAL Dkt. No. EDU 4144-12 (2013) (The petitioner challenged the board's determination that the actions of the petitioner's son constituted HIB. The board found that the student called another student "gay" and said he "danced like a girl." The demeaning remarks constituted HIB.). In both cases, the petitioners failed to satisfy their burden to show that the board's actions were arbitrary, capricious or unreasonable.

Here, petitioner filed a complaint and school personnel responded to J.M.'s HIB complaint. While the District failed to investigate the HIB complaint in a timely manner in accordance with the statute, once the investigation was conducted all timelines in the Anti-Bullying Bill of Rights were followed. Petitioner asserts that the initial investigation omitted interviews of key witnesses. She points to inconsistencies in the reports and testimony. Petitioner bears the burden of proof by a preponderance of the credible. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); DYFS v. M.R., 314 N.J. Super. 390, 414 (App. Div. 1998); In re Allegations of Sexual Abuse at E. Park High Sch., 314 N.J. Super. 149, 168 (App. Div. 1998). This tribunal has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to a reasonable probability of truth. Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consol. Gas Co., 124

N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958).

I have carefully reviewed the record. Petitioner has presented no credible evidence that the Board acted in an arbitrary manner. I am mindful of J.M.'s strong desire to protect her child from harm. Indeed, a parent's most basic instinct is to protect their children. However, petitioner provided no testimony from T.M. or any other eyewitness to refute the testimony of the respondent's witnesses. I am more persuaded by the evidence presented by the respondent than by that presented by petitioner. Furthermore, it has not been established that McGee's actions were motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic.

Based on the whole of the credible evidence presented, I **CONCLUDE** that petitioner has not met her burden of proof that the Board acted in an arbitrary manner in concluding that Coach McGee's conduct did not constitute harassment, intimidation or bullying under the New Jersey Anti-Bullying Bill of Rights Act.

ORDER

Based on the foregoing, I **ORDER** that the petition be **DISMISSED**.

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

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

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

February 23, 2015
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: February 23, 2015

Date Mailed to Parties: 2-25-15

cmo

APPENDIX

WITNESSES

For Petitioner:

J.M.

For Respondent:

Tony DeOrio
Brian Evans
Meredith McGee-D'Alessio
Charles Ford, Jr.

EXHIBITS

For Petitioner:

JM-H October 22, 2012 email from J.M. to Dr. Ford
JM-I BOE Minutes for December 18, 2012 meeting
JM-K Various BOE minutes and correspondence
JM-L December 18, 2012 letter read to BOE by J.M.
JM-M Emails regarding parking lot video

For Respondent:

R-1 Action Plan
R-2 Removed
R-3 Evaluation
R-4 HIB Report
R-5 Evaluation Form
R-6 Correspondence from Department of Education dated September 16, 2013

R-7 Department of Education Investigation Report date November 20, 2013

R-8 Tinton Falls BOE HIB Policy

125-15

CHRISTINE PALING,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SUSSEX WANTAGE REGIONAL SCHOOL, DISTRICT, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

This matter involves a request by the petitioner for damages based on the respondent Board's failure to timely remit pension contributions required under *N.J.S.A.* 18A:66-32.1(a). Petitioner was employed as a school nurse by the school district when she slipped and fell at work in August 2010, sustaining a head injury. Petitioner filed her appeal on May 14, 2014, seeking to recoup lost pension payments she allegedly would have received had the Board properly made timely pension payments while she was out of work on temporary disability leave. The respondent Board contended it had based its action upon advice from the Division of Pensions, and that the petitioner did not timely file her appeal pursuant to *N.J.A.C.* 6A:3-1.3(i). The Board asserted that the 90 day period for filing of the appeal must be counted from December 15, 2013 – the date when petitioner received notice of the Board's non-payment of pension contributions from the Division of Pensions. Petitioner asserted that she never received this notice from the Division of Pensions, and that the 90 day period for filing should be counted from March 13, 2014 – when she received a letter from respondent's counsel confirming that no contributions had been made for the period in question.

The ALJ found, *inter alia*, that: petitioner's appeal was timely filed; the respondent Board should have been aware of the governing regulation applying to this matter, and its reliance on verbal direction from the Division of Pensions was not reasonable and justifiable; respondent failed to abide by the mandates of *N.J.S.A.* 18A:66-32.1(a) when it did not remit payments to the retirement system on petitioner's behalf during her period of disability; however, neither the OAL nor the Commissioner has the authority to award the remedy sought by the petitioner, which is essentially a money judgment. Accordingly, the ALJ dismissed the appeal.

Upon review, the Commissioner concurred with the ALJ's determination that the petition must be dismissed for lack of jurisdiction. In so determining, the Commissioner noted that his jurisdiction over school laws does not extend to pension disputes arising under *N.J.S.A.* 18A:66-32.1(a). Further, the Commissioner noted that it is well established that the authority to decide pension disputes lies squarely with the Board of Trustees of the Teachers Pension and Annuity Fund. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

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

Issued 4/02/15

OAL DKT. NO. EDU 6863-14
AGENCY DKT. NO. 126-5/14

CHRISTINE PALING,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SUSSEX WANTAGE REGIONAL SCHOOL, DISTRICT, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Christine Paling, and the Sussex Wantage Regional School District's (District) reply thereto.

This matter involves a request by the petitioner for damages based on the District's failure to timely remit pension contributions required under *N.J.S.A.* 18A:66-32.1(a) during a period of time that the petitioner was receiving temporary disability payments. The petitioner alleges that she would have had the requisite 25 years of service credit for retirement in December 2013, and if the District made the proper pension contributions, she could have started receiving pension benefits in January 2014. However, the District's failure to timely make the requisite pension contributions resulted in a delay in her retirement from January 2014 until June 2014, resulting in a loss of five months of pension benefits. The Administrative Law Judge (ALJ) found that the petitioner filed her petition in a timely manner; however the ALJ determined that neither the Commissioner nor the OAL have the authority to award the monetary judgment sought by the petitioner. Therefore, the ALJ recommended that the petition be dismissed for lack of jurisdiction.

Upon review, the Commissioner concurs with the ALJ's determination that the petition of appeal must be dismissed for lack of jurisdiction. The petitioner is seeking damages in connection with the five months of pension payments that she could have received if the District did not delay its obligations under *N.J.S.A.* 18A:66-32.1(a).[1] Despite the petitioner's contention that the Commissioner has the authority to provide her relief because the District violated a provision found in Title 18A: Education, the Commissioner's jurisdiction over school laws does not extend to pension disputes arising under *N.J.S.A.* 18A:66-32.1(a). It is well established that the authority to decide pension disputes lies squarely with the Board of Trustees of the Teachers Pension and Annuity Fund. *See, Board of Trustees of the Teachers' Pension and Annuity Fund of the State of New Jersey v. Alex A. La Tronica, et al.*, 81 *N.J. Super* 461, 467-470 (App. Div. 1963). Furthermore, the Commissioner is without power to award consequential damages. *T.B. and M.B. on behalf of minor child S.B. v. Board of Education of Park Ridge,* May 24, 2007, *aff'd, State Board,* September 5, 2007. Consequently, the ALJ correctly concluded that the Commissioner and the OAL lack jurisdiction to award the petitioner the relief sought in this case.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 4/02/15

Date of Mailing: 4/02/15

[1] The District did ultimately make the outstanding pension contributions on the petitioner's behalf in the amount of $10,570.34 based upon calculations provided by the Division of Pensions.

[2] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 06836-14
AGENCY REF. NO. 126-5/14

CHRISTINE PALING,
Petitioner,
v.
SUSSEX WANTAGE REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION,
Respondent.

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

Jessica V. Henry, Esq., for respondent (Cleary, Giacobbee, Alfieri, Jacobs, attorneys)

Record Closed: February 11, 2015 Decided: February 17, 2015

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

STATEMENT OF CASE AND PROCEDURAL HISTORY

Christine Paling, petitioner, filed a Petition of Appeal on May 14, 2014, with the Acting Commissioner of Education, challenging the determination of the respondent,

the Sussex Wantage Regional School District, to not provide pension contributions from January to May 2014 into petitioner's pension fund with the Division of Pensions.

Respondent filed its Answer to the Petition on June 4, 2014, and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14B-1 through -15 and N.J.S.A. 52:14F-1 through -13. On October 7, 2014, petitioner filed a motion for summary decision pursuant to N.J.A.C. 1:1-12.5. October 24, 2014, respondent filed its response and cross-motion for summary decision seeking the matter to be dismissed pursuant to the ninety-day rule defined in N.J.A.C. 6A:3-1.3(i), requiring a party to file a petition no later than ninety days from receipt of the notice of a final order, ruling, or other action. A telephone conference was conducted on February 11, 2015 to determine if a document was available. It was determined that no document existed as to the period of January to May 2014, and the record closed on February 11, 2015.

FACTUAL DISCUSSION

The majority of the facts surrounding this matter are not in dispute. Prior to the commencement of the hearing, the parties submitted a Joint Stipulation of Facts stipulating to most of the facts (J-1) and the admission of various documents in evidence as follows. Therefore, the Stipulation of Facts and briefs in support of its motion for summary disposition and in respondent's opposition brief and cross-motion, I **FIND as FACT**:

1. Petitioner was hired by respondent as a school nurse.

2. On or about August 31, 2010, petitioner suffered a closed-head injury when she slipped and fell while at work.

3. From September 1, 2010, to September 1, 2011, petitioner received maximum temporary disability benefits, and again from September 1, 2011, to September 1, 2012.

4. From September 6, 2012, to May 23, 2013, petitioner received maximum temporary disability benefits pursuant to a Workers' Compensation determination.

5. For the period September 1, 2011, through May 2013, respondent failed to make pension contributions for petitioner.

6. On December 16, 2013, petitioner's counsel wrote to respondent regarding its payment of pension contributions on petitioner's behalf from September 1, 2011, through May 23, 2013. (See correspondence from Michael T. Barrett to Christina Riker, dated December 16, 2013 (Joint Ex. A).)

7. Respondent did not make pension contributions on petitioner's behalf during September 1, 2011, through June 30, 2012, and September 1, 2012, through May 23, 2013.

8. On December 16, 2013, a Workers' Compensation judge entered an Order on petitioner's behalf awarding her thirty-seven weeks of temporary disability.

9. Petitioner's counsel followed up by letter dated February 11, 2014, to Christina Riker (business administrator) (Joint Ex. B) and dated February 28, 2014, to Yaacov M. Brisman, Esq. (attorney for respondent) (Joint Ex. C).

10. Respondent contacted the New Jersey Department of Treasury, Division of Pensions and Benefits (Division of Pensions), to arrange for payment of petitioner's pension contributions. (See correspondence from Yaacov M. Brisman, Esq., to Michael T. Barrett (counsel for petitioner) dated March 13, 2014. (Joint Ex. D).)

11. The Division of Pension instructed respondent that it should not make payment of contributions at that time, since the petitioner was collecting Workers'

Compensation. (See correspondence from Brisman, Esq., to Barrett dated April 25, 2014 (Joint Ex. E).)

12. On May 15, 2014, respondent made the outstanding pension contributions on petitioner's behalf in the amount of $10,570.34 based upon calculations provided by the Division of Pensions. (See correspondence from Christina Riker to the Division of Pensions dated May 15, 2014. (Joint Ex. F).)

13. Petitioner did not return to work.

14. Petitioner retired in May 2014 and started receiving her pension payments and benefits in June 2014.

LEGAL DISCUSSION AND CONCLUSION

Summary decision is governed by N.J.A.C. 1:1-12.5(b), which provides that "if the papers and discovery which have been filed, together with the affidavits . . . show that there is no genuine issue as to any material fact challenged . . . and the moving party is entitled to prevail as a matter of law," then summary decision should be entered in the moving party's favor. See Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954); see also Brill v. Guardian Ins. Co. of Am., 142 N.J. 520 (1995) (holding that a material issue of fact exists when the papers and discovery, together with all the legitimate inferences therefrom, would require submission of the issue to a trier of fact). Courts do not easily grant these motions, and the standard is "applied with discriminating care, so as not to defeat the motion if the movant is justly entitled to [summary decision]." Judson, supra, 17 N.J. at 74. The underlying rationale for summary decision is to provide a prompt, businesslike, and inexpensive method of disposing of any cause which the movant clearly shows should be decided as a matter of law. Ibid. Here, the parties agree that there are no material issues of fact in dispute, and both have filed cross-motions for summary decision.

After careful review of the record, I am satisfied that the material facts giving rise to this matter are not in dispute. Therefore, in accordance with N.J.A.C. 1:12.5 and Brill, supra, 142 N.J. 520, I find that this matter is ripe for summary disposition.

Petitioner seeks to recoup lost pension payments she alleges that she would have received had her employer properly made pension payments timely on her behalf while she was out of work on temporary disability leave. Respondent contends that petitioner did not comply with the ninety-day-limitations period pursuant to N.J.A.C. 6A:3-1.3(i) and the appeal must be dismissed.

N.J.A.C. 6A:3-1.3(i) states that

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

Title 6A of the New Jersey Administrative Code provides that a petitioner may challenge the action of a board of education by filing a petition conforming to the requirements of N.J.A.C. 6A:3-1.4. However, the Code provides for a limitation of action for the commencement of a contested action pertaining to the Commissioner's determination of a controversy or dispute arising under the school laws.

Generally speaking, limitations of actions serve two salutary purposes, as expressed in Ochs v. Federal Insurance Company, 90 N.J. 108, 112 (1982). There, the Supreme Court expressed that the initial purpose is "to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims" and to "penalize dilatoriness and serve as a measure of repose." Id. at 112 (quoting Farrell v. Votator Division of Chemtron Corp., 62 N.J. 111, 115 (1975)).

The Supreme Court affirmed the validity of the ninety-day rule as applied to school law cases (then codified as N.J.A.C. 6:24-1.2(c)) in Kaprow v. Berkeley Township Board of Education, 131 N.J. 572, 588 (1993). There, the Court held that N.J.A.C. 6:24-1.2(c) represents a fair and reasonably necessary requirement for the proper and efficient resolution of disputes under the school laws, concluding that even an unofficial, informal note from respondent secretary to the petitioner stating that two positions had been created and filled was sufficient to trigger the start of the ninety-day period. The Kaprow Court stated that the time limitation, while arguably short, provides a "measure of repose, an essential element in the proper and efficient administration of the school laws." Kaprow, supra, 131 N.J. at 582. In addition, the limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after the expiration of ninety days. Ibid.

Respondent asserts that the "triggering action" occurred on December 15, 2013, when petitioner "received adequate notice of Respondent's non-payment of pension contributions direction from the Division of Pensions yet delayed five months to file her petition." (Resp't Br., p. 8.) Petitioner responds that she never received notice from the Division on December 15, 2013, as evidenced by various correspondences submitted as exhibits with her brief. (See Pet'r's correspondence Ex. A (December 16, 2013); Ex. B (February 11, 2014); Ex. C (February 28, 2014); and Ex. D (March 13, 2014).) Petitioner, therefore, contends that the "triggering action" date is March 13, 2014, based upon the letter from respondent's counsel finally confirming that no contributions were made.

Respondent asserts that "[t]he significant factor used in measuring the start of the ninety-day period is 'adequate notice.'" Campbell v. Bd. of Educ. of Camden, EDU 480-12, Initial Decision (July 27, 2012), adopted, Comm'r (Aug. 30, 2012), <http://njlaw.rutgers.edu/collections/oal/>. The form of notice deemed adequate to place someone on notice can be either formal (e.g., a letter from respondent informing petitioner directly of their action) or informal (e.g., circumstantial evidence—the example given in Campbell is a paycheck that does not contain a salary increase). Ibid.

Given the reasoning in Campbell, the respondent has offered no proof of notice being provided on December 15, 2013, either formally or informally, despite its position that this occurred. Rather, the correspondence cited by the petitioner indicates that petitioner was only put on notice on March 13, 2014, when petitioner was advised that the Division of Pensions was going to update her pension contribution. I agree. I therefore **CONCLUDE** that the ninety-day time limit is not applicable here.

Petitioner contends that had respondent made the pension contributions following the Workers' Compensation order in December 2013, she would have retired at that time and not have waited until May 2014 when the contributions were finally paid. She is seeking those five months of retirement payments that she would have received but for the action, or better stated, the inaction of respondent.

The parties do not dispute the fact that respondent failed to make these payments on petitioner's behalf until May 15, 2014.

Respondent asserts that it is not liable for failing to make the required pension payments because it received and relied upon an erroneous direction from the Division of Pensions, which verbally instructed it not to remit payments on petitioner's behalf. This is somewhat analogous to situations where petitioners argue that they relied on a misrepresentation by the Division of Pensions that they were entitled to benefits, and changed their position (to their detriment) based on the Division of Pension's representation. See, e.g., O'Reilly v. Bd. of Trs. of the Pub. Emps.' Ret. Sys., A-0071-12T1 (App. Div. Jan. 8, 2015), <http://njlaw.rutgers.edu/collections/courts/>; Checchio v. Bd. of Trs., Pub. Emps.' Ret. Sys., TYP 1679-09, Initial Decision (Feb. 18, 2014), <http://njlaw.rutgers.edu/collections/oal/>; Feigenbaum v. Bd. of Trs. of the Pub. Emps.' Ret. Sys., TYP 2685-12, Initial Decision (May 2, 2014), adopted, Bd. of Trs. (June 19, 2014), <http://njlaw.rutgers.edu/collections/oal/>; Burke v. Teachers' Pension and Annuity Fund, TYP 8625-04, Initial Decision (Dec. 5, 2005), adopted, Bd. of Trs. (Feb. 3, 2006), <http://njlaw.rutgers.edu/collections/oal/>. Only here, it is the employer who is asserting that it relied on erroneous information given by the Division of Pensions.

However, here the Division of Pensions is not a party to this matter. Respondent cannot assert that petitioner is estopped from recouping payments based on respondent's detrimental reliance on a third-party's directive. Although the Uniform Administrative Procedure Rules (UAPR) do not specifically address the issue of joinder of parties, except as occurs by consolidation of contested cases for one hearing (see N.J.A.C. 1:1-17.1 to -17.8), the regulations do provide that "in the absence of a rule, a judge may proceed in accordance with New Jersey Court Rules" [N.J.A.C. 1:1-1.3(a)], with, however, one caveat: the "[c]ourt rules regarding third-party practices . . . may not be applied unless such procedures are specifically statutorily authorized in administrative hearings." Ibid. (emphasis added). Here, there is no specific statutory authorization, and, therefore, the Division of Pensions cannot be joined. Had the Division of Pensions been involved by a separate action, consolidation would have been the appropriate remedy to have all parties before me. Accordingly, respondent's argument is ineffective.

Based upon the above, I **CONCLUDE** that the respondent has not met its burden of demonstrating detrimental reliance. In Rakoff v. Board of Trustees of the Public Employees' Retirement System, TYP 5643-96, Initial Decision (Apr. 21, 1998), adopted, Board of Trustees, <http://njlaw.rutgers.edu/collections/oal/>, Rakoff was employed by the City of Passaic for nearly thirty years when she retired. Immediately following her retirement, she was reemployed by the City in a part-time position. While considering her retirement, she was verbally advised by the Division that she could collect her full pension so long as her new position was "provisional hourly." Relying on this information, she retired. Subsequently, the Division of Pensions informed her that she needed to re-enroll in the Public Employees' Retirement System, could no longer collect her full pension benefits, and had to repay all her service benefits the Division of Pensions alleged that it had paid her, totaling over $70,000. She argued that the Division's representation estopped the agency from recouping the overpayments. The administrative law judge concluded that equitable estoppel did not bar recoupment of the funds, and ordered repayment. Among the reasons given were no misinformation was really given to petitioner, because in her part-time employment, she was not technically "provisional hourly." Similarly here, although at one point the Division of

Pensions instructed respondent not to remit payment, petitioner's attorney was simultaneously directing it to the applicable regulation. Because respondent was aware, or should have been aware, of the governing regulation, I cannot **CONCLUDE** that its reliance on the Division's direction was reasonable and justifiable. Additionally, it was significant to the administrative law judge in Rakoff that the petitioner relied on oral advice from the Division, noting that she "should have asked for written confirmation before making a major decision to jeopardize her pension benefits." Ibid. Similarly here, there is no indication that respondent requested written confirmation from the Division of Pensions before deciding not to remit payment.

Notwithstanding the foregoing analysis, N.J.S.A. 18A:66-32.1(a), entitled "Periodic benefits payable under Workers' Compensation law; salary deductions paid by employer; retirement benefits application," reads:

> a. If any member of the retirement system receives periodic benefits payable under the workers' compensation law during the course of his active service, in lieu of his normal compensation, his regular salary deductions shall be paid to the retirement system by his employer. Such payments shall be computed, in accordance with N.J.S.A. 18A:66-29, at the rate of contribution on the base salary subject to the retirement system, just prior to the receipt of the workers' compensation benefits. The moneys paid by the employer shall be credited to the member's account in the annuity savings fund and shall be treated as employee contributions for all purposes. The employer will terminate the payment of these moneys when the periodic benefits payable under the workers' compensation law are terminated or when the member retires.
>
> The member for whom the employer is making such payments, will be considered as if he were in the active service. The regulation does not contemplate the remedy sought by petitioner since the Commissioner of Education does not have authority to award the type of equitable relief sought coming from the Division by way of back pension benefits she avers she is entitled to.

While the Commissioner of Education has jurisdiction to hear all controversies and disputes arising under the school laws (N.J.S.A. 18A:6-9; N.J.A.C. 6A:2-1.2(a)(1)),

this matter predominantly involves the Division of Pensions since, if we accept respondent's contention, and I do for purposes of this motion, it was its decision to stop pension payments from respondent. However, the Division of Pensions is not directly involved as a party. There is no precedent in administrative law for an employee to collect damages from an employer due to its failure to follow the directives of Teachers' Pension and Annuity Fund (TPAF) law. To seek this remedy, petitioner might consider an action in a different tribunal, as suggested in In re Estate of Levinson, TYP 2794-10, Initial Decision (Aug. 21, 2014), <http://njlaw.rutgers.edu/collections/oal/>.

In Levinson, petitioners appealed a denial of their claim for life insurance benefits under their son's plan provided by the Division of Pensions. The employer never paid into their son's TPAF fund, which was one of the reasons his estate was denied benefits upon his death. Petitioners brought an action against the employer in Superior Court, which resulted in a settlement. Similarly, it may have been appropriate for the petitioner to seek redress from the Division of Pensions in this forum, but it is unclear how she could obtain relief from her employer, absent any statutory or regulatory grounds for such a remedy without the Division being a party to this action.

In this matter, although I **CONCLUDE** that respondent violated N.J.S.A. 18A:66-32.1(a), and that its reliance defense fails, petitioner's appeal cannot, nevertheless, be sustained under the facts presented here and for the legal discussion above.

Because N.J.S.A. 18A:66-32.1(a) does not contemplate the remedy petitioner is seeking, her claim in this matter must be dismissed. Administrative agencies have no common law or inherent jurisdiction or powers. Rather, they have only such jurisdiction or powers as have been conferred by the legislature. Equitable relief is generally not available in the administrative forum unless conferred by statute or regulation. See, e.g., Commissioner v. Gooch Milling and Elevator Co., 320 U.S. 418, 420, 64 S. Ct. 184, 186, 88 L. Ed. 139, 142 (1943); Lockwood v. Walsh, 137 N.J. Eq. 445, 448 (1946); New Jersey Dep't of Envtl. Prot. v. Owen Props., ECE-LU 12164-07 and ECE-LU 1497-08 (consolidated), Final Decision (October 17, 2008), <http://njlaw.rutgers.edu/collections/oal/>.

Respondent failed to abide by the mandates of N.J.S.A. 18A:66-32.1(a), when it did not remit payments to the retirement system on petitioner's behalf while she was receiving benefits payable under the workers' compensation law during the course of her active service, in lieu of her normal compensation, the regular salary deductions shall be paid to the retirement system by his employer. Respondent's argument that it detrimentally relied on an erroneous directive from the Division of Pensions fails. Petitioner cannot be estopped from recovering payments from respondent on grounds that respondent detrimentally relied on a third party's information, particularly in light of the fact that there is no third party named. Additionally, respondent has not demonstrated that it justifiably relied on erroneous advice from the Division of Pensions, where it is undisputed that petitioner's attorney had brought its attention to the governing regulation. Despite respondent's violation of N.J.S.A. 18A:66-32.1(a), neither the OAL nor the Commissioner of Education has the authority to award the remedy sought by petitioner—essentially a money judgment.

ORDER

Based on the briefs, exhibits and certifications submitted, it is **ORDERED** that the appeal is dismissed for the reasons set forth above.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

February 17, 2015
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: Feb. 17, 2015

Date Mailed to Parties: February 17, 2015

ljb

126-15

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

BUREAU OF CONTROVERSIES AND DISPUTES

TENURE HEARING

In the Matter of the Arbitration Between STATE OPERATED SCHOOL DISTRICT, CITY OF CAMDEN **Petitioner** AND NAMIBIA BURKE **Respondent** Agency Docket: 5-1/13	**OPINION** **AND** **AWARD**

ARBITRATOR: GERARD RESTAINO, ASSIGNED BY THE NEW JERSEY DEPARTMENT OF EDUCATION IN ACCORDANCE WITH CHAPTER 26, P.L. 2012 AND C. 18A:6-17.1

APPEARANCES:

FOR THE CLAIMANT:

BENJAMIN TERIS, ESQ.	COUNSEL FOR CLAIMANT
GLADYS NATICCHIONE	SECRETARY TO PRINCIPAL
DEBORA YAX	CLERK 2A, H/R DEPARTMENT
THERESA REESE	EMPLOYEE SERVICE MANAGER
LAURA BOYCE	PRINCIPAL, COOPER B. HATCH SCHOOL

FOR THE RESPONDENT:

CRISTAL HOLMES-BOWIE	COUNSEL FOR RESPONDENT
NAMIBIA BURKE	RESPONDENT
JULIA BENJAMIN	PARENT
CLAUDIA CREAM	RETIRED PRINCIPAL

PROCEDURAL BACKGROUND

On September 18, 2014, State Superintendent, Paymon Rouhanifard, sent a Certificate of Determination to Namibia Burke, hereinafter referred to as the Respondent. That Certificate of Determination with charges of excessive absenteeism was sent to Ms. Burke on September 22, 2014, and she responded to the charges on October 8, 2014

On November 14, 2014, the Petitioner determined there was probable cause to credit evidence in support of the charges and notified the Respondent of their determination to certify tenure charges with the Commissioner of Education. They also determined that effective December 1, 2014, in accordance with N.J.S.A. 18A:6-14 the Respondent should be suspended without pay.

On November 17, 2014, Louis Lessig, counsel for the Petitioner, submitted tenure charges to David C. Hespe, the then Acting Commissioner of Education in accordance with N.J.S.A. 7A:45. Crystal Holmes-Bowie, counsel for the Respondent, submitted a response to the tenure charges.

On December 12, 2014, M. Kathleen Duncan, Director of the Bureau of Controversy and Disputes at the Department of Education notified the undersigned that he had been appointed Arbitrator in the instant matter. The letter indicated,

"Please be advised that, following receipt of Respondent's answer on December 2, 2014, the above-captioned tenure charges have been reviewed and deemed sufficient, and if true, to warrant dismissal or reduction in salary."

Furthermore, she indicated that the charges were referred to the undersigned pursuant to N.J.S.A. 18A:6-16, as amended by P.L. 2012, c.26.

Hearings were held on January 23 and 30, 2015 at the offices of Brown and Connery, counsel for the Petitioner. The parties submitted post-hearing briefs on March 2, 2014.

On February 3, 2015, the undersigned requested an extension of time to submit the award in this matter. That request was granted by M. Kathleen Duncan, Director of the Bureau of Controversy and Disputes at the Department of Education, and my award would be due on or before April 30, 2015.

SUMMARY OF FACTS

The Respondent began working in the Camden School District in 1999 when she was hired as a teacher for grades K-8. At that time she was assigned to the Parkside School and taught Language Arts Literacy. For the years 2003-2006 she taught grade 4, and for the years 2006-2011 she taught grade 3.

Parkside School closed in 2011, and the Respondent was assigned to the Cooper B. Hatch Family School where she taught third grade. In 2013-2014 she was again assigned to teach third grade at the Cooper B. Hatch Family School. In August of 2014, the Respondent received an assignment to again teach third grade at the Cooper B. Hatch Family School.

The years at issue in the instant matter are 2010-2011, 2011-2012, 2012-2013, and 2013-2014. At the Parkside Elementary School for the 2010-2011 school year, the Respondent's Principal was Claudia Cream. During the 2012-2013 school year at the Cooper B. Hatch Family School, the Respondent's Principal was Norris Bacon, Jr. During the 2013-2014 school year, the Respondent's Principal was Laura Boyce.

The record reflects that each of the Principals submitted documentation to the Respondent about her absences, and her tardiness.

In May of 2010 the respondent and her then Principal, Claudia Cream, agreed to an attendance improvement plan, which continued into the 2010-2011 school year.

David M. Corvi, Principal of the Forest Hill Elementary School, submitted a Certification which indicated that he was Principal of the Forest Hill Elementary School for the entire 2013-2014 school year and that during that school year, the Forest Hill Elementary School opened its doors at 8:15 a.m. That Certification was signed on February 24, 2015. As evidenced by Exh. R-2, the Respondent requested and received five (5) bereavement days from December 17-21, 2013, due to the death of her brother. As evidenced by Exh. R-3, the Respondent was on an FMLA leave from February 27, 2013 through March 23, 2013. Furthermore, as evidenced by Exh. R-9, the Respondent was on jury duty on December 4, 2012.

The Collective Negotiations Agreement (CNA) between the parties references sick leave and temporary leaves of absence. Article XII – Sick Leave, establishes that all teachers shall be entitled to thirteen (13) accumulated sick leave days as of the first official day of the school year, whether or not they report for duty that day. Unused sick leave days shall be accumulated from year to year with no maximum limit. Additionally, up to three (3) days of accumulated sick leave may be utilized as family leave days.

The record reflects that on January 15, 2014, the Respondent was injured while breaking up a fight between two students. From that day to February 13, 2014, she

received physical therapy from Worknet Occ Med-Camden. After each workup, she was allowed to return to work without restrictions.

These are the essential, uncontroverted facts in the matter at bar and the issue now comes to me for resolution.

POSITIONS OF THE PARTIES

For the Petitioner

The Petitioner argued that they provide teachers with generous leave benefits and that they have proven that the Respondent abused her leave time over the past four (4) school years *"with a shameful pattern of excessive absenteeism and tardiness to which she offers no credible excuse."* During that time period, the Respondent admitted that she was absent a total of 95.5 days and late a total of 159 days and also admitted that her supervisors consistently counseled and warned her of her absenteeism and tardiness. The Petitioner argues that they have established through credible evidence and testimony that the Respondent's excessive absenteeism and tardiness has damaged the continuity of instruction of her students. Based upon the Respondent's history, the Petitioner contends that:

"It is extremely doubtful she would improve if given the opportunity. Accordingly, the tenure charges against the Respondent must be sustained as the School District has proven her excessive absenteeism and tardiness constitute conduct unbecoming a school employee, incapacity, and/or other just cause warranting her permanent dismissal from employment. Any other result would be detrimental to the students of the School District."

During the 2010-2012 school year, while at Parkside Elementary School and working with Principal Claudia Cream, Ms. Cream notified the Respondent that her absenteeism and tardiness was a problem. The record reflects that the Respondent's absences consisted of sixteen (16) sick days and one (1) personal day, and she was late twenty-six (26) times. Ms. Cream issued a Teacher Evaluation Observation Report dated March 1, 2011, (see Exh. P-3) in which indicates that the Respondent received an unsatisfactory rating for failure to maintain and have available written lesson plans; failure to monitor student progress and utilize intervention strategies; failure to complete and use records and reports; failure to be prompt with routine written assignments and written reports; and failure to demonstrate responsibility for punctuality in the performance of assigned duties. On June 17, 2011, Ms. Cream submitted an Annual Performance Report for Tenured Teaching Staff to the Respondent (see Exh. P-4), in which she indicated *"Attendance and punctuality at work is unacceptable."*

In May of 2010, Ms. Cream and Respondent signed an Individual Attendance Improvement Plan, indicating that it was developed jointly and agreed upon.

In the 2011-2012 school year, the Respondent was at the Cooper B. Hatch Family School and her Principal was Norris Bacon, Jr. The Petitioner argues that the Respondent's excessive absenteeism and tardiness did not improve and, in fact, got worse. During this school year, the Respondent was absent seventeen (17) days and late forty-one (41) times. There were no personal days taken during that school year. Gladys Naticchione, secretary to the principal at the Cooper B. Hatch Family School, testified that teachers are allotted ten (10) lateness grace periods on a yearly basis. For example an employee's pay is docked for any lateness that exceeds five (5) minutes or

a lateness of five (5) minutes or less that exceeds the ten (10) grace periods. Thirteen (13) of the Respondent's lateness of five (5) minutes or less were beyond the allotted grace periods.

During the 2012-2013 school year at Cooper B. Hatch Family School, the Respondent was absent thirty and a half (30.5) sick days, used one (1) personal day, utilized five (5) bereavement days and five and half (5.5) absences were docked from her pay because she was in excess of her allotted sick leave time. She was also late fifty-eight (58) times during that school year.

On February 26, 2013, Mr. Bacon issued the Respondent a letter of reprimand for chronic absenteeism and tardiness (see Exh. P-6). He indicated that as of February 22, 2013, the Respondent had been absent sixteen (16) days and late seven (7) times. That reprimand informed the Respondent that consistent absenteeism or tardiness is unacceptable and subject to a disciplinary warning.

During the 2013-2014 school year, the Respondent was absent fourteen (14) days of which two were personal days and three and a half (3.5) days were absences that were docked from her pay for being in excess of her allotted sick time. During that year she was late thirty-four (34) times. During that school year her Principal was Laura Boyce, who was new to the school system. Ms. Boyce testified that she consistently counseled and warned the Respondent about her excessive absenteeism and tardiness during the course of the school year both verbally and in writing. On November 21, 2013, Ms. Boyce issued the Respondent a letter of reprimand about her excessive absenteeism (see Exh. P-16). On February 6, 2014, Ms. Boyce also indicated that the Respondent had an insufficient amount of substitute plans in the main office (see Exh.

P-8) and on April 9, 2014, she again informed the Respondent that she did not have any substitute plans in the main office.

The Petitioner argues that the tenure charges against the Respondent for excessive absenteeism and tardiness must be sustained and references that excessive absenteeism and tardiness may constitute incapacity, unbecoming conduct, or other just cause sufficient to warrant dismissal. The Petitioner argues that through credible evidence and testimony, the circumstances of the Respondent's absences and lateness detrimentally impacted the continuity of instruction and how she persisted despite being given ample warning and opportunity to improve.

The School District has proven that it considered the number of Respondent's absences and lateness and the circumstances of same when they prepared the tenure charges.

The Petitioner argues that Respondent *"vaguely blamed each of the twenty-six (26) days she was late to work because of marital problems."* The Petitioner argues that is simply not credible because "*the Respondent had the opportunity during direct examination to elaborate on why marital problems precluded her from arriving at work on time but provided no detail whatsoever."* The Petitioner also argues that the Respondent admitted it is her professional responsibility to arrive at work on time. However, she failed to fulfill that responsibility during the 2010-2011 school year.

The Petitioner argues that the Respondent's absences during the 2011-2012 school year were extended weekends as they fell on a Monday or a Friday and that the doctors' notes contained in the record only account for five and one half (5.5) of the seventeen (17) sick days Respondent took during that school year. The Respondent

testified that many of her absences during the 2011-2012 school year were attributable to tonsillitis, but none of the notes in the record reference tonsillitis. The Petitioner argues that even if all of the Respondent's absences during the 2011-2012 school year were attributable to tonsillitis, the Respondent testified that she chose not to have her tonsils removed, which would have lessened the number of her absences. The Respondent never testified that any of her absences during the 2011-2012 school year were attributed to a debilitating illness or injury.

Again, the Respondent used the vagueness of marital problems as a reason why she was late to work forty-one (41) days during the 2011-2012 school year. The Petitioner continues to argue that this excuse is not credible and the Respondent never elaborated on her marital problems or why those marital problems precluded her from arriving at work on time.

The Petitioner argues that they considered the circumstances of the Respondent's absences and tardiness during the 2012-2013 school year. Even excluding the five (5) days Respondent took due to the death of her brother and an eighteen (18) day leave of absence she took for coping with depression, she was still absent nineteen (19) days that school year. Of those absences, six (6) fell on Monday or Friday and three (3) fell next to a holiday or administrative closing.

For the 2013-2014 school year, the Respondent still blamed her marital problems as the reason why she was late fifty-eight (58) times during that school year. In defense of her position, the Respondent argued that during the 2013-2014 school year, some of the days that she was late were due to the fact that she was talking to Ms. Boyce about school-related matters. However, Ms. Boyce credibly testified that the comments to

Respondent in the morning were made in passing and would not have caused her to be late. The Petitioner argues that the Respondent's attempt to blame Ms. Boyce is a weak attempt to validate her tardiness.

The Petitioner has proven that the Respondent's excessive tardiness disrupted her students' education, resulting in a diversion of resources and had a detrimental impact on student behavior. Ms. Boyce testified that the Respondent's excessive absenteeism and tardiness did have a detrimental impact on the continuity of instruction. In fact, Ms. Boyce testified that the Respondent's students math scores on the New Jersey Assessment of Skills and Knowledge (NJASK) were lower than the other elementary students at Hatch Family School. In fact, the evidence submitted by the Petitioner shows that Respondent's students' suffered due to her absenteeism and tardiness. Fourteen (14) of the eighteen (18) of the Respondent's students who took the NJASK scored less than proficient in Language Arts and Literacy and eleven (11) scored less than proficient in math. (See Exh. R-1 at NB2-NB4).

Ms. Boyce also testified that the Respondent's excessive absenteeism and tardiness negatively impacted student behavior – which again would impact the continuity of instruction. Ms. Boyce also testified that the *"school district only has a limited opportunity to instruct the students and needs as much instructional time as possible to maximize student achievement."* The Petitioner argues that every time the Respondent was late, students lost instructional time to which they were entitled.

The Petitioner argues that the testimony of Julia Benjamin in support of the Respondent was perjurious as Ms. Benjamin's daughter was in the fifth grade during the 2010 school year and was no longer attending Parkside School. Even though Ms.

Benjamin testified that her daughter was in Respondent's third grade class for 2010-2011, the record clearly established that she was not. The Petitioner asks that Ms. Benjamin's entire testimony be stricken from the record.

The Petitioner has proven that it provided Respondent with ample warning – both written and verbal – that her excessive absenteeism and tardiness was unacceptable and could result in disciplinary action, but she still failed to improve. The Petitioner strongly argues that the appropriate penalty for Respondent's excessive absenteeism and tardiness is dismissal from employment. The Petitioner further argues that during the four year period the Respondent was absent or late to work an astonishing total of 254 times. Putting that number into perspective, there are approximately 180 days in a school year, which means the Respondent was either late or absent well over the equivalent of an entire school year. The Petitioner argues that withholding the Respondent's increment would be an insufficient penalty as it is not a necessary precursor to dismissal and she has already shown that financial penalties have no impact upon her. Moreover, the Respondent has not offered any credible evidence indicating that her attendance or punctuality will improve if she were to be returned to work. In fact, there is no basis to believe that she can be reinstated without negatively impacting the continuity of instruction for her students as she has done for the past four (4) school years.

Accordingly, the Petitioner asks that the Respondent's excessive absenteeism and tardiness constitutes incapacity, unbecoming conduct, or other just cause warranting permanent dismissal from employment.

For the Respondent

The Respondent argues that the Petitioner has failed to prove the charges by a preponderance of the evidence. In addition, the Respondent contends that her record does not justify dismissal.

The Respondent does not deny the number of absences or tardiness identified in the Petitioner's records; however, her position is that *"the absences were taken for legitimate reasons, for which she provided documentation to the Petitioner, which it accepted."* Furthermore, the Respondent admits that there has been an issue with her tardiness; however, she submits there were reasons beyond her control with respect to the tardiness.

She has been a teacher in the District since 1999 and has an elementary K-8 Certificate, Supervisor Certificate and Principal Certificate. She has primarily taught third grade with an emphasis in Language Arts Literacy, and she has a Bachelor's degree in communications and two Master's degrees, one in Administration and one in elementary K-8 curriculum education.

The Respondent argues that Ms. Boyce's testimony about her abilities and impact upon students and teachers directly contradict the testimony of Ms. Cream who supervised her for ten (10) years, including the 2010-2011 school year. She acknowledges that her attendance was discussed with Ms. Cream in 2010-2011, and she admits to receiving an attendance improvement plan that was in part authored by her. She also acknowledges the memo from Mr. Bacon in the 2012-2013 school year and recalls receiving a memo in or about November 2013 from Ms. Boyce regarding attendance.

The Respondent strenuously argues that outside of those notices she did not recall meeting with Ms. Boyce to discuss attendance except when the Principal would stop her on the way into the school main office to tell her she was late.

The Respondent testified that she believed she did not abuse her leave time because she was out for valid reasons such as illness, bereavement or her children's' illnesses. Moreover, she frequently provided doctors' notes. (See Exhs. R-2/R-8). The Respondent argues that in providing the doctors' notes, she often went beyond the requirements for providing those when she would have been out of work for more than three (3) days. (See Exh. R-6 and B-120 and R-8 and B-61). When she was out beyond her allotted sick time, she requested and was granted an FMLA leave. (See Exh. R-3). She also testified that her illness was frequently attributed to tonsillitis and that she had surgery in December 2014 to remove her tonsils and expects to continue to be in good health.

The Respondent contends that even though Ms. Boyce testified at length about perceived difficulties she had with the Respondent, *"none of those allegations were raised as tenure charges for inefficiency or unbecoming conduct, nor should they be considered here."* She further argues that all of her actions with the Principal were professional and respectable, if not agreeable, to Ms. Boyce. The Respondent further contends that the Petitioner attempted to characterize her email communication with Ms. Boyce as unbecoming conduct when in fact Ms. Burke would copy others on emails where there is no policy or prohibition against such conduct. When Ms. Burke's email responses question certain practices of Ms. Boyce, it was characterized as

unprofessional and disrespectful, yet there is nothing in the record to establish such an allegation.

The Respondent argues that the school where she drops off her children is up the street from Hatch School, admitting the fact that children are not to be left alone in the school without an adult before 8:15 a.m. She also testified that there is no before school care in the Forest Hills School where her children attend. She must drop her children off to their classes and get back to her own school and check in by 8:25 a.m. The Respondent further testified that she was required to drop her children off by 8:25 a.m. Nevertheless, she understands that the current Principal of her childrens' school will certify that children may be left at the school unattended by a parent or guardian by 8:15 a.m. However, this would allow for only ten (10) minutes to drop off her children at school or with their teachers, drive to her school, park and report to the second floor office for check-in to avoid being late. She does admit that her attendance and her tardiness needs improvement.

However, her marital difficulties frequently contributed to her frequent lateness, which has also been resolved by her recent divorce granted on or about December 2014.

In spite of all of these difficulties, the Respondent's former Principal, Ms. Cream, characterized her as an excellent teacher. Ms. Cream testified that she has served as a Principal for over thirty (30) years in the School District, including the last ten (10) during which Ms. Burke was assigned to her school. Ms. Cream testified that she did not believe the charges against Ms. Burke were appropriate and also testified that when staff were tardy she allowed them to make up the time with students, by tutoring them

for example, after school. While this was voluntary, Ms. Burke did participate in tutoring students after school. Additionally, Ms. Cream testified that where she noted in Ms. Burke's evaluation about her attendance and referenced the attendance improvement plan, it was merely an effort to bring it to the staff member's attention. Those comments were simply to inform Ms. Burke what the record reflected, and it was not to be punitive.

Contrary to that practice of Ms. Cream, *"Ms. Boyce testified that she did not know, nor did she care to know, the reasons for tardiness and absence and that her only concern was the effect upon the students."* Ms. Cream also testified that the Respondent maintained direct contact with parents of her students with respect to learning and disciplinary issues. The Petitioner argued that there was difficulty with student behavior when the Respondent was not present; however, it was clarified that the students' behavior issues arose primarily during specials or sessions where the students were taught by other staff. In fact, when Ms. Boyce noticed that the *"Respondent was checking on her students while they were at the special, she was scolded and had to justify to the Principal her reason for doing so."*

The Respondent testified that she checked on students as suggested in professional development training and that if necessary she would check in with students at their homes and required and maintained regular contact with parents. The Respondent is from the community, lives in it, and is familiar with the students and the parents as indicated by her relationship with Ms. Benjamin, a mother of six students who matriculated through and are presently in the District.

The Respondent admits that she received notice of the attendance issues from her Principals, yet there was no evidence presented of disciplinary action taken for a

violation of the attendance policy prior to these tenure charges. She argues that N.J.S.A. 18A:6-10 requires that no person who acquires tenure may be dismissed or reduced in compensation, except for inefficiency, incapacity, unbecoming conduct, or other just cause. The Petitioner has the burden to prove the allegations by a preponderance of the credible evidence, and they have failed to do so.

The Petitioner is attempting to characterize the Respondent as having unbecoming conduct and creating poor morale; however, that assertion is made by Ms. Boyce only because no other staff members who testified for the Petitioner supported allegations of any improper, unprofessional or unbecoming conduct.

Respondent argues that while she did use her sick leave, there are only 3.5 days for which she was docked in 2013-2014 for which she would not have sick leave or personal time to cover it. (See Exh. P-2). She was docked for 5.5 days in the 2012-2013 school year. However, during those days she had taken FMLA, which was approved by the District. (See Exh. R-3). The Petitioner has attempted to present a pattern of absences; however, the record clearly and unequivocally establishes that the Respondent presented a doctor's note indicating that she had been seen by a doctor or a physician's assistant for illness. In fact, she submitted twenty-eight (28) doctors' notes to the District over the period in question.

The Respondent argues that while she used the time allotted to her, she denies abusing her sick leave time but was forthcoming by admitting that she had a problem with tardiness. The allegations presented do not rise to the level of unbecoming conduct necessary to prove the tenure charges by a preponderance of the credible evidence.

DISCUSSION AND ANALYSIS

The issue before me is to determine whether or not the Petitioner has proven its charge that the Respondent's absenteeism and tardiness was so excessive that it constitutes incapacity, unbecoming conduct, and/or other just cause warranting permanent dismissal from employment. What this case is not about is the issue of lesson plans. There was testimony in the record and documentation submitted about the Respondent's lesson plans not being in the main office when they were supposed to be and her inability to get those lesson plans into the main office properly. That is absolutely irrelevant to the matter before me because the statement of charges submitted by State Superintendent Rouhaniford, only references chronic and excessive absenteeism and lateness. The lesson plans have nothing to do with the instant matter. All of the documentation submitted based upon memos that Principal Boyce sent to the Respondent are irrelevant because the charge before me, as evidenced by the November 17, 2014, packet of materials sent to the Commissioner of Education by counsel for the Petitioner stated, *"I, Paymon Rouhaniford, State Superintendent of the Camden City School District, do hereby charge that Nambia Burke, a tenured employee of the District, should be permanently dismissed from employment for chronic and excessive absenteeism."* The Petitioner certainly can argue if the Respondent is not at work or is tardy to work there is a direct correlation between student learning. It is obvious that if a teacher is not in the classroom then learning will not take place. It is basically a symbiotic relationship. Students are in a classroom to learn, but they need a teacher to be in that classroom.

The Petitioner wove in tardiness as part of its argument and arguably absenteeism/tardiness do in fact go hand-in-hand with whether or not an individual, and in this case the Respondent, is properly performing her teaching duties or is flagrantly violating the requirement to be in the classroom and teach students.

The following chart shows the Respondent's absences and tardiness for the period of 2010-2011 through 2013-2014:

YEAR	ABSENCES	TARDINESS
2010-2011	17 (includes 1 personal day)	26
2011-2012	17 (all sick days)	41
2012-2013	30.5, plus 1 personal day, 5 bereavement days, 5.5 absences - pay was docked) 42 days in Total	58
2013-2014	14 , plus 2 personal days, 3.5 absences - pay was docked 19.5 in Total	34
TOTAL	**95.5**	**159**

The five (5) bereavement days must be deducted from the total days absent because she is entitled by the Agreement to utilize bereavement days and, additionally, the December 4, 2013, jury duty day must also be deducted from the total. Therefore, the Respondent was absent from work **89.5 days during that four year period or 22.34 days per year**. (Emphasis applied). Respondent's 159 days being tardy divided by 4 shows that the Respondent was tardy 39.79 days each year during that four year period.

The testimony of Gladys Naticchione, the secretary to the Principal at the Hatch Family School illuminates the method utilized for marking a teacher late. Ms. Naticchione testified that the grace period ends at 8:30 a.m. She testified that the sign-

in book is open between 8:25 and 8:30 a.m. She records a lateness after 8:25 a.m. Each teacher is allowed ten (10) lateness's per year with a five (5) minute grace period. If you go beyond the five (5) minute grace period (8:25 and 8:30 a.m) it does not count toward the ten (10). If you are late eleven (11) days, then you are docked pay. The record reflects that the Respondent was late 159 times and some of those were a few minutes and some of those were more five (5) minutes. Nevertheless, she was late. If we deduct the ten (10) per year and accept that every one of those lateness's was five minutes or less we come out with a different number. Deducting 40 days from the 159 days creates a number of 119 days divided by 4 which results in the Respondent being late 29.75 times per year.

The Petitioner has an absolute right to mandate that teachers will be in the classroom on time to teach students. We all will agree that occasionally someone will be late to school and that is why there is a grace period. It is interesting that this District does provide a grace period where many districts do not. If a teacher has to be at work at 8:25 a.m. and a teacher comes in at 8:26 or 8:27, they are late in many school systems. Here, this District has given the teachers a grace period. In spite of the grace period established by the Agreement, the Respondent still was late 29.75 times a year, taking into account the ten (10) day period for each year that the District has in its policy.

The Petitioner's argument that the Respondent's absences due to tonsillitis is more compelling and credible than the Respondent's testimony that she had her tonsils removed in December 2014. She was suspended with pay in September of 2014, and tenure charges were filed against her in November of 2014, and she was suspended

without pay effective December 1, 2014. No matter how I look at this, the surgery was after the Respondent had been suspended without pay and tenure charges were filed against her. It is not a credible argument. In fact, it is a horrible argument. The Respondent, a professional individual with three college degrees (a Bachelor's and two Masters') had a tonsillitis problem and did not have surgery. That led to her being absent from work. That is on her, not on a marital problem.

The marital problem issue cannot be controlling in the instant matter because nothing was presented other than she had a marital problem. I fully recognize that the Respondent probably felt uncomfortable about discussing personal issues and did not want to do so during the hearing. Nevertheless, if you are going to raise an issue in defense of why you are absent or late (mostly late) because of marital problems, then you have to be more explicit and explain what you meant about marital problems. Here, the Respondent chose not to do so.

The most vexing problem I have in this matter is the utilization of Ms. Claudia Cream versus Ms. Laura Boyce. Ms. Cream testified she was no longer a Principal or employee of the District. Whatever professional relationship she had with the Respondent cannot be controlling or overshadow the professional relationship Ms. Boyce had with the Respondent. However, even though Ms. Cream testified to her approach to working with teachers, nevertheless she, in fact, informed the Respondent about her attendance issues.

In fact, the second page of Exhibit P-3, which is a conference form, Ms. Cream informed the Respondent that improvement is needed in reporting to work on time and attendance. That document is dated March 16, 2011. On June 17, 2011, (see Exh. P-

4), Ms. Cream indicated that her attendance and punctuality at work is unacceptable. That document referenced that the Respondent had been absent sixteen (16) days and was late twenty-six (26) times. Exhibit P-5 is the individual attendance improvement plan jointly developed and agreed upon by Ms. Cream and the Respondent on June 22, 2011. In that document, Respondent agreed to have better time management, leave the house with more time to account for any delays, making leave on time a priority, and leave work on time to focus on home responsibilities.

Even though Ms. Cream talked about a different approach to working with teachers than Ms. Boyce testified to, the fact remains that Ms. Cream did notify the Respondent that her attendance and punctuality were unacceptable and had to improve. On February 26, 2013, Mr. Norris Bacon, the Principal of the Cooper B. Hatch Family School, sent a memo to the Respondent concerning attendance policy. That memo indicated in part,

"Our records indicate that as of February 22, 2013, you have been absent a total of 16 days and late 7 times.

Given your number of absences and lateness, you are hereby requested to submit an improvement plan that will address how you intend to improve both your absences and latenesses. This improvement plan is due in my office by the close of business March 6, 2013."

The record does not reflect if the improvement plan was submitted by the Respondent to Mr. Bacon.

On November 25, 2013, Ms. Boyce sent a memo to the Respondent concerning tardiness. That memo indicated in part,

"Lateness to school greater than five minutes will result in docked pay. In addition, any tardies of five minutes or less will result in docked pay once a staff member surpasses the ten grace tardies allowed by the contract. Continued tardiness will result in disciplinary action."

That memo also indicated at the bottom that the Respondent was tardy five minutes or less eight times and was tardy more than five minutes once.

On November 21, 2013, Ms. Boyce sent another memo to Ms. Burke also dealing with attendance in which she stated,

"...our school-wide attendance goal for this year is 96%.
The purpose of this memo is to notify you that your attendance is currently below the 96% goal."

The Respondent's statistics up to that point for the 2013-2014 school year were 4.5 absences with an attendance rate of 91.2%. Since the goal was 96% and the Respondent was only at 91.2%, there is a difference of 4.8%.

The above clearly and unequivocally establishes that three separate Principals all commented about attendance and lateness. Even though the Respondent believes that the testimony of Ms. Cream was helpful to her in the area of attendance and lateness, candidly it was not helpful because as a result of her lateness in the 2010-2011 school year, the Respondent agreed to an attendance improvement plan. Why would you agree to an attendance improvement plan if there is no attendance problem?

It is commendable that the Respondent acknowledges her absences and lateness's and asks for an opportunity to go back to work because she believes she has addressed those issues and will continue to address them. Unfortunately, that is not the record before me. Since 2010-2011, there has been a consistent absence and lateness pattern. It certainly appears to me that Ms. Boyce has a different approach to dealing with teachers than Ms. Cream had. Nevertheless, that is also irrelevant because I am not here to evaluate the methodology that any administrator employs working with teachers. The Respondent consistently reported to work late and was consistently

absent. I deducted the number of days that should not be counted such as bereavement and jury duty, but we still have a considerable number of days where the Respondent was out from work, which does negatively impact upon the students.

The focal point of Ms. Boyce's testimony is that if the teacher is not in the classroom or is late to the classroom, it has a negative impact upon students in that classroom. I don't know of any statistics that would say that is not accurate. I have talked about the symbiotic relationship, and I cannot in good conscience put aside the charges against the Respondent and put her back to work.

There is nothing in the record for me to mitigate against the absences and lateness's of the Respondent.

For the foregoing reasons and having duly heard the proofs and allegations of the parties, I Award the following:

AWARD

The Petitioner has met its burden by establishing that the Respondent was excessively absent and late to work during the time period of 2010-2011 through 2013-2014. Accordingly, the tenure charge shall be upheld and she shall be dismissed from employment with the State-Operated School District of the City of Camden.

Dated: March 30, 2015

Gerard G. Restaino, Arbitrator

State of Pennsylvania)

County of Wayne) ss:

On this 30th day of March, 2015, before me personally came and appeared GERARD G. RESTAINO to me known to be the person who executed the foregoing document and he duly acknowledged to me that he executed the same.

Judith K. Restaino

Notary Public
Lake Twp., Wayne County
My Commission expires on November 10, 2017

127-15

BROWN & CONNERY, LLP
Louis R. Lessig, Esq.
Lauren E. Tedesco, Esq.
360 Haddon Avenue
P.O. Box 539
Westmont, New Jersey 08108
(856) 854-8900
Attorneys for Petitioner Camden City School District

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, Petitioner, v. EDWARD W. BROWN, Respondent.	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY** Agency Ref. No.: 290-9/14 **CONSENT ORDER TO WITHDRAW TENURE CHARGES**

WHEREAS, the State Operated School District of the City of Camden ("District") or ("Petitioner") opened the above captioned matter by certifying tenure charges against Edward W. Brown ("Respondent") with the Commissioner of Education ("Commissioner");

WHEREAS, the Commissioner assigned this action to be adjudicated before Arbitrator Joseph Licata;

WHEREAS, the parties mutually desire resolution of the matter in terms of withdrawal of the tenure charges, and approval of the proposed settlement agreement, attached hereto;

WHEREAS, the parties submit this Consent Order pursuant to N.J.A.C. 6A:3-5.6, and the Cardonick standards established by the State Board of Education in the matter of In re Cardonick, State Board Decision of April 6, 1983 (1990 School Law Decisions (S.L.D.) 842, 846).

Now it is on this 2ND day of ~~March~~ April 2015, **ORDERED** and **AGREED** as follows:

1. Petitioner originally charged Respondent, a certificated and tenured Principal of the District with inefficiency following three (3) performance evaluations conducted during the 2013-2014 school year pursuant to N.J.S.A. 18A:7A-45;

2. On or about February 6, 2015, Petitioner received information pertaining to the performance evaluations upon which the original charges of inefficiency were based. At this time, based upon the information received, Petitioner does not believe moving forward with the charges against Respondent is appropriate;

3. Thus, withdrawal and settlement of the matter are justified;

4. The parties mutually desire the charges be withdrawn and the proposed settlement agreement approved;

5. Upon execution of the proposed settlement agreement, Respondent will simultaneously provide Petitioner, through its counsel, Brown & Connery, LLP, with an irrevocable letter of intent to retire effective December 31, 2017;

6. Upon execution of the proposed settlement agreement Petitioner shall reinstate Respondent into a Guidance Counselor position, a position in which he previously served;

7. Respondent seeks to enter into the proposed settlement agreement, and acknowledges that he has;

a. Read the proposed settlement agreement;

b. Understands it and knows he is giving up important rights;

c. Agrees with everything in it;

d. His attorney negotiated it with his knowledge and consent;

e. He has consulted with his attorney about it, and;

f. He shall sign it knowingly and voluntarily;

8. The proposed settlement agreement is in the public's interest, as the circumstances in the matter justify resolution, because Petitioner's underlying basis in filing the charges is no longer present;

9. Respondent acknowledges that he has been duly advised by his attorneys, of the Commissioner of Education's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

Date: 4/2/15

Joseph Licata
Arbitrator

THE PARTIES, BY AND THROUGH THEIR ATTORNEYS, CONSENT TO THE FORM, CONTENT, AND ENTRY OF THIS CONSENT ORDER:

Date: 4/1/15

Louis R. Lessig, Esquire
Brown & Connery, LLP
Attorneys for Petitioner Camden City School District

Date: 4/2/2015

~~Robert M. Schwartz, Esquire~~ Andrew L. Schwartz
Schwartz Law Group, LLC
Attorney for Respondent Edward Brown

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("this Agreement") is entered into by and between Edward Brown ("Brown") and the Camden City School District (the "District"). Together, Brown and the District may be referred to herein as "the Parties."

WHEREAS, Brown is a tenured Principal with the District;

WHEREAS, the District served Brown with tenure charges on or about July 15, 2014;

WHEREAS, the Parties mutually desire to resolve this matter;

NOW, THEREFORE, IT IS HEREBY AGREED by and between the Parties as follows:

1. Effective Date: This Agreement shall take effect on the date it is fully executed by the Parties.

2. Separation from Employment:

(a) Brown shall, simultaneously with his execution of this Agreement, provide the District, through its counsel, Brown & Connery, LLP, with an irrevocable letter of intent to retire effective December 31, 2017;

(b) Brown will voluntarily agree to be reinstated into a Guidance Counselor position effective Monday April 13, 2015;

(c) The District will reinstate Brown into a Guidance Counselor position effective Monday April 13, 2015;

(d) His salary of $109,685.00 per year will be increased 2.5% to $112,427.13, and then red-circled until the guide catches up to him or he retires;

(e) The District shall pay Brown a sum of $38,942.32, less withholdings, including all pension payments due, which represents 120 days of his pay pursuant to N.J.S.A. 18A:6-14;

(f) On December 31, 2017, Brown shall retire and/or resign from the District.

3. Withdrawal of Tenure Charges: The District shall withdraw the tenure charges against Brown subject to Brown's agreement and the approval of the Arbitrator. The District shall not take any further disciplinary action against Brown in relation to the underlying activities prior to the execution date of this agreement.

4. General Release: Brown releases the District from all known and unknown charges, complaints, claims, grievances, liabilities, obligations, promises, agreements,

controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts, penalties, fees, and expenses (including attorneys' fees and costs actually incurred) of any nature whatsoever that Brown has, ever had, or may have had, against the District, whether or not apparent or yet to be discovered, or which may hereafter develop, for any acts or omissions relating to or arising from anything that has happened up to the Effective Date of this Agreement. This includes, but is not limited to, any claims Brown asserted, or may have asserted, under the following: the National Labor Relations Act; the Civil Rights Act of 1964; Sections 1981 through 1988 of Title 42 of the United States Code; the Employment Retirement Income Security Act; the Immigration Reform Control Act; the Americans with Disabilities Act; the Age Discrimination & Employment Act; the Fair Labor Standards Act; the Occupational Safety & Health Act; the Family & Medical Leave Act; the Equal Pay Act; the New Jersey Law Against Discrimination; the New Jersey Wage Payment Law; The New Jersey Minimum Wage Law; the Equal Pay Law for New Jersey; the New Jersey Worker Health & Safety Act; the New Jersey Family Leave Act; the New Jersey Conscientious Employee Protection Act; any constitution, statute, regulation, ordinance, executive order, public policy or common law; any written, verbal or implied contract; and any other authority or basis for seeking damages or relief of any kind. This release is intended to be broadly construed and applies to any and all claims and potential claims whatsoever, including those of which Brown is not aware, resulting from anything that has happened up to the Effective Date of this Agreement.

5. Covenant Not to Sue: Brown warrants he has not commenced any legal proceedings of any type (including but not limited to charges filed with any governmental agency) against the District. Further, Brown agrees that he will not commence any legal proceedings against the District arising from or relating to anything that has happened up to the Effective Date of this Agreement. Should any such legal proceedings be commenced on Brown's behalf, Brown agrees that he will not seek or accept any relief or recovery therefrom. In the event of a violation of this paragraph, Brown agrees that the District shall be entitled to immediate dismissal of the legal proceedings, and that he shall be responsible for the District's attorneys' fees and costs incurred in connection with those legal proceedings. Should any entity, agency, commission, or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Section 4, Brown agrees not to seek or accept any resulting relief whatsoever, in accordance with this section.

6. Claims Not Released: Notwithstanding Sections 4 and 5 of this Agreement, it is understood and agreed that Brown is not waiving claims filed under any state workers' compensation or unemployment law or challenges to the validity of this Agreement under the Older Workers Benefits Protection Act.

7. No Admission of Liability: This Agreement is not, and may not be construed as, an admission of liability by either Party.

8. No Eligibility for Re-Hire: Brown acknowledges and agrees that his employment with the District is irrevocably severed upon the effective date of his retirement and that he is ineligible for re-hire with the District. Should Brown re-apply for employment, the District shall have no obligation to consider or review his application.

9. Reference: Should any potential employers or any other third parties contact the District in regard to Brown, the District will only provide what is required by law, namely, his employment time period, where he was employed and his salary. The District will provide no other information in regard to any dispute or any action taken involving Brown's employment with the District.

10. No waiver of Tenure or Seniority: By entering into this Settlement and Release, Brown does not waive any tenure or seniority rights or entitlements to any position he has held in the District.

11. Entire Agreement: This Agreement encompasses the sole and entire agreement between the Parties and fully supersedes any and all prior agreements or understandings pertaining to the subject matter hereof. No other promises or agreements shall be binding unless in writing, signed by the Parties, and expressly stated to represent an amendment or supersession to this Agreement.

12. Severability: If any portion of this Agreement is deemed unenforceable, the remainder will be fully enforceable.

13. Applicable Law and Construction: This Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey; however, since each party to this Agreement and their counsel have reviewed and negotiated this Agreement, the general rule of construction that any ambiguity or uncertainty in a writing shall be interpreted against the party drafting the writing shall not apply to any action relating to this Agreement. Any action to enforce or interpret this Agreement shall only be brought in a court of competent jurisdiction in Camden County, New Jersey.

14. Breach: Brown understands that if he breaches any provision of this Agreement, the District will file an action to enforce this Agreement.

15. Notices: Any notice given or demand made pursuant to this Agreement shall be made by certified mail, return receipt requested, to the following persons at the following addresses:

If to Brown:

Edward Brown
1004 Baird Avenue
Yeadon, PA 19050

With a copy to:

Robert M. Schwartz, Esquire
The Schwartz Law Group
Monroe Centre at Forsgate
12 Centre Drive

Edward Brown

Date:

Paymon Rouhanifard
State Superintendent
Camden City School District

Date: 4/1/15

F. HE SIGNS IT KNOWINGLY AND VOLUNTARILY.

IN WITNESS WHEREOF, and intending to be legally bound, the Parties hereby execute this Agreement.

Edward Brown

Date: 4/2/15

Paymon Rouhanifard
State Superintendent
Camden City School District

Date:

STATE BOARD OF EXAMINERS
DOCKET NOS. 1213-138 AND 1213-139
COMMISSIONER APPEAL NO. 6-4/14A

NANCY KANKA-HARVEY,	:	
APPELLANT,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

For the Petitioner-Appellant, Edward Cridge, Esq.

For the Respondent, State Board of Examiners, Lauren A. Jensen, Deputy Attorney General (John Jay Hoffman, Acting Attorney General of New Jersey)

For the Respondents, Lawrence Parker and Brenda Torrence, Robert M. Schwartz, Esq.

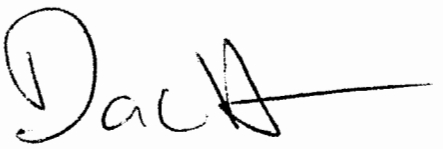
Appellant challenges the New Jersey State Board of Examiners' (Board of Examiners) decision declining to take action against the certificates held by school administrators Lawrence Parker and Brenda Torrence. In her verified petition, appellant alleged that Parker and Torrence displayed a pattern of unbecoming conduct toward her, warranting revocation or suspension of their certificates.

The Board of Examiners – in its discretion – may take action to revoke or suspend the certificates of any certificate holder "on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher or other just cause." *N.J.A.C.* 6A:9-17.5. Upon careful review of the record herein, the parties' submissions to the Board of Examiners, and their appellate briefs and appendices, the Commissioner concurs with the Board's decision declining to revoke or suspend the certificates at issue here.

In reviewing appeals from decisions of the Board of Examiners, the Commissioner may not substitute his judgment for that of the Board so long as appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Additionally, Board decisions should not be disturbed unless appellant demonstrates that the decision is arbitrary, capricious, or unreasonable. *N.J.A.C.* 6A:4-4.1(a); *Bayshore Sewerage Co. v. Dep't of Envtl. Protection*, 122 *N.J. Super.* 184, 199 (App. Div. 1973).

Initially, the record reflects that appellant was afforded due process throughout the proceedings before the Board of Examiners. Furthermore, the Commissioner finds that the sufficient credible evidence in the record adequately supports the Board of Examiners' determination. Finally, appellant failed to sustain her burden of establishing that the Board acted arbitrarily, capriciously or unreasonably in rendering its decision – and there is nothing in the record to support her claim. Appellant's obvious disagreement with the Board's decision is an inadequate basis upon which to disturb it.

Accordingly, the decision of the State Board of Examiners is affirmed.*



COMMISSIONER OF EDUCATION

Date of Decision: 4/10/15

Date of Mailing: 4/10/15

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

151-15

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

April 13, 2015

Michelle M. Smith, Clerk
Superior Court of New Jersey
Hughes Justice Complex
25 W. Market Street
6th Floor, North Wing
P.O. Box 971
Trenton, New Jersey 08625

Re: Request for Docketing of Judgment

Dear Ms. Smith:

In accordance with *N.J.S.A.* 2A:58-10, I am enclosing the April 10, 2015 Order of the Commissioner of Education finding that Angela Barrett is subject to entry of a judgment on the docket of the court due to her failure to pay the tuition assessment ordered in the matter of *A.B., on behalf of minor child, L.M.D.-R v. Board of Education of the Township of Burlington, Burlington County.*[1] By copy of this letter, I am advising Ms. Barrett, as well as counsel for the Burlington Township Board of Education, of the Commissioner's issuance of the enclosed Order.

If you require anything more, please contact this office at (609) 292-5706.

Very truly yours,

Kathleen Duncan /skh

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/JKH

Enclosure

c: Angela Barrett (with copy of Order)
David M. Serlin, Esq. (with copy of Order)
State Law Library (with copy of Order)

[1] Please note that, although the case caption reflects only Ms. Barrett's initials, her full name is included within the body of the Commissioner's Order.

131-15

OAL DKT. NO. EDU 18369-13
AGENCY DKT. NO. 291-11/13

A.B., on behalf of minor child, L.M.D.-R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY,	:	ORDER
RESPONDENT.	:	
	:	

On May 1, 2014, a final agency decision was rendered in this matter, wherein the Commissioner found A.B. liable for tuition in the amount of Eighteen Thousand-Three Hundred and Eighty One Dollars and Thirty Four Cents ($18,381.34), representing tuition for a period of ineligible attendance by her grandson, L.M.D.-R., in the Board's school district between February 13, 2013 to June 25, 2013, and September 9, 2013 to February 4, 2014. The Board subsequently notified the Commissioner that A.B. had failed to comply with the decision and it requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. A.B.'s response to the Board's request offered no reasons that have not been fully and fairly adjudicated as to why the judgment against her should not be so docketed.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Angela Barrett is now subject to entry of a judgment by the court in the amount of $18,381.34, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/13/15
Date of Mailing: 4/13/15

132-15

CLAUDIA CAVANAGH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SADDLE RIVER BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured pre-kindergarten (pre-K) teacher – alleged that the respondent Board violated her tenure and seniority rights when it did not assign her to a full-time position held by non-tenured and/or less senior teaching staff members following a reduction in force (RIF) for the 2013-2014 school year. Petitioner had been teaching in a .8 full-time equivalent (FTE) position during the 2012-2013 school year. The Board implemented budgetary cutbacks during 2012-2013, and in April 2013 petitioner was notified that her pre-K position would be reduced from .8 FTE to .6 FTE for the 2013-2014 school year. Subsequently, after petitioner notified the Board on October 17, 2013 that she intended to assert her right to a full-time tenured position, the Board restored petitioner's position to .8 FTE and retroactively paid her the difference in salary from September 1, 2013 through October 31, 2013. Petitioner filed her appeal in November 2013. The parties filed cross motions for summary decision.

The ALJ found, *inter alia,* that: there were no issues of material fact in this case, and the matter was ripe for summary decision; the issues to be determined were whether petitioner was adversely affected by a RIF and if so, whether she was entitled to one of the full-time positions held by non-tenured and/or less senior staff following the RIF; because petitioner was restored to her position in October 2013 and retroactively paid for the difference in salary from September 1 until October 31, 2013, she did not experience a loss of salary or employment benefits and was therefore not the subject of a RIF; further, petitioner was offered a full-time permanent kindergarten teacher position, with an increase in salary, but rejected that offer. The ALJ concluded that petitioner was not the subject of a RIF, and therefore could not assert rights to the positions in question, and accordingly granted the respondent Board's motion for summary decision and denied petitioner's cross motion.

Upon comprehensive review, the Commissioner rejected the Initial Decision of the OAL, finding, *inter alia,* that tenure and seniority rights are fixed as of the date of a RIF decision; accordingly, petitioner's tenure rights were triggered at the time of her RIF in April 2013; moreover, there appears to be a factual issue in dispute in this case. Accordingly, the Commissioner remanded this matter to the OAL for complete development of the record and a determination of petitioner's tenure and seniority rights as a result of the RIF in April 2013.

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

Issued 4/10/15

OAL DKT. NO. EDU 17178-13
AGENCY DKT. NO. 272-11/13

CLAUDIA CAVANAGH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SADDLE RIVER BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Claudia Cavanagh, and the Board of Education's reply thereto.

This matter involves a claim by the petitioner – a tenured teaching staff member – that she was entitled to a full-time teaching position held by non-tenured and/or less senior teaching staff members following a reduction in force (RIF) for the 2013-2014 school year. In April 2013, the Board notified the petitioner that her tenured pre-kindergarten (pre-K) position would be reduced from .8 full-time equivalent (FTE) to .6 FTE for the 2013-2014 school year. [1] The Administrative Law Judge (ALJ) determined that the petitioner was not the subject of a RIF in April 2013 because in October 2013 the Board restored the petitioner's position and retroactively paid her the difference in salary from September 1, 2013 until October 31, 2013. As a result, the ALJ determined that the petitioner did not experience a loss of salary or employment benefits, and granted summary decision in favor of the Board.

[1] On April 4, 2013, the Board reduced the petitioner's pre-K position from .8 FTE to .5 FTE for the 2013-2014 school year, but on April 29, 2013, the Board notified the petitioner that her pre-K position would be reduced from .8 FTE to .6 FTE.

Upon review, the Commissioner finds that the ALJ erroneously determined that the petitioner was not the subject of a RIF in April 2013 simply because the Board attempted to make the petitioner whole in October 2013 when it restored the petitioner to her pre-RIF status, and paid the difference in her salary retroactive to September 1, 2013. The Commissioner also finds that, based on the current record, there appear to be material facts in dispute that may preclude the disposition of this matter by summary decision.

It is well established that tenure and seniority rights are fixed as of the date of the RIF decision. See, *Francey v. Board of Educ. of the City of Salem*, 286 *N.J. Super.* 354, 358-361 (App. Div.1996) (Tenure rights are fixed as of the date of the RIF decision; therefore, any subsequent endorsements obtained by a teacher are not afforded any tenure protections) Boards of education have historically argued that the date of the employee's RIF is the only reasonable date upon which the employee's rights are established, otherwise it would be impossible for the Board to properly maintain order and efficiency for reemployment purposes. Likewise, boards of education must also adhere to that fixed date. Here, it is undisputed that the petitioner has obtained tenure in the district and that in April 2013 she was notified that her pre-K position would be reduced from .8 FTE to .6 FTE. As a result, her tenure and seniority rights were triggered at the time of the RIF in April 2013. The fact that the Board subsequently attempted to make petitioner whole by retroactively restoring her to her pre-RIF status in October 2013 does not negate the fact that the petitioner was in fact RIF'd in April 2013.

Additionally, the petitioner's rights were not limited to her .8 FTE pre-K position, but rather all other positions held by non-tenured or less senior teaching staff members within the scope of the petitioner's teaching certificate, and endorsements thereto, at the time of the RIF. Although the ALJ stated that the petitioner would not be entitled to the fifth grade position even if she was RIF'd based upon the fact that the fifth grade position was a temporary leave replacement position, the ALJ made no mention of the petitioner's right to the second grade position. It should be noted

that it is irrelevant for tenure and seniority purposes whether the non-tenured teacher who was assigned the second grade position was familiar with the students. Furthermore, the Board's alleged offer in October 2013 to transfer the petitioner to a full-time kindergarten teacher position when the current teacher began maternity leave in February 2014 similarly did not negate petitioner's bumping rights.

Moreover, there also appears to be a factual issue in dispute as to what position the Board designated as a leave replacement position, either the second grade position or the fifth grade position. It appears that the Board originally designated the second grade position as a leave replacement position, then removed that designation and in turn made the fifth grade position a leave replacement position. Certainly it is essential to make factual findings with respect to the nature of the positions in question in order to properly evaluate the petitioner's potential right to these positions.[2]

Accordingly, the Initial Decision is rejected; this matter is remanded to the OAL for complete development of the record, and a determination of the petitioner's tenure and seniority rights as a result of the RIF in April 2013.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 4/10/15

Date of Mailing: 4/10/15

[2] Petitioner has alleged that the Board may have changed the designations in order to defeat her seniority rights. It therefore may be necessary for the ALJ to make credibility determinations in order to reach the necessary factual findings.

[3] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 17178-13
AGENCY DKT. NO. 272-11/13

CLAUDIA CAVANAGH,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF SADDLE RIVER, BERGEN COUNTY,

Respondent.

Alfred F. Maurice, Esq., for petitioner

Jessica V. Henry, Esq., for respondent Board of Education of the Borough of Saddle River (Cleary, Giacobbe, Alfieri Jacobs, attorneys)

Record Closed: December 22, 2014 Decided: January 13, 2015

BEFORE **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Claudia Cavanaugh (Cavanaugh), asserts that the Board of Education of Saddle River (Board) assigned her to a part-time position as a result of a reduction in force. The matter was transmitted to the Office of Administrative Law (OAL) and filed

on November 27, 2013. On September 27, 2014, respondent filed a motion for summary decision. Petitioner filed a motion for summary decision on October 22, 2014. Respondent filed a response to petitioner's motion on December 10, 2014. A hearing is scheduled to begin on February 9, 2015.

FACTUAL DISCUSSION

Based upon a consideration of the documentary evidence presented, I **FIND** the following **FACTS**:

On September 1, 2006, Cavanaugh was hired by the Board as a pre-school aide. On August 10, 2009, petitioner status was changed to a .75 full-time equivalent (FTE) pre-K-3 teacher. A 1.0 denotes a full-time position. A number below 1.0 denotes a less than full-time position. On October 28, 2009, petitioner's pre-K position was increased to .8 FTE. On August 28, 2012, petitioner was granted tenure effective September 1, 2012. During the 2012-2013 year, respondent implemented budgetary cutbacks. On April 4, 2013, petitioner was notified that her pre-K teaching position would be reduced from .8 FTE to .5 FTE for the 2013-2014 school year. On April 29, 2013, the Board increased petitioner's pre-K position from .5 FTE to .6 FTE for the 2013-2014 school year.

In the 2013-2014 school year the following teacher positions opened up: fifth grade, kindergarten, and second grade. These positions were all posted on the NJ-HIRE website from August 18, 2013, to August 26, 2013. An email was sent to the staff on August 17, 2013, regarding the opening of a full-time fifth-grade teacher position. Petitioner was omitted from this email. The kindergarten position was filed by Jill O'Flaherty (O' Flaherty), a tenured teacher who had more seniority than petitioner. The second-grade teacher position was filed by Aubree McLean (McLean), a non-tenured teacher who possesses the required certification and was familiar with the students. The fifth-grade teacher position was filed by Kevin Lane (Lane), a new hire with the necessary mathematics experience for the position. McLean's position was made a full-time tenure-track position and a leave replacement designation was assigned to Lane.

Lane was a temporary teacher replacement due to the maternity leave of Christyn Pellearino.

On October 17, 2013, petitioner notified the Board that she wanted to assert her right to the full-time tenure-track position created when Mr. Stokes was hired as the head teacher. The positions in question are the teacher positions for second and fifth grade held by McLean and Lane. On October 29, 2013, the Board increased petitioner's position from .6 FTE to .8 FTE for the 2013-2014 retroactive to September 1, 2013. On October 31, 2014, petitioner recouped the difference between .6 FTE and .8 FTE from September 1, 2013, until her retroactive restoration. Petitioner was offered a permanent full-time position as a kindergarten teacher, a position made vacant when O'Flaherty went on maternity leave, which she refused. Had petitioner accepted the position as kindergarten teacher, her salary would have increased.

LEGAL ANALYSIS AND CONCLUSION

Both parties seek summary dismissal in this matter. The rules governing motions for summary decision in an OAL matter are embodied N.J.A.C. 1:1-12.5. These provisions mirror the language of Rule 4:46-2 and the Supreme Court's decision in Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67 (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant summary judgment should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Court in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 523 (1995), set the standard to be applied when deciding a motion for summary judgment. Therein the Court stated:

> The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party... are sufficient to permit a rational

> fact finder to resolve the alleged disputed issue in favor of the non-moving party.

In this matter there is no question of fact. The issues are whether petitioner was adversely affected by a reduction in force (RIF) and if so whether she was entitled to the positions that either McLean or Lane occupy.

N.J.S.A. 18A:28-12 states:

> If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service, and the time of service by any such person in or with the military or naval forces of the United States or of this State, subsequent to September 1, 1940, and the time of service of any member of the American Merchant Marine during World War II who is declared by the United States Department of Defense to be eligible for federal veterans' benefits, shall be credited to him as though he had been regularly employed in such a position within the district during the time of such military or naval service, except that the period of that service shall not be credited toward more than four years of employment or seniority credit.

In Carpenito v. Board of Education of Rumson, 322 N.J. Super. 522 (App. Div. 1999), the court stated:

> We agree with the NJSBA and hold that, absent allegations of bad faith or unlawful purpose, a tenured teacher's seniority rights are not triggered when a school board abolishes the teacher's position and assigns the teacher to teach different subjects within his or her certification without reducing the teacher's salary or other employment benefit.
>
> [Id. at 538.]

Although the Carpenito case involved a transfer of a teacher from one position to another, there was no loss of salary or other employment benefits. In this matter Cavanaugh did not suffer the loss of any salary or employment benefits. On October 29, 2013, Cavanaugh's position was increased from .6 FTE to .8 FTE for the 2013-2014 retroactive to September 1, 2013, which is what her hours were for the 2012-2013 school year. On or around October 31, 2013, petitioner was paid the difference in compensation from .6 FTE to .8 FTE from September 1, 2013, to her retroactive restoration. Petitioner was not RIF'd because she did not experience a loss of salary or other employment benefits. In addition petitioner was offered a full-time permanent kindergarten teacher position which would have increased her salary. She rejected that offer.

I **CONCLUDE** that petitioner was not entitled to the second-grade or fifth-grade positions held by McLean and Lane because she did not experience a loss of salary or other employment benefits and therefore she was not RIF'd. I Further **CONCLUDE** petitioner would have had a full-time permanent position with an increase in salary had she accepted the kindergarten teacher position.

Even if petitioner had been RIF'd, Lane was assigned the fifth-grade teacher position as a temporary leave replacement teacher due to the maternity leave of Christyn Pellegrino. The Court in Lammers v. Board of Education of Point Pleasant, 134 N.J. 264 (1993), held that a position left open by another teacher's leave of absence was not a vacancy which a RIF'd teacher could assert any rights. Since Lane was a temporary leave replacement teacher, no RIF'd teacher could assert any rights to the position.

I **CONCLUDE** that even if petitioner had been RIF'd she would not have been entitled to Lane's position because Lane was a temporary leave replacement teacher.

ORDER

Based on the foregoing, it is **ORDERED** that respondent's motion for summary decision is **GRANTED** and petitioner's cross-motion for summary decision is **DENIED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

1-13-15
DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

Date Mailed to Parties: JAN 16 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

DOCUMENTS RELIED ON

-Brief of Respondent, Saddle River Board of Education in Support of Motion for Summary Decision

-Certification and Exhibits of Counsel Jessica Henry in Support of Motion for Summary Decision

-Reply Brief of Respondent in support of Motion for summary Decision and in Opposition to Petitioner's cross-motion for summary decision

-Petitioner's Motion for Summary Decision and supporting documents, dated October 22, 2014

133-15

133-15

BOARD OF EDUCATION OF THE BOROUGH OF MERCHANTVILLE, CAMDEN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF PENNSAUKEN, CAMDEN COUNTY	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner Merchantville Board of Education (Merchantville) sought severance of its sending-receiving relationship with respondent Pennsauken Board of Education (Pennsauken) and establishment of a sending-receiving relationship with the Haddon Heights Board of Education (Haddon Heights). Merchantville currently sends its students in grades 9-12 to Pennsauken High School via the existing send-receive relationship. Pennsauken Board of Education opposed the severance of the agreement, arguing that removal of Merchantville students from Pennsauken schools would, *inter alia*, negatively impact the racial diversity of the district.

The ALJ found, *inter alia*, that: *N.J.S.A.* 18A:38-11 mandates that any school district that lacks high school facilities must designate a high school for its pupils through a sending-receiving relationship; change or severance of a send-receive relationship requires the approval of the Commissioner; pursuant to *N.J.S.A.*18A:38-13, the Commissioner must make equitable determinations based on all of the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on racial composition of the pupil population, and shall grant a requested change if no substantial negative impact will result therefrom; severance of the relationship with Pennsauken and establishment of a new one with Haddon Heights would not result in a substantial negative impact upon the quality of education, nor upon the financial state of either district; here, it appears that a racially diverse, majority-minority subset of students would be removed from a similar, though not identical, diverse school population and be placed into another diverse school setting. The ALJ concluded that granting Merchantville's petition to sever its sending-receiving relationship with Pennsauken would produce no substantial negative impact on the quality of education, the financial condition and the racial composition of the student population of the districts. Accordingly, the ALJ granted Merchantville's petition for severance of the agreement with Pennsauken, subject to its entering into a new sending-receiving relationship with Haddon Heights for a minimum duration of five years.

The Commissioner concurred with the ALJ's findings of fact and conclusions of law, and adopted the Initial Decision as the final decision in this matter, finding that – absent a showing of substantial negative financial, educational or racial impact herein – the Commissioner is required to grant the requested severance pursuant to *N.J.S.A.* 18A:38-13.

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

Issued 4/10/15

OAL DKT. NO. EDU 1927-12
AGENCY DKT NO. 10-1/12

BOARD OF EDUCATION OF THE BOROUGH OF MERCHANTVILLE, CAMDEN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF PENNSAUKEN, CAMDEN COUNTY	:	
RESPONDENT.	:	

The voluminous record[1] in this matter and the Initial Decision issued by the Office of Administrative Law (OAL) have been carefully reviewed. Neither party filed exceptions with the Commissioner pursuant to *N.J.A.C.* 1:1-18.4.

Petitioner, Merchantville Board of Education (Merchantville), initiated this action to request severance of its sending-receiving relationship with respondent, Pennsauken Board of Education (Pennsauken) in favor of establishing a new sending-receiving relationship with Haddon Heights Board of Education (Haddon Heights). Pennsauken opposed severance, arguing that removal of Merchantville's students[2] from Pennsauken High School will result in a substantial negative impact upon the quality of education, the financial condition, and the racial composition of the student body at the high school under *N.J.S.A.* 18A:38-13.

Following nine days of hearing at the OAL, and additional briefing to address the effect of *Board of Education of Longport v. Board of Education of Atlantic City*, Commissioner's

[1] The record contains the hearing transcripts from the Office of Administrative Law, which were reviewed in connection with this matter.

[2] Merchantville students, a majority-minority population, comprise approximately 4.1% of the student body at Pennsauken High School. (Initial Decision at 21)

Decision No. 238-14, decided June 5, 2014, the Administrative Law Judge (ALJ) granted Merchantville's petition and determined that severance of its sending-receiving relationship with Pennsauken will not result in a substantial negative impact upon the quality of education, the financial condition, or the racial composition of any of the districts involved.

The Commissioner concurs with the ALJ's findings of fact and conclusions of law – which are fully supported by his credibility determinations[3] as well as the sufficient credible evidence in the record – for the reasons stated in his extensive Initial Decision. Because the ALJ's determination is sustained by the record and consistent with applicable law, the Commissioner finds no reason to disturb it. Absent a showing of substantial negative financial, educational, or racial impact herein, the Commissioner is required to grant the requested severance pursuant to *N.J.S.A.* 18A:38-13.

Accordingly, the Initial Decision is adopted and Merchantville's application for severance of its sending-receiving relationship with Pennsauken is hereby granted, subject to establishment of a sending-receiving relationship with Haddon Heights for a minimum duration of five years.[4]

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 4/10/15

Date of Mailing: 4/10/15

[3] The ALJ's credibility determinations are entitled to deference from the Commissioner, absent a finding that they are arbitrary, capricious, unreasonable or unsupported by the record. *N.J.S.A.* 52:14B-10(c); *In the Matter of the Tenure Hearing of Dominic Costanzo*, Commissioner Decision No. 142-14, decided April 4, 2014.

[4] See *N.J.S.A.* 18A:38-13.1.

[5] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 01927-12

AGENCY DKT. NO. 10-1/12

BOARD OF EDUCATION OF THE BOROUGH OF MERCHANTVILLE, CAMDEN COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,

Respondent.

Vito Gagliardi, Jr., Esq., for petitioner (Porzio, Bromberg & Newman, attorneys)

Michael Sullivan, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: June 23, 2014 Decided: March 2, 2015

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

Petitioner Merchantville of Education seeks severance of its sending-receiving relationship with respondent Pennsauken Board of Education and seeks to establish a sending-receiving relationship with Haddon Heights Board of Education.

PROCEDURAL HISTORY

The petitioner requested a fair hearing and the matter was filed at the Office of Administrative Law (OAL) on February 14, 2012, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and 14F-1 to -13. The matter was heard on September 11, 12, 16, 17, 19, 20, 24, and 25, 2013 and on October 7, 2013. The record was held open to allow the parties to submit closing arguments in writing and was closed on March 24, 2014. The record was reopened to allow the parties to provide additional briefing after a final agency decision was issued in a similar matter and was closed again on June 23, 2014. Orders were entered in this matter to allow for an extension of time in which to file the initial decision.

FACTUAL DISCUSSION

Petitioner Merchantville Board of Education (Merchantville, petitioner) is a body politic, which operates a Pre-K through 8th school district, and educates its students in grades 9th-12th by way of a sending-receiving agreement with the Pennsauken Board of Education (Pennsauken, respondent). Respondent Pennsauken Board of Education is a body politic, which operates a Pre-K through 12th school district. Haddon Heights Board of Education (Haddon Heights) is a body politic, which also operates a Pre-K through 12th school district. In or around July 6, 1988, Merchantville filed a petition with the Commissioner of Education seeking to terminate its sending-receiving relationship with Pennsauken. *See generally Bd. of Edu. of the Borough of Merchantville v. Bd. of Educ. of the Twp. of Pennsauken,* 1992 N.J. AGEN LEXIS 5260 (Sept. 16, 1992). The State Board of Education denied Merchantville's petition in a decision issued on January 7, 1998. *Bd. of Educ. Of Borough of Merchantville v. Bd. Educ. Of Twp. Of Pennsauken*, OAL Dkt. No. EDU 5702-88, 4064-89 (Jan. 7, 1998).

In or around 2011, Merchantville commissioned Statistical Forecasting, LLC and James L. Kirtland, CPA to study the feasibility of Merchantville's termination of its sending-receiving relationship with Pennsauken. One of the options explored was the

establishment of a sending-receiving relationship with Haddon Heights for Merchantville students in grades 9th through 12th. In January 2012, the Feasibility Study was finalized and the results shared with Merchantville. (P-28). On January 17, 2012, Merchantville filed a petition with the Commissioner of Education seeking to sever its sending-receiving relationship with Pennsauken and to establish a new sending-receiving relation between Merchantville and Haddon Heights wherein Merchantville's students in grades 9th-12th would be educated at Haddon Heights High School.

The preceding statements are not in dispute and are hereby **FOUND** as **FACT**.

The following is a summary of the witness testimony in this matter:

Stephen Morrone:

Mr. Morrone testified that he has been on the Merchantville Board of Education for eight years, since 2005. He is a Detective Sergeant in the Merchantville Police Department and has been in the Department for twenty-eight years. He is a graduate of Lasalle University. With the exception of about 18 months, Mr. Morrone has lived continuously in Merchantville since 1989 and raised two children and three step-children who all attended Pennsauken High School.

Mr. Morrone recounted problems that his children had at Pennsauken High School, including school violence, problems with the IEP process and bullying to demonstrate that he felt the high school did not meet his children's needs despite that he was in contact with school officials during the children's attendance there. All five of the children either did not attend, or were not adequately prepared for, community college and subsequently none of them have degrees. His own and the community's dissatisfaction with the sending-receiving relationship are the impetus for his interest to serve on the Board of Education.

There is no formal liaison between the Pennsauken and Merchantville School Boards and past efforts by Merchantville to establish communication have been

rebuffed by Pennsauken. This includes Mr. Morrone's own outreach to a specific member of the Pennsauken Board of Education. Mr. Morrone testified that in his experience, despite any racial and socio-economic differences, every person he knows in Merchantville is in favor of changing its receiving district from Pennsauken to Haddon Heights because of a general sense of dissatisfaction with the high school.

Anthony Arcodia

Mr. Anthony Arcodia has been the Superintendent of Schools for Barrington Board of Education for four and half years. He has a Master's in Education Administration from Rutgers. Prior to becoming superintendent, he was a teacher in the district and has been there for thirty-five years. Since he has been there, Barrington has always sent their students to Haddon Heights for high school.

He testified that the professional relationship between Barrington and Haddon Heights school districts is "highly effective" and that the quantity and quality of communication between sending and receiving districts are "essential ingredients for effective schools."

Communication between the districts happens regularly between Mr. Arcodia and the Haddon Heights Superintendent. Mr. Arcodia stressed the importance of communication between the districts at all levels, not just between administrators. He states that good communication also occurs between the district secretaries, the respective directors of special education and between Barrington teachers and the curriculum coordinator for the districts.

Although recently retired, the previous Curriculum Coordinator from Haddon Heights would ask to come into Barrington schools to see the educational practices of even lower grades, like in first grade, and try to change the programs to make sure all the students in the two districts were learning the same curriculum. Additionally, calendars between the districts are coordinated and in-service trainings for teachers are conducted in similar fashions.

Resources such as the Haddon Heights auditorium and the Barrington sports fields are shared between both districts.

He regularly requests and obtains timely information about Barrington students' performance in the high school to target areas of improvement. He keeps track of students' rank and placement in specific tiers. When Barrington students were not performing well in one area, Haddon Heights offered a summer bridge program for 8th graders who needed assistance in certain areas to catch up.

He asks for academic information, all of his students went on to college and one went to the military last year, in many cases he gets a response from Haddon Heights to inquiries on the same day.

Recently, when the Haddon Heights superintendent told him about four or five special education Barrington students who were not performing well at Haddon Heights, a meeting was arranged with Barrington administrators, Haddon Heights administrators, appropriate teachers and parents to correct the issues. Mr. Arcodia testified that the students were redirected and the issues were ironed out. The issue involves Barrington because an out-of-district placement for Barrington students will increase the amount of tuition Barrington owes Haddon Heights for that student and the difference could greatly impact their budget.

There is some social interaction among the two districts' students before high school though sports and participation in dances and plays. Additionally, there is an orientation program in place for all three districts before high school.

Mr. Acordia felt that if there was in increase in racial diversity as a result of Merchantville sending its students to Haddon Heights that this would be a positive experience for Barrington students. Although the Barrington district is two-thirds white, there are programs in place to prepare students for the more diverse student body which is present at Haddon Heights since the Lawnside also sends students to Haddon Heights.

Jacquelyn Fuentes

Ms. Fuentes, a current Merchantville resident, has been on the Merchantville Board of Education since November 2012. She described her ethnic and racial background as mixed race and Latina. Ms. Fuentes and her son, now twenty-years-old, resided within the Pennsauken and Merchantville school districts but they both decided that he would not attend Pennsauken public schools from grades five to twelve. During that time, he attended parochial schools since both Ms. Fuentes and her son believed that there was a lot of violence happening in the schools and that he would not be appropriately challenged in his academics. Her son is currently serving in the military overseas.

Ms. Fuentes' son had two girlfriends in high school; one is his current wife, Amber. Both young women attended Pennsauken high school, at least for part of high school and stated to Ms. Fuentes that they did not feel safe at the school; that they were not academically challenged; and that students regularly left school early. Ms. Fuentes described her experience of going to Pennsauken High School to assist Amber in withdrawing to attend another high school. The scene in the administrative office was chaotic packed with students obtaining late passes, people screaming between offices and fights breaking out.

Ms. Fuentes was inspired to run for the School Board to change the sending-receiving relationship between Merchantville and Pennsauken. She states that there is no contact with the Pennsauken Board of Education but that the Merchantville and Haddon Heights School Boards already have had some communication about coordinating curriculums in anticipation of the new sending-receiving relationship. Ms. Fuentes collected signatures to support severing the sending-receiving relationship with Pennsauken and she did not encounter any Merchantville parents who were against severing the relationship. The parents she spoke with were of diverse racial backgrounds such as black, Vietnamese, Asian, Latino and mixed race. She does not know if she spoke specifically to parents whose of Merchantville students who graduated from Pennsauken High School with high rankings.

Scott Strong

Mr. Strong has a Master's degree in Educational Leadership and has served as the Chief School Administrator for Merchantville Board of Education for about a year and half at the time of his testimony. This position includes the role of superintendent and principal since it is such a small district. Merchantville offers education from pre-k to eighth grade and then for high school students can either go to Pennsauken, local vocational schools, parochial schools, the Audubon school through the New Jersey School Choice program or pay tuition in other public school districts. In Merchantville just fewer than forty percent of students are on the free and reduced price lunch program. About 57% of the students are white, 23% are African/American, 14% Hispanic and other races make up the remaining six percent. The eighth grade class is normally about thirty-five students. In the past, before Audubon became an option, most graduating eighth graders would go to Camden Catholic parochial school and other vocational schools. He understands that the Merchantville and Pennsauken sending-receiving relationship has been in place since the 1950's, but he is not aware of the exact start date.

In the eighteen months since he has been there, the only communication between the Merchantville and Pennsauken Boards of Education have been two letters stating that Merchantville does not meet the minimum requirement for the number of students attending Pennsauken to have a position on the Pennsauken school board. Additionally, the Merchantville members were invited to attend the graduation ceremony in Pennsauken.

In November 2012, he attended a Camden County Department of Education meeting to start a dialogue with Pennsauken Superintendent Dr. Marilyn Martinez. He opened discussions with her and expressed an interest in better communication between the districts. As follow-up to meeting, he sent email to Dr. Martinez requesting info about Merchantville student rankings, how many AP courses Merchantville students were taking, how many Merchantville students took the SATs

and other demographic information. He did not receive a response to this email and he was unable to retrieve a copy of the email because it has been deleted.

In May 2013, Mr. Strong sent an email asking about how the Merchantville Algebra I students were placed at Pennsauken. Martinez responded that she would get back to him but she never did. He did not follow up since he ultimately no longer required the information.

He called Martinez one time on the phone and left a message with a secretary and did not receive a call back. He has not made any other attempts to reach out to her. The Pennsauken district has not reached out to him regarding coordinating school calendars, workshops or trainings. There is no coordination or "articulation" regarding the curriculum between the two districts. There are no shared programs between the schools. Around the end of the school year, a counselor from Pennsauken comes to Merchantville to assist eighth grade students in registering for high school classes. Other than that, he has not seen or heard of a Pennsauken staff person coming to Merchantville. The special education programs at Merchantville and Pennsauken do stay in regular contact though. This is the only area where the two districts do communicate.

Since he has been unable to gain any data regarding Merchantville students' performance at Pennsauken, he tries to obtain anecdotal information from high school students who return to pick up younger siblings and walk home. In general they have told him that high school was not as hard as they thought it would be.

Mr. Strong has maintained regular contact with Superintendent Adams at Haddon Heights. He has found Mr. Adams to be very responsive and he attempts to answer any questions Mr. Strong has within twenty-four hours. Mr. Adams has also provided Mr. Strong with his cell phone number to make himself accessible.

Based on the data available to Mr. Strong, he states that more high school students at Haddon Heights than at Pennsauken take the SATs and on average they perform better on the test.

Currently, Merchantville provides busing for high school students who attend Pennsauken and transportation issues would have to be worked out between Merchantville and Haddon Heights since the distance is further. It is his hope that he could work together with Haddon Heights on "late buses" to allow students to participate in after-school activities.

Although the actual tuition per student is less at Haddon Heights than Pennsauken, Mr. Strong expects more interest in Haddon Heights and, given that the transportation issue may be more involved, the cost total cost to the district could be greater. This cost would be phased in over time, just as the students would be phased into Haddon Heights one class year at a time.

He could not evaluate if educating students in a more racially diverse environment could directly positively impact their overall performance but he felt that diversity is positive and it is part of educating the whole child.

Dr. Ronn Johnson

Dr. Ronn Johnson is the Superintendent of the Lawnside Board of Education. He lives in Pennsauken and has two children in the school district, ages eleven and seven. He has a Master's degree in School Administration and a Doctoral degree from Wilmington University.

He has been working in the field of education for approximately twenty years and he has been with Lawnside for fourteen years. Four of those years, he has been the superintendent. The eight years prior he served as the Vice Principal. He previously taught in Camden City for eight years. When he learned that he would be asked to

testify in this proceeding, he contacted Ms. Martinez to learn why no one from Pennsauken had reached out to him regarding the petition.

Lawnside's school is Pre-k through eighth grade with 287 students. Approximately 97% of the students are African American, 1% are Hispanic and the other 2% are Asian, Latino or other races.

Dr. Johnson believes that Lawnside has been sending its children to Haddon Heights for high school since 1926. He testified that there is a high level of communication between his district and the Barrington and Haddon Heights districts. There is "vertical articulation" among the three districts, meaning that teachers at the middle school level will work with the teachers at the high school level to discuss the skills the students are going to require. Additionally teachers of the same grade levels will work collaboratively to coordinate curriculums. The three superintendents work together to create a consistent school calendar and coordinate professional development. Additionally, Lawnside will get involved if there's a Lawnside special education student at Haddon Heights where there is an issue or a risk of out-of-district placement.

All three special education directors develop training and in-service training days where all districts work together. They also use the same type of special education software to develop IEPs. The districts provide parent nights for special education students for all three districts so that they may interact.

Dr. Johnson will occasionally go outside of his job description and speak with high school students who came from Lawnside if there is a discipline or motivational issue. Although this is outside of what is required from him, he is happy to do it when Haddon Heights requests it since he is vested in the success of his students at that school. Since he was previously the Vice Principal at Lawnside, he has experience with disciplinary issues.

There are share services agreements with Barrington and Haddon Heights. For example, Lawnside and Haddon Heights have share members of the child study team. Additionally, Haddon Heights has assisted Lawnside when they had to bus a child from outside the district to Haddon Heights when DYFS placed a student outside the home. The districts also share facilities. The Summer Bridge Program for eighth graders is hosted in all three districts. The Haddon Heights athletic teams occasionally use the Lawnside gym. Additionally, in the past Dr. Johnson has sat on a hiring panel for the child study team director at Haddon Heights.

Dr. Johnson is very aware of the academic performance of Lawnside students at Haddon Heights. He knows their graduation rates, the AP class participation, and proficiency test scores. On average, Lawnside students do not perform as well on the NJ ASK test as students in the other two districts, but overall his students are successful at Haddon Heights.

He has had conversations with Haddon Heights to eliminate some of the standardized requirements to take AP or college prep classes to potentially allow more Lawnside students to enroll in these classes. He is not certain if they have done that at this time. Lawnside is part of the Delaware Valley Consortium, which is a group of schools aiming to close the academic achievement gap between schools which are primarily minority and those that are made up of primarily Caucasian students. Eliminating the standardized requirements for these courses was an idea presented by the Consortium.

Haddon Heights and Lawnside have taken steps for Lawnside students' social integration into the high school. There is a mentoring program in place run through a local church. The Haddon Heights athletic department coaches and former students from Lawnside come back to speak with Lawnside students about the athletic transitions they will face. An organization called SADD, Students Against Destructive Decisions, is facilitated through the guidance departments and students will to come and speak with Lawnside eighth graders about drugs and alcohol. The Haddon Heights

administration also speaks with the eighth grade students about the transition to high school; they entertain student questions and quell any rumors.

He believes that Lawnside students are provided with a diverse educational experience when they go to Haddon Heights because they are leaving a primarily African American community and culture and gaining exposure to students and staff members of another socioeconomic status and culture. This is a realistic exposure to a real-world setting. He has not had any founded complaints of racial problems or issues regarding Lawnside students at Haddon Heights.

Ronald Corn

Mr. Corn is the Principal of grades seven through twelve for the Haddon Heights Board of Education. He has twenty years of experience in education including as a social studies teacher for thirteen years, then as Vice Principal at Haddon Heights.

He testified that Haddon Heights has a "hometown feel" with not too many disciplinary programs. There are less than 800 students in total and 650 in the high school. He believes the school has a unique feel because of the diverse cultural and socioeconomic backgrounds present at the school. About twenty-five to thirty percent of the students in the high school are of minority backgrounds, the remainder are white.

The high school is geared toward preparation for a college education. The lowest level is college prep courses, then honors courses and next AP courses. There are rich opportunities for students, given the budget. Mr. Corn estimates that over 85% of the high school students go on to either two or four-year colleges or the military.

The three best things about Haddon Heights High school is that it is an active community and many parents are very involved in the school, there is not a lot of teacher turnover and the three districts blend well to be known as the "Garnets," the school mascot, instead of three distinct communities.

The school did something called a "lipdub" or a video of the students set to music to show school spirit. They took an entire school day to organize and film the video. The students selected music to represent the different musical interests, clubs and teams at the school. Mr. Corn felt that the video, although it was a scary moment for the faculty since there were no structured classes that day, was a positive experience and made the students feel vested in the school as a whole.

Some things that make Haddon Heights unique are that they do a monthly report to highlight specific activities by teachers and students. Also, Haddon Heights has two Professional Learning Communities a month with the faculty so that teachers who all teach a particular subject, such as algebra, can discuss and improve the curriculum. It allows time for teachers to talk to each other, which doesn't normally happen within the school day. Also, Mr. Corn has a Site-Based Council which is an avenue for teachers to volunteer to participate in the decision-making process at the school. It is a leadership model to help keep him informed about teacher's views.

He characterized the academic relationship with Lawnside and Barrington districts as tremendous. Vertical articulation between Haddon Heights High School and the sending middle schools is heighted since Michael Adams took over as Superintendent.

He communicates very often with Dr. Johnson and Mr. Arcodia and believes that communication on all levels of the faculty is extremely important. He will involve Dr. Johnson and Mr. Arcodia when important issues arise such as residency or major discipline issues. They are also involved in graduation.

Compared to five years ago, Lawnside and Barrington students are more prepared for high school. This is due to improved communication among the districts.

Some things they have implemented to close any achievement gaps and to integrate the three districts are the Summer Bridge Program which allows rising freshman to gain more skills, mentoring programs, an orientation program involving all

three districts that includes the parents with events in the spring and summer, and they specifically arrange homerooms to include students from each district in the homeroom for social integration.

To widen cultural and racial understanding among students and staff, Haddon Heights has required teachers to read the book "Black Students, White Teacher," and they have had professional development regarding how to meet the needs of different learners and the discipline program was revised. For students, they have had guest speakers on the topic, they have an organization called Multicultural Student University that hosts dinners, performs skits and dances based on a various cultures, and they have "Mix it Up" day which pairs students of different cultures or communities together to have conversations about diversity issues and they have a Holocaust curriculum. Additionally, the school has also offered a Multicultural Art class and an African American history class.

Mr. Corn does not see any logistic problem with incorporating roughly 300 more students from Merchantville into the building.

Michael Adams

Mr. Michael Adams is the Superintendent of Schools for the Haddon Heights Board of Education. He has been in the field of education for nineteen years including as a middle school and elementary school teacher, a vice principal and a principal. He has been Superintendent at Haddon Heights for four years.

Every five years, the district does a strategic plan. These are not state mandated, but they are voluntary on the part of the district.

Some of the educational aspirations in the strategic plan for the Haddon Heights School District were: for the Special Education director, who also serves Lawnside students, to work with the Barrington Special Education director to try to bring back out-of-district placements and meet those students' needs in-district, and for there to be

vertical and horizontal articulation among the three districts. Articulation means engaging in constant communication and bringing teachers together from various grade levels, such as 7th, 8th and 9th grade teachers to determine the educational goals for 9th grade students at Haddon Heights and gear the 7th and 8th grade curriculums to ensure that students are meeting those goals. It also means that the three districts implement the same evaluation standards for the teachers. He believes all goals in the last strategic plan have been met.

Mr. Adams testified that there is excellent communication among the three districts. For example, he provided a bus to Lawnside when a busing issue arose. Additionally, Lawnside and Barrington have allowed Haddon Heights to be on a payment plan for years where the districts have over-paid tuition. The three superintendents are in touch several times in a month. The districts have decided to combine their CPAG meetings for Special Education and they rotate which school will host the meeting. When the superintendents from Lawnside and Barrington have questions for him, he gets back with them, or he has another staff person get back with them immediately.

One way the three districts have been able to work together and save money is to buy only one set of the five required novels for all eighth graders and to rotate them among the districts.

Given his past communication with Mr. Strong from Merchantville he believes Mr. Strong will fit right into the mix of the superintendents from the other two schools. He has spoken with him enough to get a sense of his style and work ethic.

The Haddon Heights Board of Education has eleven members, nine from Haddon Heights and then one from each Lawnside and Barrington. He believes the Haddon Heights members are open to receiving feedback from Lawnside and Barrington. At each Board meeting, he recognizes accomplishments by staff and students in addition to discussing issues. Each Friday he emails a Board Brief to each of the members and the Lawnside and Barrington members are free to forward this

onto their own Boards. If Merchantville did not have enough students to make up the 10% legally required to have a seat on the Board, he would still recognize the students and staff and address Merchantville concerns at the Board meeting.

The Board resolution and contract regarding the potential sending-receiving relationship with Merchantville was passed unanimously with the Haddon Heights Board of Education. No one has expressed to him that this would be a negative change for the school. Some teachers who reside in Merchantville have expressed to him that this would be a positive change.

Haddon Heights has applied for the New Jersey Choice Program whereby they would accept tuition students from other districts.

Approximately 26% of 9th-12th graders at Haddon Heights are minorities and about 12% of 7-8th graders are minorities. Mr. Adams maintains his position that adding Merchantville students will not change these demographic statistics significantly. He sees value in racial diversity at his school since it is representative of what students will later find in the workplace and they are able to learn about one another and other cultures. He stated there is no required score on the NJ ASK in order to be considered for an AP course at Haddon Heights.

He does not see a logistical problem of housing the students if there are more Merchantville students at Haddon Heights than have traditionally attended Pennsauken. He estimates that Lawnside and Barrington pay approximately $13,000 in tuition per student. He sees value in retaining all students at the school regardless of whether they are high or low achievers on standardized tests since standardized tests are not the best predictor of what students can offer in the classroom.

James Kirtland:

Mr. Kirtland was qualified at the hearing as an expert in School Finance. He performed a feasibility study on behalf of Merchantville to predict the impact of severing

the sending-receiving relationship with Pennsauken and establishing the new relationship with Haddon Heights.

Mr. Kirtland has conducted many New Jersey feasibility studies in the past for schools seeking to dissolve or withdraw from another district. His resume was reviewed and admitted into evidence. He is aware of two dissolutions of Regional Districts in New Jersey, Union County and Lower Camden County and he has been involved with both of them. Mr. Kirtland is a certified CPA in many states now retired, after twenty-six years, from the firm now known as Deloitte & Touche. He has a bachelor's degree and an MBA from Columbia University. He has a tax practice and does consulting mostly in the area of school board finance. He served on the Berkley Heights, New Jersey school board for about fourteen years. He has been performing statistical and mathematical studies since 1995. He performed feasibility studies in North Haledon and Oradell school districts where there was an issue of withdraw or dissolution.

Normally in feasibility studies of school districts, he looks at the last three years of audited finance information. He does not use projected budgets since they are only planning documents. The documents in New Jersey that reflect what districts actually spent are known as the CAFR. He also obtains the equalized property value reports published by the state of New Jersey and the School Report Card. His end result will be a calculation of the projected new tax levy and tax rate after the districts have dissolved or withdrawn.

In this case, he also spoke with the Board Secretaries of Haddon Heights, Pennsauken and Merchantville to obtain the approved tuition rates from the state for those particular sending-receiving relationships. Additionally, he uses past enrollment data, data given to him by the demographer, Dr. Grip, and mathematical calculations to predict enrollment. He prepared three reports.

He has to make assumptions to determine what is going to happen. The main assumption he makes is that this is going to be a permanent change. He does not take into account changes that would have occurred regardless of whether the school

dissolved. Additionally, he assumed that the maximum tuition rate will be charged by Haddon Heights to Merchantville since Lawnside and Barrington already pay that amount. Although this amount is different than the amount in the contract signed between Merchantville and Haddon Heights, in his experience, this number can change from the date of the agreement.

To determine the new tax levy for a community, he looks at the revenue items, state aid, federal aid, projection those against the expenditures and come to a tax levy. He does that for five years and gets the totals and takes an average to determine the projected impact on the tax levy. He uses a five year average in case there is an unusual year.

He uses the available tuition rate and he estimated the total tuition loss to Pennsauken will be $800,000 at approximately $200,000 per year during the four-year phase-out period. Given that Pennsauken's expenditures are less than $800,000, he estimates that in the first year of full implementation, it will cost tax payers in Pennsauken $259,000. Since the average property value in Pennsauken is $90,000, he estimates that the tax burden on Pennsauken tax payers on the average home would be $4.00 per year, for a total of $16 over the four years of implementation. This is utilizing an equalized tax levy which is calculated according to the full tax levy of the town so it is a rough estimate for the individual tax payer, not taking into account many individualized circumstances. Additionally, since Pennsauken has a surplus, it could use that first before charging tax payers the offset amount.

This increase in tax levy will not violate the new law that places a 2% annual cap on raising property taxes. This is because the increase will be over time and not all in one year and additionally, the past three years of tax levies in Pennsauken have remained the same. Since the 2% cap can carry over from previous years, in the fourth year, there will be an 8% cap, not a 2% cap and Pennsauken will never go above that. The opposing expert, Mr. Higgins calculated that this increase will go above the 2% cap, but that would only happen if the severed relationship occurred all at once in one

year and unused caps could not be carried forward, but that is not the current plan and he reads the legislation to allow a town to "carry over" unused caps.

In his opinion, severing the sending-receiving relationship with Pennsauken will therefore not have a significant negative impact on Pennsauken. Merchantville will actually "break even" since the tuition rate is marginally lower for Haddon Heights than Pennsauken but he factored in an increased transportation cost since Haddon Heights is a few miles farther than Pennsauken. Therefore, Merchantville will not be negatively impacted and Haddon Heights, Barrington and Lawnside will actually benefit from lower tax levies as a result. Since there will be more students at Haddon Heights, this will distribute the tax burden over a larger population and taxes will actually go down somewhat in Haddon Heights, Lawnside and Barrington.

Additionally, he believes that home values in Merchantville will probably go up if they establish a sending-receiving relationship with Haddon Heights since home prices in New Jersey have been traditionally linked to the quality of education available in the community. He had no hard data to rely on when making that assumption.

He also disagrees with Mr. Higgins about what is the "real bottom line" in this situation since he believes the net impact will be on the tax payer, not the loss in revenue to the Pennsauken. Mr. Kirtland assumes there will be an offset in expenditures in Pennsauken since there will be approximately sixty fewer students. When this occurs, Boards usually respond by laying-off teachers or reducing expenses in another way. He makes the assumption that school boards will always try to maintain the current teacher/student ratio. Under that rational, upon losing sixty students, Pennsauken will likely lay off 5.4 teachers to meet the reduced need.

On cross examination, Mr. Kirtland admitted that if Pennsauken did nothing to address the loss in revenue and it actually lost $800,000 all in the first year that the cost to the taxpayers would be $16.00 per year, according to his calculations. Therefore, this would be a total increase of $48.00 over four years. Mr. Kirtland stated that this would

not happen though because of the phase-out period where Merchantville students would be phased out of Pennsauken one grade level at a time over four years.

Richard Grip:

Dr. Grip was qualified as an expert as School Demographer and Psychometrician. His CV was entered into evidence. A Psychometrician is a statistician specializing in the field of education, psychological and sociological fields particular to those fields using quantitative techniques. His main goal is project enrollment and to conduct racial analyses when requested.

Dr. Grip holds a Bachelor's degree in civil engineering, a Master's degree in science and education and a Doctoral degree in Educational Statistics and Measurement. He has performed about twelve educational feasibility studies over the course of his fifteen years in the field and he is also the demographer for New York City schools. Additionally he has performed statistical analyses for universities and he has worked with New Jersey districts in Watchung, Carlstadt, Oradell as part of the Riverdell Regional case, South Hunterdon and Cape May. He was first hired by Merchantville in 2007 to do a preliminary racial impact analysis and he then also wrote the January 2012 expert report for Merchantville. Racial impact is an element of demography.

When Dr. Grip does statistical analyses for school districts he looks at statistics regarding birth rates, census data, and economic data. The data for Merchantville shows a historically stable population from 1940 to 2010 so there is not a lot of change predicted in the number of people there. It is between 3700 and 4400 people. In 2010, sixty-five percent of the population was white and the average family income was $88,000.

In Pennsauken, there was a lot of growth between 1940 and 1960 and then population has remained stable since that time. The general population is about

36,000. Pennsauken was 47.6% white and the average family income was $69,000 in 2010.

The best way to predict future enrollment in schools is to first look at historical enrollment. He also looks at birth rates and what type of housing exists in the community. He uses the Cohort Survival Method which shows how many children are progressing, or surviving, to the next grade level. This is the preferred method by the New Jersey Department of Education. When the grade level falls below thirty-five students, it becomes more difficult to predict with accuracy.

For all five districts involved, including Lawnside and Barrington, he projected enrollment for all races combined and then broke it down by race. During his testimony, Dr. Grip went through tables appearing in his expert report and in Dr. Fine's, the Pennsauken expert, and corrected incorrect numbers. Additionally, he wondered if Dr. Fine is factoring in Choice students into her calculations since her numbers were not correct. Additionally, he pointed out that Choice students should not factor into calculations since they are students that attend Merchantville schools but do not reside there. All values regarding the number of Merchantville students attending Pennsauken were obtained from Mr. Strong.

He calculated the average cohort survival for all students in eighth grade in Merchantville going to Pennsauken was 31% over the past six years. Overall he found that Merchantville students generally make up only 4.1% of all students at Pennsauken high school.

He analyzed student populations in all five districts in question. Over the past six years, the population at Pennsauken schools has been stable for Pre-K to eighth grade students but it has been declining at the high school. There is a low survival rate for Pennsauken 8th graders to 9th grade.

There is no increasing or declining trend with regard to births in any of the five districts. They are all relatively stable; therefore there is no indication that there will be

a surge in kindergarten students. There are no major housing changes to effect enrollment projections.

For Pennsauken High School he is projecting a decline over the next two years from 1477 students to 1463, but then after that he is predicting an increase of about fifty students to 1527. For Merchantville, he is not predicting an increase or decrease in enrollment. For grades 9^{th}-12^{th}. He predicts about fifty-five to sixty-five students. For Barrington, he predicts stable high school enrollment at about 270 students. For Lawnside the projected range at the high school is stable around 110-120 per year. Haddon Heights Elementary School is projected to increase enrollment slightly but the high school enrollment is projected to come down to 600 students in 2017 and 2018.

Therefore since Merchantville sends about sixty students each year and Pennsauken is projected to increase its population by about fifty by the time a phase in would occur, then he predicts that overall Pennsauken will only have about a ten-student differential and therefore only a loss of .7% students. In his opinion, that is incredibly small compared to the overall 1477 population of the high school. Even if Merchantville withdrew all of its students at once, it would not be as great some of the natural declines that have occurred at Pennsauken. For example in the 2008-2009 school year there was a decline of 120 students and from 2011-2012, there was a decline of approximately sixty students.

In his opinion, Haddon Heights has the ability to house Merchantville students since their facility houses 1777 students and they are about 300 students below that number at the moment. They may have to increase some student/teacher ratios, but housing should not be a problem.

In terms of a racial composition analysis, over the past six year, the white population in Merchantville has comprised between 52% and 58% of the population. This is very different than twenty years ago, the last time Merchantville attempted to sever its sending-receiving relationship with Pennsauken. At that time, the population was about 95% white. He pointed out that since Merchantville and Pennsauken have

both increased their minority populations since that time, and given Haddon Height's diverse environment, that this is an entirely different analysis.

The percentage of white Merchantville high school students that attend Pennsauken has declined over the past six years from 51% to 28%. In the 2012-2013 school year 72% of the Merchantville student who attended Pennsauken were minorities.

At Pennsauken, for the entire district over the past six years, the white and black populations have declined and the Asian and Hispanic populations have increased. Hispanic students now make up almost 40% of the district. Overall, the minority population in the district went from 81% to 84.66%. It is very unusual to see a district without at least one race occupying at least 50% of the population, but this is what is occurring at Pennsauken. This suggests that you have an unusually diverse environment at that school.

In the past six years, there has been a decline in Pennsauken High School students. First, only 91% of Pennsauken 8th graders actually go to Pennsauken High Schools. Also, the average annual loss of minority students from 8th to 9th grade for the past eleven years is thirty-eight students. The average annual loss of white students from 8th to 9th grade over that time is twenty-five per year.

At Haddon Heights High School, the population is 27% minority and 73% is white. The minority population is primarily due to the Lawnside population, which is predominantly black. Therefore, this school is also diverse.

Overall, he projects a .72% loss, less than 1%, of white students at Pennsauken. To arrive at this number, he took the number of white Merchantville students compared to the entire Pennsauken High School population over five years into the future. This differs from Dr. Fine's analysis where she claims a 12% difference since she looked at only the number of white Merchantville students compared to the entire white sub-

population. Dr. Grip disagrees with that type of analysis since it does not take into account the entire population.

The most recent count of white students who attended Pennsauken from Merchantville was in the 2012-2013 school year. That count was seventeen students. Dr. Grip points out that Pennsauken is losing more white high school students from its own district, on average twenty-five a year. He projected a loss of two white Merchantville students after the fifth year of the phase-in process. He believes with a reasonable degree of certainty that this is not a significant negative impact on Pennsauken school. He did concede that these students would be in addition to any additional loss of white students, which averages twenty-five per year and that the loss of Merchantville students would slightly exacerbate this trend.

Dr. Grip did agree that if in the 20112-2013 school year, the white Merchantville students were removed from the Pennsauken High School; it would have constituted 6.7% of the white subgroup. He believes that Pennsauken will have the ability to absorb the loss of approximately sixty Merchantville students since he expects an increase in the student body of about fifty students.

Peter Carter

Mr. Carter was certified before the court as an expert in the field of Educational Administration and Curricular and Co-curricular programming and New Jersey Public School Administration.

His education includes a Bachelor's degree from Fordham University in Classical Languages and a minor in Philosophy. He also holds a Master's degree in Educational Administration from Hofstra University. He has experience teaching Latin and English in a parochial high school in New York. He then went on to hold various assistant principal, principal and superintendent positions through the region in New York, Delaware and New Jersey for approximately thirty-six years. He served as an assistant principal for an alternative high school in Brooklyn New York for young men who had

criminal records. He worked as a principal in Newark, Delaware during a time when there was court-ordered desegregation in the district and he had to combine two racially-diverse schools. He served as a principal in Metuchen, New Jersey in a primarily white school. He went on to become an assistant superintendent in Irvington schools and improved the HSPT scores for the students there from a passing rate of 15.4% to 50%. He then served as superintendent of Roselle Schools in Union County during a time when the racial and economic make up of the population was in flux. He was then asked to serve as the Essex County Superintendent and he remained there for six years. This was during a time where there was a state take-over of the Newark School District and also during the Abbott decision. He then returned to Irvington school district as superintendent and reduced an $8 million deficit to a $3 million surplus.

Mr. Carter then went on to become the superintendent of the K-8 district in Ringwood, New Jersey. He collaborated very closely with the Lakeland District, which is where his eighth graders attended high school. In his semi-retirement, he has served as the interim superintendent in Plainfield and Hoboken in recent years. He has extensive experience reviewing and adjusting school budgets.

He was hired by the Merchantville District to consult with them on the process of severing its sending-receiving relationship with Pennsauken and establishing a new relationship with Haddon Heights.

As part of his services, he spoke with Marilyn Martinez, the Superintendent of Pennsauken schools and she did not express any concerns with him regarding severing the relationship. The district was not receptive to him actually visiting the school. He also spoke with Haddon Heights administrators and visited the school.

In his opinion, the education offered by Haddon Heights is better than Pennsauken High School. In reaching this conclusion and evaluating what the effects of the new relationship could be Mr. Carter reviewed test scores, attendance rates, the number of SAT test-takers, class size, AP course scores, drop-out rates, instructional

time, curriculums, co-curricular activities offered, outreach to students before high school, experience of the administration, social integration of the sending districts and cultural diversity.

Mr. Carter felt that Haddon Heights High School lends itself to a very fine and positive educational experience for the students. He believes the instruction, the curriculum, and the sense of oneness with the other two communities that send students all contribute to this assessment.

The scores on the High School Proficiency Assessment (HSPA) are better at Haddon Heights with 73% of the students score "adequately" or "proficiently" whereas Pennsauken students have 50% of students scoring in this range. On average, Haddon Height's SAT scores are better than Pennsauken's and there are more students at Haddon Heights actually taking the exam. About 23-26% of Pennsauken students take AP classes, but about 50% of Haddon Heights students take them. Of the Haddon Heights students who take the AP test, 83% of them scored a three or better whereas only 22% of the Pennsauken students scored in that range. A score of three, out of a possible five, is usually considered a passing score and could allow the student to obtain three college credits.

Additionally, Merchantville students' performance in grades 6 and 7 on the NJ ASK test are more in line with the Barrington, Lawnside and Haddon Heights students - with proficiency scores between 63-70% whereas Pennsauken was 50.9% proficient.

Mr. Carter analyzed the language arts and specifically the Persuasive Writing curriculum at both schools. He found that although both schools meet the core standards set by the state, the Haddon Heights curriculum had the state standards more purposely mentioned and incorporated in the school curriculum. Additionally, staff members were named on the document as contributors to the curriculum. He felt this created a "buy in" by the teachers. He felt the Pennsauken language arts curriculum does go to the same lengths and depths as that of Haddon Heights'. In the Persuasive Writing curriculum, he felt that the Haddon Heights' curriculum was easier to

understand and also went into greater depth and will produce a better performance by students.

Additionally he determined academic rigor between schools by analyzed course offerings, course descriptions, and whether there are prerequisites for upperclassmen course. Overall he felt that although there was a good deal of rigor in some of Pennsauken's courses, Haddon Heights had a greater number of rigorous courses based on the description of the course and prerequisites needed. He felt there was more rigor and challenge in the lion's share of the Haddon Height's courses.

According to his findings, Pennsauken is evolving and trying to improve its current status. The school had a Comprehensive Assessment Performance (CAPA) evaluation by the State of New Jersey. These assessments are only done in districts where there the School Report Card indicates some issues. The CAPA report for Pennsauken indicates that the high school especially needs a lot of work. Mr. Carter is familiar with these reports since the district of Irvington received one when he was there. Action Plans are required when a district receives a CAPA report. Mr. Carter did not see an Action Plan from Pennsauken.

In extra-curricular activities, Pennsauken and Haddon Heights are relatively equal except that Haddon Heights offers the additional suburban offerings of tennis, swimming and golf. He believes that if Merchantville students leave Pennsauken it will have no negative impact upon on the sports programs since the largest number of students in one activity are four students on the football time over a four-year period. This number is so small it would not be influential.

The club offerings and participation by the Merchantville are unclear but Merchantville students participate in clubs in a very low number.

Overall, the Haddon Heights class size is a bit smaller than Pennsauken. Merchantville students would benefit from this since they are already accustomed to

small class sizes. If Merchantville students left Pennsauken and the teaching staff is not reduced, there would be no educational impact on the Pennsauken students.

Haddon Heights reports thirty to thirty-five minutes more of instructional time per day than Pennsauken. This is equivalent to an extra period in the day and it would extend the number of courses per semester that Merchantville students could enjoy.

Overall, more Haddon Heights students come to school when comparing attendance rates. There is a 92.7% attendance rate at Haddon Heights and a 90.4% attendance rate at Pennsauken.

The graduation rate at Haddon Heights is better since it is 88% and Pennsauken is 81%. The drop-out rate at Pennsauken was 2.5% in the previous year, which is 1.1% over the state average. This is compared to Haddon Heights' drop-out rate of .3%.

Mr. Carter asserted that Haddon Heights does better outreach to its sending districts than Pennsauken currently does for Merchantville, currently the only sending district there. Pennsauken did not indicate any outreach activities for the Merchantville students; they only stated that contact with the Merchantville students was left to the guidance department.

Additionally, there is an established operation for articulation for curriculum between Haddon Heights and its sending districts. Pennsauken did not tell him about any curriculum articulation happening between itself and Merchantville when he spoke with administrators and therefore he believes none exists.

From his experience of performing curriculum articulation between the Ringwood and Lakeland district, he believes that this has a direct impact on students. This is because middle-school students met with teachers from the high school and they understood what was going to be expected of them in high school. Some advanced students were sent to the high school to take algebra courses where it was appropriate.

There is a positive an apparent social integration at Haddon Heights High School which he felt from the school video and when he visited the building. He expects the same type of social integration that occurs for Lawnside and Barrington will occur for Merchantville students as well. Pennsauken did not mention what they were doing to make Merchantville the totality of the high school building.

In terms of racial diversity, he felt that the current Merchantville composition is diverse in its own right and therefore this is different than the previous instance when Merchantville sought to terminate its sending-receiving relationship with Pennsauken. He believes since Merchantville, Pennsauken and Haddon Heights are all diverse districts that there will be no negative educational impact due to a decreased diversity. He conceded that the diversity at Pennsauken will decrease in a miniscule fashion. He does not agree that Pennsauken is or would be a segregated school if Merchantville left.

There will be a positive educational impact on Merchantville students because they will receive a better education. There will be no negative impact on Pennsauken students since Merchantville students occupy only 4% of the high school and they are there in such low numbers.

The loss of Merchantville student will not be noticed since the Pennsauken students never met them and also because the number of students has traditionally been so small in comparison with the Pennsauken high school students. Losing students from a high school is different than losing students from an elementary school where they have only twenty to twenty-four students in the class and they spend all day together. In the high school, the class size is normally larger and students see a variety of different student all day when they change classes. Although the high school students may better perceive why the Merchantville students are leaving, they will likely not care. If the students were concerned, he would present the issue to them openly and celebrate why Pennsauken is a good place to be.

Since in the past twenty years, which is the last time Merchantville attempted to sever its relationship with Pennsauken, there have been many changes in the choices

students have for education in New Jersey. This includes more Vocation-Technical high schools with more technology-oriented courses, charter schools and the New Jersey School Choice Act which was passed in 2010. These choices nullify any impact which could have been felt from the Merchantville students leaving Pennsauken.

Overall, Superintendent. Martinez at Pennsauken gave him the impression that they were moving forward and they were most concerned with increasing the amount of students who were prepared for higher education. He feels that Haddon Heights has already achieved some gains where Pennsauken is still striving.

Mr. Carter testified that the loss of Merchantville's tuition would not greatly impact Pennsauken's school budget of over $90 million. There would be very limited educational impact due to the reduction of revenue due to the loss of Merchantville's tuition monies. He estimates that there would be a loss of $260,000 in the year following Merchantville students leaving Pennsauken. Given Mr. Carter's experience with adjusting school budgets, he made adjustments to Pennsauken's budget to account for the reduction. He did not make any specific suggestions of where those deductions could be made. He reduced the "Regular Programs" line by $165,000, the "Essential Services, Administration and Information Technology" line by .5% or $9,300, the "Special Education" line by $35,000, "Speech, OT, PT and Related and Extraordinary Services" line by $8,300, and the "Operation and Maintenance of Plant Services" by .5% or $43,000. He relied on Mr. Kirtland's report for the total amount.

Marilyn Martinez

Ms. Martinez has been the Superintendent at the Pennsauken School District since October 2011. She attended elementary school and Girls High School in Philadelphia. She then earned her Bachelor's degree in Education, a Master's degree in Educational Administration and her Superintendent's letter. She is certified to be a superintendent by the state of Pennsylvania and reciprocally in New Jersey as of 1999.

After teaching English as a Second Language in the Philadelphia School District, she then held various Superintendent and Principal positions in the Philadelphia School District. She then went to Baltimore to serve in the Area Academic Office and returned to the Philadelphia School District in 2010 to serve as Principal to an urban troubled high school with the purpose of improving the academic experience there.

There are eleven schools in the Pennsauken district and they serve approximately 5600 Pre-K to 12th grade students. The racial breakdown is 38% Latino, 34% African American, seventeen or 18% white and a lower-teens count of Asians and then the remainders of the students are multiracial. In the high school, there are a lower percentage of white students and more Latino and African-American students. There is a relatively large Vietnamese population at the school. On cross examination, Martinez admitted that the white population at the high school in the 2012-2013 school year was 17.05% and 15.43% in the elementary population.

Since her arrival at Pennsauken, the Board of Education asked her to improve the perception of the school. She first implemented a code of conduct with earlier consequences for misconduct and more strict enforcement of the school uniform. She met with the young people in town-hall style meetings. This helped to build relationships. She also set high bars for the administration to ensure that students were in their classes on time in the high school. If students were lingering in the hallways, parents would be called. Additionally, the use of cell phones in the hallways is no longer permitted.

Martinez highlighted some further initiatives she created at Pennsauken High School. She identified overaged students and implemented a "credit recovery" program aimed at these students. She has also improved the drop-out rate from 18.2% to 15.3% in the two years she has been there. She initiated partnerships with Camden County College for a Gateway to College program and enabled her students to obtain an Early Childhood certificate through the College upon graduation. She implemented a mentoring program with fifty teachers donating their time to become trained. For the

first time, every sophomore in the school will be taking the PSAT to encourage college readiness, even for military-bound students.

With access to Title 1 dollars, which is grant money to support students at risk, she initiated intensive interventions to increase the reading levels of some students. There is also a new partnership with the Pennsauken Library to make sure all textbooks are accessible.

She made personnel changes by hiring a new principal at the high school Without regard to whether or not Merchantville withdrawals from Pennsauken, she laid off nine teachers, seven of which were at the high school, and is now proposing to lay off nine more teachers. This is to correspond with the reduction in the student population over the past five years. Additionally, she eliminated a director position.

Martinez testified that there is no way to differentiate who are the Merchantville students in the high school since they are a part of the fabric in the community. Both Merchantville and Pennsauken students attend the same 9th grade orientation programs in the Spring and in September when school beings. She has never been asked to create a separate program for Merchantville students.

Martinez testified that the communication between Merchantville and Pennsauken regarding special education students is a continuous dialogue about the welfare of the children and placement. On cross-examination, Martinez stated she has not actually participated in these conversations.

Martinez stated that no parent or student has ever complained to her specifically about the situation of Merchantville students at Pennsauken. If Merchantville leaves the high school, they are considering reducing the staff by laying-off a counselor, a social work and possibly other staff. She believes there will be a substantial economic and educational impact if Merchantville severs its relationship with Pennsauken. The economic impact will be felt because 65% to 70% of the students are from low

socioeconomic situations and the resources and materials to address this deficient, such as partnering with social service agencies like Twin Oaks, will be compromised.

She has not implemented any programs specifically geared toward Merchantville students. She has no documentation regarding curriculum articulation or any efforts of such made between Pennsauken and Merchantville students. She has not specifically spoken to any Merchantville students regarding whether they feel a sense of belonging in the school.

She testified that the diversity at Pennsauken would disappear if the seventeen white Merchantville students were removed from the high school since it decreases the other students' chance to have relationships with those students and pointed out that white students are already in the minority at Pennsauken.

Martinez could not specifically pinpoint which of her initiatives would be compromised if the district experienced the loss of Merchantville tuition. She admitted that despite the lay-off of the nine teachers, she has still been able to implement the initiatives she introduced. She has not considered a strategy to reduce overtime costs for custodians, secretaries or bus drivers since she is not planning on Merchantville withdrawing from the district. She disagreed with the Board of Education's plan not to increase taxes in the 2012-2013 school year.

She admits that she did not choose to hire either one of the assistant principals for principal when she terminated the tenured principal. She is aware of a discrimination and harassment lawsuit pending against the current principal from her previous district.

She was aware that some Pennsauken and Merchantville students have been choosing Charter Schools, NJ Choice Schools and Vo-Tech schools instead of Pennsauken High School in recent years. She was unsure of the numbers but did not disagree with any of the numbers the schools provided in response to Merchantville's OPRA requests.

Gary Higgins

Mr. Higgins was qualified as an expert in School Finance and related school financial issues. He was retained by the Pennsauken School District. He has a Bachelor's degree in Accounting in 1980 and he has held a CPA and a Public School Accountant's (PSA) license in New Jersey for thirty years. He is a member of various accounting organizations. He assists in budget projection and analyzing financial transactions for public entities. All of his work has been in the state of New Jersey.

He worked at John J. Eckelsten Accounting Firm for ten years and then opened his own firm with two partners in 1990 and is still employed there. Since 1980 he has worked with many school districts, municipalities and other authorities in the state of New Jersey. His firm currently works with eighty school districts, fifty towns and thirty other authorities in the state and he is the named Auditor for many of them. His financial analyses have never been criticized by the NJ Board of Education and a complaint has never been filed against him.

He was asked by Pennsauken to review the Merchantville expert reports and give his opinion. In order to do his analysis in this case, he looked Pennsauken's Comprehensive Annual Financial Report (CAFR) for the fiscal years ending in 2010, 2011 and 2012, the Pennsauken school budget for the 2013-2014 school year, the most recent tuition contract between Pennsauken and Merchantville, and the Merchantville feasibility reports.

Mr. Higgins noted that the actual revenue loss to Pennsauken will be $830,000 not $800,000 and the actual tax increase to the average tax payer at the end of the four-year phase-in period will be $47 per year forever into the future. Therefore, given that number, Mr. Higgins stated that in his opinion there would be a substantially negative financial impact on Pennsauken if Merchantville students leave.

In Mr. Higgins' opinion, there were no sources to validate the source of some of numbers representing the tax rates in the district. Nevertheless, he utilized those numbers and the calculations using those numbers were done correctly by Merchantville experts. He does not understand how Merchantville arrived at the conclusion that that by cutting 5.4 teachers this would close the budget gap created by the loss of Merchantville students, he assumes it is related to the student/teacher ratio but he cannot be sure.

In Mr. Higgins's opinion, there is nowhere in the Pennsauken budget where they could cut $200,000 as Mr. Carter attempted to do in his offered budget reduction which he discussed in his testimony. He disagrees with Mr. Carter's proposed cuts because it does not provide any narrative as to which specific account could be cut. Flexible accounts would require more detail that what Mr. Carter provided as to exactly what would be cut. He feels that Mr. Carter crossed two "bridges" without explanation. First he reduced the revenue loss from $800,000 to $260,000 without accounting for the rest and then Mr. Carter cut $260,000 from the Pennsauken budget without a detailed analysis.

The Pennsauken budget surplus has only $2,370,171.80 available in the "unassigned fund balance" and that amount would be depleted in three years if it is charged with the $800,000 each year over a three year period. The only sustainable way to make up for the loss of the Merchantville tuition revenue to Pennsauken is to pass on the charge to the taxpayers which would be an average of $47 each year to the taxpayer with the average home value of approximately $90,000. On cross examination, Mr. Higgins conceded that his analysis did not consider what expenses could be cut if the sixty Merchantville students no longer attended Pennsauken. Additionally, he did not refute that there would be a financial benefit to the tax payers of the four other districts involved, that was outside the scope of what he was asked to analyze.

On cross examination he agreed that in its 2011-2012 budget, Pennsauken budgeted to pay $2 million in charter school tuition and $712,500 in tuition to county

vocation schools for Pennsauken students who attend these schools, but he had not reviewed that document prior to his testimony.

As a result of the recent law that imposes a 2% tax levy cap, districts are now using any surplus for cash flow and contingency purposes. Therefore, in his opinion, there is less money readily available to districts than before the tax levy cap. Districts are only allowed to 2% of their adjusted general fund expenditure if it is a surplus. Mr. Higgins agreed with Mr. Kirtland in that the 2% cap could be carried over or "banked" from one year to the next for either three or four years. He clarified that a district will lose the "compound effect" of the 2% over the years, if it banks the levy cap. Theoretically, if a district banks for four years, then it could charge an 8% increase to the tax payers in the fourth year, but it could not charge 2% of what the total increase would have been in the previous years had the district incrementally raised the tax levy by 2% in the preceding four years.

Michelle Fine:

Dr. Fine was admitted as an expert in Social Psychology of Education, Race Relations, and Youth Development as they pertain to Education and Psychology. She obtained an undergraduate degree from Brandeis University and a Master's degree at Columbia University in psychology and philosophy. She holds a Ph.D. in social psychology from the Teacher's College of Education at Columbia. She was first employed at the University of Pennsylvania in 1981 as a professor in the human development program and was there until 1992. She worked with the public schools of Philadelphia by assisting in the major transition of separating large high schools in smaller schools.

Dr. Fine has conducted thirty years of research on schools, racial stratification in schools and she evaluates educators' and students' reactions to school changes. She focuses on youth development and the relationship of student outcomes to policy change. She has taught at universities from undergraduate to doctoral level. She is a past chair of her department and currently a Distinguished Professor of Social

Psychology and Urban Education at the City University of New York Graduate Center since 2002. She conducts ethnographic studies inside high schools in New York and New Jersey. Additionally Dr. Fine has consulted with the New Jersey and New York Departments of Education to determine the impact of standardized testing on English language learners and has worked in an effort to keep charter schools accessible to the public.

Dr. Fine was retained by Pennsauken. As part of her charge, she read the studies and materials provided by Merchantville to offer another perspective. She did not conduct interviews of students or administrators.

Dr. Fine found that severing the sending-receiving relationship in this case will have a substantial negative impact on race and class distribution and a substantial negative educational impact. She differentiated between "diversity" and "segregation." Diversity is a term used to talk about various groups, they may be racial, national, ethnic, first language groups, or special education groups. The word segregation is usually used in an analysis of white groups compared to black, Latino, and Asian groups. There can be racial imbalance at a school despite its diversity.

Pennsauken as a town is much more racially and ethnically diverse than the high school. Students who move from Merchantville 8th grade to 9th grade at Pennsauken do not represent the full racial and ethnic compositions of Merchantville. Far fewer white students at Merchantville are choosing to go to Pennsauken high school. Educational research shows that New Jersey schools are becoming increasingly segregated, which means there is heavily one race at a school. Dr. Fine agreed with Dr. Grip's changes to the student statistics in her report.

When the school becomes less white, usually middle class black and Latino families also move out. When this happens, an unpleasant dynamic historically occurs. As the white students leave, the high level courses are harder to fill, AP classes are harder to sustain, and attracting highest quality educators becomes more difficult as the student body becomes less diverse or elite. Additionally, it is her position that this case

is not just about a loss of sixty-one Merchantville students, but that other families will leave the district based on the perceptions generated by allowing Merchantville to sever the relationship.

Numerically, Pennsauken High School is a segregated school and this would increase if Merchantville students were removed. She pointed out that Dr. Grip's statistics project that Pennsauken will be at 90% minority in the fourth year of the phase out. Since a disproportionate number of white students at Merchantville already choose not to go to Pennsauken, severing the relationship would have a substantial negative racial impact both on the loss of the literal bodies but also in the stigma associated with that school. She projects that as a result of severing the sending-receiving relationship; there would be a loss of ninety-nine white students, which would be 12% of the white student body, after completion of the phase-out period. Dr. Fine concluded that severing the relationship would in essence create a subsidy to Merchantville families who would have otherwise opted for private high schools.

Dr. Fine believes the New Jersey Interdistrict School Choice program exacerbates segregation. More white students are availing themselves of a Choice option than the black and Latino students. Economically disadvantaged students are less likely to take advantage of choice options because of language barriers, knowledge of the programs, potential transportation issues and the loss of the free lunch program in charter schools.

Dr. Fine looked at the annual yearly progress (AYP) in Haddon Heights and Pennsauken. Often, larger schools and schools with a substantial number of students under the poverty line are less likely to meet AYP. In New Jersey 29% of schools did not meet AYP in 2006 and this number increased to 50% in 2011. If Merchantville leaves, this would continue to hamper Pennsauken's capacity to meet AYP.

Dr. Fine compared the performance of economically disadvantaged students at Haddon Heights to those at Pennsauken. The data for language arts shows that

Haddon Heights' students are outperforming their Pennsauken counterparts, but Pennsauken has more English language learners.

Contrary to the arguments made by Merchantville, the data does not show that students will excel beyond their current achievement levels if they attend Haddon Heights. For example in mathematics, the Lawnside students are performing lower than the Haddon Heights and Barrington students on the HSPA and in AP classes. Additionally, the Lawnside students are mostly in the lower level math classes are also disproportionately in the ASHA class. The ASHA is the test administered for New Jersey students who do not perform well on the HSPA.

Additionally, at Haddon Heights High School, white students are more likely to be in the high level math classes and African American students are much less likely to be represented in these classes. At Haddon Heights, 70.5% of the students are white and 68% of the students in the advanced math classes are white.

When Dr. Fine looked at economically disadvantaged students in both schools, the Pennsauken students are more likely to be advanced proficient in mathematics than their economically disadvantaged counterparts at Haddon Heights.

With regard to SAT averages, students from Haddon Heights have the highest average verbal, math and writing scores. They score better than students from Barrington, who in turn scores better than students from Lawnside.

Dr. Fine disagreed with Mr. Carter's statements that Pennsauken students will not care about Merchantville students leaving Pennsauken. She has found that in general lower-income students are much attuned to educational decisions which are made by adults on their behalf.

On cross examination, Dr. Fine admitted that as an expert in a previous case involving Englewood Cliffs school district, there were a lower percentage of white students at the school and she determined as an expert that it was an integrated

district. Dr. Fine stated that she made the determination that Pennsauken was segregated in part because the racial makeup of the school does not match the overall Pennsauken community. Additionally, she admitted that the largest decrease in any one racial group at Pennsauken high school recently has occurred amongst black students.

Hypothetically speaking, if there were only a total of ten Merchantville students attending Pennsauken and they were all minorities, she would say the loss would still be a negative racial impact to Pennsauken but it would not be substantial. It could still create another layer of social stigma. There would be an educational impact, but she would have to know more about the students to determine if it was a substantial impact.

She is not aware of any action taken by Pennsauken Board of Education to limit the number of children who leave the school through the Choice program.

James Kirtland – Rebuttal

Mr. Kirtland was called as a rebuttal witness after the testimony of Mr. Higgins was presented. There are two reasons why he believes Mr. Higgins' opinion about the $47 tax levy increase is not correct. First, Mr. Higgins incorrectly started off by talking about the cumulative effect over four years. This is illogical because increases are not normally presented to tax payers in this way; they are normally presented in yearly increments. Second, Mr. Kirtland disagreed with the concept that there would only be revenue loss and that expenditures would not be reduced in response to that loss. This reasoning defies logic. There are ways that schools can reduce expenditures like privatizing services or controlling overtime. Mr. Higgins only defended this position by stating that he was not hired to investigate other ways of reducing expenditures.

Mr. Higgins also admitted that he did not review the total taxes for Pennsauken. He uses inappropriate comparisons in order to make the tax levy appear more significant since he compared the tuition only to the school tax levy, $35 million, and not the overall tax levy for the town, which is $77 million.

In his experience on school boards, when enrollment is down the normal practice is to lay off teachers. The testimony of Mr. Higgins and Superintendent Martinez did not address declining enrollment. Although the district recently laid-off some teachers, neither witness testified that the district had issued the layoffs in response to declined enrollment.

Upon analyzing the video of a recent Pennsauken Board of Education meeting, Mr. Kirtland surmised that the reason for the layoffs was declining enrollment and it was not a purely financial decision. This was because the County Superintendent wanted the Board to raise taxes and to address the problem of declining enrollment in recent years. Since the County Superintendent recommended a $700,000 increase in tax levy, this goes against Dr. Higgins' argument that a $65,000 increase in tax levy to address the Merchantville tuition shortfall, after reducing expenditures, is substantial.

Additionally, Mr. Kirtland pointed out that the projected $800,000 loss in tuition from the Merchantville students may actually be less if other school choices in the area become more prevalent in the coming years.

Camille Zubrinsky Charles

Dr. Charles was admitted as an expert in Sociology specifically related to the study of Racial Inequity in Public Institutions. She holds a Ph.D. in sociology from University of California in Los Angeles. She also holds a Master's degree in sociology and two undergraduate degrees, one in sociology and the other in communication studies. She is profession of Sociology, Africana studies and Education at the University of Pennsylvania where she is also the Director for the Center of Africana Studies. She teaches many classes in her areas and she has been the principle investigator on national and regional sociological research studies on race and education. She is on the editorial board for the American Sociological Review and was invited to be a fellow at the Strauss Institute for Advanced Study of Law and Social Justice at NYU School of Law. In that fellowship, she produces research on racial,

ethnic, and economic segregation in neighborhoods and schools. She has been admitted as an expert in sociology in various legal contexts.

Dr. Charles was retained by Merchantville to be a rebuttal witness to Dr. Fine's report. She reviewed Dr. Fine's report and other legal documents, the feasibility studies in this matter and other literature on segregation and diversity as it relates to AYP. She is of the opinion that there will not be a substantially negative racial or educational impact on Pennsauken if the sending-receiving relationship is severed.

In her review of the statistics, Dr. Charles found that all five of the districts involved in this case are undergoing racial transition. This transition is felt differently in communities that have more land and less population such as Merchantville, as opposed to more densely populated towns like Pennsauken.

In Merchantville, she noted that in 1990 the population was 96% white and is now just over 75% white. The black population has increased six fold from 2% to 13%, the Asian population has doubled and the Hispanic population increased five times.

Pennsauken is also transitioning racially. There is a larger decline in their white population which was 80.5% in 1990 and more recently at 47.6%. There is a much steeper decline of the black population, a slower decline of the Hispanic population and an increase in the Asian population. The high school is experiencing the same declines and increases as the larger community.

Removing Merchantville from Pennsauken High School is not a traditional story of "white flight" since there has not recently been one group leaving the school. Statistically speaking, removing the white Merchantville students from the school will not result in any change regarding racial composition at the school since the change in in the minority population would be less than 1%. This is not a school with just two racial groups. The Merchantville students that attend Pennsauken are more black and Hispanic. They are a diverse set of students, but not identically diverse to the Pennsauken high school student body.

She disagrees with Dr. Fine's argument that it would be predominantly white families exiting Pennsauken High School – it would be predominately minority families. There is a loss of all populations at the school except Asians. Therefore, severing the relationship would not set a precedent for allowing "white flight."

Usually segregation is measured by the presence or absence of white students and there is virtually no change in the racial composition of Pennsauken High School if Merchantville students are not there. There will not be a loss to the Pennsauken students since they would not have known the Merchantville students before they were to attend. Dr. Fine's arguments about loss are not supported since she did not interview any Pennsauken students about this subject.

There would be a 3.5% increase in the minority population at Haddon Heights High School over the five-year phase in of Merchantville students. Additionally, the addition of Merchantville will also increase the class diversity at the school because Merchantville is not as affluent as Haddon Heights, but more affluent than Lawnside. Overall, she believes the new relationship at Haddon Heights will have a positive racial and educational impact on Haddon Heights and by extension also Barrington and Lawnside.

Dr. Fine's comparison of economically disadvantaged students at Pennsauken and Haddon Heights is lacking information since compiling statistics of students based only on the free or reduced-lunch program is a crude measure of economic disadvantage. More information about the students would require a higher security clearance since it would include private information about students and therefore would be difficult to obtain. Additionally, there is no precise information about test scores available to determine if some students were close to proficient on the standardized tests. Dr. Fine's statistical analysis of the racial groups at Pennsauken and Merchantville is not reliable because she uses statistical methods that require large sample sizes and she is not satisfying the basic numeric assumptions in order for the

data to be reliable. Also, Dr. Fine's opinion about how Merchantville students will perform at Haddon Heights is based on unclear data.

Dr. Charles disagrees that severing the relationship will necessarily lead to the departure of additional white students since there is already an increasing tendency among many Pennsauken and Merchantville students to make choices outside of Pennsauken High School that do not require financial resources.

After considering the testimony offered and the exhibits entered, factual determinations and conclusions of law must be made regarding the impact severance of the relationship will have on the quality of education, the financial condition and the racial composition of the student population of each district.

With regard to the quality of education, the credible testimony of Anthony Arcordia, Dr. Johnson, Ronald Corn and Michael Adams regarding the existing sending-receiving relationships Barrington and Lawnside enjoy with Haddon Heights, coupled with the credible testimony of Scott Strong, Corn and Adams as to their vision for adding Merchantville to the Haddon Heights student population compel me, in the absence of any evidence to the contrary, to **FIND** that no negative impact will be visited upon Merchantville with regard to the quality of the educations its students receive if severance is granted.

Considering the expert testimony of Peter Carter and Dr. Fine, I assign greater weight to the testimony of Mr. Carter with regard to the impact severance will have on the quality of education offered by Pennsauken in light of he vast lifelong accumulation of practical hands on experience in operating schools and school districts. Accordingly, I **FIND** that severance of the sending-receiving relationship between Merchantville and Pennsauken will not result in a negative impact on the quality of education offered by Pennsauken.

Regarding the financial condition of the school districts, the credible testimony of Strong, Adams and Johnson paint a picture wherein even though petitioner would face

higher transportation costs if severance were granted, that the districts have many opportunities of trying to mitigate costs through the use of shared services agreements and book rotations.

The parties offered expert testimony by Mr. Kirtland and Mr. Carter, on behalf of petitioner, and Mr. Higgins, on behalf of respondent to opine as to whether either district would suffer substantial negative impact if the petition is granted. Kirtland and Carter concluded that there would be no negative impact on the financial condition of either district, while Higgins asserted that there would be a substantial negative impact on the financial condition of respondent.

I give the most weight to the testimony of Mr. Kirtland. He demonstrated vast depth of experience in the area of school finance and particularly in the area of the impact of dissolution of regional school districts and the severance of sending-receiving relationships. He thoroughly and meticulously delineated each of his findings and conclusions, and explained in detail the methodology utilized to obtain those findings and conclusions, walking through each set of data reviewed.

Mr. Higgins, while certainly knowledgeable and practiced in his field of expertise, did not appear to provide a similarly rigorous analysis. He appeared to adopt a linear approach, indicating by his testimony that the loss of tuition dollars by itself constituted a substantial negative impact on respondent. Were that the standard to be applied, no petitioning district would ever be able to clear the bar to obtain severance. Higgins also seemed to not fully appreciate the mitigating effect that the phase-in plan would have on any impact to the financial condition of respondent, at first overstating the impact on the tax levy and ultimately acknowledging that respondent has and will have the ability to bank a levy increase under the 2% cap provisions.

Accordingly, I adopt the findings of Mr. Kirtland and **FIND** that granting petitioner's petition for severance will create no substantial negative impact to either district.

Regarding the impact on the racial composition of the districts, petitioner offered expert testimony by Dr. Grip and Dr. Charles, while respondent offered expert testimony by Dr. Fine. All three presented as experienced and learned with significant experience in their respective fields and considerable bodies of accomplishment. Dr. Grip, like Mr. Kirtland earlier, offered a thorough detailed analysis of his findings accompanied by explicit explanation as to methodologies used and weight given to specific data. Dr. Fine did not offer the same thorough presentation, and her testimony was undermined to some degree by her acknowledgement that she had relied on some incorrect data; her agreeing that she had concluded in another proceeding that a school with a lower percentage of white students than respondent currently has was diverse and not segregated while concluding that respondent is; and her admission that she did not employ in the current matter certain methods which she characterized in a prior hearing as essential to validating her expert opinions.

Given the forgoing, I assign greater weight to the testimony provided by Dr. Grip and Dr. Charles. Accordingly, I **FIND** that the racial composition of the Merchantville students who attended Pennsauken High School during the last year data was available, the 2012-13 school year, is seventeen white, three Asian, and forty-one African American and Hispanic. I further **FIND** that 72% of the students Merchantville sent to Pennsauken High School were minorities. I further **FIND** that were Merchantville's students removed, at once, during the 2012-13 school year, the change in the racial composition at Pennsauken High School would have been only a .47% increase in the minority student population. I further **FIND** that if Merchantville students are phased-out over the course of four years, the total change would be only a .72% increase in the minority population. I finally **FIND** that since the 2007-2008 school year, the black student population at Pennsauken High School has decreased more rapidly than the Caucasian student population.

LEGAL ANALYSIS AND CONCLUSION

N.J.S.A. 18A:38-11 mandates that any school district that lacks high school facilities must designate a high school for its pupils through a sending-receiving

relationship. The "sending" and "receiving" districts then enter into a contract where the "receiving" district accommodates the out-of-district students while the "sending" district pays a fixed rate of tuition. N.J.S.A. 18A:38-8. To subsequently change or sever such relationship between school districts requires the approval of the Commissioner of Education. Bd. of Ed. of Englewood Cliffs v. Bd. of Ed. of Englewood, 257 N.J. Super. 413, 458 (App. Div. 1992), aff'd 132 N.J. 327 (1993), cert. den. 510 U.S. 991 (1993) ("termination of a sending-receiving relationship is subject ... to the approval of the Commissioner of Education") (citing N.J.S.A. 18A:38-13). Approval requires satisfaction of the criteria of N.J.S.A. 18A:38-13, which provides in pertinent part:

> [To change a sending-receiving relationship requires an] application made to and approved by the commissioner. Prior to submitting an application the district seeking to sever the relationship shall prepare and submit a feasibility study, considering the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by pupils in each of the districts, and the effect on the racial composition of the pupil population of each of the districts. The commissioner shall make equitable determinations based upon consideration of all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts. The commissioner shall grant the requested change in designation or allocation if no substantial negative impact will result therefrom.
>
> [N.J.S.A. 18A:38-13.]

"[W]hen a local board of education applies for permission to alter or terminate a sending-receiving relationship with another board [,the] commissioner is required to grant the requested change in designation or allocation if no substantial negative impact will result." Bd. of Educ. of Borough of Englewood Cliffs v. Bd. of Educ. of City of Englewood, 257 N.J. Super. 413, 459 (App. Div. 1992), aff'd, 132 N.J. 327, cert. denied, 510 U.S. 991 (1993) (citation omitted). The statutory analysis pursuant to N.J.S.A. 18A:38-13 for evaluating a modification request does not follow a traditional balancing process. Id. at 462. Instead, **any** finding of a substantial negative impact,

regardless of the benefits or positive impacts in other areas, defeats the petition for termination of the sending-receiving agreement. Ibid. "The focus of the Commissioner's inquiry is whether a substantial negative impact exists **at all**; if it does, severance is to be denied. . . There is simply no place in this analysis for the weighing of positive impacts once a substantial negative impact has been found." Ibid. In determining the impact of changing a sending-receiving relationship, N.J.S.A. 18A:38-13 specifies the factors to consider "including: the educational (offerings) and financial (budgetary) implications for both districts, the impact on the quality of education in both districts, and the effect on the racial composition of the pupil population in both districts. Ibid. (emphasis in original). Therefore, once a party has established that there would be a substantial negative impact on the racial composition, quality of education, educational offerings, or the financial standing of either district, the petition must fail.

Englewood is the seminal case regarding termination of sending-receiving relationships and its effect on the racial balance of public schools. Englewood Cliffs (Cliffs) was an affluent, predominately white, borough that sought to terminate its sending-receiving relationship with the neighboring Township of Englewood (Englewood), and filed a petition with the Commissioner of the Department of Education. The Commissioner transmitted the matter to the OAL as a contested case. At the time of the hearings, Cliffs was sending only twenty-one students to Englewood, fifteen of whom were white. However, the Englewood public school, Dwight Morrow High School (DMHS), had an increasing population of black and Hispanic students. Englewood claimed that Cliffs sought to terminate the sending-receiving relationship because Cliffs was engaged in "white flight," as opposed to the educational reasons cited by the Cliffs board. After ninety-nine days of hearings on the matter, the administrative law judge (ALJ) made numerous findings and determined that severance of the sending-receiving relationship would have a substantial negative impact on both the racial composition and the quality of education at DMHS. Englewood, supra, 257 N.J. Super. at 439–40.

The ALJ found that the number of Englewood Cliffs students who would be departing DMHS constituted a relatively small portion of the student population. But the

ALJ held that the minimal number of students affected was outweighed by the fact that the termination of the sending-receiving relationship between the two schools would give the appearance of white flight. The Commissioner affirmed.

The State Board of Education affirmed the finding below, but for different reasons. The State Board's decision focused more on the State policy that "[e]ducational considerations are primary in eliminating school segregation. The elimination of racial imbalance is not to be sought as an end in itself but because such imbalance stands as a deterrent and handicap to the improvement of education for all." Englewood Cliffs Bd. of Educ. v. Englewood Bd. of Educ., 12 N.J.A.R. 566, 688 (1990). Though the Board stated that the State policy against segregation sought to avoid a concentration of students in a school such that it would be characterized as a "minority school with the attendant 'sense of stigma and resulting feeling of inferiority,'"

> [s]uch educational considerations do not include the beliefs and social values of the individuals attending a particular school. Rather, as set forth above, resolution of the legal and policy questions with which we have been presented rests on fundamental educational principles applicable in all educational settings as those principles have been expressed in the decisions of the United States and New Jersey Supreme Courts.
>
> [Ibid.]

In other words, the Board rejected the reliance on the mere appearance of white flight as a foundation for the finding of a substantial negative impact on the quality of education. Instead, the Board focused on the connection between racial imbalance and the quality of education, noting that when there is a substantial negative impact on racial composition of a school, there is also a substantial negative impact on the quality of education at that school due to both the inherent benefits of an integrated learning environment as well as the stigma attached to "minority schools." This was made plain by the Appellate Division, which after affirming the holding of the State Board, declared that a mandate of N.J.S.A. 18A:38-13 was "to avoid withdrawals for discriminatory purposes which would have the effect of recreating segregated school systems with

their inherent inequality of educational opportunity." Englewood, supra, 257 N.J. Super. at 464. "More to the point is the interrelationship between racial balance and education . . . These are not isolated factors. They are different sides of the same coin." Ibid.

In a recent decision considering a petition seeking severance, the Commissioner of Education noted that "*Englewood* and its progeny establish that a de minimis statistical change may constitute a "substantial negative impact" when coupled with certain aggravating circumstances. Examples of such aggravating circumstances include, *inter alia*, a trend of rapidly declining Caucasian enrollment, evidence of projected symbolic loss, and a high percentage of projected change in the gross Caucasian population upon severance." Board of Education of the Borough of Longport, Atlantic County v. Board of Education of the City of Atlantic City, Atlantic County, and Board of Education of the City of Ocean City, Atlantic County, OAL DKT. NO. EDU 8152-12, AGENCY DKT. NO. 112-4/12 (2014).

In the present matter, the record reflects that whether the Merchantville Students were to move to Haddon Heights all at once or phased in over a four year period, as is expected, the resulting increase in the minority population at Pennsauken High School would be less than one percent. I **CONCLUDE** that this constitutes a de minimis statistical change which much nonetheless be scrutinized for aggravating circumstances.

The record reflects, per the credible expert testimony of Dr. Charles, that departure of the Merchantville students will not statistically significantly change the racial composition of Pennsauken High School, thus there cannot be said to be a high percentage of projected change in the gross Caucasian population should severance be granted. Additionally, Dr. Grip noted that an anticipated subsequent change in racial composition (also less than one percent in 2017-2018 school year) will occur after the phase-in has completed and cannot be attributed to severance. Similarly, Dr. Charles noted that the population of black students has decreased more rapidly in Pennsauken since 2007-2008 than the Caucasian student population. This would tend against a finding of a consistent and rapid decrease in Caucasian enrollment at Pennsauken over

time. Dr. Fine's assertion that this is because any Caucasian students who could leave have already left, either to Parochial Schools or through School Choice is unsupported net opinion.

Similarly, the record does not contain evidence of projected symbolic loss. To the contrary, Dr. Charles and Mr. Carter offered credible expert testimony that the phase in to be employed, by which Merchantville Students currently enrolled at Pennsauken High School would remain so until graduation while Merchantville students entering high school would attend Haddon Heights rather than Pennsauken would guarantee that students at Pennsauken would not be noticing an absence of former classmates. Essentially, these students, having attended separate middles schools, would not have met and their absence would be neither noted nor felt. Dr. Fine's testimony that students are perceptive and generally aware of policies affecting their education appears to also be unsupported net opinion.

The record does not reflect the existence of aggravating circumstances which would render an otherwise de minimis change in the racial composition of Pennsauken High School a substantial negative impact. It appears that a racially diverse, majority-minority subset of students would be removed from a somewhat similarly (although not identically) diverse school population and be placed into another diverse setting. Accordingly, I **CONCLUDE** that granting Merchantville's petition would not have a substantial negative impact on the racial composition of either district.

The foregoing demonstrates that severing the sending-receiving relationship between petitioner and respondent would produce no substantial negative impact on the quality of education, the financial condition and the racial composition of the student population of districts. I therefore **CONCLUDE** that Merchantville's petition must be **GRANTED**.

ORDER

Merchantville's application for severance of its sending-receiving relationship with Pennsauken is hereby **GRANTED,** subject to its entering into a new sending-receiving relationship with Haddon Heights for a minimum duration of five years.

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

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

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

March 2, 2015
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: March 2, 2015

Date Mailed to Parties: March 2, 2015

LIST OF WITNESSES:

For Petitioner:

Stephen Morrone
Anthony Arcodia
Jacqueline Fuentes
Scott Strong
Ronn Johnson
Ronald Corn
Michael Adams
James L. Kirtland
Richard Grip
Peter Carter
Camille Zubrinsky Charles

For Respondent:

Marilyn Martinez
Gary Higgins
Michelle Fine

LIST OF EXHIBITS:

For Petitioner:

P-1 Haddon Heights Alumni Newsletters
P-2 Authorization to Terminate Merchantville and Pennsauken Send/Receive Agreement
P-3 Tables
P-5 County Superintendent letter to Merchantville – 4/10/00

P-6 County Superintendent letter to Merchantville – 4/11/12

P-7 Haddon Heights Monthly Reports

P-8 New Jersey Charter School List

P-9 Camden County Charter School List

P-10 New Jersey Charter School Fact Sheet

P-11 New Jersey Department of Education Fact Sheet on School Choice Program Dated 4/14/11

P-12 New Jersey Department of Education Fact Sheet on School Choice Program 2013

P-13 Camden County School Choice Districts

P-14 Haddon Heights Curriculum

P-15 Pennsauken Curriculum

P-16 Haddon Heights Program of Study 2011-12

P-17 Demographics re: Camden County Vo-Tech

P-18 Pennsauken State Tuition Rates

P-19 Haddon Heights State Tuition Rates

P-21 Camden County Promise and Pride Academy Enrollment for 2013-2014 and Camden County Vo-Tech enrollment for 2010-2014

P-22 Haddon Heights School Performance Report Cards

P-23 Pennsauken School Performance Report Cards

P-24 Strong Email to Martinez – 5/2012

P-25 Haddon Heights Strategic Plan 1998-2003 Revised 2006

P-26 Haddon Heights Strategic Plan 2009-2013

P-27 Haddon Heights District Goals 2012-2013

P-28 Kirkland and Grip Feasibility Study January 2012

P-29 Kirkland and Grip Expert Report March 2013

P-30 Kirtland Rebuttal Report

P-31 Curriculum Vitae of Richard s. Grip, Ed.D.

P-32 Curriculum Vitae of Peter Carter

P-33 Kirtland Curriculum Vitae

P-34 Dr. Charles' CV

P-35 Strong's Ninth Grade Enrollment by Race

P-36 Demonstrative
P-37 Demonstrative, Pennsauken '12-'13 Enrollment with Merchantville
P-38 Demonstrative, Pennsauken '12-'13 Enrollment without Merchantville
P-39 Demonstrative
P-40 List of Courses at Pennsauken High School
P-41 Sports Offered as Pennsauken High School and Haddon Heights High School
P-42 Club Participation Information 2011-2012 and 2012-2013
P-43 Sports Participation Information
P-44 Pennsauken Vision Statement
P-45 Merchantville and Pennsauken Students at Audubon School List
P-46 Pennsauken Students at Woodbury Heights Schools List
P-47 Pennsauken 2011-12 Budget Proposal
P-48 Pennsauken 2013-14 Budget Proposal
P-49 Certification of Dr. Fine
P-50 Excerpts from Charter Schools and the Corporate Makeover of Public Education
P-51 Pennsauken deseg./integ. Policy

For Respondent:

R-5 Pennsauken Course of Study Program 2012-13
R-14 Dr. Fine's Report
R-15 Dr. Fine's CV
R-16 Higgins Report
R-17 Higgins CV
R-18 Article from the Philadelphia Inquirer
R-19 Haddon Heights School Club List
R-20 Pennsauken List of Clubs and Advisors with List of Merchantville Students
R-22 2011 Senior Class Ranking
R-23 2012 Senior Class Ranking
R-27 Haddon Heights High School Courses

R-30 Pennsauken CAFR – 6/30/2012

R-31 Pennsauken Table of Aggregates 2013

R-32 Pennsauken Auditor's Management Report – 6/30/12

R-33 Pennsauken School Budget – 2013-14

R-33A Pennsauken Budget – 2013

R-35 Pennsauken CAFR – 6/30/09

R-36 Pennsauken CAFR – 6/30/10

R-37 Pennsauken CAFR – 6/30/11

R-40 Merchantville/Pennsauken Tuition Contract Agreement 9/2012 to 6/2013

Joint Exhibits:

J-1 Merchantville and Haddon Heights Send/Receive Agreement

J-2 Haddon Heights Board Resolution on Merchantville

J-3 Pennsauken High School Program of Study 2011-12

134-15

D.M.M., on behalf of minor child, K.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

On February 24, 2015, petitioner appealed the decision of the Eligibility Appeals Committee (EAC) of the New Jersey State Interscholastic Athletic Association (NJSIAA) which found that her son, K.F., transferred from Williamstown High School to Delsea Regional High School for athletic advantage, and was accordingly deemed ineligible to participate in basketball for a one-year period. Petitioner subsequently failed to submit a brief in support of her appeal, as required by *N.J.A.C.* 6A:3-7.3(a); furthermore, petitioner did not request additional time to file her brief under *N.J.A.C.* 6A:3-7.3(d).

The Commissioner found that the petitioner did not file the required brief in a timely manner, nor has she provided any reason for her failure to do so. Accordingly, the Commissioner concluded that petitioner has abandoned her cause of action, and dismissed the petition.

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

Issued 4/15/15

AGENCY DKT. NO. 36-2/15

D.M.M., on behalf of minor child, K.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

For Petitioner, Amy R. Guerin, Esq. (The Guerin Law Firm, P.C.)

For Respondent, Steven P. Goodell, Esq. (Herbert, Van Ness, Cayci & Goodell, P.C.)

This matter concerns a decision rendered by the Eligibility Appeals Committee of the New Jersey State Interscholastic Athletic Association (NJSIAA), finding that K.F. – a high school senior – transferred from Williamstown High School to Delsea Regional High School for athletic advantage. Consequently, K.F. was deemed ineligible to participate in basketball for a one-year period under NJSIAA bylaws.

On February 24, 2015, petitioner appealed the NJSIAA's decision to the Commissioner on her son's behalf, pursuant to *N.J.S.A.* 18A:11-3. Via letter to the parties dated March 2, 2015, the Director of the Bureau of Controversies and Disputes acknowledged receipt of the petition, directed the NJSIAA to file its answer within 10 days of its receipt of same , and issued a briefing schedule in accordance with *N.J.A.C.* 6A:3-7.3. The NJSIAA answered the petition on March 9, 2015. To date, petitioner has failed to submit a brief in support of her

Board Policy 3362, *Sexual Harassment*, states that "[s]exual harassment includes all unwelcome . . . verbal contacts of a sexual nature that would not have happened but for the employees gender." Policy 3362 further states that "when such conduct is severe and pervasive and has the purpose or effect of unreasonably altering or interfering with work performance or creating an intimidating, hostile, or offensive working environment, the employee shall have cause for complaint."

Board Policy 3281, *Inappropriate Staff Conduct*, states in relevant part that "[I]nappropriate conduct by a school staff member outside their professional responsibilities may be considered conduct unbecoming a staff member. Therefore, school staff members are advised to be concerned with such conduct which may include, but is not limited to, communications and/or publications using emails, text-messaging, social networking sites, or any other medium that is directed and/or available to pupils or for public display."

Board Policy 3211, *Code of Ethics*, indicates that "the educator shall exert every effort to raise professional standards to promote a climate that encourages the exercise of professional judgment, to achieve conditions which attract persons worthy of the trust to careers in education."

Board Policy 1140, *Affirmative Action Program*, establishes that the program shall "promote the acceptance of persons of diverse backgrounds regardless of race, creed, color, national origin, ancestry, age, martial status, affectional or sexual orientation, gender, religion, disability, or socioeconomic status." Further, this Policy provides that the Board's affirmative action program will "foster a learning environment that is free from all forms of prejudice, discrimination, and harassment based upon race, creed, color, national origin, ancestry, age, martial status, affectional

or sexual orientation, gender, religion, disability, or socioeconomic status in policies, programs, and practices of the Board of Education."

Board Policy 3321, *Acceptable Use of Computer Network(s)/Computers and Resources by Teaching Staff Members*, advises employees that the Board retains the right to have the Superintendent or designee monitor network activity, in any form necessary, to maintain the integrity of the network(s) and ensure its proper use." Policy 3321 further states that "the Board provides access to computer network(s)/computers for administrative and educational purposes only." Moreover, the foregoing policy, in relevant part, states that "any individual engaging in the following actions declared unethical, unacceptable or illegal when using computer network(s)/computers shall be subject to discipline or legal action: (1) using the computer network(s)computers for . . . inappropriate or obscene purposes."

Finally, Board Policy 3351, *Healthy Workplace Environment*, requires that "employees interact with each other with dignity and respect" and further states that "repeated malicious conduct of an employee or group of employees directed toward another employee or group of employees in the workplace that a reasonable person would find hostile and offensive is unacceptable and is not conducive to establishing or maintaining a healthy workplace environment."

On October 23, 2014, during a voluntary Engrade Chromebook Training, Ms. Lechelt actively participated in a group chat on the Today's Meet website (https://todaysmeet.com/engraderocks) through the District's computer network. Today's Meet is a public web forum, accessible by all Board employees and students. The group chat spanned for a period of roughly two and a half hours and served no instructional purpose. Rather, the chat was

graphically sexual in nature; discriminatory to women, homosexuals, elderly persons and special education/handicap students; highly offensive to anyone not involved with same; and created a hostile work environment to other Board employees who were able to view, at any point in time, the content of the discussion.

The nature of the foregoing conversation is egregious beyond the bounds of decency. No persons and/or classifications of persons were spared. Ms. Lechelt's behavior, as set forth more specifically below, illustrates a complete and shameful disregard of her responsibilities as an employee of the Edison Township Board of Education and a member of the teaching profession, including, but not necessarily limited to, violations of the above mentioned policies. Ms. Lechelt's conduct has caused both members of the Board's Administration and members of the staff grave concerns over her intentions and capabilities, to the point of no longer feeling comfortable to be in her presence and/or permitting her to interact with other Board employees or students.

I hereby charge Maryellen Lechelt with *conduct unbecoming a teaching staff member, misbehavior and/or other just cause, including but not necessarily limited to* insubordination; all of which warrant her dismissal, pursuant to N.J.S.A.18A:28-5, and 18A:6-10.1, et seq. As more specifically set forth below, it is clear that she has exhibited a callous disregard for the expectations of her employer, as well as the rights of other employees of the Board, to conduct their daily activities in an environment that is free from harassment, discrimination, bullying and inappropriate conduct and communications, as well as an egregious breach of the professional standards imposed upon her as a member of the teaching profession.

SPECIFICATION OF CHARGES

CHARGE I

Unbecoming Conduct and/or Other Just Cause
Inappropriate Staff Conduct With Other Staff Members

On October 23, 2014, while attending a voluntary Engrade Chromebook Training at the Board's Offices, Maryellen Lechelt engaged in a course of misconduct that violated New Jersey Law, as well as Board policies, regulations and procedures regarding staff interaction with and/or concerning other staff members. More specifically, Ms. Lechelt actively participated in a conversation through the District's network, in a public chat room ("Today's Meet"), that was visible to those present in the room and obtainable by any District employee and student through the Today's Meet website, which was discriminatory, offensive, rife with sexual innuendo and ultimately created a hostile work environment (the content of which is set forth more fully in Exhibit B of the Sworn Statement of Evidence). This misconduct by Ms. Lechelt is unconscionable and constitutes unbecoming conduct, misbehavior, neglect, insubordination, and/or other just cause for dismissal.

Count 1 - Inappropriate comments about Sara Bleekinger – Engrade Trainer

On October 23, 2014, Ms. Lechelt engaged in a course of misconduct directed towards Ms. Bleekinger, which was inappropriate, foul, discriminatory, offensive, harassing and sexual in nature (the content of which is set forth more fully in Exhibit B of the Sworn Statement of Evidence). Such conduct resulted from a group chat through "Today's Meet" that was visible to Alysia Battista and others who were present in the Training, as well as to the entire Edison Township School District community, as "Today's Meet" is a public chat room which maintains a transcript of each conversation and is accessible to all Board employees and students.

More specifically, Ms. Lechelt made the following comments about Ms. Bleekinger:

1. "the eyebrows are distracting";
2. "im [sic] trying to have her look at you";
3. "your [sic] making her nervous";
4. "this is essentially like a robot teaching the class";
5. Regarding the trainer, Ms. Bleekinger, allegedly looking at Mr. Van Pelt, Ms. Lechelt stated, "lets make it a drinking game";
6. "im [sic] starting to get a bit of a fargo accent from her";
7. "still interested tvp???"

8. "I have a feeling shed rather go out with me"

9. "I think her car is parked behind him and she's seeing if she left her windows open"

10. "im [sic] worried you'll catch something from her backchannel"[1];

11. "lets take her to lunch tvp . . . you can share a burrito";

12. "theres [sic] not enough room in her repository for two";

13. "no hes [sic] going to have to take it slow, . . . no backchannels yet . . . that's his signature move too";

14. "I'm going to use the bathroom now . . . I think I like her too";

15. In response to Mr. Van Pelt's statement that he was "thinking of a super smart question to ask that will make her melt," Ms. Lechelt stated, "what is it? Do you want to blow me?"

Ms. Lechelt's conduct resulted in a disruption of the October 23, 2014 Engrade Training, created a hostile school environment for anyone who has had occasion to review her comments and made it unpleasant for Ms. Battista and other staff members to be in her presence for fear that they will either be harassed, discriminated against and embarrassed; made to feel uncomfortable; and/or forced to hear and or view Ms. Lechelt make further inappropriate and offensive comments to them, about them and/or about others.

Count 2 - Inappropriate comments about special education/handicap students

On October 23, 2014, Ms. Lechelt engaged in a course of misconduct directed towards special education/handicap students, which was inappropriate, foul, discriminatory, offensive and harassing in nature (the content of which is set forth more fully in Exhibit B of the Sworn Statement of Evidence). Such conduct resulted from a group chat through "Today's Meet" that was visible to Alysia Battista and others who were present in the Training, as well as to the entire Edison Township School District community, as "Today's Meet" is a public chat room which maintains a transcript of each conversation and is accessible to all Board employees and students.

More specifically, Ms. Lechelt made the following comments concerning special education/handicap students:

- "I like the group name 'morons'";
- "they take the tart cart home";
- "I also prefer my lows 'jesus Christ, why the fuck did they place you with me?'";

[1] A reference to anal sex.

- "middle group = 'just shut your mouth and do your work.'"

Ms. Lechelt's conduct resulted in a disruption of the October 23, 2014 Engrade Training, created a hostile school environment for anyone who has had occasion to review her comments and made it unpleasant for Ms. Battista and other staff members to be in her presence for fear that they will either be harassed, discriminated against and embarrassed; made to feel uncomfortable; and/or forced to hear and or view Ms. Lechelt make further inappropriate and offensive comments to them, about them and/or about others.

Count 3 - Inappropriate comments about Superintendent of Schools, Dr. O'Malley

On October 23, 2014, Ms. Lechelt engaged in a course of misconduct directed towards Dr. O'Malley, which was inappropriate, foul, discriminatory, offensive, harassing and sexual in nature (the content of which is set forth more fully in Exhibit B of the Sworn Statement of Evidence). Such conduct resulted from a group chat through "Today's Meet" that was visible to Alysia Battista and others who were present in the Training, as well as to the entire Edison Township School District community, as "Today's Meet" is a public chat room which maintains a transcript of each conversation and is accessible to all Board employees and students.

More specifically, Ms. Lechelt made inappropriate and unsubstantiated comments about Dr. O'Malley's appearance, sexual proclivity, professionalism and hiring/promotion practices, as more fully set forth in Exhibit B of the Sworn Statement of Evidence. Ms. Lechelt's conduct resulted in a disruption of the October 23, 2014 Engrade Training, created a hostile school environment for anyone who has had occasion to review her comments and made it unpleasant for Ms. Battista and other staff members to be in her presence for fear that they will either be harassed, discriminated against and embarrassed; made to feel uncomfortable; and/or forced to hear and or view Ms. Lechelt make further inappropriate and offensive comments to them, about them and/or about others.

Count 4 - Inappropriate comments about Alysia Battista

On October 23, 2014, Ms. Lechelt engaged in a course of misconduct directed towards Alysia Battista, which was inappropriate, foul, discriminatory, offensive, harassing and sexual in nature (the content of which is set forth more fully in Exhibit B of the Sworn Statement of Evidence). Such conduct resulted from a group chat through "Today's Meet" that was visible to Alysia Battista and others who were present in the Training, as well as to the entire Edison Township School District community, as "Today's Meet" is a public chat room which maintains a transcript of each conversation and is accessible to all Board employees and students.

More specifically, Ms. Lechelt made the following comment about Alysia Battista:

- "she keeps scratching her lips and they are getting bigger."

Ms. Lechelt's conduct resulted in a disruption of the October 23, 2014 Engrade Training, created a hostile school environment for anyone who has had occasion to review her comments and made it unpleasant for Ms. Battista and other staff members to be in her presence for fear that they

will either be harassed, discriminated against and embarrassed; made to feel uncomfortable; and/or forced to hear and or view Ms. Lechelt make further inappropriate and offensive comments to them, about them and/or about others.

Count 5 - Inappropriate comments directed at unidentified employees in the Training

On October 23, 2014, Ms. Lechelt engaged in a course of misconduct against other unidentified employees in attendance at the Engrade training, which was inappropriate, foul, discriminatory, offensive, harassing and sexual in nature (the content of which is set forth more fully in Exhibit B of the Sworn Statement of Evidence). Such conduct resulted from a group chat through "Today's Meet" that was visible to Alysia Battista and others who were present in the Training, as well as to the entire Edison Township School District community, as "Today's Meet" is a public chat room which maintains a transcript of each conversation and is accessible to all Board employees and students.

More specifically, Ms. Lechelt made the following comments about various unidentified employees:

- "maybe you should start slowly . . . like with this lady in the red tshirt in the second row";
- Following Mr. Van Pelt's statement that he "has been there done that," Ms. Lechelt stated, "so did JB";
- "she is a fan of the backchannel . . . and jean overalls."

Ms. Lechelt's conduct resulted in a disruption of the October 23, 2014 Engrade Training, created a hostile school environment for anyone who has had occasion to review her comments and made it unpleasant for Ms. Battista and other staff members to be in her presence for fear that they will either be harassed, discriminated against and embarrassed; made to feel uncomfortable; and/or forced to hear and or view Ms. Lechelt make further inappropriate and offensive comments to them, about them and/or about others.

Count 6 - Inappropriate and offensive comments between each other

On October 23, 2014, Ms. Lechelt engaged in a course of misconduct, which was inappropriate, foul, discriminatory, offensive, harassing and sexual in nature (the content of which is set forth more fully in Exhibit B of the Sworn Statement of Evidence). Such conduct resulted from a group chat through "Today's Meet" that was visible to Alysia Battista and others who were present in the Training, as well as to the entire Edison Township School District community, as "Today's Meet" is a public chat room which maintains a transcript of each conversation and is accessible to all Board employees and students.

More specifically, Ms. Lechelt made the following comments:

- "poor man's anything is as good as its gonna [sic] get in Edison";
- "oh I will be a supervisor soon – I'm cute and blonde";
- "I didn't realize your were a backchannel guy . . . thank god I found out";
- "this conversation is so beautifully filthy";
- "she hates us . . . but then again, who doesn't";
- In reference to the use of the word repository, Ms. Lechelt stated, "yes, its used in your backchannel";
- "suck in the beauty tvp because its all down hill when we get back to schoo [sic]";
- "Well you better start thinking about baseball or dick cheney before you stand up";
- Following a reference made by Mr. Van Pelt that he just returned from the bathroom where he masturbated, Ms. Lechelt stated, "I knew it! Do you still like her . . . or are you over it";
- After suggesting that Mr. Van Pelt ask the instructor if she wants to blow him, Ms. Lechelt stated, "I love when you guys ask me that";
- "that's better than the ol [sic] 'powder your balls' shower."

Ms. Lechelt's conduct resulted in a disruption of the October 23, 2014 Engrade Training, created a hostile school environment for anyone who has had occasion to review her comments and made it unpleasant for Ms. Battista and other staff members to be in her presence for fear that they will either be harassed, discriminated against and embarrassed; made to feel uncomfortable; and/or forced to hear and or view Ms. Lechelt make further inappropriate and offensive comments to them, about them and/or about others.

CHARGE II

Insubordination and Unbecoming Conduct and/or Other Just Cause Disruption of Professional Development Training

All of the allegations contained in the Background Information and preceding Charges are incorporated by reference as if fully set forth herein. On October 23, 2014, during an Engrade Training, Maryellen Lechelt engaged in a course of misconduct that was inappropriate, foul, discriminatory, harassing, offensive and sexual in nature. More specifically, by actively participating in a group chat through "Today's Meet", which was – in part – about Alysia Battista, visible to Ms. Battista and highly offensive to her, Ms. Battista was unable to focus and effectively forced to leave the training to forego further angst, ultimately preventing her from reaping any instructional benefits.

This misconduct by Ms. Lechelt is unconscionable and constitutes unbecoming conduct, misbehavior, neglect, insubordination, and/or other just cause for dismissal.

CHARGE III

Insubordination and Unbecoming Conduct and/or Other Just Cause
Misuse of the District's Computer Network

All of the allegations contained in the Background Information and preceding Charges are incorporated by reference as if fully set forth herein. On October 23, 2014, Maryellen Lechelt actively participated in a group chat through the District's computer network that was inappropriate, foul, discriminatory, harassing, offensive and sexual in nature (the content of which is set forth more fully in Exhibit B of the Sworn Statement of Evidence), by way of the "Today's Meet" website, which constituted a flagrant misuse of Board resources and showed a concerning lack of judgment and failure to comply with the heavy duty of self-restraint and controlled behavior expected from any member of the teaching profession. This misconduct by Ms. Lechelt is unconscionable and constitutes unbecoming conduct, misbehavior, neglect, insubordination, and/or other just cause for dismissal.

CHARGE IV

Insubordination and Unbecoming Conduct and/or Other Just Cause
Violations of District Policies

All of the allegations contained in the Background Information and preceding Charges are incorporated by reference as if fully set forth herein. On October 23, 2014, Maryellen Lechelt actively participated in a group chat through the District's computer network that was inappropriate, foul, discriminatory, harassing, offensive and sexual in nature (the content of which is set forth more fully in Exhibit B of the Sworn Statement of Evidence), by way of the "Today's Meet" website, which was both viewable to other attendees of the Engrade Training and obtainable by any District employee and student through the "Today's Meet" website, in violation of numerous Board Policies, as more specifically set forth immediately below within this Charge. This misconduct by Ms. Lechelt is unconscionable and constitutes unbecoming conduct, misbehavior, neglect, insubordination, and/or other just cause for dismissal.

Count 1 – Violation of Sexual Harassment Policies/Regulations

Mr. Lechelt's conduct violated Board Policy 3362, *Sexual Harassment*, in that it subjected Alysia Bennett, as well as other Board employees, "to sexually offensive speech and conduct . . . wholly inappropriate to the harmonious employment relationships necessary to the operation of the school district." Further, Ms. Lechelt's conduct was severe and pervasive and had the purpose or effect of unreasonably altering or interfering with work performance or creating an intimidating, hostile or offensive working environment for others. More specifically, Ms. Lechelt made statements, including but not limited to, her sexual abilities and those of co-workers; obscene

teasing, jokes and remarks of a sexual nature; comments of a sexual nature on, or staring at, an individual's physical attributes; and questions about sexual conduct. Regardless of whether such comments were directed at a particular individual, or even if such targets were aware that comments were made about them, Ms. Lechelt's graphic declarations constitute sexual harassment.

Count 2 – Violation of Affirmative Action Policy

Ms. Lechelt's conduct violated Board Policy 1140, *Affirmative Action Program*, in that it subjected Alysia Battista, as well as other Board employees, to a "learning environment [rife] with all forms of prejudice, discrimination and harassment . . ."

Count 3 – Violation of Sexual Harassment and Affirmative Action Policies pertaining to Affirmative Action Investigation

Following an Affirmative Action/Sexual Harassment Investigation conducted by the District's Affirmative Action Office, Margaret Deluca, Ms. Lechelt's conduct during the October 23, 2104 Today's Meet group chat was determined to be in violation of the District's Sexual Harassment and Affirmative Action Policies, as well as various other Board Policies. In relevant part, Ms. Deluca found that the "comments in the chat were directed against females and were so outrageous that the teacher filing the complaint was unable to concentrate on the needed instruction, thus interfering with her work performance." Further, Ms. Deluca expressed her concern that Ms. Lechelt did not understand the gravity of her conduct. As a result of same, Ms. Deluca recommended that Dr. O'Malley "consider the most severe [disciplinary] consequences for Ms. Lechelt." Ultimately, Ms. Lechelt's behavior triggered an Affirmative Action/Sexual Harassment investigation that resulted in a determination of misconduct by her.

Count 4 – Violation of Code of Ethics Policy

Ms. Lechelt violated Board Policy 3211, *Code of Ethics*, in that she failed to "exert every effort to raise professional standards to promote a climate that encourages the exercise of professional judgment, to achieve conditions which attract persons worthy of the trust to careers in education, and to assist in preventing the practice of the profession by unqualified persons."

Count 5 – Violation of Inappropriate Staff Conduct Policy

Ms. Lechelt violated Board Policy 3281, *Inappropriate Staff Conduct*, by engaging in inappropriate conduct, outside of his professional responsibilities, including communications through the internet, which were available to pupils and for public display.

Count 6 – Violation of Healthy Workplace Environment Policy

Ms. Lechelt violated Board Policy 3351, *Healthy Workplace Environment*, by engaging in "repeated malicious conduct . . . directed toward another employee or group of employees in the workplace that [Ms. Battista, and others, found] hostile [and] offensive."

Count 7 – Violation of Acceptable Use of Computer Network(s)/Computers and Resources by Teaching Staff Members

Ms. Lechelt violated Board Policy 3321, *Acceptable Use of Computer Network(s)/Computers and Resources by Teaching Staff Members*, by engaging in a group chat on the District's computer network that had no administrative and/or educational purposes. More specifically, Ms. Lechelt violated this Policy by actively participating in a conversation through the District's computer network that was highly inappropriate (contrary to the intended use of the network) and outright obscene (contrary to the generally accepted social standards for use of publicly owned and operated communication vehicles).

CHARGE V

Insubordination and Unbecoming Conduct and/or Other Just Cause
Failure to Pay Attention During Professional Development Training

All of the allegations contained in the Background Information and preceding Charges are incorporated by reference as if fully set forth herein. On October 23, 2014, during an Engrade Training, as a result of a roughly two and a half hour inappropriate and extraneous conversation, unrelated to the Training in any way, Maryellen Lechelt failed to pay attention and/or make any effort to benefit from the instruction provided. By her own admission, Ms. Lechelt stated, "I can continue to sit in the back of my room and read us weekly" and "im [sic] not going to pay attention now." Ms. Lechelt's actions destroyed the trust placed in her by the Board. This misconduct by Ms. Lechelt constitutes unbecoming conduct, misbehavior, neglect, insubordination, and/or other just cause for dismissal.

CHARGE VI

Insubordination and Unbecoming Conduct and/or Other Just Cause
Ongoing Neglect of Duty

All of the allegations contained in the Background Information and preceding Charges are incorporated by reference as if fully set forth herein. On October 23, 2014, during an Engrade Training, Maryellen Lechelt stated her desire to continue to find ways to act similarly (*i.e.*, engage in inappropriate conversations during instructional time), ultimately conceding her desire to not perform her job in the future. More specifically, Ms. Lechelt made the following comments:

- "we have spent 5 minutes idling which works out to 300,787 hours of time wasted per year . . . which the township has paid close to 300,000 dollars in salary for us to do – yay us";

- "I can continue to sit in the back of my room and read us weekly";

- "tvp, lets start a todays meet when we get back to school and are supposed to teach";
- "lets find another training we can all sign up for . . . this is extremely therapeutic."

This misconduct by Ms. Lechelt constitutes unbecoming conduct, misbehavior, neglect, insubordination, and/or other just cause for dismissal.

POSITIONS OF THE PARTIES

CONTENTIONS OF THE BOARD

The Board argued as follows:

These facts pertain to Maryellen Lechelt.

- Ms. Lechelt has been employed by the Board since September 2011. She received tenure in or about September 2014 – just one month prior to engaging in the conduct at issue. 3T 63:22-25.
- Ms. Lechelt was an elementary teacher, assigned to Lincoln Elementary School for the 2014-2105 school year.
- On September 5, 2014, Ms. Lechelt executed the *Important Board Policies, Regulations, and Mandated Communications* Form, acknowledging that all Board policies and regulations can be found on the Board's website at http://www.edison.k12.nj.us/Page/514 and agreeing to review and conform to the requirements of same. B-18.

The following facts apply to all of the Respondents

- Article III(B)(1 and 2) of the Agreement for Professional Employees between Board of Education Edison Township New Jersey and Edison Township Education Association, July 1, 2011 through June 30, 2014 ("CBA") state, in relevant part, that "all Board of Education policies will be upheld and enforced by all Board employees who are party to this Agreement, as well as by all Administrators, Principals, and Supervisors" and "all Board of Education policies will be available for review in the office of the principal, school library, and the Association office." B-27.
- Board Policy 3321, *Acceptable Use of Computer Network(s)/Computers and Resources by Teaching Staff Members*, advises employees that the Board retains the right to have the Superintendent or designee monitor network activity, in any form necessary, to maintain the integrity of the network(s) and ensure its proper use." Policy 3321 further states that "the Board provides access to computer network(s)/computers for administrative and educational purposes only." Moreover, the foregoing policy, in relevant part, states that "any individual

engaging in the following actions declared unethical, unacceptable or illegal when using computer network(s)/computers shall be subject to discipline or legal action: (1) using the computer network(s)computers for . . . inappropriate or obscene purposes." B-24.

- Moreover, Policy 3321 subject employees who violate same to discipline, which includes but is not limited to, suspension, revocation of computer privileges and/or dismissal. B-24.

- Unequivocally, there is no expectation of privacy for any Board employee when using the district's computer network. In fact, there is no program and/or policy that would trump the foregoing fact. 3T-14:16-15:12; 2T 26:13-19.

- Board Policy 3362, *Sexual Harassment*, states that "[s]exual harassment includes all unwelcome . . . verbal contacts of a sexual nature that would not have happened but for the employee's gender." Policy 3362 further states that "when such conduct is severe and pervasive and has the purpose or effect of unreasonably altering or interfering with work performance or creating an intimidating, hostile, or offensive working environment, the employee shall have cause for complaint." B-21.

- Board Policy 3362 also states that "any employee . . . who is found to have sexually harassed an employee of this district will be subject to discipline which may include termination of employment." B-21.

- Board Policy 1140, *Affirmative Action Program*, establishes that the Board's affirmative action program will "foster a learning environment that is free from all forms of prejudice, discrimination, and harassment based upon race, creed, color, national origin, ancestry, age, martial status, affectional or sexual orientation, gender, religion, disability, or socioeconomic status in policies, programs, and practices of the Board of Education." B-20.

- Board Policy 3281, *Inappropriate Staff Conduct*, states in relevant part that "[I]nappropriate conduct by a school staff member outside their professional responsibilities may be considered conduct unbecoming a staff member. Policy 3281 further states that "School staff's conduct in completing their professional responsibilities shall be appropriate at all time . . . [and] school staff shall not make inappropriate comments about pupils." B-23.

- Board Policy 3211, *Code of Ethics*, indicates that "the educator shall exert every effort to raise professional standards to promote a climate that encourages the exercise of professional judgment, to achieve conditions which attract persons worthy of the trust to careers in education." B-22.

- Board Policy 3351, *Healthy Workplace Environment*, requires that "employees interact with each other with dignity and respect" and further states that "repeated malicious conduct of an employee or group of employees directed toward another employee or group of employees in the workplace that a reasonable person would find hostile and offensive is

unacceptable and is not conducive to establishing or maintaining a healthy workplace environment." Policy 3351 further defines the foregoing unacceptable conduct to include the use of derogatory remarks; insults; verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating. Finally, a single act of such conduct can constitute the unacceptable conduct prohibited by this policy if it is especially severe and egregious. B-25.

- Board Policy 3351 states that "appropriate disciplinary action may be taken depending on the severity of conduct." B-25

- On October 23, 2014, Respondents attended a mandatory Engrade Training (the "Training") at the Board's offices. Engrade was a new initiative (learning management system) for the District's elementary school teachers. 2T 24:3-23.

- The Training lasted for two-and-one-half hours (roughly 9:00-11:30AM) and was conducted by Sara Bleekinger, who is not a Board employee. 2T 28:24-29:2.

- Respondents were required to use their District issued Chromebooks to participate in the Training. All Respondents admit to using same during the Training and connecting to the Internet through the District's network. Further, Respondent's computers were open, with their screens exposed, throughout the duration of the Training. 1T 74:12-18; 2T 25:6-20.

- At 8:53AM, Mr. Van Pelt forwarded an email to Ms. Lechelt, Ms. Weber and Jonathan Bauza, requesting that they "join [him] on [his] personal wiseass backchannel discussion."[2] B-12.

- Mr. Van Pelt attached a link to bring the invitees to a web site called "Todays Meet." B-12. Today's Meet is an interactive program that hosts various educationally based conversations (i.e., teacher to teacher / teacher to student). However, Today's Meet is not a program that the District requires it teachers to use and/or be familiar with. In fact, it has no affiliation to this District. Importantly, the District does not maintain Today's Meet chat and/or content, nor does it request and/or require Today's Meet to do so. 3T 20:5-11; 5T 236:24-237:15.

- Respondents were <u>not</u> required to use Today's Meet as part of the Engrade Training. In fact, there was absolutely no compatibility and/or correlation between the Engrade Training the Today's Meet website. B-41.

- Respondents denied reading Lechelt-3 in its entirety prior to using the Today's Meet Program on October 23, 2014. More specifically, Respondent's did not review Today's

[2] Note that while the invitation was actually sent at 8:53AM, the email illustrates that it was sent at 5:53AM. The district's network is set not set to Pacific Standard time and is therefore displayed at a time three hours earlier than it actually is. 2T 45:13-46:3.

Meet's Privacy Policy and Terms of Service. In fact, said portions of Lechelt-3 became effective December 13, 2014 – after the chat at issue occurred! See, Lechelt-3.

- Moreover, the document bates stamped Lechelt-032 within Lechelt-3 illustrates that Today's Meet chat rooms can be public and/or have limited access. Without question, the chat at issue here was not totally private as Ms. DeLuca – who was not invited to take part in same – was able to access the chat room.[3] See, Lechelt-3.

- The Respondents, along with Jonathan Bauza, proceeded to engage in a 2.5 hour chat (beginning at 8:54AM and ending at 11:24AM) (hereinafter referred to as the "Group Chat"). B-13.

- James Madison Intermediate School Teacher, Alysia Battista, also attended the October 23, 2014 Engrade Training. 1T 60:10-16.

- Throughout the Training, Alysia Battista was seated in the last row, roughly 3 feet directly behind Ms. Lechelt. To the left of Ms. Lechelt were Jonathan Bauza and then Mr. Van Pelt. Ms. Weber was seated directly in front of Mr. Van Pelt. See, Lechelt-1; 1T 181:13; B-44 and Lechelt-1.

- Ms. Battista did not have any personal animosity towards Respondents prior to the Training. In fact she had no relationship (personal/professional) with any of them prior to same. 1T 83:4-9.

- A few moments after the Training began, Ms. Battista was distracted by noise emanating from Mr. Van Pelt, Ms. Lechelt and Mr. Bauza. Mr. Battista proceeded to "shush" Ms. Lechelt. 1T 67:5-22.

- Ms. Lechelt turned around and gave Ms. Battista a look that Ms. Battista interpreted as "really did you just shush me?" Ms. Lechelt and Messrs. Van Pelt and Bauza continued to converse loudly and lean in towards each other's computer screens. 1T 68:14-20.

- Ms. Battista was able to clearly see Ms. Lechelt's computer screen and, therefore, observe the content of the conversation between Ms. Lechelt, Mr. Van Pelt, Mr. Bauza and Ms. Weber. In fact, Ms. Battista indicated that Respondents made no effort to hide what was going on and, in fact, at one point during the training, Ms. Lechelt actually got up from her seat, leaving the computer screen open and the chat on the screen – exposed to the general public and visible to anyone looking. More specifically, Ms. Battista observed the following comments: "short bus" and sexual innuendos – i.e., references to male genitalia, "blow me" and "how do you think I got my job"; comments about lesbians. Ms. Battista also observed comments about someone wearing red. Ms. Battista was wearing red and believed some of

[3] Moreover, this chat was not private as the Respondents, notwithstanding their lack of privacy expectation on the district's network, have no expectation of privacy to the content of a chat displayed on their computer to a third party while in a public room.

the commentary was directed towards her. 1T 69:18-71:22; 74:12-18; 1T 70:5-9, 74:12-19; B-8, B-10.

- Ms. Battista was heavily distracted and highly uncomfortable with the nature of the chat. She described same as "unbelievable". The content of the conversation was upsetting to Ms. Battista because: (1) she has a niece who is classified as special education; (2) she has an "uncle who's epileptic and his whole life he was called retarded and that affected him, so to see that from people who work with children"; and (3) she has a cousin who is discriminated against for being a lesbian. Ms. Battista indicated that "seeing those things especially with people who work with kids, whether it's a joke or not, that's not crossing the line, that's jumping over the line and turning around and spitting on it." 1T 73:5-24.

- Ms. Battista found the Group Chat to be "sexually offensive." 1T 151:16-20.

- Similarly, Ms. Battista clearly observed the web address that hosted the Group Chat. She documented same in both her note to Mr. Figurelli and her written statement. 1T 84:4-16; B-8 and B-10.

- Ms. Battista, based on the portions of the transcript she saw, believed that the Respondents were talking about her – *i.e.*, she observed a comment about something red somebody was wearing, and assumed it was a reference to her because she was wearing a red sweater; and she saw a reference about someone "scratching their lips", which Ms. Battista tends to do when she gets upset, as was the case during the Group Chat. 1T 71:8-22; 176:11-21.

- Ms. Battista made a determination to inform central administration about this chat. She believed that since she preaches to her students to "say something if they see something", she would be disingenuous if she did not do same. Moreover, she expressed concern – *i.e.*, "if that's what's going on in public when other people can see it and I don't think they made any effort to hide what was going on, what could possibly be going on when the kids were not being supervised by other adults." 1T 74:7-11.

- Ms. Battista proceeded to take photographs of Ms. Lechelt's computer screen so she would be able to prove the egregiousness of Respondent's chat. Ms. Battista did not take the time to focus her phone when she snapped the pictures and that is why same cam out blurry. 1T 75:21-25; B-7.

- Ms. Lechelt made all of the comments in the chat attributed to "mamalechelt." B-4. Specifically, Ms. Lechelt made the following comments about the Engrade Trainer – Sarah Bleekinger:

    - "the eyebrows are distracting";
    - "im [sic] trying to have her look at you";
    - "your [sic] making her nervous";

- "this is essentially like a robot teaching the class";
- Regarding the trainer, Ms. Bleekinger, allegedly looking at Mr. Van Pelt, Ms. Lechelt stated, "lets make it a drinking game";
- "im [sic] starting to get a bit of a fargo accent from her";
- "still interested tvp???"
- "I have a feeling shed rather go out with me"
- "I think her car is parked behind him and she's seeing if she left her windows open"
- "im [sic] worried you'll catch something from her backchannel"[4];
- "lets take her to lunch tvp . . . you can share a burrito";
- "theres [sic] not enough room in her repository for two";
- "no hes [sic] going to have to take it slow, . . . no backchannels yet . . . that's his signature move too";
- "I'm going to use the bathroom now . . . I think I like her too";
- In response to Mr. Van Pelt's statement that he was "thinking of a super smart question to ask that will make her melt," Ms. Lechelt stated, "what is it? Do you want to blow me?" B-13.

- Ms. Lechelt made the following comments concerning special education/handicap students:
  - "I like the group name 'morons'";
  - "they take the tart cart home";
  - "I also prefer my lows 'jesus Christ, why the fuck did they place you with me?'";
  - "middle group = 'just shut your mouth and do your work.'" B-13.
- Ms. Lechelt made the following comments about Dr. O'Malley:
  - "I heard these engrade broads are easy . . . tricky d told me that . . . holla";[5]

[4] A reference to anal sex. 3T 266:4-7.

[5] "Tricky d" is a reference to Dr. Richard O'Malley. 3T 227:20-24.

- In response to Mr. Van Pelt's statement that he did not want Dr. O'Malley's "sloppy seconds," Ms. Lechelt stated "well that eliminates the whole district then . . . how do you think I got the job";
- "I can appreciate any man that looks like a turtle having the ability to get any woman";
- "I find him incredibly sexy . . . in a 'I need a job' kinda way";
- "oh he's proficient in pulling chicks . . . the catch is . . . theyre ugly." B-13.

- Ms. Lechelt made the following comment about Alysia Battista:
  - "she keeps scratching her lips and they are getting bigger." B-13.
- Ms. Lechelt made the following comments about various unidentified employees:
  - "maybe you should start slowly . . . like with this lady in the red tshirt in the second row";
  - Following Mr. Van Pelt's statement that he "has been there done that," Ms. Lechelt stated, "so did JB";
  - "she is a fan of the backchannel . . . and jean overalls." B-13.
- Ms. Lechelt made the following comments to Mr. Van Pelt, Ms. Weber and Mr. Bauza:
  - "poor man's anything is as good as its gonna [sic] get in Edison";
  - "oh I will be a supervisor soon – I'm cute and blonde";
  - "I didn't realize your were a backchannel guy . . . thank god I found out";
  - "this conversation is so beautifully filthy";
  - "she hates us . . . but then again, who doesn't";
  - In reference to the use of the word repository, Ms. Lechelt stated, "yes, its used in your backchannel";
  - "suck in the beauty tvp because its all down hill when we get back to schoo [sic]";
  - "Well you better start thinking about baseball or dick cheney before you stand up";

- Following a reference made by Mr. Van Pelt that he just returned from the bathroom where he masturbated, Ms. Lechelt stated, "I knew it! Do you still like her . . . or are you over it";

- After suggesting that Mr. Van Pelt ask the instructor if she wants to blow him, Ms. Lechelt stated, "I love when you guys ask me that";

- "that's better than the ol [sic] 'powder your balls' shower." B-13.

The foregoing chat had no educational purpose, nor did it enhance the instruction of the Training in any manner. 3T 250:24-251:6; B-42.

- Ms. Battista left the Training to speak with Steve Figurelli about her observations. Mr. Figurelli was unavailable so Ms. Battista wrote him a quick note and placed same in a sealed envelope for his attention. B-8.

- Ms. Battista returned to the Training because she knew the Training was important and because she felt she had a professional obligation to sit through same. She did not believe she could simply leave for the day. 1T 79:19-80:1; 149:19-21.

- As a result of Respondents' conduct, Ms. Battista was unable to concentrate and was prevented from learning the content of the Training. Thus, Ms. Battista was unprepared to use Engrade with her students and/or to teach Engrade to her less computer savy team members and/or student teachers. 1T 71:23-25; 81:8-11; 1T 60:17-61:5.

- Within an hour after the Training, Ms. Battista met with her building Principal, Mr. Duggan, to inform him of Respondents' conduct. 1T 82:2-8.

- Pursuant to the request of Mr. Duggan, Ms. Battista prepared a handwritten statement, documenting her observations during the Training. 1T 83:15-19; B-10.

- Thereafter, later in the day on October 23, 2014, Ms. DeLuca interviewed Ms. Battista as part of an affirmative action investigation concerning Respondents' conduct. Ms. Battista provided Ms. DeLuca with a handwritten statement. Ms. Battista was very upset and visibly shaken during this meeting. See, B-11, B-10 and 2T 31:2-33:18; 1T 88:3-18; B-10.

- Ms. DeLuca accessed and reviewed a written copy of the Today's Meet Group Chat ("Transcript"). More specifically, Ms. DeLuca was initially provided with a copy of same by Tara Beams, but also was able to access a copy of the Transcript by simply opening Today's Meet.com and entering the Chat Room created by Mr. Van Pelt. 2T 41:4-20; B-13.

- Ms. DeLuca found the Transcript to be disgusting and offensive. 2T 48:20-23.

- The chat between Mr. Van Pelt, Ms. Lechelt and Ms. Weber was open to the public and anyone with the chat name was able to access same. 2T 44:6-10; 6T 8:19-22.

- In fact, Don Platvoet, during his brief training of Respondent's on the potential uses of Today's Meet, did not inform Respondent's that it was a private program. 6T 8:8-15.

- Next, Ms. DeLuca met with and interviewed the other teachers in attendance during the October 23, 2014 Engrade Training, with the expectation of three or four teachers that Mr. Duggan had already spoken with. 2T 50:12-25; See, teacher interview notes.

- Only one other teacher present during the Training (Angie McKenna) observed the content of the chat between Respondents. 2T 52:22-53:16.

- Ms. DeLuca then proceeded to separately interview each of the Respondents. B-14 through B-16; 2T 56:10-12.

- Mr. Van Pelt and Ms. Lechelt indicated that they made derogatory references to special education and/or handicap students as a result of the Instructor's "offensive" use of the designation "low" for students. 2T 63:15-64:8.

- Per the District's Assistant Superintendent for Special Services, the Instructors use of the designation "low" should not have been offensive. In fact, all of the tests used by the District to classify special education students use the term "low" when classifying students. 2T 65:13-66:5; 3T 237:12-239:16.

- Respondents all appeared to be sorry they were caught, not sorry they had engaged in the conduct at issue. 2T 93:19-24; 104:14-105:4; 114:18-21.

- Specifically, Mr. Van Pelt did not take Ms. DeLuca's interview seriously. On two separate occasions during the interview, Mr. Van Pelt blurted out offensive, disgusting and unacceptable comments – *i.e.*, (1) when explaining that the phrase "eating chicken" means oral sex, Mr. Van Pelt stated under his breath, audible to Ms. DeLuca, that he likes oral sex; and (2) after explaining that the phrase "get the baby batter off the brain" was a reference to masturbation, Mr. Van Pelt stated, that he did not masturbate, "at least not that time." 2T 75:2-8; 76:6-20; 88:6-89:6.

- Throughout the course of her investigation, Ms. DeLuca determined the following meanings for the following phrases used by Respondents:

    - That many, if not all, references to "backchannel" were references to anal sex. B-15; 2T 68:7-16; 3T 266:4-7.

    - Mr. Van Pelt consistently used the phrase "eating chicken", which means both smoking marijuana and oral sex. 2T 71:1-2, 73:22-23.

    - After Ms. DeLuca stated that Ms. Battista "keeps scratching her lips and they are getting bigger." Mr. Van Pelt stated, "DSL." "DSL" is an acronym for the phrase *Dick Sucking Lips*. B-13; 2T 77:5-24.

- "Tricky d" and "Little Richard" were derogatory references to Dr. O'Malley, made by Ms. Lechelt and Mr. Van Pelt, respectively. B-13; 3T 227 20-24; 5T 244:12-20.

- Mr. Van Pelt's use of the phrase "get[ting] the baby batter off the brain" was a reference to male ejaculation/masturbation. 2T 87:10-88:5; B-14.

- Following her interviews of Respondents, Ms. DeLuca reviewed and analyzed all relevant Board Policies to determine whether violations had occurred. 2T 114:22-115:1; 2T 55:3-20.

- Finally, Ms. DeLuca analyzed and evaluated all of the information/evidence gathered throughout her investigation and prepared a memorandum summarizing her findings and providing recommendations for Dr. O'Malley's review. B-26; 2T 126:10-22.

- Ms. DeLuca recommended that Dr. O'Malley consider the most severe consequences possible for all three Respondents because "they didn't seem, for lack of a better term, to get it. They didn't seem to realize the seriousness of the situation." 2T 127:25-128:13.

- Dr. O'Malley recommended that Tenure Charges be filed against Respondents because he "felt their comments and their actions were so egregious, that it would not make them suit [sic] to fit in a position of entrusting them with children . . . I just felt that in the context of their – what they wrote and what they were talking about was just – just disgusting and unbearable . . . And how could I ever look a parent in the eye and say that their children are safe knowing that they are in front of their classroom." 3T 57:17-58:3.

- The Tenure Charges were posted to the public through the news media. Parents and teachers alike have approached Dr. O'Malley on a daily basis to express their trepidations to the possible return of Respondents to the classroom. 3T 62:22-63:19.

- Dr. O'Malley indicated that "every parent and Edison resident and teacher in the district aren't – now that the transcript was posted, that they feel that this was absolutely disgusting, and how can anyone not only talk about this, but talk about someone's child like this." 3T 63:4-8.

The record is closed and the evidence speaks for itself – the Board has proven by a preponderance of the credible evidence that Lechelt engaged in unbecoming conduct, misbehavior and/or other just cause warranting her dismissal from their tenured positions with the Board.

Lechelt conduct in engaging in a discriminatory, offensive and highly inappropriate group chat that constitutes unbecoming conduct and/or just cause warranting their dismissal. On October 23, 2014, during a mandatory Engrade Training, Lechelt and the other respondents engaged in a two

and one-half hour "Group Chat" through the "Today's Meet Website, visible to those present in the room, observed in detail by Alysia Battista and ultimately printed through the news media and therefore, viewable by the general public. Respondents conceded that they were responsible for posting the various comments attributed to them (*i.e.*, "tvp" = Mr. Van Pelt; "trish" – Ms. Weber; and "mamalechelt" = Ms. Lechelt).. The chat was full of sexual innuendo, discriminatory, offensive and ultimately created a hostile and uncomfortable work environment for Ms. Battista. In fact, Ms. Battista believed portions of the chat were directed at her and was made to feel so uncomfortable by the general content of same that she was unable to remain focused during the Training and was ultimately brought to tears after having been exposed to same.

The inappropriateness of Respondents' chat is born from an objective review of the Today's Meet Transcript (B-13). Respondents' subjective descriptions and/or interpretations of the chat as a *joke* or a *misunderstanding* are entirely irrelevant to this Tribunal's consideration. Conversely, the Board's conclusion that the Respondents displayed such poor judgment through their participation in the Group Chat that they are not fit to be entrusted with the care of this District's students, coupled with the common sense determination that their conduct crossed all behavioral boundaries for public school teachers, should not be disturbed.

As to Charge I Count 1, Respondents, as a group, consistently directed commentary towards and/or about Ms. Bleekinger that was sexually explicitly offensive, demeaning, derogatory and wholly inappropriate. More specifically, Respondents consciously decided to turn a serious and important instructional course into a fantasy game of sorts, within which they vividly described and/or actively suggested ways for Mr. Van Pelt to initiate and achieve sexual interactions with Ms. Bleekinger, along with the sexual fantasies Mr. Van Pelt had towards Ms. Bleekinger. Mr. Van Pelt

admitted to making the following comments: "I'd like to tag her"; "you know what would look good on you? ME"; "do you like to have your hair pulled"; "I'd like to invite her to a private backchannel discussion . . . all night long".

Ms. Lechelt admitted to making the following comments: "I have a feeling she would rather go out with me";"im [sic] worried you'll catch something from her backchannel"; "theres [sic] not enough room in her repository for two"; "do you want to blow me". Ms. Weber admitted to making the following comments: "dare you to ask if she would go out with our friend ty"; "tell her to meet u [sic] at Dartmouth at 4"; "im [sic] sure his roomie would love to join too") our friend ty"; "tell her to meet u [sic] at Dartmouth at 4 (Van Pelt's address)" ; "im [sic] sure his roomie would love to join too").

Despite denying engaging in such behavior within their Answers to the Sworn Tenure Charges and Answers to Interrogatories, Mr. Van Pelt and Ms. Weber conceded, through their testimony, that their comments towards Ms. Bleekinger were inappropriate. Conversely, the record is devoid of any concession of remorse by Ms. Lechelt with regard to the specific comments she directed towards Ms. Bleekinger during the Group Chat.

Regardless of Respondent's testimony, even a cursory review of the portions of the Transcript directed towards Ms. Bleekinger illustrate that same is inappropriate for teachers to partake in during school hours and through the District's computer network. Further, whether or not Ms. Bleekinger observed the comments directed towards her is immaterial. The record is clear – the Board's administration, Ms. Battista (the only Board employee to view the chat) and the general public found the comments directed towards Ms. Bleekinger to be inappropriate, foul, discriminatory, offensive, harassing and sexual in nature. Thus, the Board has provided sufficient

evidence to sustain this Charge.

With respect to Count 2 of Charge I, Ms. Van Pelt and Ms. Lechelt engaged in the following exchange:

> Performance indicators are very positive with this fella – tvp
>
> I like the group name "morons" – mamalechelt
>
> The mo moes – lol
>
> Bobo – tvp
>
> They take the tart cart home – mamalechelt
>
> Short bus kids – tvp
>
> I name my smart kids group "mr vp's favority students – tvp
>
> Lol – mamalechelt
>
> And my low group is called "I hate you don't waste my time" – tvp
>
> My middle group is "whatever" – tvp
>
> I also prefer for my lows "jesus christ, why the fuck did they place you with me?" – mamalechelt
>
> Middle group = "just shut your mouth and do your work" – mamalechelt

The foregoing comments were, without question, made by Mr. Van Pelt and Ms. Lechelt and directed towards the special education/handicap students in their respective classes (*e.g.*, "tart cart" and "short bus" are references to vehicles used to transport special education students).

Mr. Van Pelt and Ms. Lechelt, after having occasion to discuss, with each other, their conduct during the Group Chat, conspired and formulated an excuse that is illogical, unpersuasive and perhaps, most importantly, devoid entirely of any remorse. Specifically, Mr. Van Pelt indicated that

he made the foregoing comments because Ms. Bleekinger "advised teachers they could feel comfortable labeling the students low because these labels wouldn't be seen" and such comments "struck a nerve." Similarly, Ms. Lechelt indicated that she made the foregoing statements following Ms. Bleekinger's categorization of students as "lows" and "your lows", coupled with Ms. Bleekinger informing the group that groups can be given any name the teacher desires. As a result of same, Ms. Lechelt explained that she countered such ridiculousness with more ridiculousness.

Notwithstanding the fact that Mr. Van Pelt and Ms. Lechelt are essentially attempting to argue that *two wrongs make a right*, their argument is fatally flawed and not credible for two reasons: (1) they acknowledged and accepted the district's use of various tests (*i.e.*, Woodcock-Johnson, Wechsler, etc.) that classify students as "low", "very low", "low-average"; and (2) they did not raise any complaints during the Training regarding Ms. Bleekinger's classifications of students as "low," but, rather, devised such an argument only after realizing others viewed what they written. Most importantly, however, even if Mr. Van Pelt and Ms. Lechelt were subjectively offended by something the instructor had said, their responsive commentary – made of their free will and volition – exhibited a disturbing lack of judgment and that, when viewed objectively, illustrates their true feelings towards this district's students. Thus, the Board has sustained its burden in establishing that Mr. Van Pelt and Ms. Lechelt engaged in unbecoming conduct by making wildly inappropriate comments about special education/handicap students.

Finally, as argued by the Board in its opening remarks, and as elicited through the testimony of Ms. DeLuca and Dr. O'Malley, Mr. Van Pelt and Ms. Lechelt's efforts to blame their voluntary conduct on something said by Ms. Bleekinger illustrates their childishness, lack of remorse, poor judgment and inability to comprehend right and wrong. Respectfully, any effort by Respondents to

mitigate the gravity of this particular Charge should be disregarded.

Charge I Count 3 concerns offensive and inappropriate comments made by Mr. Van Pelt and Ms. Lechelt about Dr. O'Malley, the Superintendent of Schools. In relevant part, they engaged in the following exchange:

> I heard these engrade broads are easy – mamalechelt
>
> Tricky d told me that – mamalechelt
>
> Well, I don't want that dudes sloppy seconds – tvp
>
> Well that eliminates the whole district then – mamalechelt
>
> I hear its part of the criteria – holla
>
> It is – mamalechelt
>
> How do you think I got the job – mamalechelt
>
> I'm not saying I disagree with all of the man's philosophies – tvp
>
> I can appreciate any man that looks like a turtle having the ability to get any woman – mamalechelt
>
> I find him incredibly sexy – mamalechelt
>
> In a "I need a job" kinda way – mamalechelt
>
> I am not prepared to accept the premise that little Richard has ever been proficient at pulling chicks – tvp
>
> Oh he's proficient at pulling chicks – mamalechelt
>
> The catch is . . . theyre ugly – mamlechelt

Mr. Van Pelt and Ms. Lechelt conceded making the foregoing statements and admitted that said exchange was about their boss – the superintendent of schools, Dr. O'Malley. On their face, the comments reference Dr. O'Malley's appearance, sexual proclivities and sexually-based hiring, firing and promotional practices. However, such defamatory comments are entirely without basis

in fact or reality and ultimately caused Dr. O'Malley undue embarrassment once the Today's Meet transcript was posted by the news media.

Suffice it say that the inappropriateness of this exchange between Mr. Van Pelt and Ms. Lechelt is borne from Ms. Weber's recognition and acknowledgment of same in the middle of the exchange – *i.e.*, "inappropriate in so many ways." Further, however, this count must be sustained against Mr. Van Pelt and Ms. Lechelt as they both acknowledged the inappropriateness and untruthfulness of their respective comments. 5T 139:19-140:6; B-15.

Charge I Count 4 deals with the unbecoming conduct of Mr. Van Pelt and Ms. Lechelt with respect to their harassing and offensive conduct about Alysia Batista. They engaged in the following exchange:

> She keeps scratching her lips and they are getting bigger – mamalechelt
>
> Actually ignore than [sic] – mamalechelt
>
> That – mamalechelt
>
> That was a complete threes company statement – mamalechelt
>
> Dsl – tvp
>
> We totally just made eye contact and totally had a moment – tvp

The foregoing comments were all made within a couple seconds of each other, as they are each time stamped 9:55AM. B-13.

Ms. DeLuca, through her investigation, deciphered the meaning and context of this portion of the chat between Ms. Lechelt and Mr. Van Pelt. Specifically, Ms. Lechelt's reference to "scratching lips" was a direct reference to Ms. Battista, who testified that when she gets nervous/anxious she has a habit of scratching her lips, and was doing same during the Respondents'

group chat. In response to Ms. Lechelt's comment about Ms. Battista's lips, Mr. Van Pelt stated "dsl." B-13. "Dsl" is a text acronym for "dick sucking lips." Clearly, Mr. Van Pelt's comment was directed toward Ms. Battista. Therefore, through the testimony of Ms. DeLuca and Ms. Battista, as well as the logical objective inferences to be drawn from the exchange on its face, the Board has sustained these allegations against Ms. Lechelt and Mr. Van Pelt.

Charge I Count 5 indicates that Mr. Van Pelt and Ms. Lechelt made offensive, discriminatory and inappropriate comments about unidentified employees in the training session. They made the following comments throughout his participating in the Today's Meet Group Chat:

> Following a reference by Ms. Lechelt to a lady in the red tshirt, Mr. Van Pelt stated, "been there done that"
>
> Had her when she was in her f-ing prime
>
> How's that for an image . . . try getting that out of your head
>
> Yea . . . she got the mustache too yo

Ms. Lechelt added the following comments:

> Maybe you should start slowly . . . like with this lady in the red tshirt in the second row
>
> Following Mr. Van Pelt's statement that he "has been there done that," Ms. Lechelt stated, "so did JB"
>
> She is a fan of the backchannel . . . and jean overalls

Clearly, as was par for the course throughout the Training and the Group Chat, Mr. Van Pelt and Ms. Lechelt picked a target (*i.e.*, lady in red tshirt) and attacked said employee through comments that were insulting, discriminatory, derogatory, offensive and sexual in nature. More simply, Mr. Van Pelt and Ms. Lechelt, through the foregoing comments, degraded a colleague by mocking her age, appearance and alleged sexual behavior. Thus, such comments were highly

inappropriate and deemed offensive to Alysia Battista, the Board's Administration and the general public - which likely includes the lady referenced by Mr. Van Pelt and Ms. Lechelt.

Count 6 of Charge I alleges that the Respondents made disgusting, offensive and inappropriate sexual comments among themselves and about each other.

Respondents, throughout the Group Chat, made consistent comments between each other about Mr. Van Pelt enjoying, preferring and/or engaging in anal sex – *i.e.*, use of word "backchannel." Mr. Van Pelt and Ms. Lechelt discussed masturbating, particularly in school and during the training session. In fact, the clear implication from their conversation was that Mr. Van Pelt had excused himself from the Training to masturbate in the restroom. Mr. Van Pelt made multiple references to the act of oral sex – *i.e.*, eating chicken, as well as a flippant comment about him being a "lesbian". Ms. Lechelt stated emphatically that she "loves" when Respondents ask her to "blow" them. Finally, the inappropriateness of Respondents' exchange is encapsulated by Ms. Weber's admission that the conversation is "so beautifully filthy" and "it always is when tvp is chatting."

Without question, such comments were graphically sexual, offensive, discriminatory, harassing and inappropriate to Ms. Battisa, Ms. DeLuca, Dr. O'Malley and the general public. Such commentary simply has no place inside of a school building. Thus, the Board has established that Respondents, with respect to this Charge, have engaged in unbecoming conduct.

Charge II alleges that Respondents engaged in unbecoming conduct during the training session when the caused a disruption by preventing Ms. Batista from participating in the training.

The record evidence demonstrates that Ms. Battista, upon viewing portions of the Group Chat, became offended, was unable to focus and was effectively forced to leave the training to report

the misconduct she observed Respondents partake in. In fact, Respondents' conduct prevented Ms. Battista from learning the content of the training. Thus, Ms. Battista was unprepared to use Engrade with her students and/or to teach the Engrade program to her team members and/or student teachers.

Respondents' defense to this Charge is entirely misplaced. More specifically, Respondents, through their testimony, failed to address the actual disruption to Ms. Battista (which was alleged in Charge II of the each of the Sworn Tenure Charges), while attempting to divert this Tribunal's attention to the lack of general disruption. Importantly, however, the Board did not charge Respondents with causing a general disruption to the Training as the Group Chat was only observed by one person and thus, logically, only could have disrupted one person – Alysia Battista.

Merrian's Webster Dictionary defines disruption as follows: to cause (something) to be unable to continue in the normal way; to interrupt the normal progress or activity of (something). Here, without question, Respondents' Group Chat resulted in a situation where Ms. Battista was unable to continue with the Training in the normal way. Thus, the Board has sustained its burden in establishing that Respondents disrupted the Engrade Training.

As a consequence of Respondents' partaking in a 2 ½ hour group chat, they failed to pay attention to the training . The Board has established by a preponderance of the credible evidence that Respondents, as a result of their participation in a 2.5-hour conversation during the Training, failed to sufficiently pay attention to the content and/or presentation of the Engrade materials.

The Board had an expectation that all teachers present at the Training, or any professional development training for that matter, would pay attention to the entirety of the instructional presentation and refrain from engaging in ancillary and unrelated conduct. Respondents' conduct fell far short of the foregoing expectation.

The transcript of the Chat proves that it lasted for 2.5 hours. Mr. Van Pelt made his first comment at 8:54AM and his last comment at 11:23AM. Similarly, Ms. Lechelt made her first comment at 8:54AM and her last at 11:24AM. B-13. Finally, Ms. Weber made her first comment at 8:58AM and her last comment at 11:24AM. B-13. Between 8:54AM and 10:49AM, the longest period of time in between comments was only 4 minutes, on two separate occasions. Both Mr. Van Pelt and Ms. Weber testified that they spent as much as 15-20 minutes participating in the chat. See, Ms. Lechelt did not attempt to quantify her participation in the chat.

Regardless of the self-serving estimates set forth by Mr. Van Pelt and Ms. Weber, even if each Respondent only spent 15-20 minutes participating in the chat (or the length of time it took them to type the comments they admitted to making into the chat), they failed to pay attention, or at the least, refrain from engaging in unrelated activity – by their own admission – throughout the entirety of the Training. Thus, the Board has sustained this Charge against all Respondents.

As to Charge III, on October 23, 2014, during the Training, Respondents participated in an inappropriate, foul, discriminatory, harassing and offensive chat through the District's computer Network and District's computers. The chat was not the result of any educational and/or instructional requirements or necessities. Thus, it constituted a misuse of the District's computer network.

Board Policy 3321, *Acceptable Use of Computer Network(s)/Computers and Resources by Teaching Staff Members*, states – in relevant part – that "any individual engaging in the following actions declared unethical, unacceptable or illegal when using computer network(s)/computers shall be subject to discipline or legal action: (1) using the computer network(s)/computers for illegal, inappropriate or obscene purposes, or in support of such activities . . . Inappropriate activities are defined as those that violate the intended use of the network(s) . . . ; and (3) using the computer

network(s) in a manner that: engages in other activities that do not advance the education purposes for which computer network(s)/computers are provided."

Here Ms. Weber agreed that her conduct constituted a misuse of the District's network. Similarly, Ms. Lechelt grudgingly conceded that her participation in the Group Chat did not enhance any educational purposes. Only Mr. Van Pelt refused to acknowledge same by steadfastly arguing that the Group Chat, which provided an infusion of humor to the Training, enhanced the Respondents' learning capacity.

Next, an objective review of the content of the chat illustrate that same was wholly inappropriate in relation to Board Policy 3321 and entirely unrelated to the educational purposes of the Training. Finally, and perhaps most importantly, the admissions of Ms. Lechelt and Ms. Weber that they misused the district network must be similarly attributed to Mr. Van Pelt, as his conduct during same was at least as egregious as the other two Respondents.

Thus, the Board has sustained its burden in proving that Respondents misused the District's computer network, constituting unbecoming conduct.

Charge IV indicates that Respondents' conduct during the training session violated several district policies. In September 2014, Respondents executed "Important Board Policies, Regulations, and Mandated Communications Forms." B-17, 18 and 19. These forms indicate, "employees are expected to review and become familiar with all Board policies and regulations" and further, directs employees to the web address where same can be found. In fact, Respondents all acknowledged that the policies and regulations are on the Board's website and agreed to "conform to the requirements of the policies and regulations of the Edison Township Board of Education."

Additionally, Article III(B), *Board Policies*, of the controlling CBA states, in relevant part, that: (1) all Board of Education policies will be upheld and enforced by all Board employees who are party to this Agreement, as well as by all Administrators, Principals, and Supervisors; and (2) all Board of Education policies will be available for review in the office of the principal, school library, and the Association office.

Thus, regardless of whether or not Respondent's actually adhered to their obligations to familiarize themselves with and abide by all Board policies and regulations, their affirmative obligation to do same undercuts any efforts by Respondents to argue that they were unaware of certain policy requirements that they disregarded. More simply put, in considering whether or not Respondents violated Board Policies as alleged in the Sworn Tenure Charges against them, this Tribunal must find that they were familiar with all Board Policies and aware of their obligations pursuant to same.

Pursuant to Counts 1, 2 and 3 of Charge IV, Respondents are charged with violating the Board's Affirmative Action and Sexual Harassment Policies. More specifically, Board Policy 1140, *Affirmative Action Program*, requires the Board to implement and "foster a learning environment that is free from all forms of prejudice, discrimination, and harassment based upon race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, gender, religion, disability, or socioeconomic status in the policies, programs, and practices of the Board of Education."

Board Policy 3362, *Sexual Harassment*, states that "[t]he Board of Education recognizes that an employee's right to freedom from employment discrimination includes the opportunity to work in an environment untainted by sexual harassment." Said Policy further provides that "[s]exually

offensive speech and conduct are wholly inappropriate to the harmonious employment relationships necessary to the operation of the school district and intolerable in a workplace which the children of this district are exposed." Sexual harassment includes all "verbal or physical contacts of a sexual nature that would not have happened but for the employee's gender. When such inappropriate conduct is "severe and pervasive" and has the effect of unreasonably altering or interfering with work performance or creating an intimidating, hostile, or offensive working environment, the employee shall have cause for complaint. Finally, employees are put on notice through Policy 3362 that should they be found guilty of sexual harassment, they will be subject to discipline which may include termination.

Though Respondents were not charged with violating New Jersey's sexual harassment laws, Respondents sought to interject the more stringent standards of same into this matter in an effort to defend the Board's allegations. Respectfully, any comparison of the Respondents' conduct to New Jersey Law is not relevant and/or appropriate, as Respondents were not charged with violating state law.

However, to the extent this Tribunal disagrees with the Board's interpretation of the Sworn Charges, the Board contends Respondents have, in fact, violated New Jersey Law, as established by the New Jersey Supreme Court. Lehman v. Toys R Us, Inc., 132 N.J. 587, 603-604 (1993)(a four part test must be considered in determining whether or not sexual harassment has occurred: (1) the complained of conduct would not have occurred but for the employee's gender; and (2) was severe or pervasive enough; (3) to make a reasonable woman believe that (4) the conditions of employment are altered and the working environment is hostile or abusive).

Here, the credible record evidence is clear and convincing – Respondents violated the Board's Affirmative Action and Sexual Harassment Policies. Ms. Battista, based on the portions of the transcript she saw, believed that Respondents – at least in part - were talking about her (*i.e.*, she observed a comment about somebody in read, and assumed it was a reference to her because she was wearing a red sweater; and she saw a reference about someone "scratching their lips", which Ms. Battista tends to do when she gets upset and was doing during the Group Chat). More specifically, but without limitation, Ms. Battista observed and recalled the following commentary between Respondents: reference to a "short bus" - a demeaning reference to the mode of transportation for special education students; the size of male genitalia; use of the word "dick"; comments about being a "virgin"; describing the trainer as a lesbian, with a reference to a rainbow; "blow me" – "how do you think I got my job"; "men who are like 'turtles'". As a result of Respondents' conduct, Ms. Battista was unable to concentrate and was prevented from learning the content of the training – *i.e.*, Respondents altered and interfered with Ms. Battista's work performance and created an intimidating, hostile, and offensive working environment.

Further, the severity and pervasiveness of Respondent's 2.5 hour chat is borne from Ms. Battista's reaction at the time she observed same, Ms. Battista's demeanor during her testimony when she broke down in tears because she remains upset with the content of Respondent's chat and the testimony and conclusions of Ms. DeLuca and Dr. O'Malley.

Ms. DeLuca, an experienced affirmative action coordinator/investigator, determined that Respondents' comments during the Today's Meet Group Chat included: (1) explicit and graphic references to sexual acts and sexual sayings; (2) references and imaginations regarding a sexual relationship between Mr. Van Pelt and Ms. Bleekinger; (3) comments concerning Ms. Bleekinger's

sexual preferences – *i.e.*, the suggestion that she is a lesbian; (4) inexcusable and insulting comments about special education/handicap students; (5) demeaning comments about other persons present in the training, including their sexual orientation and/or age; and (6) inappropriate, insulting and unfounded comments concerning Dr. O'Malley's physical appearance and hiring/promotion practices.

Ultimately, Ms. DeLuca concluded that the related Board Policies were violated because Respondents' verbal attack on females, elderly persons, lesbians and students with disabilities created a hostile and offensive working environment for Alysia Battista. Respectfully, the record would not support any alternative finding by this Tribunal.

Importantly, Respondents' efforts to attack the credibility of Ms. Battista by categorizing her as both unreasonable and atypical are unavailing. Initially, common sense must prevail.

Regardless of Respondents' self-serving and rehearsed definitions/meanings for the various phrases used throughout the transcript, this Tribunal must evaluate same based on the meaning the general public would have, and since has, attributed to such relevant statements – that they are disgusting, sexually offensive, insulting, demeaning, and discriminating on their face. Further, to the extent this Tribunal is convinced that Respondents' efforts to apply the "reasonable person standard" to Ms. Battista are appropriate, which the Board remains steadfastly opposed to, the Board argues that said standard has been satisfied – both Ms. DeLuca and Dr. O'Malley corroborated the reasonableness of her reaction to Respondents' Group Chat.

Thus, to categorize Ms. Battista's reaction to Respondents' commentary as "unreasonable" would be to implicitly identify such comments as acceptable. Moreover, the Board would be remiss to fail to point out the hypocrisy of Respondents' argument – *i.e.*, Respondents, in one breath, ask

this tribunal to find that Ms. Battista's reaction to Respondents' comments was atypical or unreasonable, while in the other breath, argue that their "reaction" to Ms. Bleekinger's well accepted categorizations/classifications of special education students (*i.e.*, "low") was normal and a legitimate excuse to their behavior. Respondents' attempt to deflect this Tribunal's attention from their conduct, by yet again attacking Ms. Battista's person, should not be overlooked. The overwhelming record evidence illustrates that Respondents' conduct violated the Board's Affirmative Action and Sexual Harassment Policies.

Count 4 and 5 of Charge IV asserts that Respondents violated Board Policy 3211 and Board Policy 3281. The *Code of Ethics* policy states in relevant part that the educator "shall not intentionally expose the pupil to embarrassment or disparagement." Further, Policy 3211 requires that the "educator shall exert every effort to raise professional standards to promote a climate that encourages the exercise of professional judgment, to achieve conditions which attract persons worthy of the trust to careers in education, and to assist in preventing the practice of the profession by unqualified persons."

Board Policy 3281, *Inappropriate Staff Conduct*, indicates, in relevant part, "staff members have the public's trust and confidence to protect the well-being of all pupils attending the school district." Policy 3281 further requires that "school staff's conduct in completing their professional responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments . . . about pupils." B-23.

The foregoing policies hold Board employees to the highest degree of morality and professional standards. Similarly, they confer expectations on Board employees to safeguard the trust and confidence conferred upon them by the public. However, Respondent's voluntary and

willful conduct during the October 23, 2014 Group Chat, along with the content of said chat, constituted a grave lack of professional judgment and a breach in the trust attributed to these teachers by both the Board and the general public. More specifically, the 2.5-hour conversation between the Respondents, with no instructional/educational purpose, during an important Professional Development Training (a professional responsibility) was highly inappropriate and a drastic deviation from the administration's expectations for its employees to embrace the Engrade program and/or act with a certain level of respect and commitment during any professional development training.

Further, the content of same, specifically the derogatory references by Mr. Van Pelt and Ms. Lechelt about their special education / handicap students leapt across all bounds of decency. Perhaps most importantly, as a result of the words documented by Respondents, the young impressionable students (and their parents) previously assigned to Mr. Van Pelt and or Ms. Lechelt, at any time during the employment of Mr. Van Pelt and Ms. Lechelt, are forced to wonder which hurtful and derogatory grouping they were assigned to by their respective teacher. Thus, the Board has sustained its burden in establishing that Respondents' conduct violated Board Policies 3211 and 3281.

Count 6 refers to Board Policy 3351, *Healthy Workplace Environment*, which states, in relevant part, "employees [must] interact with each other with dignity and respect . . . Repeated malicious conduct of any employee or group of employees directed toward another employee or group of employees in the workplace that a reasonable person would find hostile or offensive is unacceptable and is not conducive to establishing or maintaining a healthy workplace environment."

Policy 3351 defines unacceptable conduct as conduct that constitutes the "use of derogatory remarks; insults; verbal . . . conduct that a reasonable person would find threatening, intimidating

or humiliating. A single act of such conduct shall not constitute the unacceptable conduct prohibited by this policy unless it is especially severe and egregious."

Here, once again, the Board has sustained its burden in proving that Respondents have violated this Policy. By there own admission, the overall content of the Group Chat contained interactions devoid of both dignity and respect – *e.g.*, graphic and vulgar sexual comments concerning Mr. Van Pelt's desires with respect to Ms. Bleekinger; derogatory and insulting comments about Mr. Van Pelt and Ms. Lechelt's student groupings and special education students in general; baseless insulting and defamatory remarks about Dr. O'Malley's appearance and hiring/firing/promotional practices; derogatory and insulting remarks about woman, lesbians, elderly persons. B-13. Further, the Group Chat by Respondent's lasted 2.5 hours, encompassed 16 pages of a transcript and contained 318 separate comments, making the foregoing malicious conduct repeated conduct. B-13.

Finally, notwithstanding Respondents' unjustified and desperate claims that Ms. Battista is not a reasonable person and/or did not have a reasonable reaction to the content of the Group Chat, Ms. DeLuca and Dr. O'Malley certainly found Respondents' conduct hostile, offensive and humiliating as well.[1] In reality, even a cursory review of the public comments associated with any of the printed news articles related to Respondents' conduct illustrates that the general public also finds the content of Respondents' Group Chat hostile, offensive and humiliating. Thus, without question, the Board has also satisfied the *reasonable person* element of this Policy.

[1]Importantly, note that until the news media released a copy of the Group Chat transcript, no non-administrator, besides Alysia Battista, had seen a copy of same. Thus, Respondents' argument that Ms. Battista's reaction was atypical is disingenuous in that no one else had occasions to observe the chat during the Training.

Respondent Lechelt's willingness and intent to continue to engage in similar inappropriate group chats during instructional time constitutes unbecoming conduct During the October 23, 2014 Group Chat, Ms. Lechelt made the following comments, exhibiting both her willingness to avoid performing her required job functions in the future and her desire to continue to find ways to act in a similar manner as Respondents acted during the Training (*i.e.*, engage in inappropriate activities during instructional time):

> We have spent 5minutes idling which works out to 300,787 hours of time waster per year . . . which the township has paid close to 300,000 dollars in salary for us to do – yay us
>
> I can continue to sit in the back of my room and read us weekly
>
> Tvp, lets start a todays meet when we get back to school and are supposed to teach
>
> Lets find another training we can all sign up for . . . this is extremely therapeutic

Predictably, Ms. Lechelt testified that such statements were taken out of context, and that, if given the opportunity to come back to her classroom, she would never engage in similar behavior again. However, Ms. Lechelt, as a result of her conduct during the Training, has not earned the right to be given the benefit of the doubt and/or avail herself to the "trust me" defense. Rather, this Tribunal must consider whether such testimony was authentic, or simply a self-serving effort to minimize the gravity of these statements in an effort to ultimately save her job.

The Board submits that the overwhelming evidence, coupled with Ms. Lechelt's lack of credibility, points to the latter. Had Ms. Battista not observed the Group Chat, and reported same to the administration, the logical inference from the comments attributed to Ms. Lechelt is that she had every intention of using Today's Meet as a tool to engage in additional inappropriate, offensive

and disgusting discussions with her colleagues during instructional time. Ms. Lechelt's intentions must be evaluated at the time the relevant statements were made, not after she was caught, coached and prepared to defend her job. Importantly, at the time Ms. Lechelt contributed to the Group Chat she was clearly enjoying herself, speaking freely and unconcerned with the ultimate affects of her comments. Thus, there is simply no reason for this Tribunal to ignore Ms. Lechelt's stated intentions.

Credibility is the value that the fact finder gives to the testimony of a witness. It contemplates an overall assessment of the witness's story in light of its rationality, internal consistency, and the manner in which it "hangs together" with the other evidence. Credible testimony must proceed from the mouth of the credible witness and must be such as common experience, knowledge and common observation can accept as probable under the circumstances. The Board cites judicial case law in this regard.

In deciding the facts of a case, the fact finder must decide which witnesses to believe and which witnesses not to believe based on the following factors: (1) interest in the outcome of this case; (2) witness' recollection; (3) ability to know what he/she was talking about; (4) contradictions or changes in testimony; (5) demeanor; (6) whether or not testimony makes sense; (7) reasonableness of testimony when considered in the light of other evidence. See, NJ Model Civil Jury Charge. Additionally, New Jersey law permits a fact finder to reject the entirety of a witness's testimony if a determination is made that the witness deliberately lied on any fact significant to the decision in the case.

Initially, all Respondents' display of remorse during the Hearing was incredible as the Board exposed the same glaring contradictions made by each Respondent. Respondents attempted to

illustrate, through their testimony, remorse for their behavior during the Training. However, the authenticity of such remorse, only displayed to the person responsible for deciding their fate, after undergoing hours of preparation with their counsels, must certainly be undermined by the Respondents conduct (*i.e.*, lack of remorse) during their suspension meetings with Dr. O'Malley, November 11, 2014 interviews with Ms. DeLuca, Sworn Answers to the Tenure Charges and Answers to Interrogatories.

Notwithstanding the lone admissions of making the comments in the Transcript, as well as other various innocuous admissions, Respondents uniformly and consistently denied the remaining substantive allegations made by the Board in the Sworn Tenure Charges. Id. Therefore, the weight given to Respondents' staged showing of remorse during the Hearing, must certainly be weighed in light of their failure to exhibit the same remorse when meeting with Dr. O'Malley and Ms. DeLuca, filing their Answers to the Charges and serving their Answers to the Board's Interrogatories. Such behavior by the Respondents bolsters the Board's assertion that Respondent's were only sorry they got caught, but not sorry for what they had done.

Next, Respondents' efforts to assert an expectation of privacy in defense of their actions during the Group Chat is unreasonable based on the record and the law – *i.e.*, Board Policy 3321 expressly denies Board employees of any expectation of privacy when using the district's network; pursuant to state and federal law, when something is exposed to the public view, such as this Group Chat, same is not protected by an reasonable expectation of privacy. Thus, Respondents' efforts to push such an illogical argument/defense on this Tribunal illustrate Respondents' lack of credibility.

Mr. Van Pelt and Ms. Lechelt's lack of credibility is further borne from the unreasonableness of their defense to the Charge alleging that they made inappropriate comments directed towards

special education / handicap students – *i.e.*, that their perceived anger towards Ms. Bleekinger's direction to label a group of students "low" triggered their barrage of insulting and demeaning commentary.[2] This argument is irrational because: (1) the district's Assistant Superintendent / Director of Special Services informed Ms. DeLuca that the use of the designation "low" is an acceptable norm; (2) all Respondent's acknowledged and accepted the District's practice, as well as the nationwide practice, of using various test that ultimately label the students as "low", "very low" and "average"; and (3) not one of the Respondents confronted Ms. Bleekinger during the Training about her student *designations* or raised a concern with the administration with regard to their accepted use of such *offensive* tests/terms.

Rather, only after they realized they were in trouble for making such offensive comments did they devise, between each other, this defense. Mr. Van Pelt and Ms. Lechelt's position on this issue is so contrary to reality, and therefore, so inherently unreasonable, that it should be entirely discredited. More importantly though, the unreasonableness of Mr. Van Pelt and Ms. Lechelt's testimony on this issue illustrates their lack of candor and overall lack of credibility.

Lastly, when engaging in credibility determinations related to each Respondent, it should not be lost on this Tribunal that all of the Respondents, rather than simply take ownership for their conduct, blamed and attacked others (*i.e.*, Ms. Bleekinger and Ms. Battista), for causing these grown teachers to act in the manner they chose to act. More specifically, the notions that Ms. Bleekinger's use of a uniformly accepted student classification; or that Ms. Bleekinger was inadequately prepared for the presentation; or that Ms. Battista was a "peeping tom" with the intention of bringing trouble upon the Respondent's are so ostensibly absurd that the credibility of the persons making such

[2]Notably, this ludicrous defense also illustrates their lack of remorse – *i.e.*, their willingness to blame their voluntary actions on someone else, as opposed to simply stating they were wrong without qualification and excuse.

statements must be gaged against he lunacy of same. In other words, a credible witness/person would not make such arguments.

Thus, the Board submits that this record is replete with reasons that should cause this Tribunal pause when considering whether Respondents provided credible testimony.

As a point of legal argument, the Board asserts that Respondents had no right to privacy when engaging in the Group Chat during the October 23, 2014 training session. Throughout this process, Respondents have asserted that they had a good faith belief that the Group Chat was private. More specifically, in concert, Respondents argued that if the chat rooms were open to the public, student privacy concerns under FERPA and state law would be triggered. However, Respondents' efforts to assert an expectation of privacy in defense of their actions during the Training are unavailing, as both the record and the law are fatal to such a defense. In fact, said argument is so suspect that it does nothing more than bolster the Board's assertion that Respondents are not remorseful for their conduct – *i.e.*, despite the baselessness of the claim, Respondents have conspired to stick with the defense through the resolution of this matter.

Board Policy 3321, *Acceptable Use of Computer Network(s)/Computers And Resources by Teaching Staff Members*, states – in relevant part – that "[t]he Board retains the right to have the Superintendent or designee monitor network activity, in any form necessary, to maintain the integrity of the network(s) and ensure its proper use." Further, every District employee is aware that there is no expectation of privacy when using the District's computer network, and there is no program and/or policy that trumps same. More specifically, Respondents were actually informed during Today's Meet training that the program was <u>not</u> private.

Here, Respondents all executed "Important Board Policies, Regulations, and Mandated Communications" Form, within which Respondents agreed to review and conform to all Board Policies. Simply put, there is no way the Board could have been more explicit with the reality that employees do not enjoy any expectation of privacy when using the District's network.

FERPA is a Federal Law that controls the disclosure of personally identifiable information from an eligible student's *education records* to a third party unless the eligible student has provided written consent. The applicable statute defines education records as those records, files, documents and other materials which: (1) contain information directly related to a student; and (2) are maintained by an educational agency or institution or by a person acting for such agency or institution. Importantly, without dispute, the Group Chat did not contain and/or reference specific students or information directly related to specific students. Further, the Board does not maintain the Group Chats and/or transcripts of the Chats, and there is simply no reason for Respondents to have thought otherwise. Thus, Respondents' efforts to grasp on to the protections of FERPA, despite the record evidencing that FERPA's application is unjustified, is merely an act of desperation.

A person cannot assert an expectation of privacy with regard to something exposed to the public view. There is no liability under the tort of invasion of privacy for observing a plaintiff or even taking his photograph while he or she is walking on a public highway, since he or she is not then in seclusion, and his or her appearance is public and open to the public eye. These premises are supported by judicial case law.

Here the record evidence is clear, Ms. Battista observed the conversation and identified the web address by viewing Ms. Lechelt's computer screen during a Training session. In fact, all Respondents engaged in the Group Chat on their computers in a room filled with thirty to forty other

persons, with the screens open and on their desks for a two and a half hour period, during which they all, at one point or another, stood up and walked around, while not closing their computer screens. Had Respondents desired to avail themselves to an expectation of privacy, they surely would have found a way to be more discreet during the Group Chat. Thus, Respondent's expectation of privacy defense is contrary to well-established law. In fact, in the event this Tribunal feels compelled to give any deference to Respondents' FERPA based privacy argument – to which the Board contends none is warranted – Respondents' cavalier participation in the Group Chat during a training, visible to other members of the public, must trump any FERPA privacy considerations.

As to the charges served on Respondents, the record confirms that the Board has proven by a preponderance of the credible evidence that Respondents are guilty of conduct unbecoming, insubordination and/or other just cause warranting dismissal. The infractions established in the record evidence cut to the core of Respondents' fitness to continue to teach. Unlike labor arbitration, this Tribunal's decision regarding any potential penalty must be first and foremost concerned with the welfare of students, not the employment rights of Respondent. There is ample, longstanding precedent for this proposition in the body of School Law in New Jersey that has developed over the last several decades, as well in the growing number of Tenure Hearing arbitral decisions under the recently revised Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TeachNJ Act").

With respect to just cause, in evaluating whether an employer has just cause to discipline an employee, Arbitrators follow guidelines similar to those utilized in Enterprise Wire Co., 46 LA 359, 363-64 (1966); Grief Brothers Cooperage Corp., 42 LA 555, 558 (1964). Consequently, it has been

held that the employer should satisfy the conditions set forth in the above cases in order to prove "just cause" for the disciplining the employee.

The "inherent duties of a public employee include compliance with all reasonable rules and regulations, and duties arising from a fiduciary relationship to the public and from such duties as arise by the nature of the office held." Unless the penalty is unreasonable, arbitrary or offensively excessive under all of the circumstances, it should be permitted to stand. These statements have been well established by New Jersey courts.

Moreover, recent case law suggests that progressive discipline is ***not*** a fixed and immutable rule to be followed without question because some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. For example, in American Arbitration Association Decision, 2010 AAA LEXIS 439, Arbitrator Renovitch acknowledged that extremely serious offenses usually justify the enforcement of a discharge.

The holding that dismissal was warranted in the cited case resulted from a Grievant failing to perform an end-of-run check, which resulted in a sleeping student being left on her school bus. In that case, the arbitrator enforced a summary dismissal. Arbitrators Tener, Dichter and Simon enforced summary dismissals in other cases that reflected other fact patterns.

Moreover, since the implementation of the TeachNJ Act, Arbitrators have dismissed teachers for engaging in inappropriate conduct that has reflected poorly on both the teacher and the school district. The cited decisions were all issued since 2012.

In anticipation of the cases Respondents will likely seek to rely upon to argue that their dismissal is not warranted in this matter, the Board asserts same are readily and easily distinguishable from the matter at bar based on discrepancies in fact and proofs.

Here, the just cause conditions have been satisfied: namely, Respondents were forewarned prior to the Group Chat that dismissal could result from misusing the District's computer network and violating various Board Polices and standards of expected behavior; Respondents conduct on October 23, 2014 violated established Board Policy and any reasonable expectations of employee conduct; Respondents' conduct was investigated fully; substantial evidence, including Respondents' acknowledgments of wrongdoing, admissions and a copy of the actual transcript, were obtained; and termination was reasonably related to the seriousness of Respondents' offenses (*i.e.*, the duration and wholly inappropriate nature of the conversation, coupled with the grave lack of judgment displayed by Respondents) and the Respondents' past record. Specifically, Respondents' conduct with respect to the group chat, without the consideration of progressive discipline, rose above and beyond the level of egregiousness necessary for dismissal.

Accordingly, satisfaction of the just cause standard, along with the arbitral precedents, must result in the termination of Respondents. Their acts are egregious on their face. In fact, the totality of their conduct, and each specific charge considered alone, are more egregious than that deemed sufficient for dismissal in the above-cited precedents. Respondents violated board policies and the common decency expected of public school teachers, as illustrated in the record evidence, by misusing the District's network to mock, insult, harass and offend others (including special education students, the superintendent of schools, the Engrade Training presenter, females, older persons and each other), while creating a hostile and unhealthy work environment for the one person who openly observed same; continuing such conduct for a period of 2.5 hours during scheduled instructional time; failing to comprehend the seriousness of their conduct by constantly making excuses, placing the blame elsewhere and disingenuously declaring remorse only when face-to-face with the assigned

arbitrator after being prepped by their counsel as to what this tribunal wants to hear; and, in the case of Mr. Van Pelt, admitting to masturbating on school property.

Respondents showed a complete lack of concern for the parents and students of the Edison Township School District, and a callous sense of desperation by attempting to attack and demonize the VICTIM – Ms. Battista (*e.g.*, referring to her as a "*peeping Tom*", claiming that she went out of her way to discover their chat and ultimately blaming her for the trouble and embarrassment now endured).

The record, as discussed and documented above, clearly illustrates that Respondents recognize a large portion of their conduct was inappropriate. Specifically, Respondents concede, for the most part, that they misused the District's network and made regrettable comments about other persons and classifications of persons

It is well established in case law that the term "unbecoming conduct" is a broadly defined, elastic term, encompassing any conduct that has a tendency to destroy public respect for government employees and competence in the operation of public services. In hearings similar to this one, arbitrators have determined that conduct unbecoming a teacher has been found to include a broad range of behavior that impacts a teacher's ability to perform his duties or otherwise renders him unfit to have the responsibility to care for children. In this matter, Respondents have unmistakably breached the public trust placed in their position as teachers.

Charge VIII of the charges alleges that the acts of misconduct set forth in the Charges and the Counts, jointly and severally, manifest a series of ongoing infractions over an extended period of time, despite prior warnings, constituting a pattern of conduct unbecoming a teacher. This pattern warrants dismissal. Notwithstanding that each charge warrants a finding of conduct unbecoming a

teacher and/or just cause for dismissal, when taken together, a pattern if unbecoming emerges sufficient to warrant Me. Van Pelt's dismissal from his tenured position.

The Commissioner has confirmed that a pattern of conduct that persists over a number of years warrants dismissal, even if the individual charges standing alone would not. It cites numerous decisions in this regard.

Based on the foregoing, Respondents have failed to satisfy the standards of a profession predicated on public trust and respect. Respondents' misdeeds were not mere oversights or simple mistakes. Their misconduct go to the heart of their character and fitness.

CONTENTIONS OF RESPONDENT

Respondent argued as follows:

In the present case, the material facts as to the misconduct which occurred are not in dispute. The transcript of the chat says what it says. This is simply not a case that warrants termination of employment. The punishment that the Edison Township Board of Education ("Board") is requesting does not fit the crime.

In this matter, Maryellen Lechelt ("Ms. Lechelt"), an award-winning teacher with an unblemished employment record who in the past has received acclaim and favorable evaluations for her classroom teaching excellence, engaged in a single act of misconduct, an on-line chat with colleagues which she reasonably believed to be private, and while engaged in the chat made a few regrettably inappropriate comments. Immediately after the chat, in an informal interview with the superintendent and assistant superintendent, Ms. Lechelt expressed sincere remorse for her comments, took ownership of her conduct, and clearly manifested that she understood the gravity

of her comments and their potential impact.

In New Jersey, the lead case on misconduct-based tenure charges is *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967)(copy enclosed). The TEACHNJ Act does not specify whether the Arbitrator is bound by *Fulcomer* or whether your award is to be governed by the classic seven tests for just cause. In *Fulcomer*, the Appellate Division reversed a decision terminating a teacher's employment based upon a single incident of misconduct. The Commissioner reasoned that Mr. Fulcomer engaged in the misconduct alleged, and therefore, termination of employment was warranted. The court disagreed, breaking the test down to two elements:

- Did the employee engage in conduct unbecoming a teacher?
- If so, does the misconduct proven warrant the penalty of termination of employment or some lesser penalty?

The court noted that, in assessing penalty, the person hearing and deciding the case (then, the Commissioner of Education; now, under the TEACHNJ Act, you, the arbitrator) should consider factors including:

- impact of the decision on the respondent's teaching career;
- the longevity of the respondent's career;
- the respondent's otherwise good teaching record;
- the respondent's unquestioned teaching ability;
- the absence of discipline by the school board during employment;
- the absence of past increment withholdings;
- the nature and gravity of the offenses under all the circumstances involved;
- evidence as to provocation, extenuation or aggravation, and

- any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system.

The proofs in this case have shown that, during Ms. Lechelt's tenure as a teacher in the Board's employ, she was recognized by the school district and by the community as an outstanding teacher. She always earned outstanding evaluations, and the Edison Chamber of Commerce named her Edison Township's Outstanding Classroom Teacher of the Year for 2012. In the interviews with administrators and in her testimony in this case, Ms. Lechelt took full responsibility for comments she made in the Engrade Chromebook Training on October 23, 2014 ("Training"). She acknowledged that her comments at issue in this case were inappropriate and she clearly demonstrated understanding and remorse as to the impact of those comments. Ms. Lechelt had one bad morning where she had a one-time lapse in judgment.

However, it is clear that the Board's characterization of Ms. Lechelt's attitude and demeanor toward the Training, other staff and faculty members, and of her students, during the Training and in general, is grossly inaccurate. In her testimony, Ms. Lechelt has explained the comment concerning special needs students which, if read in a vacuum, could be viewed as alarming. The presenter at the Training suggested that teachers could name groups of students "low" as in "low performing." Ms. Lechelt, who is a Special Education teacher and who is the mother of a special needs child, found the presenter's use of such terms personally offensive and mocked the presenter. Overall, although Ms. Lechelt's career has not been a long one, the conduct at issue here is consistent with a youthful indiscretion. When looking at Ms. Lechelt's comments during the chat, contrary to what the Board asserts, it is obvious she was paying attention to the Training. While admittedly some of her comments were inappropriate and in poor taste, the Board greatly exaggerates the malice

behind those comments. By seeking the penalty of removal, and by filing tenure charges, the Board completely ignores the positive contributions Ms. Lechelt has made to her students and to the community while in the Board's employ.

The Board attempts to paint the chat as violating the Board's healthy workplace environment and anti-harassment policies. However, the proofs in this case have shown that the chat was neither severe nor pervasive, and was not readily accessible to members of the public. The chat was only accessed and accessible through the use of unusual means by a colleague who, because she had an axe to grind, re-positioned herself and zoomed her iPhone camera in on Ms. Lechelt's computer screen to view and photograph the chat, and then had an atypical, unreasonable, and idiosyncratic reaction to the chat. In addition, no person could access the chat unless invited or if the person knew the chat room's web address.

The impact of a decision to terminate Ms. Lechelt's employment would have the net effect of ending her teaching career. The conduct at issue here simply does not warrant such a harsh penalty, particularly in view of Ms. Lechelt's unblemished employment record.

The Board and its administrators have taken a prosecutorial approach to this matter and have chosen to try to "spin" this matter into much more than it is. As the proofs show, during the EEO/AA investigation, the Board's administrators brushed aside and failed to document any mitigating circumstances, or expressions of remorse, concluding that Ms. Lechelt did not acknowledge the gravity of her misconduct, when she plainly did, and that it warranted removal of Ms. Lechelt from her teaching position. The Board has repeatedly tried to spin and exaggerate the conduct at issue, assigning the worst possible meaning to each double entendre, overstating the disruption caused by the chat, and disregarding mitigating circumstances. The *Fulcomer* case and

the seven tests for just cause require much more.

Furthermore, the Board's efforts to terminate Ms. Lechelt's employment ignore past case law where teachers have been charged with unbecoming conduct for much more egregious conduct than Ms. Lechelt's, and yet were not terminated from their positions. All of the counts in the Board's tenure charges center upon unwise conduct occurring during a two (2) hour training session, on one (1) single day, which did not take place in the classroom, and which Ms. Lechelt mistakenly believed was part of a private on-line chat. The Board's effort to terminate Ms. Lechelt's employment, especially given the fact that the Board itself has recognized that she is an outstanding teacher, is extremely disproportionate to her conduct. Although Ms. Lechelt did make some indiscreet comments, she did not engage in conduct unbecoming that warrants the termination of her employment.

We urge the Arbitrator to review this case keeping in mind Ms. Lechelt's outstanding teaching record and unblemished disciplinary record, the first-time nature of this conduct, Ms. Lechelt's remorse and realization of the impact of her comments, and prior case law which shows the Board's effort to terminate Ms. Lechelt's employment to be excessive. The punishment does not fit the crime.

Respondent urges the Arbitrator to consider to be the most critical elements of the proofs presented:

- Ms. Lechelt is a Special Education teacher who has been employed by the Board as a full-time teacher since June 2011. (Lechelt Testimony, 3T171-21 to -23[1])

[1] In this brief, citations to the transcripts of the hearing are as follows:

"1T" refers to the transcript of March 10, 2015;
"2T" refers to the transcript of March 19, 2015;
"3T" refers to the transcript of March 25, 2015;

- The Board first assigned Ms. Lechelt to teach at Menlo Park Elementary School. She was eventually transferred to Lincoln Elementary School. The transfer was not disciplinary. (O'Malley Testimony, 3T99-2 to -7; Lechelt Testimony, 3T172-23 to -25; 3T179-1 to 180-14)

- Before the incident in question, Ms. Lechelt had an unblemished employment record. In her evaluations, Ms. Lechelt earned ratings of "very good" and "excellent" under the old rubric. After the rubric changed, Ms. Lechelt has earned evaluations of "proficient" and, increasingly as "accomplished." (Exh. Lechelt-3; O'Malley Testimony, 3T100-7 to 103-15; Lechelt Testimony, 3T172-6 to -13)

- Before the incident giving rise to these tenure charges, Ms. Lechelt never has received any form of discipline or warnings. (O'Malley Testimony, 3T57-13 to -16; 3T98-22 to 99-1; Lechelt Testimony, 3T179-11 to -24)

- Dr. O'Malley reviewed Ms. Lechelt's teaching performance, recommended Ms. Lechelt for re-employment for 2013-14 and 2014-15 academic years and recommended she receive tenure. (O'Malley Testimony, 3T96-8 to 97-2)

- In 2012, Ms. Lechelt was named Outstanding Teacher of the Year by the Edison Township Chamber

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"4T" refers to the transcript of April 2, 2015;
"5T" refers to the transcript of April 13, 2015, and
"6T" refers to the transcript of April 21, 2015.

of Commerce. (O'Malley Testimony, 3T97-16 to -18; Lechelt Testimony, 3T175-8 to -14)

- Ms. Lechelt was invited by the Chamber of Commerce to attend an awards dinner to honor her achievement. At the dinner, Dr. O'Malley and Ms. Lechelt took a picture together, and Dr. O'Malley congratulated Ms. Lechelt on her achievement. (O'Malley Testimony, 3T97-6 to 98-21; Lechelt Testimony, 3T176-9 to -23)

- The Board announced on its own website that Ms. Lechelt was named Teacher of the Year in 2012 and, in the announcement, stated how proud it was of Ms. Lechelt. (Exh. Lechelt-4; O'Malley Testimony, 3T103-24 to 104-19; Lechelt Testimony, 3T176-2 to -8)

- Ms. Lechelt was nominated for teacher of the year on one other occasion. (Lechelt Testimony, 3T175-12 to -14)

- While employed for the Board, Ms. Lechelt either began or was a part of the following school activities, usually for no additional compensation:

    - school newspaper;
    - Special Education intervention referral service;
    - anti-bullying club advisor;
    - an after-school athletic club for girls;
    - piloted I-STEM, a program designed to promote science achievement in schools;

- asked to mentor other non-tenured teachers; and
- served on several committees. (Lechelt Testimony, 3T172-17 to 173-10)
- Ms. Lechelt was particularly proud of her efforts as the founding anti-bullying club advisor and in connection with the I-STEM inclusion program because of her teaching background and her experience as a parent of a special needs child. (Lechelt Testimony, 3T172-17 to 173-10)
- During her teaching career, Ms. Lechelt has successfully taught many Special Education students. (Lechelt Testimony, 3T173-19 to 175-2)
- Ms. Lechelt is the mother of a special-needs child named Hallie who has struggled achieving success in school. (Lechelt Testimony, 3T192-10 to -18)
- Before working for the Board, Ms. Lechelt participated in graduate classes with Ms. Alysia Battista ("Ms. Battista") The graduate classes were small, seminar-style classes, where students would present and comment. The program was a small one so many of the students were in the same classes with each other. (Lechelt Testimony, 3T186-1 to -12)
- Ms. Lechelt often attended Board-sponsored trainings and/or inservice sessions where Ms. Battista was present. Often, Ms. Lechelt and Ms. Battista would publicly disagree and volunteer opposite opinions on issues being discussed. In particular, Ms. Lechelt and Ms. Battista publicly and contentiously disagreed at a language arts training, on how a language arts program should be introduced in the classrooms. (Lechelt Testimony, 3T186-13 to 187-20)
- Today's Meet is a website that offers opportunities for teachers and students to log in and set up chat rooms and speak to one another. (Deluca Testimony, 2T42-43; Lechelt Testimony,

3T181-13 to 183-4) The Board offered training on the use of the site and it encouraged teachers to use this site. (Lechelt Testimony, 3T181-13 to 183-4)

- Ms. Lechelt first became aware of Today's Meet and its capabilities when she attended training for the science curriculum on October 10, 2014. The instructor of the science curriculum training was Mr. Don Platvoet ("Mr. Platvoet"), staff development trainer for Edison Township. He sent teachers links to be used during this training, and a link to a chat room on Today's Meet was one of the links Mr. Platvoet sent to the curriculum training's participants, including Ms. Lechelt. (Lechelt Testimony, 3T181-13 to 183-4)
- During the October 10, 2014 curriculum training, Mr. Platvoet encouraged the participants to converse with one another in a chat room during his presentation. (Lechelt Testimony, 3T182-5 to -11)
- After using the Today's Meet chat room at the curriculum training, Ms. Lechelt decided to try and use it with her students as part of her curriculum. She researched the Today's Meet website, and found, under the Frequently Asked Questions section, the following statement: "Rooms are never listed publicly, so only the people who know the name of your room can join it. With Teacher Tools you can add more controls—and accountability."[2] (Exh. Lechelt-2 at pp. 74; Lechelt Testimony, 3T182-21 to 183-4) This caused Ms. Lechelt to believe that comments made in these chat rooms were private, and never accessible to the public. (Exh. Lechelt-2 at pp. 74 ; Lechelt Testimony, 3T183-4) Ms. Lechelt also believed that only users sent a link to the chat room could access chat room content. (Lechelt Testimony, 3T181-5

[2]The Board argued that the date of the online documentation suggests that it was created ***after*** Ms. Lechelt engaged in the chat. Ms. Lechelt testified without contradiction that she read such documentation ***before*** she engaged in the chat. (Lechelt Testimony, 3T180-24 to 182-20) The Board offered no proofs that an earlier version of this documentation was not available on-line during the time period that Ms. Lechelt said she read it.

to -7)

- Ms. Lechelt was totally unaware that any member of the public, or any person not specifically given the specific name and URL address of the chat room, could access conversation content in a Today's Meet chat room. (Lechelt Testimony, 3T181-3 to -5)
- The Training was led by Ms. Sara Bleekinger ("Ms. Bleekinger"). Also in attendance was Mr. Tyler Van Pelt ("Mr. Van Pelt"), Ms. Maria Weber ("Ms. Weber"), and Mr. Jonathan Bauza ("Mr. Bauza"). (Deluca Testimony, 2T44-45)
- Mr. Van Pelt, through the Today's Meet chat function, invited Ms. Lechelt, Ms. Weber, and Mr. Bauza to log into a chat room on the Today's Meet website to engage in informal discussions during the Training. At the Training, Ms. Lechelt, Ms. Weber, and Mr. Bauza all logged in to the chat room in reply to Mr. Van Pelt's invitation. (Exh. Board-13)
- During the Training, Ms. Battista was also in attendance. She was seated in the fifth row of seats back from the presentation screen. She was seated directly behind Ms. Lechelt, who was in the fourth row. (Exh. Board-44; Battista Testimony, 1T62-14 to 63-9; 1T93-19 to 94-22; 1T108-19 to -21)
- The distance from Ms. Lechelt's computer screen to Ms. Battista was approximately six (6) feet. (Lechelt Testimony, 3T185-8 to -10) This proposed fact finding is contrary to Ms. Battista's testimony. Ms. Battista claimed that her seat was only a "couple of feet" away from Ms. Lechelt's computer. (Battista Testimony, 1T180-7 to 181-13) This is belied by Ms. Margaret Deluca's ("Ms. Deluca") testimony that the two tables between Ms. Battista and Ms. Lechelt's computer screen were each 18 inches wide (Deluca Testimony, 2T281-3 to -15), and Ms. Lechelt's testimony that she had approximately three feet to sit and for someone

to squeeze behind her. (Lechelt Testimony, 3T184-21 to 185-5) Ms. Lechelt's testimony should be credited over Ms. Battista's on this critical issue.

- Ms. Battista had a direct line of sight to the presentation screen at the front of the room. (Board-45, pg. 2, notes of Angie McKenna interview)
- During the Training, Ms. Lechelt made some inappropriate comments while engaged in the chat with Mr. Van Pelt, Mr. Bauza, and Ms. Weber. The comments were, for the most part, double-entendre and sarcasm. Ms. Lechelt used very little profanity in the chat. (Exh. Board-13, Lechelt Testimony, 3T180-15 to -23)
- At some point early in the Training, Ms. Lechelt turned in her seat. When she did, Ms. Battista saw comments on Ms. Lechelt's computer screen which offended Ms. Battista. (Battista Testimony, 1T108-3)
- In order to view the presentation screen that Ms. Bleekinger was using, Ms. Battista had to lean slightly to the right. Instead, she chose to reposition herself to the left to monitor and photograph the chat. (Battista Testimony, 1T126-2 to 127-24)
- More specifically, despite having a direct line of sight to the presenter, Ms. Battista:
- took her iPhone out;
- repositioned herself to the left;
- moved forward towards Ms. Lechelt and Ms. Lechelt's computer;
- zoomed in on Ms. Lechelt's screen; and
- took several pictures of the screen. (Exh. Board-7, pp. 2-9; Battista Testimony,1T108-7; 1T126-2 to 127-24)
- A logical inference can and should be drawn that Ms. Battista did all of these things to monitor and photograph the chat on Ms. Lechelt's computer screen.
- During her presentation in the Training, Ms. Bleekinger was using terms such as "low" and

"middle" to describe groups of students by intellectual ability. Ms. Lechelt thought about her own child and was offended that Ms. Bleekinger used such labels and that Ms. Bleekinger said words to the effect that you can label the students and they'll never know what you are calling them. In the chat, Ms. Lechelt sarcastically referred to "low" kids in response to and as a way to mock Ms. Bleekinger using these terms. When Ms. Lechelt used the terms "morons" and "tart cart" in the chat, Ms. Lechelt was using the most ridiculous and offensive terms for Special Education students she could think as a logical extension of Ms. Bleekinger's usage of offensive terms, and was suggesting that Ms. Bleekinger might use such terms later in her (Ms. Bleekinger's) presentation. (Deluca Testimony, 2T97-12 to -17; Lechelt Testimony, 3T189-20 to 190-19; 3T192-10 to -18; 3T192-22 to 193-6)

- Ms. Lechelt's intention was to mock Ms. Bleekinger, not to mock special needs students, including her own daughter. (Lechelt Testimony, 3T189-10 to -16)
- Ms. Lechelt's comments regarding the "backchannel" is related to a feature on the Today's Meet website that provides opportunities for chat room meetings and exchanges between teachers and/or between teachers and students. (Exh. Lechelt-2, pg. 5; Lechelt Testimony, 3T266-18 to 267-1)
- Despite Ms. Battista's perception, Ms. Lechelt in no way personally attacked her in the chat. (Lechelt Testimony, 3T189-7 to -9)
- Ms. Battista's interpretation of Respondent's comments made in the chat room were idiosyncratic and erroneous. For example:

Ms. Battista reported that at some point that Respondents were making comments about her. However, not one comment in the chat refers to Ms. Battista. (Lechelt Testimony, 3T189-7 to -9) Ms. Battista reported that Ms. Lechelt's use of the word "turtle" referred to male genitalia. (Battista Testimony, 1T136-14 to 137-21) However, Ms. Lechelt's use of this word referred to Dr. O'Malley's

personal appearance. (Lechelt Testimony, 3T280-25 to 281-4)

Ms. Battista quoted Respondents using the words "terrible" and "useless." However, nowhere in the entire chat do any of Respondents use these words. (Exh. Board-13) Ms. Battista was particularly offended because she thought the chat was directed specifically at her. (Deluca Testimony, 2T32-1 to -15) Ms. Battista had an idiosyncratic reaction to what she saw on Ms. Lechelt's computer screen. (Deluca Testimony, 2T286-21 to -23; Exh. Board-45, Notes of Angie McKenna interview, pg. 2)

Dr. O'Malley met with Ms. Lechelt on October 24, 2014, the day after the Training. Ms.Tara Beams, Assistant Superintendent ("Ms. Beams"), and Mr. Jeff Bowden, Edison Township Education Association President ("Mr. Bowden"), were also in attendance. (O'Malley Testimony, 3T27-24 to 28-1; 3T105-21 to 106-2; Lechelt Testimony, 3T195-9 to -15)

- Before speaking with Ms. Lechelt and hearing her explanations concerning the chat, Dr. O'Malley had already decided to suspend Ms. Lechelt. (O'Malley Testimony, 3T106-3 to -15; Lechelt Testimony, 3T195-17 to -19; 3T199-8 to -10)
- During the meeting with Dr. O'Malley, Ms. Lechelt was visibly upset and terrified while the meeting was proceeding. (Lechelt Testimony, 3T197-23 to 198-13, 3T198-21)
- After seeing Ms. Lechelt was visibly upset and crying, Dr. O'Malley asked Mr. Bowden to get her a tissue and asked Ms. Lechelt "Are you done?" (O'Malley Testimony, 3T109- 18 to -22; Lechelt Testimony, 3T198-4 to -5)
- During her interview with Dr. O'Malley, Ms. Lechelt never had the opportunity to fully explain the context and meaning of the terms she used in the chat. (Lechelt Testimony, 3T197-7 to -8)
- Dr. O'Malley reviewed the chat transcript at least ten (10) times. (O'Malley Testimony, 3T72-20 to 73-4)

- Dr. O'Malley felt personally attacked and hurt by the chat comments. (O'Malley Testimony, 3T24-14 to -17; 3T40-19 to 41-3; 3T106-25 to 107-3)
- Ms. Deluca, the Board's Chief Academic Officer, met with Ms. Battista on October 23, 2014, after the Training (Deluca Testimony, 2T31-6)
- Ms. Battista repeatedly told Ms. Deluca that she was in fear of it becoming known that she reported the Respondents. (1T81-21 to -23) Nevertheless, Ms. Deluca sent Ms. Battista an Affirmative Action Report form to Ms. Battista and told Ms. Battista to fill it out. (Deluca Testimony, 2T38-9 to -15; 2T229-6 to -12)
- Ms. Deluca was chosen by Dr. O'Malley to conduct the investigation into Ms. Battista's complaints concerning Mr. Van Pelt, Ms. Weber, Mr. Bauza, and Ms. Lechelt's conduct during the Training. (O'Malley Testimony, 3T21-6 to -25)
- Ms. Deluca is also the Board's Affirmative Action Officer. In this role, part of her duty is to assure that all district staff receive training on affirmative action and sexual harassment policies. (Deluca Testimony, 2T20-22 to -24; 2T214-15 to -23)
- Ms. Deluca has a very close professional relationship with Dr. O'Malley. Ms. Deluca worked under Dr. O'Malley when both worked at the Matawan-Aberdeen Regional School District, and when Dr. O'Malley became the Board's superintendent, he recruited Ms. Deluca to work for the Board. (Deluca Testimony, 2T255-56; O'Malley Testimony, 3T11-2 to -25; 3T21-25 to 22-2; 3T95-11 to -18)

In the chat transcript, eight (8) screen names are attributed to all of the comments in the chat room. The following is a list of the screen names and the participant who used each name:

- "tvp"-Mr. Van Pelt (Deluca Testimony, 2T190-91);
- "mamalechelt"-Ms. Lechelt (*Id.*);
- "jb"-Mr. Bauza (*Id.*);

- "trish"- Ms. Weber (*Id.*);
- "Captain"-(Ms. Deluca never determined who this was) (*Id.*);
- "lol"- (Ms. Deluca never determined who this was) (*Id.*);
- "docdick"- (Ms. Deluca never determined who this was) (*Id.*), and
- "holla"- (Ms. Deluca never determined who this was) (*Id.*).
- During her investigation, Ms. Deluca spoke to Ms. Battista, questioned the chat room participants who she could identify, and questioned all other teachers in attendance at the Training. (Deluca Testimony, 2T52-9 to -15)
- Ms. Deluca used the web address she was provided by Dr. O'Malley to access the chat transcript. (Deluca Testimony, 2T44-4 to -5; 2T46-11 to -15)
- Ms. Deluca took handwritten notes when conducting the interviews. Subsequently, she made typed notes of her interviews while reviewing her written notes. After completing her typed notes, she discarded her hand written notes. (Deluca Testimony, 2T34-9 to -13; 2T80-1 to -2; 2T194-20 to -24) Ms. Deluca received no training or instruction as to whether and how to maintain these primary materials. (*Id.* at 2T193-10 to -14)
- As part of her investigation, Ms. Deluca interviewed twenty-three (23) other people other than Ms. Battista and the three (3) respondents who attended the Training. Besides Ms. Battista, no other person who attended the Training complained of Ms. Lechelt's conduct being disruptive, offensive, or harassing in anyway.[3] (Deluca Testimony, 2T53-19 to -21; 2T170-24 to 171-24; 2T280-4 to -6)
- Besides Ms. Battista, only one other person who attended the Training claimed to have seen

[3]Tellingly, the Board initially chose to mark only part of its investigative file, omitting the notes of the interviews of others present at the training. Only after an objection was made to the proffer and admission of partial documentation did the Board mark this portion of its investigative file as Exhibit Board-45. The reason is clear. Exhibit Board-45 points to the fact that the chat did not generally disrupt the Training, undercuts the claim that the chat constituted severe and pervasive harassment, and also points to the idiosyncratic nature of Ms. Battista's reaction to the chat. *See* Point I.A.6. of Law and Argument below.

or viewed in any way the contents of the chat at issue. (Deluca Testimony, 2T53-15 to -16)

Besides Ms. Battista, no other teacher, staff member (excluding the administration), has told the Board and/or its administrators that they fear they will either be harassed, discriminated against and embarrassed; made to feel uncomfortable; and/or forced to hear and/or view Ms. Lechelt make further inappropriate and offensive comments to them, about them, or about others. (Deluca Testimony, 2T203-10 to -20)

- Besides Ms. Battista, no teacher, staff member (excluding the administration), parent, student, and/or member of the public has reported accessing the Today's Meet chat-room transcript manifesting the chat-room discussion Ms. Lechelt engaged in during the Training. (Deluca Testimony, 2T185-19 to -25)
- Most people whom Ms. Deluca interviewed stated that the atmosphere and noise in the Training was similar to other inservices and/or workshops. (Exh. Board-45)
- Ms. Angie McKenna ("Ms. McKenna"), who sat directly on Ms. Battista's left at the Training, also saw a few inappropriate words on Ms. Lechelt's screen. However, unlike Ms. Battista, she chose to look away and focus on Ms. Bleekinger's presentation. (Deluca Testimony, 2T53-2 to -11; Exh. Board-45, pg. 2)
- According to Ms. McKenna, Ms. Battista was "consumed" by the chat, and was the only person present at the Training who was "consumed" by the chat. (Exh. Board-45, Notes of Angie McKenna interview, pg. 2; Battista Testimony, 1T102-14 to -15; Deluca Testimony, 2T171-12 to -16; 2T291-8 to -20)
- In the course of her investigation, Ms. Deluca spoke with the attorney from Engrade, the company that assigned Ms. Bleekinger to conduct the Training. Engrade's attorney spoke with Ms. Bleekinger, and told Ms. Deluca that Ms. Bleekinger was not disrupted in any way during the Training, and/or was not aware of any disruption at the Training. (Deluca

Testimony, 2T173-1 to -2; 2T243-19 to -25)

- Ms. Deluca never timed the actual keyboarding time Ms. Lechelt spent actually typing comments during the Training. (Deluca Testimony, 2T253-9 to -14)
- Ms. Deluca's report contained no factual findings and/or no conclusions she reached after interviewing those she deemed were the relevant witnesses. (Exh. Board-26)
- Ms. Deluca's report fails to indicate what factors she took into consideration when deciding to recommend considering the "most severe consequences" for Mr. Van Pelt, Ms. Weber, Mr. Bauza, and Ms. Lechelt. (Exh. Board-26)
- Ms. Deluca's typed notes inaccurately described what Ms. Battista was wearing during the Training. In her typed notes of her October 30-31, 2014 interview of Ms. Battista, Ms. Deluca stated that Ms. Battista told her that she was wearing a red dress in the Training. However, Ms. Battista was wearing a red sweater. (Battista Testimony 1T130-8 to -9; Deluca Testimony, 2T269-14 to 270-17) This is material because Ms. Battista erroneously thought that Ms. Lechelt and others were talking about her in the chat when they referred to a woman in the second row wearing a red T-shirt even though she was sitting in the fifth row, wearing a sweater. (Deluca Testimony, 2T265-7 to 267-3)
- Ms. Deluca's typed notes are not complete. When Ms. Deluca asked Ms. Lechelt at the end of the meeting if Ms. Lechelt had anything to add, Ms. Deluca snapped her pen down on the table, and stopped writing, as Ms. Lechelt continued to explain the context and meaning of her comments and express her remorse, but Ms. Deluca wrote none of the comments down. (Lechelt Testimony, 3T200-21 to 201-17)
- During her interview with Ms. Deluca, Ms. Lechelt never had the opportunity to fully explain the context and meaning of the terms she used in the chat. (Lechelt Testimony, 3T205-13 to 209-16)

- When recommending the "most severe consequences" for Ms. Lechelt and the other Respondents, Ms. Deluca never looked at Ms. Lechelt's personnel file to determine what kind of past discipline record Ms. Lechelt had. (Deluca Testimony, 2T253-17 to -18; *contra Fulcomer* and the seven tests for just cause, *see* Law and Argument below)
- Ms. Deluca's interviewed Ms. Lechelt approximately three (3) weeks after the Training. (Lechelt Testimony 3T199-11 to -15) Ms. Deluca's report fails to mention that, during Ms. Lechelt's interview:

Ms. Lechelt stated many times that she thought the chat was private (Deluca Testimony, 2T277-6 to -10);

- Ms. Lechelt mentioned many times that her comments were misguided jokes (Deluca Testimony, 2T97-12 to -17; 2T99-1 to -2; 2T104-18; 2T275-16 to -18; 2T278-16 to -17; 2T278-79; Lechelt Testimony, 3T200-16);
- Ms. Lechelt admitted that her comments were inappropriate (Deluca Testimony, 2T128-5 to -7; 2T275-16 to -18);
- Ms. Lechelt admitted that she used bad judgment (Deluca Testimony, 2T104-20);
- Ms. Lechelt stated that she never would waste time reading magazines when she is supposed to be teaching (Lechelt Testimony, 3T176-24 to 177-23);
- Ms. Lechelt stated that she never has, nor ever would use the same comments while working with students (Lechelt Testimony, 3T197-8 to -17); and
- Ms. Lechelt stated she did not seriously believe that one's appearance or sexual favors were related to the Board's personnel decisions (Exh. Board-15, pg. 3; Deluca Testimony, 2T75-9 to -24)
- When writing her report, Ms. Deluca painted Ms. Lechelt's comments with the most harassing interpretations when the comments could have had several other equally valid

interpretations that were not harassing. (Deluca Testimony, 2T273-6 to 274-16; Lechelt Testimony, 3T205-18 to 209-17)

- Ms. Deluca's report fails to explain why there were four (4) chat room participants' conduct being investigated, but there were eight (8) chat room screen names seen posting comments during the chat. Ms. Deluca's report fails to match each participant with each screen name used, and does not explain which person(s) in the training used the chat room names "Captain", "lol", "docdick", and "holla." (Exh. Board-26)
- Ms. Deluca was supposed to investigate whether Respondents violated the Board's affirmative action policies. On her own, without the Board's direction, Ms. Deluca, in her report, suggested additional Board policies that she felt Respondents had violated. (Deluca Testimony, 2T200-20 to 202-02)
- Several principals from several Edison schools interviewed several teachers who were present at the Training and were not interviewed by Ms. Deluca. Not one teacher reported any kind of disruption at the Training. (Deluca Testimony, 2T51-1 to -25; 2T172-1 to -12)
- In order for any member of the administration, staff member, student, and/or member of the public to have access to the chat, unless they were specifically invited by email, they had to have the web address. If they did not have the web address, they could not access the chat transcript. (Deluca Testimony, 2T165-8 to -9; 2T198-13 to -24)
- Ms. Lechelt's remarks concerning sitting in the back of her class and reading magazines while she is supposed to be teaching, and having chats at other trainings, was an awkward attempt at humor and was a joke. As her prior record shows, Ms. Lechelt never has, nor ever will, sit in the back of a class and read magazines while she is supposed to be teaching her students. (Lechelt Testimony, 3T176-24 to 177-23)
- Ms. Lechelt expressed sincere remorse for her comments made in the chat room during the

training. She expressed her remorse including, but not limited to during her interview with Ms. Deluca, her interview with Dr. O'Malley, and during her testimony. (Lechelt Testimony, 3T200-15; 3T202-4 to -5)

- Ms. Deluca expressed the sentiment that Ms. Lechelt failed to appreciate the gravity of this situation. (Deluca Testimony, 2T127-23 to 128-21) This claim is directly and specifically undercut by the testimony of Ms. Lechelt who testified without contradiction that at the time of her interview by Ms. Deluca she authorized her counsel to make a settlement offer to the Board's representatives. (Lechelt Testimony, 3T208-7 to -21)
- As to penalty, Ms. Lechelt has testified that a one-hundred twenty (120) day suspension would cost her approximately $22,000 in salary. (Lechelt Testimony, 3T210-12 to -13; Exh. Board-27, at pp. 75-76) This testimony is uncontested.
- If the arbitrator were to direct that Ms. Lechelt be suspended without pay from December 16, 2014 until the end of the 2014-2015 school year, this will cost her approximately $38,000.00 in salary. (Lechelt Testimony, 3T213-20 to -22; Exh. Board-27, at pp. 75-76) This testimony is uncontested.
- Based upon past contracts, Ms. Lechelt's salary increments for the 2015-2016 school year will be approximately $2,000.00. A one-time increment withholding would cost Ms. Lechelt approximately $2,000.00. (Lechelt Testimony, 3T214-8 to -9) This testimony is uncontested.
- Provided that the arbitrator returns Ms. Lechelt to work and if Ms. Lechelt were to teach an additional 22 years and then retire, a permanent increment withholding would cost Ms. Lechelt an additional approximately $40,000.00 in salary, and this loss would continue into retirement. (Lechelt Testimony, 3T214-11 to -17) This testimony is also uncontested.
- Ms. Lechelt is not disputing the Board's assertion that she participated in the chat and made inappropriate comments. However, the *Fulcomer* case and the seven tests for just cause demand that

a separate determination be made as to whether Ms. Lechelt's employment should be terminated, or whether a lesser penalty is appropriate. In addition, New Jersey case law under the TEACHNJ Act, and the law preceding the TEACHNJ Act (the Tenured Employees Hearing Act ("TEHA")), provides several examples of public employees charged with conduct unbecoming for actions significantly more egregious and offensive than Ms. Lechelt's conduct, and which did not result in termination of employment. Given the context in which Ms. Lechelt's comments were made, the environment the comments were made in and who they were addressed to, and the relevant case law, it is clear that Ms. Lechelt's conduct is not egregious enough to warrant the harsh penalty of termination of employment.

A petitioning board of education has the burden of proving tenure charges brought against a respondent by the preponderance of the competent and credible evidence. Conduct unbecoming a public employee has been described as an "elastic" phrase that includes "any conduct which adversely affects the morale or efficiency" of the public entity or "which has a tendency to destroy public respect for ... [public] employees and confidence in the operation of ... [public] services." *Karins v. City of Atlantic City*, 152 *N.J.* 532 (1998); *In re: Emmons*, 63 *N.J. Super.* 136, 140 (App. Div. 1960). In the context of a school tenure case, "the touchstone is fitness to discharge the duties and functions of one's office or position." *In re: Grossman,* 127 *N.J. Super.* 13, 29 (App. Div. 1974).

As noted from the inception of this hearing, *Fulcomer, supra*, is the foundational case under New Jersey tenure charge case law. It sets forth the approach which finders of fact in tenure charge hearings must follow when deciding a tenure charge case.

After the State Board upheld the Commissioner's decision as to penalty, the teacher appealed to the Superior Court, Appellate Division. The court upheld the unbecoming conduct decision, but overturned the Commissioner's decision as to penalty. In doing so, the court explained:

However, in our opinion the Commissioner erred in failing to render an independent

decision as to the penalty to be imposed based on the evidence before him and in permitting the local board to exercise this function. The Commissioner also erred in restricting his function to an appellate review as to whether the local board's determination was clearly unreasonable, arbitrary or unlawful. This restricted interpretation of the duties imposed upon him by the Tenure Employees Hearing Act, we believe, resulted in prejudice to the rights of the appellant and requires that the matter be remanded to the Commissioner for decision as provided herein . . . The teacher is entitled to an independent determination as to the scope of penalty based on all the evidence presented against him.

The court then applied the above standards to the circumstances of the case. Citing the teacher's unblemished prior disciplinary record and his outstanding teaching evaluations, the court determined that termination of employment was "an unduly harsh penalty" under these circumstances.

Each of the *Fulcomer* standards support the conclusion that you should not terminate Ms. Lechelt's employment and that you should impose a lesser penalty:

1. Impact of the Decision on Ms. Lechelt's Teaching Career

If Ms. Lechelt's employment is terminated, under New Jersey law, the Board is required to report the termination to the State Board of Examiners for possible revocation of Ms. Lechelt's certificates. *N.J.A.C.* 6A:9B-4.5. This would effectively end a promising teaching career for Ms. Lechelt, who has consistently proven to be an excellent teacher and has demonstrated her ability in providing an outstanding education for her students. She has had superior ratings in her observations, and she has won awards for her teaching. This factor weighs heavily in Ms. Lechelt's favor and supports the conclusion that her employment should not be terminated.

2. The Length of Ms. Lechelt's Employment with the Board

Although at the time of the Training Ms. Lechelt was into her fourth (4^{th}) year as a teacher

for the Board, *Fulcomer* shows that the length of her career is not dispositive and does not overshadow other factors which clearly weigh in Ms. Lechelt's favor. At the time of his tenure hearing, Mr. Fulcomer was a teacher for only seven (7) years. However, the court determined that Mr. Fulcomer should be retained as a teacher. In this case, similar to *Fulcomer*, given the fact that all of the *Fulcomer* factors weigh heavily in Ms. Lechelt's favor, length of teaching career should not pre-dominate over the other factors.

3. Ms. Lechelt's Impeccable Teaching Record

Not only has Ms. Lechelt never had an increment withheld, she has never before been disciplined, formally or informally. It is unquestioned and unchallenged that Ms. Lechelt's teaching record prior to the Training was impeccable. Not only did Ms. Lechelt testify that she had never been disciplined in any manner for any kind of misconduct, Dr. O'Malley testified to her outstanding teaching record as well. (O'Malley Testimony, 3T100-7 to 103-15) The only type of recognition Ms. Lechelt received in her employ for the Board was positive recognition when, as stated above, she was named Teacher of the Year for 2012. Again, this factor weighs heavily in Ms. Lechelt's favor and supports the conclusion that her employment should not be terminated.

4. Ms. Lechelt's Unquestioned Teaching Ability

Besides the aforementioned Teacher of the Year award, Ms. Lechelt's outstanding teaching ability can be seen in a number of ways. Not only have Ms. Lechelt's ratings in her observations and evaluations always been outstanding, her supervisors often cited her as the model example for other teachers to follow. Ms. Lechelt's immediate supervisors even recognized this, as she was asked to serve as a mentor to other teachers who were struggling. A teacher who was not outstanding would not be asked to serve in such a role

5. Ms. Lechelt's Spotless Prior Disciplinary Record with No Increment Withholdings

As to this *Fulcomer* factor, it must be stated that, once again, this factor weighs heavily in

Ms. Lechelt's favor and supports the conclusion that her employment should not be terminated.

6. The Nature and Gravity of Ms. Lechelt's Offense under All Circumstances Involved

As to the nature and gravity of the offense, Ms. Lechelt's comments were made during a morning inservice training, and did not occur in the classroom with students present. No comments were ever made to any student. No comments were made to any other person besides the three other adults who were involved in the chat.

Under the New Jersey case law for hostile environment sexual harassment and the Board's own policies, the Board is hard pressed to contend that, under all of the circumstances, Ms. Lechelt's conduct amounts to sexual harassment. The lead case on sexual harassment in New Jersey is *Lehmann v. Toys 'R' Us, Inc.*, 132 *N.J.* 587 (1993)(copy enclosed). The Supreme Court in *Lehmann* set forth the elements that a plaintiff must prove in a New Jersey sexual harassment case. Those standards have not been met here.

In its tenure charges and in the testimony of its witnesses, the Board repeatedly claims that Ms. Lechelt sexually harassed Ms. Battista, created a substantial disruption of the Training, and made others fear of being harassed. A careful review of the proofs in this matter demonstrates that no harassment occurred because the conduct was neither ***severe nor pervasive*** nor was it conduct that would make a ***reasonable woman*** believe that the working environment is hostile or abusive.

The tenure charges charge independent violation of the Board's Sexual Harassment and Healthy Workplace Environment policies (Exhs. Board-21 and Board 25). At hearing, the Board argued that the conduct was both severe and pervasive but attempted to read the "reasonable woman" element out of the policies. However, the "reasonable person" element is clearly an articulated part of the Healthy Workplace Environment policy. (Exh. Board 25 at pg. 1, ¶ 2, line 4) Moreover, notwithstanding the contention that the reasonable woman element is not present in the Board's Sexual Harassment policy, the source law cited as the basis of the policy, 29 C.F.R. §1604.11 clearly

includes the element of reasonableness and provides "(3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." This reasonableness element is plainly incorporated into the Board's policy (Exh. Board-21 at pg. 1, ¶ 2).

On the issue of severity or pervasiveness, the conduct at issue was neither severe nor pervasive. As to severity, the contents of the chat were not severe. The comments were sarcastic, filled with innuendos and double-entendres (Exh. Board-13). The fact that Ms. Deluca had to resort to Google to find the meaning of several of the comments (Deluca Testimony, 2T77-19 to -21) makes clear the fact that the comments were not particularly graphic or severe. There are very few curse words used, there is very little discussion about sex, and there is very little discussion concerning body parts, none of it graphic in nature (Exh. Board-13).

On the issue of "pervasiveness," at hearing the other parties often argued the issue of "expectation of privacy." These arguments miss the point. The true issue is one of pervasiveness. To be pervasive, the conduct must be, literally, "existing in or spreading through every part of something." http://www.merriam-webster.com/dictionary/pervasive This means that it must be generally known and public. In this case, the conduct was not generally known and public. Other than the participants, only Ms. Battista and Ms. McKenna were aware of the existence of the chat.

On the issue of "unreasonable interference" with work or of whether a "reasonable person" would view the working environment as hostile and abusive, the atypical reaction of Ms. Battista is critical. It is important to bear in mind the extraordinary lengths Ms. Battista had to resort to in order to see and photograph the chat on Ms. Lechelt's computer screen. Ms. McKenna, a neutral third-party witness, who was sitting next to Ms. Battista at the Training, told Ms. Deluca at her interview, that Ms. Battista had a direct line of sight to Ms. Bleekinger and the presentation board. Therefore, there was no need for Ms. Battista to adjust herself in any way to see Ms. Bleekinger's presentation.

In spite of this, Ms. Battista, who was, as Ms. McKenna described, "consumed" by the chat (Exh. Board-45 at p. 2), took out her iPhone, re-positioned herself to the left, leaned forward toward Ms. Lechelt's and her computer, aimed her iPhone at Ms. Lechelt's computer screen, zoomed in on the screen and took several pictures (Exh. Board-7, pp 2-9). This clearly shows that Ms. Battista had to make special efforts to be disrupted by and to photograph what was on Ms. Lechelt's computer screen.

When analyzing the other proofs against Ms. Battista's testimony, it is clear she did not testify truthfully as to the lengths to which she went to view and photograph the chat. One striking example is when she described the distance between where she was sitting and Ms. Lechelt's computer screen. Ms. Battista stated, on direct and on cross-examination, that she was a couple of feet from Ms. Lechelt's screen (Battista Testimony, 1T180-7 to 181-13). However, this is physically impossible. As Exh. Board-7, pg. 1 shows, there is someone sitting immediately to Ms. Battista's left. If Ms. Battista was only two (2) feet away from the computer screen as she contends, in order to see the screen around Ms. Lechelt, given the angle that she took the pictures in Exh. Board-7, pg. 2-9, Ms. Battista would either be sitting in her neighbor's lap, or Ms. Battista's neighbor would have had to move from his/her seat. There is no testimony that either of these things took place. However, if the computer screen was significantly further away than two (2) feet away, then Ms. Battista could have done what she testified she did. In other words, she could have re-positioned herself to the left, leaned forward, zoomed in on the screen, and took her pictures.

Ms. Lechelt's testimony on this matter is much more credible. Ms. Lechelt testified that the tables, by themselves, were at least two (2) feet wide. (Lechelt Testimony, 3T184-8 to 185-5, *accord* Deluca Testimony, 2T281-3 to -15) Given the fact that there was room between the tables for people in Ms. Lechelt's row to sit and squeeze behind the people who were seated (Lechelt Testimony, 3T184-8 to 185-5), and given Ms. Lechelt's unchallenged testimony that her computer was at the

end of her table, there had to have been at least five (5) feet from where Ms. Battista was sitting, and where Ms. Lechelt's screen was.

It is a simple case of common sense and geometry. If Ms. Battista were as close to Ms. Lechelt's computer screen as she claimed she was, the photos would have been taken from a much more acute angle. The only logical conclusion to be reached is that Ms. Battista exaggerated how close she was to Ms. Lechelt's computer screen. Ms. Battista was further away from Ms. Lechelt's screen when she took the photographs. Therefore, Ms. Battista had to zoom her phone in to specifically focus on viewing the content of the chat and to photograph it.

To paraphrase Judge Garibaldi in *Lehmann*, Ms. Battista is the hypersensitive employee who had an idiosyncratic reaction to what she saw on Ms. Lechelt's computer screen. Not only did Ms. Battista have to go through extraordinary steps to view and take pictures of Ms. Lechelt's computer screen when having a direct line of sight to Ms. Bleekinger, in light of Ms. McKenna's reaction to the chat, Ms. Battista's reaction was unreasonable from its inception. The Board's own interviews clearly show that, despite the Board's claims, there was no general disruption of the Training. Furthermore, while Ms. Lechelt acknowledged that her comments were inappropriate and unprofessional, placed in the proper context, the conduct is not as severe and pervasive as the Board suggests.

Ms. Battista's response to the chat was plainly unreasonable. Ms. McKenna, sitting directly to Ms. Battista's left, also saw some of the chat, but only after Ms. Battista asked her to look at the screen. When Ms. McKenna did look at the screen, her reaction was almost polar opposite to Ms. Battista's "consumed" reaction: Ms. McKenna saw the words, chose to look away, and focus her attention on Ms. Bleekinger. (Deluca Testimony, 2T53-2 to -11) Ms. Battista, as stated above, instead chose to re-position herself to take pictures of Ms. Lechelt's computer screen. During the Training, Ms. McKenna was the reasonable woman–Ms. Battista was not.

The non-public, non-disruptive nature of the chat is borne out by Ms. Deluca's interviews of the other attendees at the Training which the Board initially chose to exclude from the record when it initially moved only portions of its investigative materials into the record. Other than Ms. Battista, not one person said he or she believed that Ms. Lechelt's conduct disrupted them. Other than Ms. Battista, not one person stated that his or her work environment was hostile or abusive.

Therefore, the Board's claim that Ms. Lechelt's conduct violated these policies is unfounded. Given the absence of severe or pervasive conduct and given Ms. Battista's unreasonable and idiosyncratic reaction, it is clear that Ms. Lechelt did not sexually harass Ms. Battista or anyone else. This *Fulcomer* factor, once again, weighs heavily in Ms. Lechelt's favor and supports the conclusion that her employment should not be terminated.

7. Evidence of Provocation, Extenuation, and/or Aggravation

Many of Ms. Lechelt's comments were in response to inappropriate comments made by Ms. Bleekinger during the Training. During the hearing, Ms. Lechelt testified that Ms. Bleekinger was frequently using terms such as "lows" to describe groups of students. As Ms. Lechelt memorably stated in her testimony, she was offended by the usage of that term, because of the struggles her daughter Hallie experiences in school. Her "tart cart" comment in the chat was an attempt to mock Ms. Bleekinger for using these offensive terms, in a "what offensive term will she use next" manner.

8. The Lack of Any Harm or Injurious Effect Which Ms. Lechelt's Conduct Had on the Maintenance of Discipline and the Proper Administration of the School System

There is no evidence that Ms. Lechelt's continued employment in Edison will have any kind of negative effect on the maintenance of discipline and the proper administration of the school system. Ms. Deluca and Dr. O'Malley both testified in conclusory terms that they do not feel comfortable returning Ms. Lechelt to her position because the Board has fielded complaints about Ms. Lechelt. However, it is the Board's burden to prove this, and the Board has failed to enter one

single document into evidence which would show some kind of public perception problem or problems with overwhelming parent concern if Ms. Lechelt were to remain employed.

C. Applying the Seven Tests for Just Cause

Applying the above-stated just cause principles to this case, the testimony and proofs clearly show that, at the very least, the Board has failed to provide satisfactory answers to questions 4, 5, and 7 of the seven tests for just cause. The Board's investigation was not conducted fairly and objectively, and it lacked substantial proof that Ms. Lechelt was "guilty as charged."

The testimony and proofs show the Board investigated this incident with the result being pre-determined. Ms. Deluca interviewed twenty-three (23) other staff members who attended the Training. She also spoke to Engrade's attorney, who spoke to Ms. Bleekinger. In addition, principals at several Edison schools conducted their own interviews. Out of all of these people who were interviewed, the only person who said there was a disruption during the Training was Ms. Battista. Yet, despite at least twenty-three (23) other people contradicting her by stating the atmosphere in the Training was the same as any other training, the Board decided there was a disruption.

Before the Training, she received an email invitation from Mr. Van Pelt to join him in a Today's Meet chat room during the Training. Once engaged in the chat, Ms. Lechelt knew there were no students in the chat room, and thought the chat was just between her and her adult friends. The chat Respondents engaged in was immature and inappropriate. However, during the Training, Ms. Bleekinger used terms for students that, as stated previously, greatly offended Ms. Lechelt.

While Ms. Lechelt's explanations in no way diminish her lack of judgment, once again Ms. Deluca omitted these explanations from her notes and report, and by doing so, her and Dr. O'Malley failed to consider any evidence of mitigation. That kind of investigation is grossly inadequate and

completely improper.

As indicated above, Dr. O'Malley seeks her dismissal. New Jersey case law provides numerous examples of public employees charged with conduct unbecoming for conduct much more egregious and serious than Ms. Lechelt's conduct, but yet were not fired from their tenured positions. It is clear that, when comparing the circumstances of Ms. Lechelt's conduct and the comments she made, they pale in comparison to those of some of the teachers who were the subject of cited cases.

E. Cost Analysis of Potential Penalties

Ms. Lechelt testified without contradiction that a one-time increment withholding would cost her approximately $2,000 based upon the current guides. Ms. Lechelt testified that, based upon the 2013-14 salary guide, if she were to experience a permanent increment withholding, she would lose approximately $40,000 in salary over the course of her career due to the lost increment.

In addition, Ms. Lechelt provided uncontested testimony as to cost of the 120-day suspension from December 16, 2014 until April 15, 2015. She has already lost $22,000 in salary as a result of the 120-day unpaid suspension this year. (Lechelt Testimony, 3T210-12 to -13)

Ms. Lechelt provided uncontested testimony that if she was returned to her employment, but suspended without pay for a longer period of time from December 16, 2014 until the end of the 2014-2015 school year, based on the 2013-14 Salary Guide, her total loss in salary would be approximately $38,000. (Lechelt Testimony, 3T213-20 to -22) If the Arbitrator were to impose a suspension from December 16, 2014 until the end of the 2014-2015 school year and a one-time increment withholding, Ms. Lechelt would lose approximately $40,000 in salary. (Lechelt Testimony, 3T214-11 to -17) If Ms. Lechelt were to be suspended from December 16, 2014 until the end of the 2014-2015 school year and further penalized with a permanent increment withholding, she would lose approximately $78,000 in salary over her career.

In response to anticipated Board argument, Ms. Lechelt Is sincerely remorseful for her conduct. She has credibly taken full responsibility for her chat room comments.

The Board has claimed that Ms. Lechelt is not truly remorseful for her conduct in the chat. The Board has attempted to show this by alleging that Ms. Lechelt's did not have a remorseful attitude during her interviews, which it claims shows she did not understand the gravity of her conduct. However, when examining the proofs, it is clear that Ms. Lechelt expressed remorse for her comments at every step of this tenure charge process, from the day she was interviewed by Dr. O'Malley until the day she testified at hearing. She testified sincerely and honestly about how remorseful she was, demonstrated that she fully understood the impact of her comments and how they could be construed, and credibly stated that she would never repeat this conduct again. Nothing in Ms. Lechelt's teaching career or in her testimony suggests that there will be a re-occurrence of this conduct.

Additionally, Dr. O'Malley testified that, in his meeting with Ms. Lechelt, she began crying. However, he called her tears "crocodile tears." (O'Malley Testimony, 3T29, 11-20) Ms. Lechelt, during her testimony, said she began crying in Dr. O'Malley's office when she thought about the struggles her own special needs daughter experiences. Similarly, when Ms. Lechelt began talking about her daughter at the hearing, she began crying. Despite Dr. O'Malley's perspective, the anguish Ms. Lechelt feels when she considers her daughter's issues is real. This also strongly indicates the sincerity of Ms. Lechelt's remorse.

In its cross-examination, the Board tried to paint Ms. Lechelt's remorse as insincere by questioning her about her statements in her Answer to Tenure Charges and her responses to the Board's Interrogatories. The Board argues that because Ms. Lechelt did not admit to violating Board policies, she is somehow insincere in her remorse and does not understand the gravity of her actions.

The words her lawyers write in legal documents are not the measure of Ms. Lechelt's remorse. At hearing, she testified convincingly that she regretted her conduct during the Training, she understood how her comments could impact others, she understood that her comments were inappropriate, irresponsible, and could be construed as offensive, and that she would never repeat the same conduct again. You saw her testify; you can measure the sincerity of her testimony and her expressions of remorse. Moreover, the Board's argument ignores Ms. Lechelt's consistent expression of genuine remorse for her actions. She expressed remorse during her interview with Ms. Deluca, her interview with Dr. O'Malley, and most prominently, in her testimony.

It is unquestioned that besides one ill-advised morning, as noted above, Ms. Lechelt has dedicated herself to helping children with special needs and to improving the lives of all of her students.

Given New Jersey case law providing that the expression of remorse is a mitigating factor and given that Ms. Lechelt has never been disciplined for any reason prior to this single incident, you should not terminate Ms. Lechelt from her tenured teaching position.

At hearing, the Board's counsel alluded to legal principles articulated in *In re: Tenure Hearing of Jennifer O'Brien, State-Operated School District of the City of Patterson, Passaic County*, OAL Docket No. EDU 5600-11, Agency Ref. No. 108-5/11, 2011 *WL* 5429055 (Oct. 28, 2011), *aff'd by Comm'r* (Dec 12, 2011)(copy enclosed). However, *O'Brien* is not in any way similar to Ms. Lechelt's case, nor controlling of this case's outcome. In *O'Brien*, a teacher was charged with conduct unbecoming for posting on a publicly-available Facebook page that she was "not a teacher-she was a warden for future criminals!" among other disparaging comments about her students. *Ibid.* Here, the ALJ cites the primary reason for recommending termination of employment–that the teacher was not remorseful.

However, as the proofs and evidence shows, Ms. Lechelt's case cannot be more inapposite

to *O'Brien*. As stated above, Ms. Lechelt expressed sincere remorse for her conduct and clearly understands the impact her conduct could have on the school and the Edison community. Ms. Lechelt has consistently expressed this remorse, beginning with the EEO/AA investigation conducted by Ms. Deluca, and continuing to her testimony at the tenure charge hearings. There is nothing in Ms. Lechelt's past history that would even remotely suggest that her conduct at the Training is likely to re-occur. The sincere remorse and understanding she has consistently expressed clearly distinguishes this case from the insincere and/or non-existent remorse and understanding expressed by the teacher in *O'Brien*.

There are numerous examples in New Jersey case law where a public employee's sincere remorse for their actions was a major factor in determining the penalty for those actions. Ms. Lechelt's circumstances and statements of remorse and understanding demonstrates that, unlike the teacher in *O'Brien*, her employment should be reinstated. Once again, Ms. Lechelt never had been previously disciplined for anything. She is legitimately and sincerely remorseful for her conduct. She clearly understands the possible impact of her conduct on the school and the Edison community. Ms. Lechelt's demonstrated sincere remorse, clear understanding, and lack of prior discipline demonstrate her ability to work with staff members and students alike, and that also shows her conduct will not repeat itself. Therefore, Ms. Lechelt should not be terminated from her tenured teaching position.

The Board's tenure charges are prosecutorial in tone, charging Ms. Lechelt with six different offenses, with two charges having multiple counts. By doing so, the Board paints Ms. Lechelt's conduct in as negative light as possible, refocusing the same conduct through six different lenses. The Board attempts to portray Ms. Lechelt's one-time occurrence of bad judgment into multiple charges and counts in an attempt to paint Ms. Lechelt as unworthy of her position and a threat to children. The Board could have merged the charges to accurately reflect the one-time nature of Ms.

Lechelt's conduct. At hearing, the Board continued to suggest that the chat amounted to multiple acts of misconduct.

However, the Board cannot escape what the proofs show. The proofs show that, once again, this is the first time Ms. Lechelt was disciplined in any way, and that her prior disciplinary record is spotless. It is uncontested that Ms. Lechelt participated in a single chat on one morning, during a two-and-one-half-hour (2 ½) inservice session. No matter how hard the Board attempts to spin Ms. Lechelt's conduct, the Board cannot change the fact that this was the first-and only-time Ms. Lechelt engaged in any kind of misconduct. While it does not excuse what Ms. Lechelt said, the Board's attempt to inflate Ms. Lechelt's one-time conduct into multiple charges and counts is improper. Therefore, the conduct should be analyzed as what it is–a single incident.

The Board argues that Ms. Lechelt was not justifiably offended by Ms. Bleekinger's usage of the terms "lows" during the training to describe students because Ms. Deluca testified that a Board-employed administrator said he did not find term offensive. Additionally, the Board argued that standardized tests use that term, so it cannot be offensive. However, by so arguing, the Board once again is completely ignoring the context in which Ms. Bleekinger used the term and how she used it.

It is undisputed that Ms. Bleekinger used the term "lows" several times to describe low performing and/or Special Education students. (Deluca Testimony, 2T97, 12-17; Lechelt Testimony, 3T189-90, 20-19; 3T192, 10-18; 3T192-93, 22-6) All three (3) Respondents testified that Ms. Bleekinger's usage of that term offended them. (Lechelt Testimony, 3T189-90, 20-19) Once again, Ms. Lechelt testified that when she heard that term she thought of how disgusted she would be if her daughter was ever grouped and/or thought of in that way. Given these thoughts, not only the usage of the term "lows," but the number of times Ms. Bleekinger used the term, and the callous manner in which she used the term–"you can call them lows and they'll never know it"–offended

Ms. Lechelt. This is the context that the Board has repeatedly ignored, and refused to consider. Ms. Deluca testified that because one of the Board-employed administrators said he was not offended by the term "lows," it could not have been offensive to Ms. Lechelt. However, once again, this testimony lacks credibility because it is unsupported hearsay with no documentary support. More importantly, this Board administrator was not in the Training, and did not see how many times Ms. Bleekinger used the term "lows" and the manner it was used.

The Board attempts to point to standardized testing using the term "low" as proof of the term's acceptability. However, using the term "low" as part of standardized tests is completely devoid of the context in which Ms. Bleekinger used the term. It reflects neither the number of times Ms. Bleekinger used the term nor the manner in which Ms. Bleekinger used the term. It also does not reflect Ms. Lechelt's consideration of her special needs child. Despite what the Board argues, context matters when assessing Ms. Lechelt's comments. When applying the proper context to Ms. Lechelt's comments, it is clear she was offended by Ms. Bleekinger's usage of the term "lows."

The Board separately charges Ms. Lechelt with violation of its Acceptable Use policy (Exh. Board-24), its Inappropriate Staff Conduct policy (Exh. Board-23) and its Code of Ethics (Exh. Board-22), arguing that the same conduct constitutes multiple infractions. However, as New Jersey case law clearly demonstrates, when teacher usage of school computers has been found to violate school board policies, the violation of the policies, on its own, is not sufficient to support terminating the teacher's employment. There are several cases which illustrate this principle. These cases clearly show that a school board is required to show more than a pro forma violation of its policies in order to support a termination of a teacher's employment. In each of these cases, the arbitrator applied the *Fulcomer* standard and/or the seven tests for just cause, and took the teacher's prior disciplinary record into account when deciding the appropriate penalty.

For these reasons and the other reasons outlined in this brief, the Board's proposed penalty

does not fit the crime. We ask that you impose a penalty far less than what the Board has requested. A one-hundred twenty (120) calendar day suspension with a one year increment withholding and advancement to Step 6 of the Board's salary guide in the 2016-17 school year is appropriate.

OPINION

After considering the documentary and testimonial evidence, the undersigned concludes that Maryellen Lechelt is guilty of Charges I- Counts 1,2, 3, 4, 5, 6, IV- Counts 1,2, 4, 5, 6. 7, V and VI. Charges II, III, and IV-Count 3 are dismissed.

ANALYSIS OF THE CHARGES

The charges are arranged such that the numbered charges and specifications are preceded by a section entitled *Background Common to All Charges.* It would be appropriate to address that section before considering the numbered charges and specifications.

The bulk of this section deals with established Board policies. The cited policies concern sexual harassment (BX21), inappropriate staff conduct (BX23), the code of ethics (BX22), affirmative action (BX20), acceptable use of computer networks and computers (BX24) and a healthy workplace environment (BX25). The relevant Board Policy Numbers are 3362, 3281, 3211, 1140, 3321 and 3351 respectively.

On the theory that employees cannot be held accountable for the implementation of policies of which they were not put *on notice,* it is first essential to determine if and how the teachers employed by the Board knew of the existence of these policies and how they knew or should have known the substantive content of the policies.

The Board met its burden of demonstrating that the Respondents acknowledged their knowledge of the existence of said policies, the manner in which they could secure copies of the policies and their agreement to review the policies and to abide by them. It did so by producing a document entitled *Important Board Policies, Regulations and Mandated Communications Form.*

The record indicates that Respondent Lechelt executed this form on September 5, 2014 (BX18). Thus, she acknowledged that she was aware of the policies, that she would review them and conform to them.

In sum, Respondent Lechelt was *on notice* both procedurally and substantively of the Board's policies central to these charges. More important, she agreed to review the policies, to be conversant with the policies and to conduct herself in accordance with them.

It is well settled that employers are entitled to establish policies and work rules and to require employees to conform to them. This statement is true provided the employees are notified of the policies and rules. In this case, Respondent Lechelt acknowledged her responsibility to comply with them.

What is highly relevant here is that, under the circumstances, the failure to abide by the rules and policies is chargeable conduct. Since the failure to comply is chargeable, the Board is well within its rights to impose discipline on employees who are guilty of such breaches.

The second major component of *Background Common to All Charges* is a reference to a group chat on the *Today's Meet* website that was conducted through the District's computer network. The 2 ½ hour group chat was alleged to have taken place on October 23, 2014 during a professional development program that was called an *Engrade Chromebook Training.*

The District provides the teachers with laptop computers, Chromebooks. Thus, those participating in the group chat did so on District owned computers.

The record suggests that *Engrade* is a educational program employed by the District. The October 23, 2014 meeting was devoted to the program.

It is unchallenged that the *Engrade* meeting took place on October 23, 2014, that the group chat lasted (from beginning to end) 2 ½ hours and that Respondent Lechelt and approximately 25 other teachers were in attendance.

This section of *Background Common to All Charges* goes on to elaborate on the group chat and sets forth the allegedly unacceptable content of it. To the extent that these matters are included in the Charges and Specifications, they will be addressed below.

Charge I

This charge asserts that Respondent Lechelt's participation in the group chat rises to the level of unbecoming conduct and/or just cause. It alleges that Lechelt violated New Jersey law and Board policies, regulations and procedures concerning staff interactions. It charged that the chat room was public, was visible, and was accessible to other employees and students. It added that the chat room was offensive, discriminatory, rife with sexual innuendo and constituted a hostile work environment. This charge was the subject of six *counts* or specifications.

Count 1 concerned inappropriate comments about the Endgrade trainer, Sara Bleekinger. Lechelt was charged with a course of misconduct toward Ms. Bleekinger. It stated that the group chat was foul, discriminatory, offensive, harassing and sexual in nature. It cited the specific comments made by Lechelt during the group chat.

It should be stated that the group chat lasted for 2 ½ hours. It was downloaded from the computers and it was 16 pages in length (BX13). The text of Lechelt's comments were included in the charges served on her.

It must be noted that Lechelt's comments must be read in the context of comments made by other participants in the group chat. There were three main participants, Maria Weber, Maryellen Lechelt and Tyler Van Pelt. All of them were served with charges. While the matter was consolidated relative to the hearings, separate decisions are being written for each of the three named participants.

There was a small number of additional participants in the chat. They were either not

identified or no longer employed by the Board. In any event, their participation was limited and minor as compared to the three charged teachers.

As to Lechelt's culpability or lack thereof of Count 1, her comments about Sara Bleekinger were inappropriate. The comments related to Bleekinger's looks and speech. They also dealt with an imaginary liaison between Van Pelt and Bleekinger. Many of her comments had sexual innuendos and denigrated Bleekinger's professional abilities.

When these comments are put in the context of the entire chat, their inappropriateness is magnified. Thus, an objective review of the comments concerning Sara Bleekinger suggests that Lechelt's comments in and out of context with the total chat were inappropriate.

Despite the obvious, Lechelt argued that, while there is no denying what her comments were, she is not guilty of this Count. She insisted that the she had an expectation of privacy relative to the chat. She posited that the chat would have gone unknown but for Alysia Battista, another attendee at the meeting, seeing it. Thus, in her view, the chat was private and her participation in it cannot be chargeable conduct.

As will be discussed in greater depth below, Lechelt and her cohorts had no expectation of privacy. They were engaged in a chat in a public setting while using a District computer and a District network. Under the circumstances, there could be no expectation of privacy.

The fact that they thought that the chat was private is of no moment. Thinking something does not make it so.

Their reasoning was that one needed an access code in order to see that chat's comments. That reasoning is fallacious. Anyone passing by could see what was on the screens of the computers. The fact that only one person complained about chat is irrelevant. The chat was undertaken in a public setting and, irrespective of all of the issues concerning the ownership of the computer and the

network, it fell into the public realm. Once that is recognized, it is readily apparent that Lechelt had no expectation of privacy.

Much was said about Lechelt's remorse for her conduct. While she in fact made certain comments about her remorse for having participated, the defense suggests that she has not fully taken responsibility for her participation in the chat.

She always had the option of logging out of the chat. If she thought the comments being made were truly offensive, why would she continue to participate? She did not, suggesting that the comments were not, in her view, inappropriate until she was called to task for it.

Furthermore, Lechelt made a significant number of the comments in the chat transcript. Many of them were crude and surprising given her level of education and her profession. Her comments were not disputed.

Once the content of the chat became known, Lechelt became the subject of charges of unbecoming conduct for making inappropriate comments about Sara Bleekinger. The fact that the comments were not known to Bleekinger is irrelevant. The comments were public and were treated that way.

This count alleges that Lechelt's comments were disruptive and had a negative impact on another Engrade participant, Alysia Battista. These issues will be addressed below since they are part of many of the charges. In short, the Board met its burden relative to Count 1.

Count 2 concerns comments made about special needs students. The comments were undisputed. They referred to the children in outrageous pejoratives.

Lechelt indicated that she made these comments in response to Bleekinger referring to a *low group*. She suggested that she was offended by the term *low group*. She tearfully added that one of her children has special needs and resented the thought that her daughter would be described in such

a way.

There is no way that Lechelt can justify her comments. Even if she did feel offended, a proposition that the undersigned has difficulty accepting, why would she not address her resentment like an adult and a professional? Under those conditions, she would have either privately or publicly expressed her displeasure. She certainly would not have made the comments quoted in the transcript in an attempt to be humorous. If she thought her comments were funny, no rational reader of the transcript would laugh.

Once again, even of Lechelt had been offended by Bleekinger's characterization, her conclusion that *low group* is demeaning was arrogant and is a view that was unsupported by anything in the professional literature. By contrast, District witnesses cited to test and other professional literature that specifically referred to *low groups*.

In sum, Lechelt has neither the credentials nor the standing to refute the use of an accepted term. She is entitled to have an aversion to it but she does not have the right to object to it by making the comments she made.

It must be added that Lechelt's comments must also be viewed in the context of Van Pelt's comments about special needs students. She and Van Pelt were clearly having what they thought was a good time at the expense of handicapped students

For the reasons stated above, Lechelt is culpable of Count 2.

Count 3 alleges that Lechelt made inappropriate comments about Dr. O'Malley, the Superintendent of Schools. A review of the transcript reveals that Lechelt's comments indicate her reference to Dr. O'Malley as *tricky d.* They comment about his appearance. They are replete with sexual innuendo and suggest that his hirings are less than ethical and professional.

Her comments were unacceptable. When put in the context of Tyler Van Pelt's comments

about the Superintendent, they become even more offensive. Lechelt is guilty of Charge 3.

Count 4 addresses comments that Lechelt made about Alysia Battista. Alysia Battista is the teacher who saw Lechelt's computer screen and became upset when she read the comments that were part of the chat .

The comments made by both Lechelt and Van Pelt were graphic. Lechelt chose to comment about Battista's tendency to pick at her lips when she is anxious. Lechelt made a negative comment about this tendency and made a derisive comment about the lips getting bigger. Many of the comments in the exchange between Lechelt and Van Pelt were sexual in nature. The comments rose to the level of unbecoming conduct. Lechelt is guilty of Count 4.

Count 5 addresses comments made by Lechelt about unidentified individuals attending the training. The comments were primarily made by Lechelt and Van Pelt.

As were true of the comments made about Ms. Bleekinger, Ms. Battista and Dr. O'Malley the comments attributed to Lechelt about unidentified attendees at the training t were offensive, crude and sexual in nature. They were also discriminatory with respect to older people.

Count 5 was proven. The Board met its burden of proof in this regard.

Count 6 concerns comments made by Lechelt to Van Pelt and Weber. These comments concerned her becoming a supervisor because she is *cute and blonde,* made a reference to Van Pelt as being a *backchannel guy* (a reference to anal sex), references to Van Pelt being sexually aroused, a reference to male genitalia and an acknowledgment of her enjoying being asked to perform oral sex.

A review of the comments is sufficient to conclude that they constituted unbecoming conduct. Moreover, as noted above, Alysia Battista read the comments and became upset by them. Given the crudeness of the comments, her reaction was understandable and reasonable. Lechelt is guilty of Count 6.

Charge II

This charge is limited to a single count. It alleges that Lechelt was insubordinate and guilty of unbecoming conduct in that she was involved in the disruption of Engrade training. An analysis of the allegation must be done before a determination is made about the charged misconduct.

The key word in this charge is *disruption.* An accepted definition of this word suggests that the action(s) of an individual or group interfered with the ability of others to continue an ongoing activity. Put another way, the actions of one or more people had to have prevented the organizers of a specific activity from continuing the activity to its planned conclusion.

With this definition in mind, one needs to examine the facts surrounding the instant matter. It is uncontested that the training started and ended on time. It is also clear that from the perspective the trainer, Sara Bleekinger, her presentation was made in an uninterrupted manner. Thus, it is difficult to conclude that Lechelt and others disrupted the training.

That is not to suggest that Alysia Battista was not upset by the contents of the chat. It is apparent that seeing the text of the chat interfered with her ability to benefit from the training.

It must be said that Battista was the subject of negative comments by the three main participants in the chat. There was a good deal of blaming the victim here. Such a response was inappropriate.

By any reasonable standard, there were many grossly offensive comments that were made during the chat. Any reasonable person would have found them offensive and large numbers of reasonable people would have been disturbed to read the comments, particularly in a professional setting.

The undersigned hastens to add that an absence of disruption of the training session does not obviate the contention that Lechelt was guilty of misconduct. As noted in the findings to Charge I,

she was guilty of misconduct. Specifically in Charge I Count 3, 4, and 5, Lechelt was found to be culpable of unbecoming conduct in connection with Alysia Battista, Dr. O'Malley and Sara Bleekinger. Furthermore, as will be seen in charges not yet addressed, she is guilty of additional misconduct.

However, it cannot be said that Lechelt disrupted the training session. If the actions of Lechelt and her two cohorts had not transpired, from the perspective of the vast majority of the attendees, it is likely that the session would have been no different than it was in the presence of the group chat. Thus, Charge II is dismissed.

Charge III

This charge alleges the misuse of the District's computer network through a group chat that was *inappropriate, foul, discriminatory, harassing, offensive and sexual in nature.* The District alleged that the foregoing was a flagrant misuse of the Board's resources. The Board concluded that this conduct constitutes unbecoming conduct, insubordination and just cause for dismissal.

Without commenting on the merits of Charge III, the Arbitrator points out that Charge IV Count 7 alleges, although worded in a slightly different way, the same misconduct in the context of Board Policy 3321.

Therefore, the issue of the alleged misuse of the District's computers and network will be addressed in the discussion of Charge IV Count 7. As such, Charge III is dismissed.

Charge IV

This charge asserts that Maryellen Lechelt violated various District policies. The District posited that such misconduct constituted unbecoming conduct and/or just cause for dismissal.

Charge IV is comprised of seven counts. Each of the counts will addressed individually. It should be noted that, of the seven counts, only Count 3 does not allege that Weber violated a specific

District policy.

With that in mind, there are certain comments that apply to Counts 1, 2, 4, 5, 6, 7. Since it is more efficient to make certain observations about all six counts at the outset rather than repeat them in connection with each policy, the following observations apply to all of the cited Board policies.

As noted above, Lechelt was *on notice* about each policy (BX18). This document listed 34 policies and procedures in effect in the District. The policies cited in the six counts identified above are all listed on the document.

Lechelt signed this document to acknowledge receipt of it as well as an acknowledgment of her awareness that the policies can be found on the Board's website. Finally, Lechelt's signature reflects her agreement to conform to the listed policies and procedures.

What must be concluded is that Lechelt was bound to comply with the policies. If she failed to review the policies in order to be able to comply with them, she did so at her own risk. In short, she was required to comply with the policies.

A second observation to be made is that Lechelt and her two colleagues participated in the group chat. Their continued participation in the chat makes each of them responsible for its contents.

It is true that Lechelt made some, not all, of the inappropriate comments. However, had she been concerned about her commitment to honor District policies, she would have logged off of the chat and, in so doing, disassociated herself from it. She did not do so and must be held accountable for her actions.

What remains is an application of the facts of this case to the terms of the cited policies. Such an analysis will result in a determination of whether Weber is guilty of one or more of the counts.

Count 1 alleges a violation of the Board's sexual harassment policy (Policy number 3362) (BX21). In relevant part, the policy states:

> The Board of Education recognizes that an employee's right to freedom from employment discrimination includes the opportunity to work in an environment untainted by sexual harassment. Sexually offensive speech and conduct are wholly inappropriate to the harmonious relationships necessary to the operation of the school district and intolerable in a workplace to which the children of this district are exposed.
> Sexual harassment includes all unwelcome sexual advances, requests for sexual favors, and verbal or physical contacts of a sexual nature that would not have happened but for the employee's gender. Whenever submission to such conduct is made a condition of employment or the basis for an employment decision, or when such conduct is severe and pervasive and has the purpose or effect if unreasonably altering or interfering with work performance or creating an intimidating, hostile, or offensive working environment, the employee shall have cause for complaint.
> The sexual harassment of any employee of this district is strictly forbidden. Any employee or agent of the Board who is found to have sexually harassed an employee of this district will be subject to discipline which may include termination of employment.
> The Affirmative Action Officer shall instruct all employees and agents of the Board to recognize and correct speech and behavior patterns that may be sexually offensive with or without the intent to offend.

Before considering the facts, there needs to be analysis of the policy. The policy addresses two forms of sexual harassment, sexually offensive speech and sexually offensive advances, both physically and verbally. There is no evidence of sexual advances in any way, shape or form. Thus, the relevant language in this policy concerns the first paragraph above.

The sexual harassment in this case concerns sexually offensive speech. The purported sexually offensive speech was contained in the comments made during the group chat.

The facts suggest that Alysia Battista, a participant at the Engrade training was sitting behind and to the left of Maryellen Lechelt. She was able to see Lechelt's computer monitor and was able

to read the ongoing comments of the group chat and became offended by the comments that were overtly sexual as well as those that had sexual innuendos

Battista became upset by what she saw and left the meeting room. She filed a complaint about the chat and the instant proceeding resulted.

To be clear, counsel for Weber, Lechelt and Van Pelt all cited *Lehman v. Toys 'R' Us,* 132 N.J. 587 (1993) as the seminal case in New Jersey for matters involving sexual harassment. The cited case is applicable to the portion of the instant policy that deals with physical and verbal sexual advances. This aspect of the policy is found in its second paragraph, not the first one.

Moreover, the language in the second paragraph tracks *Toys 'R' Us.* The same cannot be said for the first paragraph. It is evident that, if the Board intended for the *Toys 'R' Us* standards to apply to both paragraphs, it would have made such an indication in the policy. Thus, the plain language of the policy indicates that the Board intended to distinguish sexually offensive language from sexual advances of either a physical or a verbal nature.

Thus *Lehman v. Toys 'R' Us* is inapposite here. The standards set forth in *Toys 'R' Us* do not apply in matters involving sexually offensive comments that are distinguishable from cases in which there was sexual advances of a physical or verbal nature.

This case deals with sexually offensive speech. The Board is well within its rights to issue policies that are relevant to the governance of the school district.

With the above analysis having been completed, the undersigned must now consider whether Lechelt was guilty of the violation of the Board's sexual harassment policy in terms of participating in sexually offensive speech.

The Arbitrator is persuaded that she did so through direct comments, by responses to the comments of others and by participating in the group chat from beginning to end. She directly commented on Van Pelt as being a *backchannel guy.* The record suggests that *backchannel* refers

to anal sex. Lechelt made numerous other offensive sexual comments. Thus, Lechelt's comment were sexual in nature.

There are numerous examples of responses by Lechelt to comments made primarily by Van Pelt. These comments were made in the midst of a series of comments about Sara Bleekinger, Alysia Battista and Dr. O'Malley that were sexual in nature.

In sum, Maryellen Lechelt violated the Board's policy proscribing sexually offensive speech. Thus, she is guilty of Charge IV Count 1.

Count 2 alleges a violation of the Board's affirmative action policy (Policy Number 1140) (BX20). This policy is designed to promote the acceptance of people of diverse backgrounds regardless of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, gender, religion, disability, or socioeconomic status. The intent of the policy is spelled out in the first full paragraph of the policy statement.

While Lechelt's comments were about Alysia Battista and other people, some of them being unidentified participants at the training, they were disparaging of women, special needs students, lesbians and older people (BX13). She cannot credibly assert that she did not violate this policy while sitting through and participating in a chat that was replete with comments about people protected by the policy. Thus, she is guilty of Charge IV Count 2.

Count 3 concerns a purported violation of the policies alluded to in Counts 1 and 2 pertaining to the Affirmative Action Investigation. This count is dismissed.

Lechelt has already been found guilty of Counts 1 and 2. She is essentially being charged with the same misconduct a second time. In this regard, Count 3 is duplicative.

With respect to the interview per se, there are circumstances under which a interviewee's conduct at an interview could rise to the level of misconduct. However, under the facts of this case, Lechelt was said to have not understood the seriousness of the matter but was not shown to have

been guilty of misconduct at the interview per se. Thus, as indicated above, Charge IV Count 3 is dismissed.

Count 4 suggests a violation of the Code of Ethics policy (Policy Number 3211) (BX22). The key language in this policy is found in Principle II. It states as follows:

> The education profession is vested by the public with a trust and responsibility requiring the highest ideals of professional service.
> In the belief that the quality of the services of the education profession influences the nation and its citizens, the educator shall exert every effort to raise professional standards, to promote a climate that encourages the exercise of professional judgment, to achieve conditions which attract persons worthy of the trust to careers in education, and to assist in preventing the practice of the profession by unqualified persons.

Among other issues, this Code of Ethics requires teachers to endeavor to raise professional standards and to encourage the exercise of professional judgment. Lechelt's participation in the group chat was inconsistent with both of these principles.

Lechelt attended a professional development training session. It was offered in order to provide participants with the opportunity to improve their abilities with the Endgrade program. It is inconceivable that experienced educators would engage in group chat for 2 ½ hours while a trainer was engaged in a professional presentation. What makes the misconduct especially egregious is the content of the chat. It was demeaning, denigrating, offensive and discriminatory. There was nothing about the chat that reflected *an endeavor to raise professional standards*. It was crude by any standard and a clear violation of the District's Code of Ethics.

The Arbitrator is compelled to comment on the argument that the amount of time that the participants were involved in the chat was limited to the time spent in inputting the comments. This argument is invalid and inappropriate. It suggests that they may have spent 15-20 minutes actually inputting their entries in the chat.

It is highly disingenuous to assert that the chat lasted 150 minutes but that the participants were involved in the chat for 15 or 20 minutes. That implies that they were focused on the training material for 130-135 of the 150 minutes. That suggests that the three respondents spent no time reading each other's *contributions* to the chat and that they spent no time watching their computer monitors while waiting for responses to previous inappropriate comments.

The chat lasted 2½ hours from beginning to end. The greatest time gap between comments was four minutes. This argument trivializes the misconduct and does nothing to reinforce the premise that they are sincerely remorseful for their actions.

The second aspect of the Code of Ethics that is pertinent here is the creation of a climate that encourages the exercise of professional judgment. The participation in the group chat is the antithesis of the exercise of professional judgment.

The Arbitrator is convinced that Lechelt violated this policy. Thus, Lechelt is guilty of Charge IV Count 4.

Count 5 addresses the Inappropriate Staff Conduct policy (Policy Number 3281) (BX 23). The relevant provision in this policy is found in the fourth full paragraph. It states as follows:

> School staff in completing their professional responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments to pupils or about pupils and shall not engage in inappropriate conduct towards the pupils.

There was an extensive string of comments concerning special needs students in the transcript of the chat. The comments, many of which were made by Lechelt, were, to say the least, inappropriate and discriminatory.

What makes Lechelt even more culpable is the fact that she is a parent of a Special Education student. If such a teacher is not offended by negative statements about students like her daughter, who will be?

Suffice it to say that Maryellen Lechelt violated the Inappropriate Staff Conduct policy. She is culpable of Charge IV Count 5.

Count 6 concerns the Healthy Workplace Environment Policy (Policy Number 3351) (BX25). The relevant language in this policy is found in the second full paragraph of the text. It sates as follows:

> A significant characteristic of a healthy workplace environment is that employees interact with each other with dignity and respect regardless of an employee's work assignment or position in the district. Repeated malicious conduct of an employee or group of employees toward another employee or group of employees in the workplace that a reasonable person would find hostile and offensive is unacceptable and not conducive to establishing or maintaining a healthy workplace environment.

The record indicates that Supt. O'Malley was the subject of numerous comments about his appearance, hiring practices and his purported sexual practices. The comments were graphic and crude. The treatment that he received in the group chat was prototypical of what was proscribed in the policy.

Lechelt made numerous offensive comments about various individuals other than Superintendent O'Malley. Therefore, there was *repeated malicious conduct.*

Therefore, she violated this policy. As such, Lechelt is culpable of Charge IV Count 6.

Count 7 addresses the final policy allegedly violated. It is the policy concerning the acceptable use of district computers and computer networks (Policy Number 3321)(BX24).

The key language in this policy is as follows:

> The Board recognizes that telecommunications will allow teaching staff members access to information sources that have not been pre-screened using Board approved standards. The Board therefore adopts the following standards of conduct for the use of computer network(s) and declares unethical,

> unacceptable, inappropriate or illegal behavior as just cause for taking disciplinary action limiting or revoking access privileges, instituting legal action or taking any other appropriate action as needed necessary.
> The Board provides access to computer network(s)/computers for administrative and educational purposes only. The Board retains the right to have the Superintendent or designee monitor network activity, in any form necessary, to maintain the integrity of the network(s) and ensure its proper use
> Standards for Use of Computer Network(s)
> Any individual engaging in the following actions declared unethical, unacceptable or illegal when using computer network(s)/computer shall be subject to discipline or legal action:
> 3. Using the computer network(s) in a manner that:
> k. Engages in other activities that do not advance the educational purposes for which the computer network(s)/computers are provided.

Irrespective of the defenses offered by the three charged teachers, there can be no question that they used the District's computers in a manner that was violative of this policy. The defenses will be discussed below. However, the use of the computers for the group chat was clearly in violation of the Board's policy.

Lechelt, as one of participants in the chat, violated the policy concerning the use of District computers and computer networks. Thus, she is guilty of Charge IV Count 7.

Charge V

This charge is one of a single count of misconduct. Lechelt is charged with a failure to pay attention during the Endgrade training and with making no effort to benefit from the instruction provided.

As has been previously documented, Maryellen Lechelt has been found guilty of various kinds of misconduct, ranging from inappropriate conduct with other staff members and with other participants in the group chat and individuals not in the employ of the District to significant

violations of Board policy. In each of those charges and counts, the misconduct could be documented through a review of the transcript of the chat and through a review of the conduct of Lechelt in the context of the terms of several Board policies.

In this charge, Lechelt is said to have not paid attention to the training and having made no effort to benefit from the instruction. The transcript of the chat shows the timing of the comments. At most, there was a time gap of four minutes between comments.

It makes no sense to limit the time spent on the chat to the amount of time writing comments. Lechelt was paying attention to the chat for virtually the full 2 ½ hour duration of the session. The total time she was involved in the chat precluded her paying attention to the content of the training.

Based on the record created, the Arbitrator concludes that Lechelt did not pay attention and did not make appropriate efforts to benefit from instruction that was designed to improve her teaching. As such, Charge V must be sustained.

Charge VI

This charge asserts that Lechelt was guilty of ongoing neglect of duty. The basis of this charge is found in comments she made that suggested that she wanted to avoid performing her duties in the future.

The comments referenced by the District were self-explanatory. She derided the training as a waste of time and then calculated the time wasted as about 300,000 hours of time at a cost of about $300,000. She ended the comment by congratulating them, presumably the chatters, for this waste.

One would think that she would have made better use of her time getting what she could from the training rather than making inane calculations. It is inconceivable that Lechelt, a relatively junior teacher, could not gain some measure of benefit from a staff development program. However, her approach was to publicly deride the District's effort to enhance the training of the teachers and then to engage in offensive calculations in an effort to show that the District was guilty of wasting time

and money.

She followed the above described comment with two more that were equally inappropriate. The first one appeared to suggest that since the training was a waste of time, she could continue to waste time by sitting in the back of her classroom reading a magazine.

The second comment was directed to Van Pelt. She suggested setting up a chat when they return to their teaching duties and to continue the chat when they are supposed to be teaching.

These two comments need to be put in context. On the one hand, Lechelt stressed that none of her inappropriate comments were said to or in the presence of students. On the other hand, she suggested that, because she had so little appreciation of the training, it would be agreeable to her to deny her students instructional time.

Two comments are in order. If she thought her comments were humorous and should not be taken seriously, they were not funny and reflected a side of her that was unlike the image of a dedicated teacher that she tried to project at other points during the hearing.

Second, assuming *arguendo* (an assumption not shared by the Arbitrator) that the training session needed improvement, does Lechelt suggest that every pedagogical effort that she has made has been an outstanding success? Rather than appreciating the District's effort to support the staff through additional training, she chose to denigrate the District's effort and to humiliate the Superintendent and Bleekinger. A professional who finds a training to be in need of improvement makes suggestions for improvement but does not act as Lechelt did.

Lechelt's last comment suggested that the chat was therapeutic and that the chat group should attend other training sessions. The comment indicates that the group chat was so meaningful that they should continue to participate in them in future training sessions.

The comment posits that the negative comments about the Endgrade training were irrelevant. She viewed the training sessions as times for them to act in an irresponsible and unprofessional way.

It clearly puts the defenses she raised in a light that does not serve her well.

Lechelt argued that her teaching record suggests that she would never waste teaching time by reading magazines. Lechelt does not appear to recognize that, if purposeful use of instruction time was of such great importance, she would not have made such a comment because such a thought would never have dawned upon her.

The District charged Lechelt with neglect of duty. The comments reflect an intent to neglect teaching duties and professional obligations in the future. They also add further evidence of her actions during the Endgrade training as rising to the level of neglect of duty. Thus, Lechelt is culpable of Charge IV.

ANALYSIS OF THE DEFENSES

Lechelt offered a number of defenses in an effort to mitigate the findings of misconduct. They are deserving of mention and discussion.

She acknowledged that the facts in this matter are undisputed. However, she urged that she has an unblemished record and that she has expressed sincere remorse for her actions. She stressed that, although they are not mandatory, an application of the *Fulcomer* standards suggests that termination is unjustified in this case.

At the same time that Lechelt makes the above statements in her own defense, she sees her actions as a *youthful indiscretion.* She posits that the District exaggerated its claims of her malice. She minimizes her misconduct by claiming it was limited to two hours of a single day. She characterized her comments in the chat as being *misguided jokes*.

The two paragraphs above stand in contrast to each other. The first one seems to assume responsibility for her actions and simply suggests that a penalty short of termination would be appropriate.

The second paragraph trivializes her misconduct in a number of ways. It leaves the

undersigned uncertain about the sincerity of her remorse and her assumption of responsibility.

The reference to Lechelt's *youthful indiscretion* makes suggests that Lechelt is a teenager. She may have behaved like one but she is a professional who can reasonably be expected to behave like one.

She objected to Dr. O'Malley's and Ms. DeLuca's characterization of her attitude at her interview as being unaccepting of the seriousness of her misconduct. Lechelt's beliefs as set forth in the second paragraph add great credence to the conclusions of Dr. O'Malley and Ms. DeLuca.

Lechelt made a conscious effort to demonstrate that she has added to the tone of the school through her participation in extra-curricular and co-curricular activities. The undersigned notes that Lechelt had a leadership role in an anti-bullying club. This program was designed for the benefit of students.

The Arbitrator is taken by her lack of insight into her own actions. Did she not realize that her comments about Sara Bleekinger were bullying ones? Did she not recognize that her castigation of Battista for having the temerity to look at a computer monitor that was publicly displayed involved bullying. Lechelt's current situation was primarily the result of her own actions. But for the actions of the three people involved in the chat, Battista would not have become upset and would have had nothing to report.

The undersigned will discuss Lechelt's belief that she had a right to privacy. However, the bullying comments that she made were in a public venue. Anyone passing by could have seen her computer screen and would have had the opportunity to share the comments with Ms. Bleekinger.

Moreover, the comments were insulting and denigrating. There is a serious inconsistency between passing oneself off as leading an anti-bullying effort and then acting as she did in connection with Sara Bleekinger, Alysia Battista and others.

A major defense raised by Lechelt was that she had a right to privacy and that the chat was

inaccessible to others. Her premise is totally without merit.

The computers and the network belong to the District. The District always had the right to confiscate the computers and to examine its contents. So much for the chat being inaccessible to others.

Additionally, the chat was conducted in a public venue and subject to being viewed by anyone passing by. The fact is that the chat was seen by Alysia Battista. Rather than recognizing that Battista read the chat in a public setting, Lechelt excoriated Battista as being similar to a voyeur. If Lechelt seriously believed that she had a right to privacy under the facts of this case, she is extremely misguided. Before engaging in the conduct that placed her in a position that could lead to her dismissal, she needed to have the curiosity needed to determine the extent of her liabilities.

It is difficult to credit the argument that Lechelt believed that she really had a right to privacy. She knew or should have known the District's policy concerning the use of its computers and computer networks. She had to know that the chat substantively violated various Board policies as well as common decency.

A second area of Lechelt's defense concerned Alysia Battista. She portrayed Battista as the villain. She claimed that Battista had an ax to grind.. Therefore, in Lechelt's view, she reported the misconduct.

She claimed that Battista and she had disagreed about various professional issues when they both attended training sessions. Thus, taken to its logical conclusion, professionals should not disagree about professional issues because such disagreements could lead to subsequent charges of animus. There is nothing in the record to suggest that Battista engaged in a personal vendetta against Lechelt and seized upon the chat *to get* Lechelt.

Lechelt observed that Battista's interpretations of the chat were erroneous. Lechelt fails to recognize that the basis of the charges have little to do with Battista's interpretations. The charges

are largely based on the transcript of the chat.

She accused Battista of being untruthful. The basis of this claim is Battista's inaccurate estimate of the distance of her seat from that of Lechelt. An inaccurate estimate of distance is hardly an obfuscation of the truth.

Lechelt opined that Battista's response to the chat was unreasonable. Such a view is self-serving and is devoid of credibility. As noted, the chat was offensive on numerous levels. It is not unreasonable that a third party reader of the chat's transcript would become offended.

Are there people who might not have been offended? There are. However, that does not make those who do become upset *unreasonable.* On the contrary, Battista's being upset was entirely reasonable under the circumstances.

Lechelt engaged in a *blame the victim* exercise. Battista saw the chat and became upset by its crudeness. Objectively, the chat was crude. It would have been better for Lechelt to indicate *mea culpa* without trying mitigate the misconduct by in some way blaming Battista for the situation in which she currently finds herself.

Another significant aspect of Lechelt's defense is her allegedly being offended by Bleekinger's reference to some special needs students as being in the *low group.* As indicated above, Lechelt's view of this term is based on nothing other than her opinion. While the District cited professional literature that refers to a *low group,* Lechelt and Van Pelt evidently decided that they were was the final authorities on this matter. Moreover, even if Lechelt believed that she had a serious philosophical difference with Bleekinger, did she really think that making offensive and discriminatory comments about special needs students was the appropriate way to address the issue?

Lechelt's purported reaction to *low group* suggests a sensitivity to this issue. Perhaps her sensitivity stems from the fact that her daughter has special needs. That possibility is understandable. What defies understanding is her justifying her sensitivity while deriding what may

have been Battista's sensitivity to a chat that was laden with overtly and extremely offensive statements.

Lechelt argued that the chat was private because of FERPA issues. This claim is without merit. FERPA is a statute that protects the privacy of student records. Student records were in no way discussed at the Endgrade training.

The Arbitrator concludes that this assertion is further evidence of Lechelt's failure to understand the seriousness of this matter. It also suggests that her remorse is not as sincere as she would like the Arbitrator to believe.

Lechelt suggested that she is an effective professional. Would an effective professional describe Dr. O'Malley as she did? Would such an individual suggest that his hiring practices are based on sexual favors? Would a professional accuse him of making up his mind to suspend her before he interviewed her? This question is posed in the context of Lechelt having reason to know that Dr. O'Malley read the transcript of the chat multiple tomes.

Last, Lechelt observed that, under *Toys 'R' Us,* she is not guilty of sexual harassment. The Arbitrator has addressed this matter in connection with the charge related to the violation of the Board's sexual harassment policy. That analysis need not be repeated here. Needless to say, this argument is not persuasive. As noted above, while the undersigned rejects the *Toys 'R' Us* defense, it is the opinion of the Arbitrator that, while recognizing that others might have reacted differently, Battista's reaction was reasonable. Her reaction was not idiosyncratic.

A final element of the defense concerned the interview conducted by Ms. DeLuca after becoming aware of the alleged misconduct. She outlined the interview by indicating the questions asked and the responses received (DX15).It is necessary to comment on this matter since, under *Just Cause,* the undertaking of a fair investigation is required.

DeLuca interviewed numerous people. She could not identify all of the possible interviewees

but she made a reasonable effort to identify those who should be interviewed. The fact is that a large number of attendees at the training knew little or nothing about the matter at hand.

Lechelt claimed that many of her comments are not reflected in DeLuca's report. However, at the end of the interview, DeLuca specifically provided Lechelt with an opportunity to make any additional comments. Evidently, Lechelt availed herself of the opportunity and DeLuca included them in the summary of the interview.

DeLuca indicated that she took notes during the interview and then transcribed her notes. She was criticized for not preserving her hand written notes. No authority was cited that indicated that handwritten notes must be preserved.

Moreover, the interview was not done in the presence of a court reporter and was not recorded. If Ms. DeLuca was intent on making Lechelt appear guilty, she could have handwritten anything she wanted, preserved her handwritten notes and then transcribed them. The lack of preservation of the handwritten notes in this case is simply a *red herring.*

In the final analysis, the resolution of this matter comes down to a credibility determination. On the one hand, aside from the issue over DeLuca's notes, there were no credibility issues raised in connection with DeLuca. The same cannot be said relative to Lechelt.

The summary of the interview is lengthy and detailed. De Luca credibly stated that the summary was complete and accurate. In this regard, the undersigned credits DeLuca's testimony.

In a broader context, the Arbitrator is persuaded that the investigation of the instant matter was fair and comprehensive. This is fundamental to a finding of *Just Cause.*

THE *FULCOMER* STANDARDS

The Board is seeking the termination of Lechelt's services as a teacher. She argued that the leading New Jersey case concerning the termination of tenured teachers as a consequence of unbecoming conduct is *In re Fulcomer,* 93 N.J. Super. 403 (App. Div. 1967). This was a case in

which the Commissioner of Education concluded that Respindent Fulcomer engaged in unbecoming conduct and that dismissal was required.. The Appellate Division disagreed and held that the trier of fact must first determine if the respondent teacher engaged in unbecoming conduct and, if so, whether the misconduct warranted discharge or a lesser penalty.

The application of *Fulcomer* is not mandated. However, it is useful since, like *Just Cause,* it establishes an objective set of guidelines to be considered in cases such as this one.

In this regard, the Court determined that the following factors should be considered:

1. The potential impact on the charged teacher's career.

It is evident that, should Lechelt be terminated, the District would be required to report the dismissal to the State Board of Examiners for the possible revocation of her teaching certificates. It is reasonable to conclude that a termination in this case would dramatically increase the likelihood of Lechelt's teaching career being ended in New Jersey and probably in other states.

2. The longevity of Lechelt's career.

Maryellen Lechelt has been a teacher in New Jersey for about four years. She is a junior teacher and should not be given the consideration afforded teachers with many more years of effective service.

3. Lechelt's overall teaching record.

Lechelt's teaching record is devoid of negative comments. However, given the length of her tenure in Edison Township school, her record must be viewed as being not fully developed. Her four year record is good but one needs to suspend judgment in this regard until a determination can be made as to whether the past record is prelude to the future.

4. Lechelt's teaching ability

A review of Lechelt's evaluations reveals that she has been consistently rated positively both as a provisional and a tenured teacher. Her ratings as a tenured teacher were either *Proficient or*

Accomplished on the sub-parts to the evaluations, as well as on her overall ratings. She apparently has done well but there is room for further growth. Greater respect for professional training would be helpful.

In addition, the record suggests her willingness to immerse herself in co-curricular and community activities. These activities reflect a desire to contribute to the school's standing through her contributions to out-of-classroom ventures.

5. Whether there was an absence of prior discipline affecting Lechelt during her employment.

Lechelt has never been disciplined in any manner

6 . Whether there was an absence of past increment withholdings.

There is no evidence of a salary increment being withheld.

7. The nature and the gravity of the offenses under all of the circumstances involved.

The misconduct described herein is very serious. She was part of a group of teachers who violated several important Board policies. She argued that her misconduct was mitigated in part by the fact that the trainer, in her view, made offensive comments about special needs students and by Battista's invasion of a private chat. As noted above, Lechelt's comments in this regard were given little weight.

8. Evidence as to provocation, extenuation or aggravation.

Lechelt claimed that she was provoked by certain comments made by Bleekinger. This claimed provocation is without merit.

9. Any harm or injurious effect which Lechelt's conduct had on the maintenance of discipline and the proper administration of the school system.

This matter ultimately became public. It had an impact on the manner in which the community views the school. Further, the comments made about Dr. O'Malley had to be personally embarrassing and offensive and could have had the effect of weakening his image as the

Superintendent of Schools.

Furthermore, Lechelt's comments related to Charge V suggest that she might need closer supervision until she can demonstrate that her intent to reduce her efforts while teaching were either not serious or were reconsidered.

JUST CAUSE

Just Cause standards emanate from *Enterprise Wire,* 46 LA 555 (1956). There are seven tests that need to be applied to a determination of the appropriateness of discipline.

In this case, there was Just Cause to discipline Lechelt. The Board policies forewarned her that she could be disciplined for violations of the policies. The cited policies were more than reasonably related to the *business efficiency of the District and the performance the employer might expect from an employee.* There was an investigation conducted to determine if Lechelt was culpable of misconduct. The investigation was fair and objective. It was related solely to the purported misconduct and there was an effort made to interview anyone who had knowledge of the underlying conduct Based upon the investigation and a review of the transcript, the District determined that there was substantial evidence of Lechelt's guilt. The rules/policies were applied fairly. Finally, the degree of discipline applied herein is related to Lechelt's misconduct and her past record.

CONCLUSIONS

A review of the *Fulcomer* and *Just Cause* standards persuades the Arbitrator that the Board had cause to serve disciplinary charges on Maryellen Lechelt. The Arbitrator points out that both sets of standards have been addressed herein. In sum, Ms. Lechelt is guilty of serious misconduct.

While she has expressed remorse, it is not entirely clear that she fully accepts responsibility for her actions. Nor is it evident that, aside from the possibility of losing her job, she comprehends just how serious her misconduct was.

However, when Lechelt's record is viewed as a whole, her misconduct , while very serious does not rise to the level of justifying termination of services. When this finding is combined with the analysis of the *Fulcomer* and *Just Cause* standards , it becomes clear that dismissal is excessive.

Therefore, Lechelt must recognize that her misconduct was serious and rose to the level of unbecoming conduct. She must also understand that future findings of unbecoming conduct could lead to the termination of her services.

Finally, counsel for the parties did an outstanding job of researching the relevant issues and presented numerous cases for the consideration of the Arbitrator. The cases were reviewed and considered. However, given the number of cases cited by both parties and their non-precedential nature, the cases are not cited in the Opinion. Furthermore, counsel for the parties are to be commended for their overall preparation, the quality of the examinations and cross-examinations and professionalism throughout a long and complicated case.

Thus, the Arbitrator finds that the appropriate penalty to be imposed on Maryellen Lechelt is a 120 day suspension without pay plus a one time loss of a salary increment. Therefore, based on the above, the undersigned makes the following

AWARD

1. Maryellen Lechelt is guilty of Charge I -Counts 1, 2, 3, 4, 5, 6, Charge IV- Counts 1, 2, 4, 5, 6, 7, Charge V and Charge VI.
2. The following charges are dismissed: Charge II,, Charge III and Charge IV- Count 3
3. The penalty imposed on Maryellen Lechelt is a 120 day suspension without pay plus a one time loss of a salary increment.

Dated: June 30, 2015
Hewlett Harbor, NY

ARTHUR A. RIEGEL, ESQ.
ARBITRATOR

AFFIRMATION

STATE OF NEW YORK)
COUNTY OF NASSAU)

I, Arthur A. Riegel, am the individual described in and who executed the foregoing instrument, which is my Opinion and Award.

ARTHUR A. RIEGEL

petition as required by *N.J.A.C.* 6A:3-7.3(a). Furthermore, petitioner did not request additional time to file her brief under *N.J.A.C.* 6A:3-7.3(d).

Absent exigent circumstances, a petitioner's failure to prosecute a matter should result in its dismissal. *N.O. v. Board of Education of the Bridgewater-Raritan School District*, 96 N.J.A.R.2d (EDU) 746 (1996); *R.J. v. Board of Education of the Lower Camden County Regional School District*, 97 N.J.A.R.2d (EDU) 155 (1996). Here, petitioner has not filed the required brief in a timely manner, nor has she provided any reason for her failure to do so. As a result, the Commissioner is constrained to conclude that she has abandoned her cause of action.

Accordingly, the Commissioner hereby dismisses petitioner's appeal for the reasons stated herein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/15/15

Date of Mailing: 4/16/15

* This determination may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

135-15

135-15LM

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

April 16, 2015

Michael I. Inzelbuch, Esq.
Santander Bank Building – 2nd Floor
555 Madison Avenue
Lakewood, New Jersey 08701

Caroline Jones, DAG
Office of the Attorney General
Department of Law and Public Safety
Division of Law
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625-0112

Re: *Center for Education v. New Jersey Department of Education, OAL Dkt. No. EDU 14525-14, Agency Dkt. No. 280-9/14.*

Dear Counsel,

I have reviewed the parties' submissions in connection with the New Jersey Department of Education's (Department) request for interlocutory review of Administrative Law Judge (ALJ) Schuster's March 26, 2015 oral ruling requiring disclosure of certain documents that the Department contends are privileged and non-discoverable, along with the full sound recording[1] of the five-hour hearing at the Office of Administrative Law (OAL).

At the outset, it should be noted that the record does not contain a written order, and a review of the sound recording of the proceedings at the OAL reveals that many documents were never actually ruled upon. The sound recording also reflects that the ALJ reviewed each unredacted document at issue – in the presence of counsel for both parties – despite the Department's request for *in camera* review. Finally, it cannot be determined from the sound recording precisely when (or which) documents were given to counsel for the Center for Education (Center) by the ALJ.

[1] A transcript of the March 26, 2015 hearing was not provided in connection with the request for relief.

Ultimately, the ALJ determined that the following documents were not subject to any asserted privilege[2]: DOE135-308, 498-540[3], 541, 590, 592-595, 607, 608, 612, 619-622, 629-630, 631, 693-696[4], 702-704, 793, 796, 810-811, 823-825, 827, 837-839, 840-842, 845-847, 850, 892, 900, 909-911, 926-927, and 930.[5] According to the Department's certification, after denying its request for a stay pending interlocutory review, the ALJ immediately released unredacted copies of these documents to counsel for the Center. (Department's Certification, ¶¶28-31) For reasons unknown, the following documents were discussed during the hearing but omitted from the ALJ's oral ruling, and are therefore not considered herein: DOE613-614, 632, 801, 808, 854, 863, 865-867, 913, 921-922, and 925.[6] Any unredacted copies of documents that the ALJ deemed privileged were returned to counsel for the Department.

First, as to the Department's contention that the documents labeled DOE135-308 are privileged attorney-client communications, I conclude that DOE135 – an internal memo between Deputy Attorneys General – qualifies as attorney work product and therefore should not have been released to the parties. *O'Boyle v. Borough of Longport*, 218 *N.J.* 168, 188-89 (2014); *LaPorta v. Gloucester Ctny. Bd. of Chosen Freeholders*, 340 *N.J. Super.* 254 (App. Div. 2001). Attorney work product is not discoverable "unless 'the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.'" *LaPorta*, *supra*, 340 *N.J. Super.* at 260 (quoting *Hickman v. Taylor*, 329 *U.S.* 495 (1947)); *New Jersey Court Rule* 4:10-2. There is nothing in the record to suggest that the Center demonstrated a substantial need for DOE135 that would compel its disclosure. Therefore, to the extent the ALJ ordered the release of DOE135 absent a finding of substantial need, that ruling is rejected. The Center and the Lakewood Board of Education (Lakewood) shall immediately return DOE135 to the DAG and destroy any and all copies thereof. Furthermore, DOE135 shall not be considered as part of the record in this matter or used as evidence during any of the proceedings.

In contrast, the documents labeled DOE136-308 consist of a transmittal notice, the Center's petition of appeal, and attachments related to the petition; those documents do not become privileged attorney-client communications simply because they were attached to

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[2] To the extent the Department asserts in its pleadings that the ALJ also released *other* documents deemed non-privileged that are not listed or accounted for herein, the Commissioner can only render determinations based upon discernible findings of fact and conclusions of law, and will therefore only address those documents that were specifically mentioned by the ALJ during his oral ruling.

[3] A copy of DOE537 was not provided with the Department's application. Therefore, the Commissioner cannot review the ALJ's determination as to that document.

[4] The ALJ indicated that he would personally redact DOE693-696 and make the documents available for the Center's counsel the following morning in Freehold Township. Unfortunately, the ALJ failed to specify what would be redacted from the document or the reason for same.

[5] A copy of DOE930 was not provided with the Department's application. Therefore, the Commissioner cannot review the ALJ's determination as to that document.

[6] To the extent these documents remain a point of contention between the parties and were released, the documents shall be returned to the DAG pending the ALJ placing his determinations on the record.

DOE135 when the Deputy Attorney General (DAG) was assigned this matter and were later transmitted from the DAG to the client. *See Leonen v. Johns-Manville*, 135 *F.R.D.* 94, 98 (D.N.J.1990) ("Merely attaching something to a privileged document will not, by itself make the attachment privileged.") Therefore, to the extent the ALJ found that DOE136-308 were not privileged, that ruling is upheld.

Second, I concur with the Department's contention that the documents labeled DOE693-696 are both privileged attorney work product and privileged attorney-client communications, thereby shielded from disclosure absent a showing of adequate reasons to justify production. The documents were created by the client – at the direction of the DAG – to assist her in preparing the case. (Department's Certification, ¶ 31) Furthermore, the information was communicated from client to attorney within the scope of that professional relationship. *K.L. v. Evesham Twp. Bd. of Educ.*, 423 *N.J. Super.* 337, 352 (App. Div. 2011) (communications between attorney and client in course of relationship are privileged and need not be disclosed). In addition, the record lacks any indication of a showing by the Center of substantial need for the materials or an inability, without undue hardship, to obtain the substantial equivalent through some other means. Therefore, to the extent the ALJ ordered the release of DOE693-696 – redacted or otherwise – to the parties, that ruling is rejected. The Center and Lakewood shall immediately return DOE693-696 to the DAG and destroy any and all copies thereof. Furthermore, DOE693-696 shall not be considered as part of the record in this matter or used as evidence during the proceedings.

Third, I conclude that the following pre-decisional, deliberative documents contain advisory opinions, recommendations and deliberations about the Department's decision-making process and policies and are therefore shielded from disclosure in their entirety by the deliberative process privilege: DOE592-595 (internal memo analyzing application), 608 (e-mail message containing preliminary analysis of application), 620 (e-mail message with handwritten notes regarding the needs assessment), 630 (handwritten notes from Department staff regarding application), 702-704 (internal review document/checklist with handwritten notes reflecting deliberation over the application), 810-811 (internal memo analyzing application), 845-847 (internal memo analyzing application and supporting data interpreted as reflected in handwritten notes), 892 (internal document memorializing deliberation over the application with handwritten notes), and 900 (internal review document/checklist reflecting deliberations over application). *Ed. Law Ctr. v. Dep't of Ed.*, 198 *N.J.* 274, 285-86 (2009); *Ciesla v. Dep't of Health*, 429 *N.J. Super.* 127, 137-38.

The longstanding justification of the deliberative process privilege acknowledges an interest in protecting government advisory opinions, recommendations and deliberations that would reveal the process by which its decisions and policies are formulated, as well as "the desire to prevent disclosure of proposed policies before they have been fully vetted and adopted by a government agency." *Ed. Law. Ctr., supra*, 198 *N.J.* at 285-86; *See Ciesla, supra*, 429 *N.J. Super.* at 140-41 (treating pre-decisional drafts as protected materials under the deliberative process privilege). "Without such protection, policy advisers would be reluctant to express on paper or a computer screen their tentative thoughts on a pending issue, lest their words be prematurely launched into the public domain." *Ciesla, supra*, 429 *N.J. Super.* at 140-41.

Once the privilege is invoked, the presumption of confidentiality afforded to these documents can only be overcome "upon a showing that the need for the materials overrides the government's interest in confidentiality." *Ed. Law Ctr.*, *supra*, 198 *N.J.* at 286-87. "Only in 'exceptional' cases will it be deemed consistent with the public interest to compel an agency to produce inter- or intra- agency advisory opinions." *Ciesla*, *supra*, 429 *N.J. Super.* at 146. Here, the record lacks any showing by the Center of substantial need for the materials that would override the Department's interest in confidentiality. Therefore, to the extent the ALJ ordered the release of these documents to the parties absent the required showing by the Center, that ruling is rejected. The Center and Lakewood shall immediately return DOE592-595, 608, 620, 630, 702-704, 810-811, 845-847, 892, and 900 to the DAG and destroy any and all copies thereof. Furthermore, these documents shall not be considered as part of the record in this matter or used as evidence during the proceedings.

Fourth, I conclude that the following documents are not shielded from disclosure by the deliberative process privilege: DOE536, 621-622, 629, and 825.[7] *See Ed. Law Ctr.*, *supra,* 198 *N.J.* at 299-300. In evaluating whether documents are deliberative, "the deliberative nature of the material sought must be functionally determined based on the document's nexus to the decision-making process and its capacity to expose the agency's deliberations during that process." *Id.* at 298. "[W]hen materials [can]not reasonably be said to reveal an agency's or official's mode of formulating or exercising policy-implicating judgment the deliberative process privilege is inapplicable." *Correctional Medical Servs., Inc. v. State*, 426 *N.J. Super.* 106, 123 (App. Div. 2012) (internal citations omitted). These e-mail messages lack a sufficient nexus to the agency's policy-implicating judgment about the Center's 2014 application and disclosure will not expose the nature of the Department's deliberations. In particular, the documents in question do not "spell[] out the cumulative formulation of ideas among the participants," thereby distinguishing the present matter from the facts in *McGee v. Township of East Amwell*, 416 *N.J. Super.* 602, 621 (App Div. 2010). Therefore, to the extent the ALJ found these documents were not privileged, that ruling is upheld.

Fifth, as to the remaining documents at issue[8], it appears that they contain – in part – opinions, recommendations, or advice about agency policies subject to the deliberative process privilege and therefore warrant redaction prior to disclosure. *See Gannett N.J. Partners, L.P. v. County of Middlesex*, 379 *N.J. Super.* 205, 220 (App. Div. 2005) (requiring redaction of deliberative entries prior to release of documents). According to the Department's privilege log, some of these documents were redacted and produced previously, while others were withheld altogether. Without having reviewed the documents containing the redactions – as only unredacted documents were provided to this office – it is impossible to determine whether the information redacted by the Department was, in fact, deliberative in nature and appropriately shielded. Therefore, to the extent the ALJ ruled that these documents, in their entirety, were not privileged and ordered the release of unredacted versions to the Center and Lakewood, that

[7] Despite arguments to the contrary in the Department's brief, the DAG agreed to produce DOE825 during the hearing.

[8] The remaining documents ruled upon by the ALJ include DOE498-499, 504, 538-541, 590, 607, 612, 619, 631, 793, 796, 823-824, 827, 837-842, 909-911, and 926-927.

ruling is rejected. The Center and Lakewood shall immediately return the unredacted documents to the DAG and destroy any and all copies thereof. Furthermore, the unredacted documents shall not be considered as part of the record in this matter or used as evidence during the proceedings. Nevertheless, I conclude that the Department must immediately produce appropriately redacted documents (to the extent it has not already done so) to the Center and Lakewood. The redacted documents will become part of the record and may be used as evidence during the proceedings.

Accordingly, the ALJ's March 26, 2015 order is hereby upheld in part, rejected in part, and modified as indicated herein. The stay of the proceedings at the OAL is hereby lifted.

IT IS SO ORDERED.[9]

Sincerely,

Peter Shulman

Peter Shulman
Assistant Commissioner[10]

c: John Shuster, III, ALJ
Clerk, Office of Administrative Law
Eric Harrison, Esq.
County Superintendent
State Law Library

PS/JKH/DCS

VIA FACSIMILE AND REGULAR DELIVERY

[9] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

[10] This matter has been delegated to the undersigned Assistant Commissioner pursuant to *N.J.S.A.* 18A:4-34.

137-15

NEW JERSEY DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Hearing of Angela L. Dunlap-Harris:

SCHOOL DISTRICT OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY

"Petitioner,"

- and -

ANGELA L. DUNLAP-HARRIS

"Respondent."

Agency Docket No. 378-12/14

DECISION APPROVING SETTLEMENT AGREEMENT

Before
Joyce M. Klein
Arbitrator

Appearances:

For the Petitioner:
Adam Herman, Esq.
Adams, Gutierrez & Lattiboudere, LLC

For the Respondent:
Nicholas Poberezhsky, Esq.
Caruso, Smith, Picini, PC

On March 2, 2015, representatives of the School District of the Township of Hillside [the "Petitioner"] and Angela Dunlap-Harris [the "Respondent"] met to commence hearing on the tenure charges served on Respondent. At that hearing, the parties reached an agreement in principle to resolve the tenure charges filed by the Petitioner with the State of New Jersey, Department of

Education on January 13, 2015. The terms of settlement were approved by Petitioner on March 19, 2015 and by Respondent on April 14, 2015.

The terms of settlement are as follows:

SETTLEMENT AGREEMENT

The Borough of Hillside Board of Education (the "Board"), whose principal office is located at 195 Virginia Street, Hillside, New Jersey 07205, and its successors, assigns, officers, employees, agents and representatives (collectively, "School Board"), and Angela L. Dunlap-Harris, residing at 71 Westervelt Place, Teaneck, New Jersey 07666 ("Respondent") (collectively, the "Parties") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

NOW, THEREFORE, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. Concurrent with the execution of this Stipulation, Respondent shall submit an irrevocable letter of resignation to the Board, which shall provide for her resignation from the Board effective June 30, 2015, ("Effective Date"). (See Exhibit "A," to the Stipulation, a copy of Respondent's signed letter of resignation).

2. Upon final approval of the signed Stipulation by the Arbitrator, the Board shall and hereby does withdraw the instant Tenure Charges. The Board agrees to not pursue the subject Tenure Charges against Respondent as long as this Stipulation remains in effect and is not voided by any court or administrative agency of competent jurisdiction. In the event the Stipulation is voided, the Board retains the right to file and consider for certification, tenure charges against Respondent, including those tenure charges which have been previously filed against her by the Board, and Respondent reserves the right to defend same.

3. Upon final approval of the signed Stipulation by the Arbitrator, and no later than April 30, 2015, Respondent will receive her full salary prorated for the period effective December 19, 2014 through March 27, 2015 in a lump sum check. All salary paid for said period shall be subject to all applicable and mandatory salary withholdings and deductions. Respondent will be recorded as an employee on administrative leave with pay between December 19, 2014 and March 27, 2015. Between March 28, 2015 and June 30,

2015, Respondent will be recorded as an employee on unpaid administrative leave.

4. Respondent shall not earn any paid vacation, sick or personal days for any portion of the 2014-15 school year.

5. The Board shall provide Respondent with health insurance until June 30, 2015. Pursuant to Chapter 78, Respondent shall be responsible for her employee contribution for the 2014-2015 school year. Respondent's required Chapter 78 contributions shall be deducted from the payments she will receive pursuant to Paragraph 3 of this Stipulation of Settlement.

6. This Stipulation is based upon the understanding that Respondent's separation from employment with the Board, effective June 30, 2015, will be deemed a voluntary resignation in good standing. Upon inquiry from any third party to authorized employees or representatives of the Board, those employees or representatives will provide no information other than to confirm Respondent's employment, position, salary and dates of employment, and state that the reason for her separation from employment was her voluntary resignation. Notwithstanding the foregoing, the Board has agreed to prepare a one-time "To whom it may concern" letter, which has been approved by Respondent, and attached hereto as Exhibit "B".

7. The Board will not oppose any application by Respondent for unemployment benefits.

8. In accordance with N.J.A.C. 6A:3-5.6 (a) 6, Respondent has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners. Additionally, pursuant to N.J.A.C. 6A:9-17.4, Respondent has been advised of the Board's duty to notify the State Board of Examiners she has resigned. The Board is legally required to participate in proceedings initiated against Respondent's license by the State Board of Examiners resulting from the Commissioner's referral. Aside from such requirements, pursuant to the above-referenced regulation, the Board agrees to not independently seek the suspension or revocation of Respondent's teaching certification or license or seek to prevent her from applying for or receiving pension benefits on any grounds related to the Tenure Charges or her resignation pursuant to this Stipulation of Settlement.

9. As of the Effective Date, all of Respondent's rights of employment with the Board, including but not limited to accrued salary, benefits, tenure and seniority, will permanently end.

10. Respondent will not apply for reemployment with the Board at any time. If Respondent does apply for reemployment with the Board and is approved for employment, the terms of this Agreement shall control and shall be grounds for termination of Respondent's employment.

11. In exchange for the consideration set forth in paragraph 3 above, the sufficiency of which is hereby acknowledged, Respondent, through the date of her resignation, hereby waives, releases and discharges any and all claims or rights that she has or may have against the Board, the Superintendent, its Board of Education and its Advisory Board members, and any and all other Board officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Respondent's employment with the Board or separation from employment with the Board. It specifically includes, without limitation, all claims which Respondent may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey

Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on her employment by and/or termination of her employment with the Board, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, wages, attorneys' fees, costs, and/or future wage loss. Respondent agrees to withdraw any and all other pending complaints or actions that have been filed against the Board or any of its employees or representatives. The parties agree that Respondent, by signing this Stipulation of Settlement, does not waive any claims she may have related to exposure to toxic or hazardous substances during the course of Respondent's employment.

12. To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises Respondent of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Stipulation of Settlement. Accordingly, by executing this Stipulation, Respondent acknowledges that she: (i) fully understands the terms and conditions of this Stipulation of Settlement; (ii) has consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives her right to pursue any current claims she may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Stipulation of Settlement; and (v) has seven (7) days from the date of the execution of this Stipulation of Settlement to revoke it. Respondent understands that she may rescind this Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the Board either by hand or by certified mail within the seven (7) day period.

13. This Stipulation and all of its terms, are and will remain confidential to the maximum extent permitted by law, including the Open Public Records Act, N.J.S.A. 47:1A-1, et al. Respondent is expressly forbidden from discussing this Stipulation with any person, other than her accountant, tax advisor and attorney ("permitted disclosures") and any other individual or entity as necessary to implement the Stipulation or to which it is legally obligated to respond ("legally-required disclosures"). In making any permitted disclosure, Respondent agrees that it will inform the

person to whom it is making the permitted disclosure that the existence and substance of this Stipulation, the settlement giving rise to this Stipulation and the sum of money paid pursuant to this Stipulation are to be held strictly confidential to the fullest extent permitted by law. Respondent specifically agrees not to discuss the nature, terms, conditions of this Stipulation with others, any representative of the media, or any past, present, or prospective employee of the Board, or its agents or attorneys. Respondent understands that this provision is not a simple recital but is an important, integral part of this Stipulation. The Board agrees that it will keep this Stipulation confidential to the extent permitted by law, including the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. ("OPRA"). In the event that the Board receives an OPRA request, for which this Stipulation would be responsive to, the Respondent understands that the Board is legally obligated to disclose same under OPRA and that such disclosure would not be a breach of this Stipulation.

14. Respondent understands that the instant tenure charge is a public document maintained by the Board under the New Jersey Open Public Records Act ("OPRA"). As such, while the instant tenure charges and related documents will be maintained elsewhere by the District, Respondent's personnel file will not contain the tenure charges or any related documents referencing the tenure charges.

15. This agreement shall not constitute a precedent in any matters involving other Board employees.

16. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

17. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

18. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive

jurisdiction over any dispute arising from, in connection with, or related to this Stipulation.

19. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

20. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

21. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

22. If any provision of this Stipulation is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

23. Additionally, this Stipulation is subject to final approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and will become effective only upon approval by the Arbitrator. Counsel for the Parties shall jointly request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

Under N.J.A.C. 6A:3-5.6, the arbitrator is required to issue a brief decision approving the settlement of tenure charges and explaining why the arbitrator is approving the terms of settlement. I have approved these terms for the following reasons.

I am persuaded that the issues that were raised in the Statement of Tenure Charges and Specifications filed by the Petitioner and the Answer to Tenure Charges filed by the Respondent have been fully reviewed and discussed by all parties and that the issues raised therein have been satisfactorily addressed by the terms of settlement. The terms of settlement reflect an appropriate resolution of the charges leveled against the Respondent. The settlement will allow both parties to move forward without using valuable

educational time as well as the avoidance of protracted and costly proceedings at the public's expense. The Respondent's determination to tender her resignation in exchange for a monetary settlement will allow the Board to continue to provide a thorough and efficient education to the Board's students. The Respondent has been advised and understands that by accepting this settlement and tendering her resignation the Commissioner of Education has a duty to refer tenure determinations resulting in a loss of position to the State Board of Examiners for possible suspension or revocation of certificate. I believe that the settlement terms properly balance all of the parties' interests and provide a satisfactory basis for the resolution of any concerns that were raised by the Statement of, and the Answer to, the Tenure Charges that were set forth in the record of this proceeding.

Accordingly, and based upon all of the above, this will serve as the arbitrator's approval of the parties' settlement agreement.

Dated: April 20, 2015
Ocean Grove, New Jersey

Joyce M. Klein

State of New Jersey }
County of Monmouth } ss:

On this 20th day of April, 2015, before me personally came and appeared Joyce M. Klein to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

SANDRA DANIELSON
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Feb. 3, 2020

AG&L Adams Gutierrez & Lattiboudere, LLC

The Legal Center
1037 Raymond Blvd., Suite 900
Newark, NJ 07102
Phone: 973-735-2742 - Fax: 973-735-2743
www.asgllaw.com

April 21, 2015

VIA EMAIL & FIRST CLASS MAIL
Joyce M. Klein
Arbitrator and Mediator
P.O. Box 186
Ocean Grove, NJ 07756

Re: ***Hillside Board of Education***
v.
Angela Dunlap-Harris
Agency Docket No.: 378-12/14 (Tenure Hearing)

Dear Arbitrator Klein:

Enclosed please find a copy of the Stipulation of Settlement, executed by Respondent and the President of the Hillside Board of Education. Kindly advise if you require any additional information or documentation for your review and approval of the stipulation of settlement.

Thank you for your attention to this matter.

Very truly yours,

ADAM S. HERMAN

ASH/xa
Enclosure

cc: Dr. Frank Deo, Superintendent of Schools (*via email only*)
Nicholas Poberezhsky, Esq. (*via email only*)

ADAMS GUTIERREZ & LATTIBOUDERE, LLC.
The Legal Center
1037 Raymond Boulevard, Suite 900
Newark, New Jersey 07102
(973) 735-2742
Attorneys for Hillside Board of Education

In the matter of	:	
ANGELA L. DUNLAP HARRIS	:	AGENCY REFERENCE NO.: 378-12/14
BOROUGH OF HILLSIDE BOARD OF EDUCATION	:	**STIPULATION OF SETTLEMENT**

The Borough of Hillside Board of Education (the "Board"), whose principal office is located at 195 Virginia Street, Hillside, New Jersey 07205, and its successors, assigns, officers, employees, agents and representatives (collectively, "School Board"), and Angela L. Dunlap-Harris, residing at 71 Westervelt Place, Teaneck, New Jersey 07666 ("Respondent") (collectively, the "Parties") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

WHEREAS Respondent is a tenured teaching staff member employed by the Board as a teacher; and

WHEREAS the Superintendent of Schools for the Board ("Superintendent") certified tenure charges of conduct unbecoming and other just cause to the Commissioner of Education of the State of New Jersey, captioned *In the Matter of Tenure Charges Against Angela L. Dunlap Harris, Borough of Hillside Board of Education* ("Tenure Charges"), under Agency Reference Number 378-12/14 upon allegations, including, but not limited to, that Respondent was arrested

and indicted on charges relating to the manufacture, distribution and possession of a controlled dangerous substance; the maintenance and operation of a controlled dangerous substance production facility; tampering with evidence and resisting arrest; and failing to report her arrest in accordance with N.J.A.C. 6A:9-17.1(c); and

WHEREAS, Respondent filed an answer opposing the charges; and

WHEREAS the Commissioner of Education, having reviewed the charges and Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation, and accordingly referred the matter to Arbitrator Joyce M. Klein ("Arbitrator") for a hearing; and

WHEREAS, Respondent has denied the allegations set forth in the tenure charges; and

WHEREAS, the Parties are aware of the uncertainty of the outcome of arbitration; and

WHEREAS, the Board with stringent budget limitations and due to the expenditure of resources due to multiple days of hearings with numerous witnesses, and the concern that school personnel will be removed from their educational duties and responsibilities during that time, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

WHEREAS the proposed Stipulation of Settlement is in the best interest of the Parties and the public because Respondent resigns from her employment without litigation and avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

NOW, THEREFORE, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. Concurrent with the execution of this Stipulation, Respondent shall submit an irrevocable letter of resignation to the Board, which shall provide for her resignation from the Board

effective June 30, 2015, ("Effective Date"). (See Exhibit "A," to the Stipulation, a copy of Respondent's signed letter of resignation).

2. Upon final approval of the signed Stipulation by the Arbitrator, the Board shall and hereby does withdraw the instant Tenure Charges. The Board agrees to not pursue the subject Tenure Charges against Respondent as long as this Stipulation remains in effect and is not voided by any court or administrative agency of competent jurisdiction. In the event the Stipulation is voided, the Board retains the right to file and consider for certification, tenure charges against Respondent, including those tenure charges which have been previously filed against her by the Board, and Respondent reserves the right to defend same.

3. Upon final approval of the signed Stipulation by the Arbitrator, and no later than April 30, 2015, Respondent will receive her full salary prorated for the period effective December 19, 2014 through March 27, 2015 in a lump sum check. All salary paid for said period shall be subject to all applicable and mandatory salary withholdings and deductions. Respondent will be recorded as an employee on administrative leave with pay between December 19, 2014 and March 27, 2015. Between March 28, 2015 and June 30, 2015, Respondent will be recorded as an employee on unpaid administrative leave.

4. Respondent shall not earn any paid vacation, sick or personal days for any portion of the 2014-15 school year.

5. The Board shall provide Respondent with health insurance until June 30, 2015. Pursuant to Chapter 78, Respondent shall be responsible for her employee contribution for the 2014-2015 school year. Respondent's required Chapter 78 contributions shall be deducted from the payments she will receive pursuant to Paragraph 3 of this Stipulation of Settlement.

6. This Stipulation is based upon the understanding that Respondent's separation from employment with the Board, effective June 30, 2015, will be deemed a voluntary resignation-in good standing. Upon inquiry from any third party to authorized employees or representatives of the Board, those employees or representatives will provide no information other than to confirm Respondent's employment, position, salary and dates of employment, and state that the reason for her separation from employment was her voluntary resignation. Notwithstanding the foregoing, the Board has agreed to prepare a one-time "To whom it may concern" letter, which has been approved by Respondent, and attached hereto as Exhibit "**B**".

7. The Board will not oppose any application by Respondent for unemployment benefits.

8. In accordance with N.J.A.C. 6A:3-5.6 (a) 6, Respondent has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners. Additionally, pursuant to N.J.A.C. 6A:9-17.4, Respondent has been advised of the Board's duty to notify the State Board of Examiners she has resigned. The Board is legally required to participate in proceedings initiated against Respondent's license by the State Board of Examiners resulting from the Commissioner's referral. Aside from such requirements, pursuant to the above-referenced regulation, the Board agrees to not independently seek the suspension or revocation of Respondent's teaching certification or license or seek to prevent her from applying for or receiving pension benefits on any grounds related to the Tenure Charges or her resignation pursuant to this Stipulation of Settlement.

9. As of the Effective Date, all of Respondent's rights of employment with the Board, including but not limited to accrued salary, benefits, tenure and seniority, will permanently end.

10. Respondent will not apply for reemployment with the Board at any time. If Respondent does apply for reemployment with the Board and is approved for employment, the terms of this Agreement shall control and shall be grounds for termination of Respondent's employment.

11. In exchange for the consideration set forth in paragraph 3 above, the sufficiency of which is hereby acknowledged, Respondent, through the date of her resignation, hereby waives, releases and discharges any and all claims or rights that she has or may have against the Board, the Superintendent, its Board of Education and its Advisory Board members, and any and all other Board officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Respondent's employment with the Board or separation from employment with the Board. It specifically includes, without limitation, all claims which Respondent may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform

Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on her employment by and/or termination of her employment with the Board, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, wages, attorneys' fees, costs, and/or future wage loss. Respondent agrees to withdraw any and all other pending complaints or actions that have been filed against the Board or any of its employees or representatives. The parties agree that Respondent, by signing this Stipulation of Settlement, does not waive any claims she may have related to exposure to toxic or hazardous substances during the course of Respondent's employment.

12. To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises Respondent of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Stipulation of Settlement. Accordingly, by executing this Stipulation, Respondent acknowledges that she: (i) fully understands the terms and conditions of this Stipulation of Settlement; (ii) has consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives her right to pursue any current claims she may

have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Stipulation of Settlement; and (v) has seven (7) days from the date of the execution of this Stipulation of Settlement to revoke it. Respondent understands that she may rescind this Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the Board either by hand or by certified mail within the seven (7) day period.

13. This Stipulation and all of its terms, are and will remain confidential to the maximum extent permitted by law, including the Open Public Records Act, N.J.S.A. 47:1A-1, et al. Respondent is expressly forbidden from discussing this Stipulation with any person, other than her accountant, tax advisor and attorney ("permitted disclosures") and any other individual or entity as necessary to implement the Stipulation or to which it is legally obligated to respond ("legally-required disclosures"). In making any permitted disclosure, Respondent agrees that it will inform the person to whom it is making the permitted disclosure that the existence and substance of this Stipulation, the settlement giving rise to this Stipulation and the sum of money paid pursuant to this Stipulation are to be held strictly confidential to the fullest extent permitted by law. Respondent specifically agrees not to discuss the nature, terms, conditions of this Stipulation with others, any representative of the media, or any past, present, or prospective employee of the Board, or its agents or attorneys. Respondent understands that this provision is not a simple recital but is an important, integral part of this Stipulation. The Board agrees that it will keep this Stipulation confidential to the extent permitted by law, including the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. ("OPRA"). In the event that the Board receives an OPRA request, for which this Stipulation would be responsive to, the Respondent understands that the

Board is legally obligated to disclose same under OPRA and that such disclosure would not be a breach of this Stipulation.

14. Respondent understands that the instant tenure charge is a public document maintained by the Board under the New Jersey Open Public Records Act ("OPRA"). As such, while the instant tenure charges and related documents will be maintained elsewhere by the District, Respondent's personnel file will not contain the tenure charges or any related documents referencing the tenure charges.

14. This agreement shall not constitute a precedent in any matters involving other Board employees.

15. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

16. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

17. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Stipulation.

18. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original,

which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

19. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

20. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

21. If any provision of this Stipulation is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

22. Additionally, this Stipulation is subject to final approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and will become effective only upon approval by the Arbitrator. Counsel for the Parties shall jointly request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

Dated: 4-13-15

ANGELA L. DUNLAP HARRIS

BOROUGH OF HILLSIDE
BOARD OF EDUCATION

Dated: 4-20-15

By: Calvin Lofton, President

CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):

Dated: 4/21/15

Adam S. Herman, Esq.

ADAMS GUTIERREZ & LATTIBOUDERE
Attorneys for the Borough of Hillside
Board of Education

APPROVED:

Dated: _____

_____
Joyce M. Klein, Arbitrator

Angela Dunlap Harris
71 Westervelt Place
Teaneck, New Jersey 07666

April 30, 2015

Dr. Frank J. Deo
Superintendent of Schools
Borough of Hillside Board of Education
195 Virginia Street
Hillside, New Jersey 07205

Dear Dr. Deo:

Please accept this letter as my irrevocable resignation from employment with the Borough of Hillside Board of Education, for personal reasons, effective at the close of business on June 30, 2015.

Very truly yours,

Angela Harris

ANGELA DUNLAP HARRIS

HILLSIDE PUBLIC SCHOOLS
"Providing Every Student, Every Learning Opportunity, Every Day"
Frank J. Deo, Ed.D.
Superintendent of Schools

To whom it may concern:

Angela L. Dunlap Harris served as a teacher for the Township of Hillside Board of Education from September 1, 2000 until her resignation on June 30, 2015. In 2011, Mrs. Dunlap Harris was selected by a committee of her peers as W.O.K. Middle School Teacher of the Year. The Rotary Club of Elizabeth presented Ms. Dunlap Harris with a teacher of the year recognition for her efforts at the Walter O. Krumbiegel School in conjunction with that designation.

Very truly yours,

Frank Deo

Dr. Frank J. Deo,
Superintendent of Schools

139-15

IN THE MATTER OF THE TENURE	:	
HEARING OF AMANDA EISENHOUR,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF HOWELL, MONMOUTH COUNTY.	:	

SYNOPSIS

In January 2012, the Board certified tenure charges of conduct unbecoming against Amanda Eisenhour – a tenured special education teacher in petitioner's school district – for alleged abusive behavior toward a student and for failure to follow procedures for security during Alternate Proficiency Assessment (APA) testing. The matter was heard in the OAL in May 2012, and the Initial Decision was issued in December 2012. The Commissioner issued a final decision in February 2013, in which he concurred with the ALJ that the Board had established that respondent was guilty of unbecoming conduct, but found that the charges against respondent were of a serious nature, warranting a penalty more severe than that recommended by the ALJ. Accordingly, the Commissioner ordered that the respondent's increment be withheld for two years and that – pursuant to *N.J.S.A.* 18A:6-14 – she be suspended without pay for 120 days following the certification of tenure charges; further, the Commissioner ordered an additional 360 day suspension without pay, as well as appropriate training – with cost to be borne at respondent's expense as applicable – in the use of assistive techniques for dealing with difficult students and the protocol for the APA. Subsequently, respondent appealed the penalty imposed by the Commissioner. The Appellate Division remanded the matter to the Commissioner for analysis and consideration of the mitigating factors and the proportionality of the penalty for the respondent's unbecoming conduct.

On remand from the Appellate Division, the Commissioner found, *inter alia*, that: the factors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, any evidence as to provocation, the teacher's prior record and present attitude, the effect of such conduct on the maintenance of discipline among the students and staff, and the likelihood of such behavior recurring; in this case, there was no indication that respondent's conduct was premeditated or done with the intent to punish, however physical force in the school environment will not be tolerated; the ALJ's recommended penalty was not sufficient to impress upon respondent the seriousness of her errors in judgment; respondent engaged in two separate and unrelated incidents of unbecoming conduct, one involving excessive use of physical force with a student, and one involving a breach of testing protocols; a review of the hearing transcripts indicates that respondent did not admit or accept responsibility for her conduct, and thus there is concern that the behavior could reoccur; the penalty imposed must be significant enough to effectively communicate that although she may remain a teacher in the school district, respondent's unbecoming conduct was completely inappropriate and can never be repeated. Accordingly, the Commissioner determined that the appropriate penalty herein shall be the withholding of respondent's increments for two years; suspension without pay for 120 days following certification of the charges; an additional suspension without pay of 360 days; and appropriate training and assistance in connection with the use of assistive techniques for dealing with difficult students and the protocol for the APA, at respondent's own expense where applicable.

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

Issued 4/27/15

OAL DKT. NO. EDU 1384-12
AGENCY DKT NO. 14-1/12

IN THE MATTER OF THE TENURE	:	
HEARING OF AMANDA EISENHOUR,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF HOWELL, MONMOUTH COUNTY.	:	

This case involves tenure charges brought by the Board against respondent, Amanda Eisenhour, a special education teacher in the Howell Township School District. The Board charged the respondent with unbecoming conduct for exhibiting abusive behavior involving improper physical contact towards students, and for failing to follow the appropriate security measures in connection with Alternate Proficiency Assessment (APA) testing. The Administrative Law Judge ("ALJ") found that the respondent was guilty of unbecoming conduct, including use of excessive physical force with a student, and a breach of testing protocols. The ALJ recommended: loss of respondent's increment for two years; forfeiture of the 120 days of pay withheld pursuant to *N.J.S.A.* 18A:6-14 following the certification of tenure charges; and an additional 150 day suspension without pay. The ALJ also recommended that the respondent be provided with the appropriate training and assistance in connection with the use of assistive techniques for dealing with difficult students and the protocol for the APA.

In a decision dated February 11, 2013, the Commissioner concurred with the ALJ that the Board established that the respondent was guilty of unbecoming conduct. The Commissioner was also in accord with the ALJ's determination based on the circumstances and considerations existing in this matter, that the removal of respondent from her tenured position was an unduly harsh penalty. However, recognizing the seriousness of the charges, the

Commissioner found that the penalty recommended by the ALJ was not sufficient to impress upon respondent the seriousness of her errors in judgment. The Commissioner emphasized that inappropriate physical force will not be tolerated under any circumstances, and the breach of testing protocols by tampering with assessments is extremely serious. The respondent appealed the Commissioner's February 11, 2013 decision, and on June 18, 2014, the Appellate Division remanded this matter to the Commissioner for an analysis and consideration of the mitigating factors and the proportionality of the penalty for the respondent's unbecoming conduct.

The factors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, any evidence as to provocation, the teacher's prior record and present attitude, the effect of such conduct on the maintenance of discipline among the students and staff, and the likelihood of such behavior recurring. *In re Hearing of Ostergren, Franklin School District*, 1966 *S.L.D.* 185; *In re Hearing of Kittell, Little Silver School District*, 1972 *S.L.D.* 535, 541; *In re Fulcomer,* 93 *N.J. Super.* 404 (App. Div. 1967). It is also well recognized that by virtue of the unique position they occupy educators must be held to an enhanced standard of behavior. As was succinctly stated in *In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional*, 1972 *S.L.D.* 302, 321

> [Teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. *This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment.* (Emphasis added)

It is well established that "unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant." *Fulcomer*, *supra*, 93 *N.J. Super.* at 421 (citations omitted)

After a comprehensive analysis of the nature and circumstances surrounding respondent's conduct in this case, the Commissioner concurs with the ALJ that, based upon the mitigating and aggravating factors outlined in the Initial Decision, the conduct proven at the hearing does not warrant the removal of the respondent's tenure. Notably, there is no indication that the respondent's conduct was "premeditated, cruel or vicious, or done with the intent to punish." See, *In re Fulcomer, supra,* 93 *N.J. Super.* at 421. However, the Commissioner again finds that the penalty recommended by the ALJ is not sufficient to impress upon respondent the seriousness of her errors in judgment displayed in this matter.

Despite the fact that the respondent has received positive evaluations during her tenure with the District, the respondent engaged in two separate and unrelated incidents of unbecoming conduct that involve excessive physical force with a student, and a breach of testing protocols. When considering the nature of the incidents under the *Fulcomer*, *supra*, analysis, it is often important to assess whether the students were directly impacted by the inappropriate conduct. See, *In the Matter of the Tenure Hearing of Lauren Cooke, School District of the Township of Egg Harbor, Atlantic County*, Commissioner Decision No. 503-10, decided November 22, 2010 (When determining the appropriate penalty for the respondent's use of inappropriate name calling in reference to another staff member, the Commissioner considered the fact that the respondent never treated the students inappropriately and her comments were not directed at a student or made around the students.) The fact that the unbecoming conduct proven in this case was not isolated to the faculty or staff, but instead directly impacted the special education students in the District, is an aggravating factor in determining the proportionality of the penalty.

Further, the Commissioner has previously stated that physical force in the school environment will not be tolerated. See, *In the Matter of the Tenure Hearing of Edith Craft, School District of the Township of Franklin, Somerset County*, Commissioner Decision No. 366-11, decided September 1, 2011. In that case the Commissioner emphasized that:

> There are a series of cases which are routinely cited by litigants involving incidents of physical contact between a teacher and a student. Although the penalties given in those cases can offer some insight into appropriate penalties to be imposed in future matters, it is important to recognize that cases involving physical force are extremely fact sensitive and require a case-by-case analysis. Moreover, conduct on the part of teaching staff members that occurred several decades ago may not be consistent with the type of behavior that will be tolerated in this day and age.

Although the student was not injured in this case when the respondent yanked him by the arm, the Commissioner finds the respondent's behavior particularly troubling under the circumstances because her use of excessive force involved a special education student who may not be in a position to understand the situation. Moreover, the excessive force was witnessed by three other staff members, and it had an impact on the school environment. It is without question "that teachers carry a heavy responsibility by their actions and comments in setting examples for the pupils with whom they have contact." *In the Matter of the Tenure Hearing of Blasko, School District of the Township of Cherry Hill*, 1980 *S.L.D.* 987, 1003.

Additionally, with regard to the respondent's present state, a review of the transcripts indicates that the respondent did not admit or accept any responsibility for her conduct. The respondent denied using excessive force on the student, and with respect to the testing protocols, she simply provided excuses for the breaches.[1] There is a concern that, without accepting responsibility or acknowledging the extent of the inappropriate conduct, there could be

[1] The ALJ did note that the respondent was not insubordinate or resistant to learning new teaching methods or skills.

a likelihood of the behavior recurring. Consequently, a significant penalty must be imposed on the respondent that effectively communicates to her that although she may remain a teacher in the District, her conduct was completely inappropriate and can never be repeated.

Therefore, the respondent's increments shall be withheld for two years and – pursuant to *N.J.S.A.* 18A:6-14 – the respondent is suspended without pay for 120 days following the certification of tenure charges, and the respondent shall also be suspended for an additional 360 days without pay. Furthermore, the respondent shall receive, at her own cost and expense to the extent there is same, the appropriate training and assistance in connection with the use of assistive techniques for dealing with difficult students and the protocol for the APA.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 4/27/15

Date of Mailing: 4/27/15

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

139-15E

OAL DKT. NO. EDU 3311-15
AGENCY DKT. NO. 48-3/15

PATRICIA GALLANTE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY; HAROLD KENNEDY, JR.; RAFEAL FAJARDO and ARMENIO MONTEIRO,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENTS.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.[1] Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 4/23/15

Date of Mailing: 4/23/15

[1] The petitioner filed exceptions to the Order, however they were not considered because there is no provision that permits a party to filed exceptions to an Order on Emergent Relief.

[2] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENCY RELIEF

OAL DKT. NO. EDU 03311-15

AGENCY REF. NO. 48-3/15

PATRICIA GALLANTE,

Petitioner,

v.

ELIZABETH BOARD OF EDUCATION;
HAROLD E. KENNEDY, JR., Board Secretary;
RAFAEL J. FAJARDO and
ARMENIO "TONY" MONTEIRO, individually,

Respondents.

Vito A. Gagliardi, Jr., Esq., for petitioners
(Porzio, Bromberg & Newman, P.C., attorneys)

Stephen Edelstein, Esq., for respondents
(Schwartz Simon Edelstein & Celso, LLC, attorneys)

Record Closed: March 31, 2015 Decided: April 1, 2015

BEFORE **JOAN BEDRIN MURRAY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Patricia Gallante (Gallante), a resident and taxpayer of the City of Elizabeth, has filed an application for emergency relief, seeking an order as follows: (1) voiding the votes cast by respondent, Rafael Fajardo (Fajardo), at the January 7, 2015 reorganization meeting of the Elizabeth Board of Education (the Board); and (2) enjoining respondent, Anthony Monteiro (Monteiro), from continuing to occupy a seat on the Board in light of his resignation submitted on January 6, 2015.

In response, the Board contends that the issues raised by Gallante were disposed of in a predecessor action she brought against respondents, known as Patricia Gallante v. Elizabeth Board of Education, Rafael M. Fajardo, and Harold E. Kennedy, Jr., Law Division, Union County, Docket No. UNN-L-105-15, filed on January 12, 2015.[1] In that matter, Gallante challenged, via Verified Complaint in Lieu of Prerogative Writs, the validity of a special board meeting convened on January 6, 2015, without proper notice, in contravention of the Open Public Meetings Act (OPMA). Said meeting came one day before the Board's reorganization meeting on January 7, 2015. Among her other demands, Gallante asked that an order issue voiding all actions taken at the January 6, 2015 special meeting. These actions included the Board voting to appoint departing board member Fajardo to fill a seat made vacant by the resignation of Monteiro earlier that day. Fajardo was an incumbent board member whose November 2014 bid for re-election to the Board failed. As such, his term was on the brink of expiration. After assuming Monteiro's seat at the January 6 special meeting, Fajardo sat with the Board at the January 7, 2015 reorganization meeting,

[1] Monteiro was not named as a respondent in this initial action. After its dismissal by Judge Cassidy, Monteiro was added as a respondent in petitioner's Verified Amended Petition of Appeal, filed with the Commissioner of Education on March 6, 2015. His inclusion in the instant matter stems from his January 14, 2015 withdrawal of his January 6, 2015 resignation from the Board, and his resumption of his board seat from that date to the present. This occurred two days after Judge Cassidy heard oral argument on Gallante's application for injunctive relief, as set forth in greater detail herein.

casting a number of votes and conducting himself in every regard as a lawfully seated board of education member.

Oral argument on Gallante's application in the preceding action was heard on January 12, 2015, the date her Order to Show Cause was filed. Based on representations made by defendants that Fajardo would no longer hold himself out as a board member, and that all actions taken at the January 6, 2015 special meeting would be declared null and void, the Hon. Karen M. Cassidy, A.J.S.C., dismissed the relevant counts of Gallante's complaint for mootness. Pursuant to Paragraph 3 of the Order, filed on February 13, 2015, "[j]urisdiction of all remaining aspects of this matter shall be and hereby is transferred to the Commissioner of Education of the State of New Jersey and/or the New Jersey School Ethics Commission for further proceedings and resolution, and therefore this Complaint & Order to Show Cause are dismissed with prejudice." (Rodriguez Cert., Exh. D.).

On March 6, 2015, Gallante filed a Verified Amended Petition of Appeal with the Commissioner of Education (the Commissioner), which was then filed in the Office of Administrative Law (OAL) on March 10, 2015. In support of her motion for emergency relief, petitioner submitted a brief, a certification of Jose Rodriguez (Rodriguez Cert.), and a reply memorandum of law. Respondents submitted a brief in opposition to the motion and in support of a cross-motion to dismiss, and a certification of Stephen Edelstein, Esq. (Edelstein Cert.). Oral argument, initially scheduled to be heard on March 13, 2015, was postponed at the request of respondents' counsel. Oral argument on the motion was then held on March 31, 2015.

FACTUAL DISCUSSION

A summary of the pertinent evidence presented follows.

On January 6, 2015, Monteiro tendered his resignation as a member of the Board to Board Secretary Harold E. Kennedy, Jr. (Kennedy). That evening, during the course of the special board meeting referred to above, the Board accepted Monteiro's resignation and voted to install Fajardo in the vacant seat. On the following night, January 7, 2015, the Board reorganized. The newly constituted Board was invited to individually address the public. Board Member Trujillo recognized Monteiro, who was present in the room, for his service to the Board, and advised the audience that Monteiro had decided to "work on other problems in the City and he cannot do that serving in this capacity." (Rodriguez Cert., Exh. C, January 7, 2015 Minutes at page 3). Fajardo assumed the board seat vacated by Monteiro, and voted on all matters that typically come before a reorganizing Board. On another front, Board attorney Lehman that night rendered his legal opinion that Board member Rodriguez had a conflict with regard to his board membership, purportedly due to recently discovered information that he was the President of the Watchung Hills Regional Education Association. Based on Lehman's recommendation, Kennedy then disregarded all votes cast by Rodriguez that evening. Id. at 15-17. Kennedy's failure to count Rodriguez's votes was included in Gallante's application for injunctive relief, heard by Judge Cassidy on January 12, 2015. This claim, like the others mentioned above, was rendered moot by Kennedy's subsequent recording of all votes cast by Rodriguez.[2]

On January 14, 2015, after Gallante's Order to Show Cause was heard by Judge Cassidy, a regular board meeting was convened. Fajardo did not appear. Instead, Monteiro came to the meeting. Kennedy then read a letter from Monteiro stating that he was withdrawing his resignation from the Board (Rodriguez Cert., Exh. E, January 14, 2015 Minutes at page 1). Attorney Stephen Edelstein, counsel to the Board in the Gallante matter, then advised the Board that as the validity of the special January 6, 2015 meeting was being

[2] However, it appears that the voting at the reorganization meeting was not retabulated to include Rodriguez's disallowed votes. Kennedy began counting Rodriguez's votes thereafter.

challenged in a court action, it had been decided by board counsel, Fajardo, Monteiro, and Board President Amin that the meeting would be declared null and void. Id. at 2. According to respondents, since Monteiro's resignation was not accepted due to the meeting being a nullity, he was able to withdraw his resignation at the January 14, 2015 meeting and resume his board seat.

LEGAL DISCUSSION AND CONCLUSIONS

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief. The regulation states in part:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. Degioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
> 2. The legal right underlying the petitioner's claim is settled;
> 3. The petitioner has a likelihood of success on the merits of the underlying claim; and
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the relief is not granted.
>
> [N.J.A.C. 6A:3-1.6(b).]

Petitioner has the burden of establishing each of the above requirements in order to warrant relief in her favor.

Beginning with the issue of whether petitioner will likely succeed on the merits of the underlying claim, the facts presented thus far tilt in favor of petitioner with regard to Monteiro. Respondents urge that although the Board

accepted Monteiro's resignation at the June 6, 2015 meeting, the Board later nullified that action at a subsequent meeting, rendering the resignation void. In fact, Monteiro resigned his Board seat, and then conducted himself in a manner that comports with that of a former board member. He appeared at the January 7, 2015 reorganization meeting, and accepted the plaudits and good wishes that were offered him by board member Trujillo. He permitted Trujillo, in essence, to speak on his behalf in explaining that Monteiro had other endeavors that he was interested in pursuing, and that he could not do so in his position as member of the Board of Education. Trujillo's words, unrefuted by Monteiro, strongly suggest that the resignation was a thoughtful, considered act. In Silberstein v. Board of Education of the Township of Lakewood, 1990 S.L.D. 491, the Commissioner of Education held that, "[i]n that a board member cannot be compelled to serve . . . so long as a resignation is clearly communicated to and received by a board of education, it is effective, even without a formal vote by the board . . ." Id. at 499. The Commissioner explained that although a board must take formal action to accept a resignation, "it is not necessary, however, for a resignation to become effective that there shall be a formal acceptance. Any conduct on the part of the officers charged with the duty of filling the vacancy . . . is sufficient . . . such as the appointment of a successor . . . or in any other manner treating the resignation as operative." Ibid. (quoting 78 C.J.S. Resignation Section 115 (1952). Further, while Silberstein claimed that his resignation was submitted hastily and in the middle of an emotional board meeting, the ALJ, in upholding the resignation, was persuaded by the certifications of two board members who indicated that Silberstein had explained the reasons for his resignation to them. Interestingly, he offered that the business of the Board was " . . . beginning to eat into my family and business obligations." Id. at 494. Therefore, not only does Silberstein stand for the proposition that a resignation needs only to be clearly communicated to a board, but also that the resigning member's expressed intent and accompanying actions are also a critical factor.

While the facts in this matter appear to be complicated at first blush, they are fairly straightforward, and will be rendered even more so once testimony is taken in a plenary hearing. The other criteria for determining whether emergency relief is appropriate, however, present a more difficult challenge. Turning to the first standard stated in Crowe, it is well settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe, supra 90 N.J. at 132. The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980).

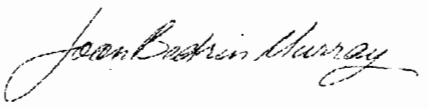
In the instant matter, I am not persuaded by the assertions of petitioner, as set forth in the supporting briefs, that if Monteiro is permitted to remain in his board seat pending a full hearing of this matter, irreparable harm will occur. I might take a different view if there was a third party who had a meritorious claim to the seat occupied by Monteiro, but this is not the case. In addition, as is evident from the actions of the Board in recent history, its members are schooled in the mechanics of taking remedial action. Conversely, I do not agree with respondents' position that in the event Monteiro is enjoined from sitting on the Board, hardship would ensue as the Board is in the throes of budget preparation. No proofs were offered that Monteiro is a member of the budget committee or is otherwise indispensable to the budget process.

On the other hand, respondents have raised, among other issues, the question of whether petitioner has standing to bring the within action, given that she is neither a school board member nor a parent in the district. A consideration of respondents' assertions in this regard constrain me from concluding that the legal right underlying petitioner's claim is wholly settled, based on the limited record before me.

Based on the foregoing, I **CONCLUDE** that petitioner has failed to meet the requirements set forth in N.J.A.C. 6a:3-1.6(b) warranting a stay or emergency

relief. Accordingly, I **ORDER** that petitioner's application for such relief be and hereby is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Commissioner does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.



April 1, 2015

DATE

JOAN BEDRIN MURRAY, ALJ

140-15

OAL DKT. NO. EDU 14815-13
AGENCY DKT. NO. 252-10/13

JANINE WALKER CAFFREY	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that the agreement attached to the Initial Decision contains only petitioner's signature; the agreement is not signed by the Board attorney – who is the Board's duly authorized representative in litigation. Furthermore, neither the file nor the agreement contain a copy of the Board's resolution approving the settlement and designating someone other than the Board attorney to sign the agreement on its behalf that is required by *N.J.A.C.* 6A:3-1.13. Without either the Board attorney's signature evidencing respondent's assent to the terms of the settlement, or the appropriate Board resolution and signature of its designee, the Commissioner cannot approve the within settlement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement and General Release consistent with the concerns set forth

above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION*
EVD POPOFF

Date of Decision: 5/06/15

Date of Mailing: 5/06/15

* This matter has been delegated to an Assistant Commissioner pursuant to *N.J.S.A.* 18A:4-34.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 14815-13
AGENCY DKT. NO. 252-10/13

JANINE WALKER CAFFERY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,
Respondent.

Andrew Babiak, Esq., for petitioner

Derlys Gutierrez, Esq., for respondent (Adams, Stern, Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: April 2, 2015 Decided: April 2, 2015

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

On October 17, 2013, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. The matter was scheduled for settlement conferences on January 23, 2014, February 13, 2014 and March 31, 2014 but all dates were adjourned because the parties agreed to settle the matter. A signed copy of the Settlement Agreement and General Release indicating the terms of settlement was forwarded to the undersigned on August 5, 2014 and is attached hereto.

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

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

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

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

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

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

April 2, 2015

DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: APRIL 7, 2015

Date Mailed to Parties: APRIL 7, 2015
sej

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

CAL DKT NO.
EDU 14815-13

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement") is made and entered into this 13th day of June , 2014, by and between Janine Walker Caffrey and The Board of Education of the City of Perth Amboy, Obdulia Gonzalez, Israel Varela, Kenneth Puccio, Dianne Roman, Samuel Lebreault, Milady Tejeda, Anthony Bermudez, William Ortiz, Mark Carvajal and any and all past or present board members of the Perth Amboy Board of Education.

WHEREAS, Janine Walker Caffrey was employed by the Perth Amboy Board of Education from July 1, 2011 to June 30, 2014; and

WHEREAS, Janine Walker Caffrey initiated a claim seeking equitable and legal relief based on allegations of wrongful discharge and non-renewal of contract including but not limited to claims under: (1) the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, *et seq.*; (2) Conscientious Employee Protection Act, N.J.S.A. 34:19-1, *et seq* ; (3) breach of express and implied contract; and (4) breach of the implied covenant of good faith and fair dealing.

WHEREAS, the parties desire to settle fully, permanently and finally all differences between them for any event related to, arising out of, or in connection with Janine Walker Caffrey's employment by the Perth Amboy Board of Education and to terminate any and all claims made or that could have been made against the Perth Amboy Board of Education and the individual past and present board members along with all officers, trustees, employees, agents, directors, representatives, successor or assigns, which settlement shall constitute the good faith settlement of the aforementioned claims;

NOW, THEREFORE, the parties, intending to be bound hereby, covenant and agree as follows:

1. The Perth Amboy Board of Education through its insurance carrier agrees to pay Janine Walker Caffrey a total amount of $184,000.00. The payment of this sum is in full and complete satisfaction of all of claims against the Perth Amboy Board of Education and all past and present individual board members including claims for attorneys' fees, expenses, back wages, front wages, liquidated damages, punitive damages, emotional distress damages, and any other claim that could be made by Janine Walker Caffrey against the Perth Amboy Board of Education and the past and present individual board members. Said payment is to made payable to Janine Walker Caffrey and Alan Schorr, Esq.

2. The Insurance Carrier for the Perth Amboy Board of Education shall issue a Form 1099 to Alan Schorr, Esq. in the amount of $62,966.67 which shall be reflected as payment of attorneys' fees and costs, and the remainder in the amount of $121,033.33 shall be paid to Janine Walker Caffrey, and the Insurance Carrier will issue a 1099 to Janine Walker Caffrey in that amount. No other Form 1099 and no W-2 shall issue.

3. Payment shall be made within 10 days of approval of this agreement by the Perth Amboy Board of Education as this agreement is subject to Board approval.

4. Release. For good and valuable consideration, including without limitation the payments described in this Agreement, Janine Walker Caffrey hereby releases, discharges, and covenants not to sue the Perth Amboy Board of Education, Obdulia Gonzalez, Israel Varela, Kenneth Puccio, Dianne Roman, Samuel Lebreault, Milady Tejeda, Anthony Bermudez, William Ortiz, Mark Carvajal and any and all past or present board members of the Perth Amboy Board of Education and the Perth Amboy Board of Education's direct and indirect parents, subsidiaries, and predecessors, and all of its and their respective past and present employees, directors, officers, attorneys, successors, and

assigns (individually and collectively the "Releasees"), from and/or upon with respect to any and all actions, suits, liabilities, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, torts, variances, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever, whether known or unknown, suspected or unsuspected, in law or equity, which could be or have been asserted against the Releasees, parties to this Agreement, heirs, executors, administrators, successors, assigns, and attorneys and for any and all claims which have, ever had, now have, or hereafter can, shall, or may have been asserted by reason of any matter, cause, or thing whatsoever from the beginning of the world to the date of this Agreement, including specifically by way of description, but not by way of limitation, any and all claims:

a. alleged or related to the employment of Janine Walker Caffrey by the Perth Amboy Board of Education;

b. arising out of or related to any claims Janine Walker Caffrey may have against the Perth Amboy Board of Education, Obdulia Gonzalez, Israel Varela, Kenneth Puccio, Dianne Roman, Samuel Lebreault, Milady Tejeda, Anthony Bermudez, William Ortiz, Mark Caravjal and any and all past or present board members of the Perth Amboy Board of Education from the beginning of time to a time to the date of this Agreement;

c. arising out of or in any way related to claims pertaining to New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq., Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000(e) *et*

seq. , the Civil Rights Act of 1991 as amended 42 U.S.C. Section1981 *et seq.* , the Family Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Conscientious Employee Protection Act, the Wage and Hour Act, the Employee Retirement Income Security Act, breach of express or implied contract, tortious interference with prospective business relations, breach of the implied covenant of good faith and fair dealing, breach of any employment handbook or contract, and the Administrative Code and charters of the various cities and State of New Jersey;

d. any and all claims for violation of the federal or any state constitution;

e. any and all claims arising out of any other laws and regulations relating to employment discrimination and wrongful discharge; and

f. any and all ethics claims instituted against any past or present individual board member of the Perth Amboy Board of education including but not limited to the following: Caffrey v. Varela, SEC 30-12; Caffrey v. Lebreault, Gonzalez, Varela, & Tejeda, SEC 02-13; and Caffrey v. Varela, SEC 35-13;

g. any and all claims instituted under the school laws of the State of New Jersey including but not limited to the action entitled Caffrey v. Perth Amboy Board of Education, Agency Ref. No. 252-10/13, OAL Docket No. EDU 14815-2013N brought before the New Jersey Commissioner of

Education;

h. any and all claims for attorneys' fees and costs.

5. Waiver of Right to Consider and to Revise Agreement. Janine Walker Caffrey waives any right she may possess under any federal or state statute: (a) to a waiting period to consider this Settlement Agreement and Mutual Release further before signing same; and (b) to revoke her signature after having signed this Settlement Agreement and Mutual Release.

6. Confidentiality and Non-Disparagement Clause. In consideration of the payment made in this Agreement. Janine Walker Caffrey hereby agrees and promises that she will not make, publish or cause to be made or published, any statements or comments, true, false or otherwise, whether they be oral or written, which in any way relate to, refer to, or otherwise concern her employment with the Perth Amboy Board of Education, this Agreement, any and all ethics claims or complaints against any past or present Perth Amboy Board of Education board member or any interaction with any past or present individual board members including Obdulia Gonzalez, Israel Varela, Kenneth Puccio, Dianne Roman, Samuel Lebreault, Milady Tejeda, Anthony Bermudez, William Ortiz, and Mark Carvajal, or which in any way relate to her opinions, thoughts or comments concerning the Perth Amboy Board of Education, the Perth Amboy Public Schools, **any past, present or future board members and shall refrain from engaging in any blogging, tweeting, posting, writing an article or a book,**

commenting in any form of social media, posting on any internet website whatsoever, and/or granting an interview or making a statement or comment to a journalist, blogger, editor, etc...regarding same including but not limited to attending any board meetings of the Perth Amboy Board of Education. Janine Walker Caffrey hereby agrees should she breach this paragraph, the Perth Amboy Board of Education shall be entitled to a payment of $10,000 for each discrete breach of this paragraph. Any dispute over this paragraph shall be submitted to the jurisdiction of the State of New Jersey, Superior Court. Notwithstanding the forgoing, in the event that any board member shall make a public statement about Janine Walker Caffrey she shall be permitted to respond publicly to that comment only. If served with a lawful subpoena, Janine Walker Caffrey shall be permitted to respond to the subpoena to the extent it requires information related to her employment with the Perth Amboy Board of Education. Nothing set forth in this agreement shall prevent Janine Walker Caffrey to list her employment with Perth Amboy on her resume and discuss her employment with prospective employers privately.

7. No Admission of Liability. The Parties understand and acknowledge that this Agreement constitutes a compromise and settlement of disputed claims. No action taken by the Parties hereto, or either of them, either previously or in connection with this Agreement shall be deemed or construed to be (a) an admission of the truth or falsity of any claims heretofore made or (b) an acknowledgment or admission by either party of any fault or liability whatsoever

to the other party or to any third party.

8. Agreement not to Voluntarily Testify – In consideration of the payment made in this Agreement, Janine Walker Caffrey agrees to not voluntarily testify in any and all ethics claims against any past or present board member of the Perth Amboy Board of Education including but not limited to Obdulia Gonzalez, Israel Varela, Kenneth Puccio, Dianne Roman, Samuel Lebreault, Milady Tejeda, Anthony Bermudez, William Ortiz, and Mark Carvajal which claim or claims are presently pending before or may be instituted before the Office of Administrative Law and/or the School Ethics Commission whether being prosecuted by the School Ethics Commission through the New Jersey State Deputy Attorney General's Office or any individual. These actions include but are not limited to: Caffrey v. Lebreault, SEC 16-12; Caffrey v. Varela, SEC 17-12; Cores v. Varela, SEC 18-12; Caffrey v. Puccio, SEC 21-12; Cores v. Puccio, SEC 25-12; and Cores v. Puccio, SEC 31-12. Janine Walker Caffrey further agrees to advise the School Ethics Commission in writing that she believes that this Agreement is sufficient to resolve all the ethics claims she had originally instituted including those now prosecuted by the School Ethics Commission. If served with a lawful subpoena, Janine Walker Caffrey shall be permitted to respond to the subpoena.

9. Withdrawal of pending claims In consideration of the payment made in this Agreement, Janine Walker Caffrey agrees to withdraw the following pending claims she has instituted against the Perth Amboy Board of Education and/or individual board members Obdulia Gonzalez, Israel Varela, Kenneth Puccio,

Samuel Lebreault, and Milady Tejeda: Caffrey v. Perth Amboy Board of Education, Agency Ref. No. 252-10/13, OAL Docket No. EDU 14815-2013N, Caffrey v. Varela, SEC 30-12; Caffrey v. Lebrealt, Gonzalez, Varela, & Tejeda, SEC 02-13; and Caffrey v. Varela, SEC 35-13;

10. Move out of City of Perth Amboy In consideration of the payment made in this Agreement, Janine Walker Caffrey represents that she has already moved out of the City of Perth Amboy and does not intend on returning.

11. Costs. The Parties shall each bear their own costs, expert fees, attorneys' fees and other fees incurred in connection with this Agreement subject to what is reflected in this Agreement.

12. Authority. The Parties each represent that they have the authority to act on their own behalf and all who may claim through them to the terms and conditions of this Agreement. Each Party warrants and represents that there are no liens or claims of lien or assignments in law or equity or otherwise of or against any of the claims or causes of action released herein.

13. No Representations. Each Party and its duly authorized agents represent that they have had the opportunity to consult with an attorney, and have carefully read and understand the scope and effect of the provisions of this Agreement. Neither Party has relied upon any representations or statements made by the other Party hereto which are not specifically set forth in this Agreement.

14. Severability. In the event that any provision hereof becomes or is declared by a court of competent jurisdiction to be illegal, unenforceable or void, this Agreement shall continue in full force and effect without said provision.

15. Entire Agreement. This Agreement represents the entire agreement and understanding between the Parties and supersedes and replaces any and all prior agreements and understandings between the Parties.

16. No Oral Modification. This Agreement may only be amended in writing signed by all of the Parties to this Agreement.

17. Governing Law. This Agreement is made and entered into in the State of New Jersey, and shall in all respects be interpreted, enforced and governed under the laws of the State of New Jersey.

18. Effective Date. This Agreement is effective after it has been signed by all parties.

19. Interpretation. The parties agree and represent that both parties have drafted this Agreement and both parties are to be considered equal drafters of this document for the purpose of interpretation of the meaning of this Agreement. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties.

20. Counterparts. This Agreement may be executed in counterparts, and each counterpart shall have the same force and effect as an original and shall constitute an effective, binding agreement on the part of each of the undersigned.

21. Approval. This agreement is subject to approval by the Perth Amboy Board of Education.

22. This Agreement is binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, personal or legal representatives, predecessors, successors, and/or assigns.

23. Nothing in this agreement shall affect, Janine Walker Caffrey's right to be indemnified under statutory law for claims arising out of her employment with the Perth Amboy Board of Education.

IN WITNESS WHEREOF, and intending to be legally bound hereby, the parties have executed this Agreement as of the date first above written.

PLEASE READ CAREFULLY. THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE IS NINE (9) PAGES IN LENGTH (INCLUSIVE OF SIGNATURE PAGE) AND INCLUDES A RELEASE OF KNOWN AND UNKNOWN CLAIMS.

THE UNDERSIGNED HAVE READ THE FOREGOING SETTLEMENT AGREEMENT AND GENERAL RELEASE, FULLY UNDERSTAND IT AND VOLUNTARILY AGREE TO IT.

Witness

Janine Walker Caffrey

Date: 6/13/14

Date: June 13, 2014

141-15L

141-15

State of New Jersey

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

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

April 30, 2015

Jack Gulli
[redacted]
Williamstown, New Jersey 08094

Jack Gulli
[redacted]
Turnersville, New Jersey 08012

Daniel J. Rosenthal, Esq.
Capehart & Scatchard, P.A.
8000 Midlantic Drive, Suite 300S
P.O. Box 5016
Mount Laurel, New Jersey 08054-5016

Re: *Board of Education of the Township of Washington, Gloucester County v. J.G. on behalf of minor child, B.G., Agency Dkt. No. 307-10/14.*

Dear Parties:

Upon review of the Petition of Appeal filed in connection with this matter and based upon the respondent's failure to submit an Answer to the Petition that complies with *N.J.A.C.* 6A:3-1.5, I have determined to grant summary decision in favor of the petitioner.

On October 16, 2014, the Board filed its Petition of Appeal pursuant to *N.J.A.C.* 6A:3-8.1 seeking an order assessing tuition and claiming that minor child B.G. was not entitled to attend school in the district during the 2011-2012, 2012-2013, and 2013-2014 school years pursuant to *N.J.S.A.* 18A:38-1 *et seq.* A copy of the Petition was served upon J.G. on October 14, 2014 – via certified and regular mail – as was an acknowledgment of filing, and notice dated October 22, 2014 that an Answer to the Petition was due within 20 days. *N.J.A.C.* 6A:3-1.5.

Because J.G. failed to respond to the initial notice, a second notice was sent on November 7, 2014 – via certified and regular mail – clearly indicating that, absent receipt of an Answer to the Petition within 10 days, each count in the Petition would be deemed admitted and the matter may be decided on a summary basis pursuant to *N.J.A.C.* 6A:3-1.5(e). According to information obtained from the U.S. Postal Service, the copy sent via certified mail to J.G.'s

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Turnersville address was not claimed, but the copy sent via regular mail to the Turnersville address was not returned. J.G. also failed to respond to the second notice.

To date, no Answer has been filed on behalf of J.G. Accordingly, petitioner's claim that B.G. was not entitled to attend school in the district pursuant to *N.J.S.A.* 18A:38-1 *et seq.* is deemed admitted. It is hereby ordered that J.G. reimburse the petitioner $15,669[1] in tuition costs for B.G.'s ineligible attendance in the district during the 2013-2014 school year. Because *N.J.A.C.* 6A:22-6.1(a) does not permit tuition to be assessed in excess of one year, tuition reimbursement for B.G.'s ineligible attendance in the district during the 2011-2012 and 2012-2013 school years must be denied.

IT IS SO ORDERED.[2]

Sincerely,

David C. Hespe
Commissioner of Education

c: County Superintendent
State Law Library

DCH/MKD/DCS

VIA REGULAR MAIL

[1] Pursuant to *N.J.A.C.* 6A:22-6.1(a), "If no appeal is filed by the parent, guardian, adult student, or district resident keeping an 'affidavit' student following notice of an ineligibility determination, the district may assess tuition for up to one year of a student's ineligible attendance, including the 21-day period provided by *N.J.S.A.* 18A:38-1 for appeal to the Commissioner." The Board's petition indicates that the tuition due for the 2013-2014 school year is $15,669 ($87.05/day).

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

142-15

STATE BOARD OF EXAMINERS DKT. NO. 1314-170
AGENCY DKT NO. 10-11/14A

IN THE MATTER OF THE SUSPENSION OF :
THE CERTIFICATES OF YVETTE NICHOLS :
BY THE STATE BOARD OF EXAMINERS. :

COMMISSIONER OF EDUCATION

DECISION

Order of Suspension Decision by the State Board of Examiners, October 23, 2014

For the Respondent-Appellant, Ronald J. Ricci, Esq.

For the Petitioner-Respondent State Board of Examiners, Frederick H. Wu, Deputy Attorney General (John J. Hoffman, Acting Attorney General of New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with the appellant, Yvette Nichol's, appeal of the State Board of Examiners' (Board) Order of October 23, 2014, suspending her Teacher of Elementary School Certificate of Eligibility With Advanced Standing and her Teacher of Elementary School Certificate for one year. On appeal the appellant does not deny that she posted inappropriate comments about a student on her Facebook page. Instead the appellant argues that her comments do not rise to the level of conduct necessary to suspend her certificates because they do not make her unfit to be a school teacher. In the alternative, the appellant maintains that if the one-year suspension is upheld it should be retroactive to one of the following dates: the date when the petitioner resigned as a teacher with the district; the date when the Board issued the Order to Show Cause; or the date when the Board voted to suspend her certificates.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute his judgment for that of the Board so long as the appellant

received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious, or unreasonable. *N.J.A.C.* 6A:4-4.1(a).

After full consideration of the record and all submissions, the Commissioner finds that the record adequately supports the Board's determination that the appellant engaged in unbecoming conduct and that a one-year suspension of the appellant's certificates was the appropriate penalty. There is nothing in the record to suggest that the Board's decision was arbitrary, capricious or unreasonable, and as a result the Commissioner finds no basis upon which to disturb the decision of the State Board of Examiners. Moreover, the Commissioner is not persuaded by the appellant's argument that the commencement date for the one year suspension should be triggered by one of the dates proposed by the appellant. The one-year suspension of the appellant's certificates was not finalized until the Board issued its decision on October 23, 2014, and there is nothing in the applicable regulatory provisions to suggest that backdating the appellant's suspension would be appropriate.

Accordingly the decision of the State Board of Examiners is affirmed for the reasons expressed therein.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 5/06/15
Date of Mailing: 5/06/15

*This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF	:	STATE BOARD OF EXAMINERS
YVETTE NICHOLS	:	ORDER OF SUSPENSION
_____	:	DOCKET NO: 1314-170

At its meeting of December 6, 2013, the State Board of Examiners (Board) reviewed information the Wayne Township School District (Wayne) had forwarded pursuant to *N.J.A.C.* 6A:9-17.4 regarding Yvette Nichols. Nichols resigned from her tenured position in Wayne following allegations that she and others had posted inappropriate comments on Facebook about a student in her class. Nichols allegedly posted a screenshot of an assignment one of her students had completed instructing students to "practice writing my name the kindergarten way." The student's name contained a curse word and Nichols allegedly posted ""I want to ask the parents if I can change it" and 'I still can't get over the student's name!" In response to others' comments about the name, Nichols allegedly wrote "How do you think I feel when I have to address him???? I literally can't stop laughing! I have to go all year with this'---!!!"" Wayne investigated and determined that Nichols had violated the district's Harassment, Intimidation and Bullying (HIB) policy. Nichols currently holds a Teacher of Elementary School Certificate of Eligibility With Advanced Standing, issued in September 2000 and a Teacher of Elementary School certificate issued in June 2001. Upon review of the information, at its January 17, 2014 meeting, the Board voted to issue Nichols an Order to Show Cause.

The Board sent Nichols the Order to Show Cause by regular and certified mail on January 24, 2014. The Order provided that Nichols must file an Answer within 30 days. Nichols responded on March 3, 2014. In that Answer, Nichols admitted to the allegations regarding her Facebook posts but denied that she had engaged in bullying, harassment or intimidation. (Answer, ¶¶ 3, 4). Nichols further denied that her conduct warranted the revocation of her certificates or that her actions had any effect on "the maintenance of discipline and the proper administration of the school system." (Answer, Affirmative Defenses, ¶¶ 2, 3). She added that her conduct had resulted from a lapse in judgment rather than a pattern of conduct and noted that she had no prior disciplinary history as a teacher in New Jersey. (Answer,

Affirmative Defenses, ¶¶ 5, 6). In a certification attached to her Answer, Nichols stated that she had only had the student in question for a few days and had no ill will towards him and "intended no harm towards him or his family." (Certification, ¶ 3). Nichols added that "I had and still do not have any idea of the student's name is based on religious beliefs or his national origin." (Certification, ¶ 3). Nichols admitted that her statements were immature but noted that they were "based solely on the fact the student's name contained the word 'shit'." (Certification, ¶ 4). Nichols stated that she resigned from Wayne because she did not want to adversely affect the administration of the school or distract from the education of the students. (Certification, ¶ 6). She acknowledged that the lapse in judgment took place when she was depressed because of a recent divorce and subsequent break up, struggling with diabetes and raising her child as a single mother without any support. (Certification, ¶ 7). Nichols added that she had just started counseling when the conduct took place and had continued with the counseling sessions. (Certification, ¶ 9). She noted that she understood her comments were inappropriate and she expressed her remorse. (Certification, ¶ 10). She added that she disagreed with Wayne's findings that her actions constituted bullying and added that the investigator would not meet with her to discuss the district's concerns. (Certification, ¶ 12). Nichols requested that while the Board may find her conduct inappropriate, that it not result in the suspension or revocation of her certificates. (Certification, ¶ 14).

Thereafter, pursuant to *N.J.A.C.* 6A:9-17.7(e), on March 11, 2014, the Board sent Nichols a hearing notice by regular and certified mail. The notice explained that it appeared that no material facts were in dispute. Thus, Nichols was offered an opportunity to submit written arguments on the issue of whether the conduct addressed in the Order to Show Cause constituted conduct unbecoming a certificate holder as well as arguments with regard to the appropriate sanction in the event that the Board determined to take action against her certificates. It also explained that upon review of the charges against her and the legal arguments tendered in her defense, the Board would determine if Nichols' offenses warranted action against her certificates. Thereupon, the Board would also determine the appropriate sanction, if any. Nichols was also offered the opportunity to appear before the Board to provide testimony on the sanction issue. Nichols submitted a Hearing Response on April 11, 2014.

In her response, Nichols again admitted to posting the comments on Facebook but denied that she was bullying the child. (Hearing Response, pp. 2-3). Nichols insisted that "the curse word in the name was the target of the Facebook post, not the child himself." (Hearing Response, p. 3). She added that the boy had only been her student for a few days and she "obviously did not harbor any ill will towards the young man or his family during such a short time period." (Hearing Response, p. 3). Nichols emphasized that her posts were based on the uniqueness of the student's name and that there was nothing to indicate that the comments were based on the student's national origin. (Hearing Response, p. 4). In her Hearing Response, Nichols also contrasted prior instances where teachers had engaged in patterns of inappropriate communications with students and received various suspensions of their teaching certificates. (Hearing Response, pp. 5-7). Finally, Nichols argued that the loss of her teaching position was a serious enough punishment for her conduct. (Hearing Response, pp. 7-9). In addition to her Hearing Response, Nichols requested to appear before the Board.

In testimony before the Board, Nichols' counsel argued that Nichols was a teacher who was well liked by her peers, students and the community. He added that she was dealing with health and financial issues at the time of her conduct and resigned right away because she did not want to cause a commotion in the district. He noted that Nichols apologized immediately and that she never meant to hurt anyone. Finally, he added that Nichols' loss of her dream job and her self-imposed suspension from public school employment was a sufficient penalty for her conduct.

Nichols testified that she was extremely remorseful and recognized that she had acted immaturely and made a bad decision. She stated that she had no intention to hurt anyone and repeated that she was "very, very sorry." Nichols added that she loved teaching and did not want that to be taken away.

The threshold issue before the Board in this matter is whether Nichols' posting comments on Facebook about a student's name constitutes conduct unbecoming a certificate holder. At its meeting of September 19, 2014, the Board considered the allegations in the Order to Show Cause, Nichols' Answer and Hearing Response with accompanying submissions and her testimony. The Board determined that no material facts related to Nichols' offense were in dispute since she admitted to the conduct alleged in the

Order to Show Cause. Thus, the Board determined that summary decision was appropriate in this matter. *N.J.A.C.* 6A:9-17.7(h). It is therefore ORDERED that the charges in the Order to Show Cause are deemed admitted for the purpose of this proceeding.

The Board must now determine whether Nichols' conduct, as set forth in the Order to Show Cause, provides just cause to act against her certificates pursuant to *N.J.A.C.* 6A:9-17.5. The Board finds that it does.

The Board may revoke or suspend the certification of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher or other just cause. *N.J.A.C.* 6A:9-17.5. "Teachers... are professional employees to whom the people have entrusted the care and custody of ... school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. Furthermore, the Commissioner has long held that teachers serve as role models for their students.

In this matter, Nichols had posted comments on her Facebook page ridiculing a child's name. Regardless of whether or not she intended her comments to be made public, Nichols' conduct was immature and hurtful and falls below the "role model" status that is expected of teachers. Accordingly, the Board believes that Nichols' behavior here cannot go unremarked.

Nonetheless, Nichols fully accepted responsibility for her actions and has offered an explanation about what led to her conduct. She has also undertaken counseling to deal with her level of stress and many responsibilities. She has also had a long record of teaching experience free of any disciplinary action. However, although the Board cannot condone Nichols' actions, her sincere sense of remorse coupled with her long and unblemished record and her cogent explanation of what transpired in her life during that time period, militate against the revocation of her certificates. Thus, the Board believes that the appropriate sanction in this case is the suspension of Nichols' certificates.

Accordingly, on September 19, 2104, the Board voted to suspend Nichols' Teacher of Elementary School Certificate of Eligibility With Advanced Standing and her Teacher of Elementary School certificate for a period of one year. On this 23rd day of October 2014 the Board voted to adopt its formal

written decision and it is therefore ORDERED that the one-year suspension of Yvette Nichols' certificates be effective immediately. It is further ORDERED that Nichols return her certificates to the Secretary of the State Board of Examiners, Office of Licensure, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

Robert R. Higgins, Secretary
State Board of Examiners

Date of Mailing: 10/22/04
Appeals may be made to the Commissioner of Education pursuant to the provisions of *N.J.S.A.* 18A:6-38.4.

RRH:MZ:th

144-15

T.R. and T.R., on behalf of minor child, E.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

This case involves a challenge by the petitioners to the Board's determination that certain conduct directed at E.R. by another student, P.H., did not constitute Harassment, Intimidation and Bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq*. In an Initial Decision dated August 11, 2014, an Administrative Law Judge (ALJ) found that the Board's determination that P.H.'s conduct did not meet the definition of HIB was arbitrary, capricious and unreasonable, and granted summary decision in favor of the petitioners. This determination was adopted by the Commissioner in a final decision issued November 10, 2014. Subsequent to the issuance of the final decision, the Commissioner granted the Board's motion for reconsideration because an error in mailing had precluded the Board from submitting exceptions to the Initial Decision prior to the issuance of the Commissioner's final decision in the matter.

Upon consideration of the Board's exceptions and a comprehensive review of the record, the Commissioner again concurred with the ALJ's conclusion that the Board's determination that E.R. was not the victim of HIB must be overturned as arbitrary, capricious and unreasonable, finding, *inter alia*, that: all four elements of the definition of HIB were clearly established in this case; the objections advanced in the Board's exceptions were unpersuasive; the Board's arguments as to why the proven conduct did not rise to the level of HIB are contrary to the spirit of the anti-bullying Act; and the Board's own investigation report of P.H.'s alleged conduct alone indicates that his behavior toward E.R. clearly met the definition of HIB. Further, the Commissioner expressly rejected the Board's contention that, since the term "sexual harassment" is not specifically contained in the text of the Act, that acts of sexual harassment cannot form the basis for a finding of HIB within the intendment of *N.J.S.A.* 18A:37-14. Accordingly, the recommended decision of the OAL was adopted as the final decision in this matter, and the Board's determination that E.R. was not the subject of HIB was overturned. The respondent Board was directed to comply with all reporting and other statutory and regulatory requirements applicable to the substantiation of an incident of HIB.

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

5/06/15 Issue date

OAL DKT. NO. EDU 10208-13
(EDU 0066-13 ON REMAND)
AGENCY DKT. NO. 355-12/12

T.R. and T.R., on behalf of minor child, E.R.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	AMENDED DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the Board of Education (Board) and the petitioners' reply thereto.[1] This case involves a challenge by the petitioners to the Board's determination that certain conduct directed at E.R. by another student, P.H., did not constitute Harassment, Intimidation and Bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.* The Administrative Law Judge (ALJ) found that the Board's determination that P.H.'s conduct did not meet the definition of HIB was arbitrary, capricious and unreasonable, and granted summary decision in favor of the petitioners.

In its exceptions the Board contends that the ALJ improperly granted summary decision in favor of the petitioners, and that the Initial Decision is based upon erroneous factual determinations which were unsupported or contradicted by the undisputed facts presented on the motion for summary decision. The Board argues that the ALJ failed to consider several facts

[1] No exceptions were considered in the final decision issued by the Commissioner on November 10, 2014. On February 26, 2015, the Commissioner granted the Board's motion for reconsideration to allow the Board to submit exceptions. It was determined that the OAL sent the Board's copy of the Initial Decision to an incorrect email address, and did not provide the Board with a copy of the decision via the postal service. Therefore, the Board was not originally afforded an opportunity to submit exceptions prior to the issuance of the final decision.

disclosed by the HIB investigation that was conducted by the Board. Additionally, the Board asserts that it conducted an HIB investigation in full compliance with the Act and its decision was entirely reasonable based on the investigation. As such, the Board maintains that its determination was entitled to deference and the ALJ had no authority to modify it by granting summary decision to the petitioners *sua sponte*. Finally, the Board suggests that the ALJ should have applied a *de novo* standard of review instead of using the arbitrary capricious and unreasonable standard. Therefore, the Board maintains that the Initial Decision should be rejected.

As a threshold matter, the Board attempts to argue in its exceptions that this case presents an issue of first impression with respect to the standard of review to be used by an ALJ in evaluating whether a board of education has correctly interpreted the statutory definition of HIB.[2] It is well established that when a local school board acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that the decision was arbitrary, capricious or unreasonable. *Thomas v. Bd. of Ed. of Morris Twp.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965), *aff'd* 46 *N.J.* 581 (1966). The fact that the substance of this case involves a challenge to the Board's HIB determination and the application of the Act does not impact the customary standard of review.

Upon a comprehensive review of the record, the Commissioner concurs with the ALJ's conclusion that the Board's determination that E.R. was not the victim of HIB must be overturned as arbitrary, capricious, and unreasonable. The Commissioner is also in accord with the ALJ's determination – for the reasons thoroughly outlined in the Initial Decision – that all four

[2] Ironically in the Board's motion for summary decision the Board stated that the appropriate standard of review in this case is the arbitrary, capricious or unreasonable standard. In fact, the Board included the applicable case law to support the fact that its decision should not be overturned unless it was established that the Board acted in an arbitrary, capricious or unreasonable manner.

elements of the definition of HIB were clearly established in this case.[3] Moreover, the Commissioner finds the objections advanced in the Board's exceptions to be unpersuasive. The arguments made by the Board as to why the proven conduct did not rise to the level of HIB are contrary to the spirit of the anti-bullying Act. Despite the Board's contention to the contrary, the ALJ was fully authorized to grant summary decision in favor of the petitioners, as it is clear from the Board's own investigation report alone that the conduct of P.H. did in fact meet the definition of HIB.[4]

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter, and the Board's determination that E.R. was not the subject of HIB is hereby overturned. The Board of Education of the Bridgewater-Raritan School District is hereby directed to comply with all reporting and other statutory and regulatory requirements applicable to the substantiation of an incident of HIB.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 5/06/15

Date of Mailing: 5/06/15

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[3] The Commissioner expressly rejects the argument advanced by the Board in its summary decision motion that, since the term "sexual harassment" is not specifically contained in the Act, acts of sexual harassment cannot form the basis for a finding of HIB within the intendment of *N.J.S.A.* 18A:37-14. The Commissioner finds nothing in the language of the statute or in the legislative history of the Act to support the notion that the Legislature intended to exclude acts of sexual harassment from the definition of HIB. To the contrary, the Act was enacted "to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of **harassment**, intimidation, and bullying of students that occur in school and off school premises." *N.J.S.A.* 18A:37-13.1.f. (emphasis added).

[4] The Board's investigation report states, "[d]uring the month of April P.H. asked E.R. to do inappropriate things through text and ooVoo. E.R. did not comply with P.H.'s request but he continued to ask her. After being counseled by Mrs. Geogham, P.H. stopped asking E.R. to do inappropriate things through text or ooVoo." Additionally, according to the report, P.H. admitted "that he asked to see [E.R.'s] breast a couple of times." Finally, other students who were interviewed during the investigation indicated that they saw or were aware of other text messages "that mentioned fingering and saying 'you're so sexy' [and where P.H.] asked [E.H.] to make out with him and strip [and] show him her private areas."

[5] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

145-15

145-15

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

In the Matter of the Tenure Charges Against

PHYLLIS MACK

and

BOARD OF EDUCATION OF LINDEN PUBLIC SCHOOLS

Agency Docket No.: 287-9/14

AWARD OF ARBITRATOR

Hearings were held in the above-entitled matter on February 5, 2015 and on March 13, 2015 at the Linden Board of Education in Linden, New Jersey before Daniel F. Brent, duly designated as Impartial Arbitrator for the purpose of adjudicating the tenure charges filed by the Board of Education of Linden Public Schools against Phyllis Mack pursuant to the TEACHNJ Act, NJSA 18A: 6-16, as amended by P.L. 2012, c. 26. These charges alleged that Respondent had engaged in conduct unbecoming a public school secretary, gross misconduct, and other just cause requiring her dismissal. The Board of

Education introduced documentary evidence setting forth in detail the basis for the charges in the instant case. The Respondent disputed the validity of the tenure charges. During the course of the hearings, the parties resolved their dispute amicably.

The terms and conditions of this voluntary resolution were reduced to a Settlement Agreement and Release executed by both parties on April 8, 2015. The Settlement Agreement and Release was ratified by the Linden Board of Education by a formal resolution adopted by the Board at its meeting on April 27, 2015, as certified by the Board Secretary on April 28, 2015.

The Settlement Agreement and Release was submitted to the Arbitrator for examination and approval. After duly considering the nature of the tenure charges, the Respondent's record of service to the Linden Public Schools, the absence of harm to any student, and the advantages and factors cited by the parties as the basis underlying their voluntary settlement, I hereby find the terms and conditions contained in the Settlement Agreement and Release between the Linden Board of Education and Respondent Phyllis Mack dated April 8, 2015, as agreed upon by the Respondent and the Board, each of whom has been advised by independent legal counsel, to be reasonable, consistent with the terms and intent of the TEACHNJ statute and applicable regulations, and in the best interest of both the parties and the public. The Settlement

Agreement and Release resolved all issues and allegations of misconduct, including the charge of conduct unbecoming a public school employee.

Consequently, I accept the settlement as proposed by the parties in the Settlement Agreement and Release executed by the parties, and hereby issue this Award of Arbitrator incorporating the terms of the Settlement Agreement and Release, which Award will be effective as of April 27, 2015.

Princeton, New Jersey
May 4, 2015

Daniel F. Brent, Arbitrator

State of New Jersey
County of Mercer

On this 4th day of May, 2015 before me personally came and appeared Daniel F. Brent, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.

An Attorney at Law of the
State of New Jersey

WEINER | LESNIAK LLP
ATTORNEYS AT LAW
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STEVEN R. NEVOLIS
Associate

snevolis@weinerlesniak.com

April 29, 2015

VIA NEW JERSEY LAWYER'S SERVICE
Daniel F. Brent, Arbitrator
239 Shady Brook Lane
Princeton, New Jersey 08540

Re: ***In the Matter of the Tenure Hearing of Phyllis Mack, School District of the City of Linden***
Our File No.: LBOE173

Dear Mr. Brent:

As you are aware, this firm represents the Linden Board of Education in the above matter. Enclosed for your approval are one (1) original and two (2) copies of the Settlement Agreement and Release between the Board and Phyllis Mack, along with the Certified Board Resolution approving the Agreement at the Board's April 27, 2015 meeting.

If you require any further information, please do not hesitate to contact me. Thank you for your time and assistance in resolving this matter.

Very truly yours,

WEINER LESNIAK LLP

By: _____
Steven R. Nevolis
For the Firm

SRN
Enclosures
C: Nicholas Poberezhsky, Esq. (via NJ Lawyer's Service w/enclosures)
Dr. Danny Robertozzi, Superintendent
Kathleen A. Gaylord, Board Secretary
Bryan Russell, Board President
920228_1

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Attorneys for Petitioner
Linden Board of Education
File No: LBOE-173
888230_1

IN THE MATTER OF THE TENURE CHARGES AGAINST PHYLLIS MACK, SCHOOL DISTRICT OF THE CITY OF LINDEN, UNION COUNTY.

COMMISSIONER OF EDUCATION
STATE OF NEW JERSEY

AGENCY REFERENCE NO. 287-9/14

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and General Release ("Agreement") is made and entered into between the **Linden Board of Education** ("Board") and **Phyllis Mack** ("Mack"), collectively referred to as the "Parties".

WHEREAS, Mack is a tenured secretary assigned to Linden High School; and

WHEREAS, the Board certified tenure charges against Mack on or about September 23, 2014 for unbecoming conduct; and

WHEREAS, the matter was assigned to Daniel F. Brent to arbitrate the tenure proceedings; and

WHEREAS, the parties have reached an amicable resolution in resolving the tenure charges; and

WHEREAS, the Parties deem it to be in their best interests to set forth in a formal written agreement their respective rights, duties and obligations regarding the resolution; and

WHEREAS, the Parties have been afforded the opportunity to consider the terms of this Agreement with advice of counsel and/or a representative of their choice;

NOW, THEREFORE, in consideration of the promises and the mutual covenants herein contained, and for other good and valuable considerations, the Parties hereby agree as follows:

1. The recitals set forth above are incorporated herein by reference and made part of this Agreement as if set forth at length.

2. The **"Board"**, as used herein, shall at all times mean the Board of Education of the City of Linden, its affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, elected officials, officers, representatives, associates, partners, servants, employees, agents, attorneys, and successors, whether in their individual or official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith.

3. **"Mack"**, as used herein, shall mean Phyllis Mack, her heirs, representatives, privies, executors, administrators, assigns, successors-in-interest and predecessors-in-interest.

4. In consideration of the covenants set forth in this Agreement, the parties agree as follows:

    a. Mack shall be assigned to a secretarial position within the District at the sole and exclusive discretion of the Superintendent and Board. Mack's assignment shall be made effective on a date selected by the Superintendent in his sole and exclusive discretion. The effective date of Mack returning to work is within the sole and exclusive discretion of the Superintendent. The District will notify Mack of her reassignment no later than seven (7) calendar days prior to her return-to-work date.

    b. Mack <u>will not</u> be reimbursed for the 120-day unpaid suspension she has already served as a result of tenure charges being filed against her. The suspension will remain recorded as an unpaid suspension.

5. Mack expressly understands and agrees that the terms and payment set forth in this Agreement include any and all amounts that may ever be claimed by Mack or on her behalf, or by her attorneys, heirs, successors or assigns against the Board. The parties covenant not to sue, initiate or continue any legal or administrative proceedings or appeals with regard to any or all claims released herein, provide; however, that this shall not preclude any claims pertaining to a breach or enforcement of this Agreement from being taken.

6. In consideration of the mutual promises and exchanges made herein, the Parties agree and understand that this Agreement is a compromise settlement of all claims asserted and unasserted in connection with the tenure charges certified by the Board against Mack and that the Board will not take any further disciplinary action against Mack based on the allegations that gave rise to the charges. By entering into this Agreement, neither party admits that it has violated New Jersey Statute, Title 18A; New Jersey Administrative Code, Title 6 and Title 6A; state or federal law or any contractual provisions that might exist. This Agreement is entered solely for the purpose of resolving disputed claims and neither the execution, delivery, nor performance of this Agreement, shall constitute or be construed at any time or for any purpose to be an admission of fact or liability by any of the Parties.

7. The Parties acknowledge and agree that this Agreement is a full and complete settlement of any and all claims that have been asserted or can be asserted or may be asserted or could be asserted by either Party against the other for compensatory damages, pain, suffering, emotional distress, stress, humiliation, embarrassment, mental anguish, medical expenses, punitive damages, interests, attorneys fees, costs

of suit, loss of sick time, loss of vacation time, loss of benefits, consequential damages, reputation damages, breach of express or implied contract, interference in any contract, economic opportunity or prospective economic advantage which arose out of or could arise out of the Board's certification of tenure charges against Mack.

8. As an inducement for the Parties to enter into this Agreement, each Party does hereby remise, release and forever discharge all other parties from any and all debts, obligations, suits, actions, causes of action, claims or demands, in law or in equity, which any one Party now has or hereafter may assert against the others arising out of the Board's certification of tenure charges against Mack and/or her employment with the Board, including, but not limited to, all claims, liabilities, costs and attorneys' fees under: (1) the Civil Rights Acts of 1964, as amended (42 U.S.C. 2000(e) et seq.); (2) the Americans with Disabilities Act; (3) the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1, et seq.); (4) any collective negotiations agreement; (5) Title 18A and its rules and regulations, including, but not limited to, Title 6A, including any tenure appeal; (6) the Constitution of the United States; (7) the Constitution of New Jersey; (8) wage and hour laws, federal and state; (9) any other federal or state statute or common law; (10) any and all paid and/or unpaid medical and/or personal and/or family leave laws and regulations, federal and state including, but not limited to, FMLA and NJ FLA; (11) any and all federal and state tax laws and regulations, including, but not limited to, the Internal Revenue Code and New Jersey Tax provisions; (12) the New Jersey Tort Claims Act N.J.S.A. Title 59; (13) the Fourth and Fourteenth Amendments to the United States Constitution; and/or (14) other causes of action whether enumerated herein specifically or not. Further,

the parties hereby waive any and all relief not explicitly provided for in this Agreement. Nothing in this provision shall be deemed to bar either party from taking any and all necessary legal action to enforce the terms of this Agreement.

9. The Parties agree that in consideration of the promises set forth in this Agreement that neither party shall file: (a) an appeal before the Commissioner of Education seeking any type of relief whatsoever; (b) any grievances or arbitrations relative to Mack's employment; and (c) any type of judicial or administrative action of any type or nature in connection with Mack's employment, tenure charges, terms and conditions of employment or payments made under this Agreement. Mack agrees to release, acquit and forever discharge the Board from any and all claims which have been or may be made against the Board by any other person or organization on his behalf. Mack specifically waives any right to become, and promises not to become, a member of any class in any case in which any claim is asserted against the Board, involving any event that has occurred on or before the date of this Agreement. The Board affirms that, as of the date of execution of this Agreement, they have no knowledge of any pending class action against it to which Mack could be a potential class member.

10. Mack and the Board shall each bear their own costs, attorney's fees, and any other expenses associated with these tenure proceedings and this Agreement. As further consideration for this Agreement, Mack and her attorney and/or representative agree that the sums set forth in this Agreement represents all of the monies which the Board has agreed and will ever agree to pay in connection with Mack's tenure charges and her employment with the Board.

11. This Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey.
12. Mack's and/or the Board's failure to contest a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other, or as a waiver of any subsequent breach by the other.
13. If any term, provision or condition of this Agreement is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other provision, term or condition of this Agreement.
14. The parties hereby acknowledge and agree that they further expressly waive and assume the risk of any and all claims or damages which exist regarding Mack's tenure charges and/or her employment as of this date for which the Board and Mack do not know of or suspect to exists, whether through ignorance, oversight, error, negligence, or otherwise and which, if known, would materially affect their decision to enter into this Agreement.
15. Both parties acknowledge that this Agreement is subject to approval of the Board. If such approval is not given, this Agreement and all stipulations and acknowledgements, whether contained herein or attached hereto, shall be rendered null and void and the parties shall be returned to the status quo existing prior to this Agreement. If approved, the Board's resolution approving this Agreement shall be attached and maintained with this Agreement.
16. Both parties acknowledge that this Agreement is subject to approval by Arbitrator Daniel F. Brent. If such approval is not given, this Agreement and all stipulations

and acknowledgements, whether contained herein or attached hereto, shall be rendered null and void and the parties shall be returned to the status quo existing prior to this Agreement.

17. This Agreement may be executed in counterparts but shall be enforceable only if executed by Mack and the Board.

18. This Agreement contains the entire Agreement between Mack and the Board with regard to the matters set forth in it, and shall be binding upon and inure to the benefit of their officials, officers, directors, attorneys, representatives, employees, associates, partners, agents, servants, executors, administrators, personal representatives, heirs, successors and assigns of each, and all other persons, firms, corporations, associations or partnerships or any other entity or persons connected therewith, except as set forth herein or as may be agreed to in writing between the parties.

19. In entering into this Agreement, Mack has relied upon the legal advice of her attorney or representative, who is the attorney or representative of her own choice, as to the terms of this Agreement which have been completely read and explained by her attorney or representative and those terms are fully understood and voluntarily accepted as being reasonable.

20. The terms of this Agreement, the Agreement itself, and any information relative to the tenure charges, shall be held in strictest confidence by all parties and their agents and representatives and shall not be publicized or disclosed in any manner whatsoever, except that: (a) either party may disclose this Agreement or any other information relative to the tenure charges in confidence to their attorneys,

accountants, auditors, tax preparers, and financial advisors; (b) the Board may disclose this Agreement or any other information relative to the tenure charges as necessary to fulfill its obligation under the Open Public Records Act, as well as all other standard or legally required reporting or disclosure requirements; and (c) the parties may disclose this Agreement or any other information relative to the tenure charges insofar as such disclosure may be necessary to enforce its terms or as otherwise required by law.

21. Both parties acknowledge and agree that they will not disclose, discuss or post the terms of this Agreement via electronic communication, including, but not limited to, e-mail or text messages; or via the internet or social media websites, including, but not limited to, Facebook, Twitter, blogs, NJ.com, or similar websites.

22. Both parties agree that, if asked about the Agreement by anyone, including any member of the media, they will respond only: "That the matter has been resolved to the mutual satisfaction of the parties."

23. Mack acknowledges and agrees that if she is to violate any of the terms of this Agreement, including but not limited to breach of the provisions set forth in paragraphs 20 through 23, all of the Board's obligations shall cease and the Parties will return to their original positions as if this Agreement never occurred and the tenure charges will be reinstated and proceed accordingly.

24. In any action commenced against a party to enforce the provisions of this Agreement, the moving party, if it is the prevailing party, shall be entitled to recover its reasonable attorneys' fees, costs and disbursements incurred in prosecuting the action.

25. Mack understands that, pursuant to the Older Workers Benefit Protection Act of 1990, if applicable, she has been advised to consult with an attorney before signing this Agreement, had twenty-one (21) calendar days to consider the Agreement before signing it, and may revoke the Agreement within seven (7) calendar days after signing it. Mack further understands that the Agreement will not become effective or enforceable until the seven (7) day revocation period has expired. Timely revocation of this Agreement can be made in writing, signed by Mack, delivered to and received by counsel for the Linden Board of Education, Mark A. Tabakin, Esq., Weiner Lesniak, 629 Parsippany Road, Parsippany, New Jersey 07054 by no later than 5:00 P.M. on the seventh (7th) day after Mack signs this Agreement. Mack expressly understands and agrees that if she does not sign this Agreement, or if she revokes it within the Revocation Period, the Agreement shall not be effective or enforceable, and she will not be entitled to any of the payments and other benefits provided for in this Agreement until the Revocation Period expires. If the Agreement is revoked or not signed by Mack, the parties shall revert to the positions they were in as though the Agreement was never made.

26. For purposes of construction, this Agreement shall not be deemed to be drafted by any Party, and any ambiguity shall not be construed against any Party.

Attest:

Kathleen Gaylord, Board Secretary

Dated: 4/27/15, 2015

LINDEN BOARD OF EDUCATION

BY: _____
Bryan Russell, Board President

Dated: 4-27-15, 2015

PHYLLIS MACK

Witness NICHOLAS POLICHETTI

Dated: 4/8/15, 2015

BY: _____
Phyllis Mack

Dated: 4/8/15, 2015

The Attorney Committee, upon recommendation of the Superintendent of Schools, presents the following motions to the Linden Board of Education for approval:

1. **BE IT RESOLVED** that the Board hereby approves the terms of the Settlement Agreement and General Release between the Board and Employee #19-13/14, a copy of which is on file with the Board Secretary

   BE IT FURTHER RESOLVED that the Board President and Secretary are hereby instructed to execute the Agreement and are authorized to take all action necessary to effectuate the terms of the Agreement.

2. **BE IT RESOLVED** that the Board hereby approves the terms of the Settlement Agreement and General Release between the Board and Employee #20-13/14, a copy of which is on file with the Board Secretary.

   BE IT FURTHER RESOLVED that the Board President and Secretary are hereby instructed to execute the Agreement and are authorized to take all action necessary to effectuate the terms of the Agreement.

3. **BE IT RESOLVED** that the Board hereby approves the terms of the Settlement Agreement and General Release between the Board and Employee #21-13/14, a copy of which is on file with the Board Secretary

   BE IT FURTHER RESOLVED that the Board President and Secretary are hereby instructed to execute the Agreement and are authorized to take all action necessary to effectuate the terms of the Agreement.

   BE IT FURTHER RESOLVED that upon approval of the Agreement, Employee #21-13/14 will hereby be reassigned to a secretarial position within the District at the sole and exclusive discretion of the Superintendent and the Board effective April 28, 2015.

I CERTIFY THE FOREGOING TO BE A TRUE COPY OF THE RESOLUTION ADOPTED BY THE BOARD OF EDUCATION OF LINDEN IN THE COUNTY OF UNION, NEW JERSEY, AT A MEETING HELD ON APRIL 27, 2015.

Kathleen A. Gaylord
Business Administrator/Board Secretary

4/28/15
Date

Daniel F. Brent
ARBITRATOR
239 SHADY BROOK LANE
PRINCETON, NEW JERSEY 08

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CONTROVERSIES & DISP
2015 MAY -6 A 10:47

(609) 683-0033
Fax (609) 924-6171
dfbrentarbitrator@gmail.com

May 5, 2015

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes
State of New Jersey
Department of Education
P.O. Box 500
Trenton, NJ 08625-0500

For professional services rendered:

In the Matter of the Tenure Charges Against

Phyllis Mack and
Board of Education of Linden Public Schools
Agency Docket No.: 287-9/14

1 day of hearing – 2/5/15	$ 1,250.00
4 days study and preparation	5,000.00
Travel	36.00
Total	$ 6,286.00

Arbitrator's Tax I.D. No. 22-2228695

146-15

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

In the Matter of the Tenure Charges Against

ANTIONETTE MODRAK

and

BOARD OF EDUCATION OF LINDEN PUBLIC SCHOOLS

Agency Docket No.: 288-9/14

AWARD OF ARBITRATOR

Hearings were held in the above-entitled matter on February 5, 2015 and on March 13, 2015 at the Linden Board of Education in Linden, New Jersey before Daniel F. Brent, duly designated as Impartial Arbitrator pursuant to the TEACHNJ Act for the purpose of adjudicating tenure charges filed by the Board of Education of Linden Public Schools against Principal Antoinette Modrak pursuant to the TEACHNJ Act, NJSA 18A:6-16, as amended by P.L. 2012, c. 26. These charges alleged that Respondent had engaged in

conduct unbecoming a public school employee, gross misconduct, and other just cause requiring her dismissal. The Board of Education introduced documentary evidence setting forth in detail the basis for the charges in the instant case. The Respondent disputed the validity of the tenure charges. During the course of the hearings, the parties resolved their dispute amicably.

The terms and conditions of this voluntary resolution were reduced to a Settlement Agreement and Release that was executed by Respondent and witnessed by the Arbitrator on March 13, 2015, and executed by the President of the Linden Board of Education and the Board Secretary on April 27, 2015. The Settlement Agreement and Release was ratified by the Linden Board of Education by a formal resolution adopted by the Board at its meeting on April 27, 2015, as certified by the Board Secretary on April 28, 2015.

The Settlement Agreement and Release was submitted to the Arbitrator for examination and approval. After duly considering the nature of the tenure charges, the Respondent's record of service to the Linden Public Schools, the absence of harm to any student, and the advantages and factors cited by the parties as the basis underlying their voluntary settlement, I hereby find the terms and conditions contained in the Settlement Agreement and Release between the Linden Board of Education and Respondent Antoinette Modrak dated April 27, 2015, as agreed upon by the Respondent and the Board, each of whom has been advised by independent legal counsel, to be reasonable,

consistent with the terms and intent of the TEACHNJ statute and applicable regulations, and in the best interest of both the parties and the public.

The Settlement Agreement and Release resolved all issues and allegations of misconduct, including the charge of conduct unbecoming a public school employee. Consequently, I accept the settlement as proposed by the parties in the Settlement Agreement and Release executed by the parties, and hereby issue this Award of Arbitrator incorporating the terms of the Settlement Agreement and Release, which Award will be effective as of April 27, 2015.

Princeton, New Jersey
May 6, 2015

Daniel F. Brent, Arbitrator

State of New Jersey
County of Mercer

On this 6th day of May, 2015 before me personally came and appeared Daniel F. Brent, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.

An Attorney at Law of the
State of New Jersey

WEINER | LESNIAK LLP

ATTORNEYS AT LAW
www.weinerlesniak.com

STEVEN R. NEVOLIS
Associate

snevolis@weinerlesniak.com

April 29, 2015

VIA NEW JERSEY LAWYER'S SERVICE
Daniel F. Brent, Arbitrator
239 Shady Brook Lane
Princeton, New Jersey 08540

Re: ***In the Matter of the Tenure Charges Against Antoinette Modrak by the Board of Education of Linden Public Schools***
Our File No.: LBOE174

Dear Mr. Brent:

As you are aware, this firm represents the Linden Board of Education in the above matter. Enclosed for your approval are one (1) original and two (2) copies of the Settlement Agreement and Release between the Board and Antoinette Modrak, along with the Certified Board Resolution approving the Agreement at the Board's April 27, 2015 meeting.

If you require any further information, please do not hesitate to contact me. Thank you for your time and assistance in resolving this matter.

Very truly yours,

WEINER LESNIAK LLP

By: _____
Steven R. Nevolis
For the Firm

SRN
Enclosures
C: Sanford R. Oxfeld, Esq. (via NJ Lawyer's Service w/enclosures)
Dr. Danny Robertozzi, Superintendent
Kathleen A. Gaylord, Board Secretary
Bryan Russell, Board President
920222_1

WEINER LESNIAK, LLP
629 Parsippany Road
P. O. Box 438
Parsippany, New Jersey 07054-0438
Phone: (973) 403-1100 Fax: (973) 403-0010
Attorneys for Petitioner
Linden Board of Education
File No: LBOE-174
887767_1

IN THE MATTER OF THE TENURE CHARGES AGAINST ANTOINETTE MODRAK, SCHOOL DISTRICT OF THE CITY OF LINDEN, UNION COUNTY.

COMMISSIONER OF EDUCATION
STATE OF NEW JERSEY

AGENCY REFERENCE NO. 288-8/14

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and General Release ("Agreement") is made and entered into between the **Linden Board of Education** ("Board") and **Antoinette Modrak** ("Modrak"), collectively referred to as the "Parties".

WHEREAS, Modrak was a tenured principal assigned to Linden High School during the 2013-2014 school year; and

WHEREAS, the Board certified tenure charges against Modrak on or about September 23, 2014 for unbecoming conduct; and

WHEREAS, the matter was assigned to Daniel R. Brent to arbitrate the tenure proceedings; and

WHEREAS, the Parties have reached an amicable resolution in resolving the tenure charges; and

WHEREAS, the Parties deem it to be in their best interests to set forth in a formal written agreement their respective rights, duties and obligations regarding the resolution; and

WHEREAS, the Parties have been afforded the opportunity to consider the terms of this Agreement with advice of counsel and/or a representative of their choice;

NOW, THEREFORE, in consideration of the promises and the mutual covenants herein contained, and for other good and valuable considerations, the Parties hereby agree as follows:

1. The recitals set forth above are incorporated herein by reference and made part of this Agreement as if set forth at length.
2. The **"Board"**, as used herein, shall at all times mean the Board of Education of the City of Linden, its affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, elected officials, officers, representatives, associates, partners, servants, employees, agents, attorneys, and successors, whether in their individual or official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith.
3. **"Modrak"**, as used herein, shall mean Antoinette Modrak, her heirs, representatives, privies, executors, administrators, assigns, successors-in-interest and predecessors-in-interest.
4. In consideration of the covenants set forth in this Agreement, the Parties agree as follows:

    a. Modrak will be returned to the Principals' Salary Guide effective July 1, 2015 at the Principals' Salary Guide for the High School Principal, MA+30, at Step 5. However, she shall continue to be paid at that step with no step movement for the remainder of her time in the District subject to Paragraph ~~B~~ C, below. MT

    b. Modrak shall be returned not to the position of Principal, but to the position of coordinator, supervisor, or some other administrative position. However, the parties agree that whatever the title may be that is assigned to Modrak, she

shall retain her tenure in the category of Principal subject to Paragraph 5, below.

c. Modrak shall turn 55 on January 1, 2019. She shall remain governed by the two paragraphs listed above until June 30, 2019. At that time, in the discretion of the District, she may be returned to the classroom, as a tenured teaching staff member. She shall return to the highest step of the Linden Education Association MA+30 12 Month Guide then in effect.

d. It is mutually understood that in the event both parties to this Agreement shall determine at any point in the future to amend the terms of this Agreement and mutually agree to a different placement/assignment of Modrak, nothing contained in the Agreement shall be interpreted as precluding that possibility.

e. Modrak acknowledges that in entering into this Agreement she is waiving any claim to repayment for the 120 days she was suspended.

5. Modrak expressly understands and agrees that the terms and payment set forth in this Agreement include any and all amounts that may ever be claimed by Modrak or on her behalf, or by her attorneys, heirs, successors or assigns against the Board. The parties covenant not to sue, initiate or continue any legal or administrative proceedings or appeals with regard to any or all claims released herein, provided however, that this shall not preclude any claims pertaining to a breach or enforcement of this Agreement from being taken.

6. In consideration of the mutual promises and exchanges made herein, the Parties agree and understand that this Agreement is a compromise settlement of all claims asserted and unasserted in connection with the tenure charges certified by the Board against Modrak. By entering into this Agreement, neither party admits that it has violated New Jersey Statute, Title 18A; New Jersey Administrative Code, Title 6 and Title 6A; state or federal law or any contractual provisions that might exist. This Agreement is entered solely for the purpose of resolving disputed claims and neither

the execution, delivery, nor performance of this Agreement, shall constitute or be construed at any time or for any purpose to be an admission of fact or liability by any of the Parties.

7. The Parties acknowledge and agree that this Agreement is a full and complete settlement of any and all claims that have been asserted or can be asserted or may be asserted or could be asserted by either party against the other for compensatory damages, pain, suffering, emotional distress, stress, humiliation, embarrassment, mental anguish, medical expenses, punitive damages, interests, attorney's fees, costs of suit, loss of sick time, loss of vacation time, loss of benefits, consequential damages, reputation damages, breach of express or implied contract, interference in any contract, economic opportunity or prospective economic advantage which arose out of or could arise out of the Board's certification of tenure charges against Modrak and/or her employment with the Board.

8. As an inducement for the Parties to enter into this Agreement, each Party does hereby remise, release and forever discharge all other Parties from any and all debts, obligations, suits, actions, causes of action, claims or demands, in law or in equity, which any one Party now has or hereafter may assert against the others arising out of the Board's certification of tenure charges against Modrak or her surrendering of her principal position, including, but not limited to, all claims, liabilities, costs and attorneys' fees under: (1) the Civil Rights Acts of 1964, as amended (42 U.S.C. 2000(e) et seq.); (2) the Americans with Disabilities Act; (3) the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1, et seq.); (4) any collective negotiations agreement; (5) Title 18A and its rules and regulations, including, but not limited to,

Title 6A, including any tenure appeal; (6) the Constitution of the United States; (7) the Constitution of New Jersey; (8) wage and hour laws, federal and state; (9) any other federal or state statute or common law; (10) any and all paid and/or unpaid medical and/or personal and/or family leave laws and regulations, federal and state including, but not limited to, FMLA and NJ FLA; (11) any and all federal and state tax laws and regulations, including, but not limited to, the Internal Revenue Code and New Jersey Tax provisions; (12) the New Jersey Tort Claims Act N.J.S.A. Title 59; (13) the Fourth and Fourteenth Amendments to the United States Constitution; and/or (14) other causes of action whether enumerated herein specifically or not. Further, the parties hereby waive any and all relief not explicitly provided for in this Agreement. Nothing in this provision shall be deemed to bar either party from taking any and all necessary legal action to enforce the terms of this Agreement.

9. The Parties agree that in consideration of the promises set forth in this Agreement that neither party shall file: (a) an appeal before the Commissioner of Education seeking any type of relief whatsoever; (b) any grievances or arbitrations relative to Modrak's employment; and (c) any type of judicial or administrative action of any type or nature in connection with Modrak's employment, tenure charges, terms and conditions of employment or payments made under this Agreement. Modrak agrees to release, acquit and forever discharge the Board from any and all claims which have been or may be made against the Board by any other person or organization on her ~~his~~ behalf. Modrak specifically waives any right to become, and promises not to become, a member of any class in any case in which any claim is asserted against the Board, involving any event that has occurred on or before the date of this

Agreement. The Board affirms that, as of the date of execution of this Agreement, they have no knowledge of any pending class action against it to which Modrak could be a potential class member.

10. Modrak and the Board shall each bear their own costs, expenses, attorney's fees and any other costs associated with these tenure proceedings and this Agreement. As further consideration for this Agreement, Modrak and her attorney and/or representative agree that the sums set forth in this Agreement represents all of the monies which the Board has agreed and will ever agree to pay in connection with Modrak's tenure charges and her employment with the Board, as of this date.

11. This Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey.

12. Modrak's and/or the Board's failure to contest a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other, or as a waiver of any subsequent breach by the other.

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

14. The parties hereby acknowledge and agree that they further expressly waive and assume the risk of any and all claims or damages which exist regarding Modrak's tenure charges and/or her employment as of this date for which the Board and Modrak do not know of or suspect to exists, whether through ignorance, oversight, error, negligence, or otherwise and which, if known, would materially affect their

decision to enter into this Agreement.

15. Both parties acknowledge that this Agreement is subject to approval of the Board. If such approval is not given, this Agreement and all stipulations and acknowledgements, whether contained herein or attached hereto, shall be rendered null and void and the parties shall be returned to the status quo existing prior to this Agreement. If approved, the Board's resolution approving this Agreement shall be attached and maintained with this Agreement.

16. Both parties acknowledge that this Agreement is subject to approval by Arbitrator Daniel R. Brent. If such approval is not given, this Agreement and all stipulations and acknowledgements, whether contained herein or attached hereto, shall be rendered null and void and the parties shall be returned to the status quo existing prior to this Agreement.

17. This Agreement may be executed in counterparts but shall be enforceable only if executed by Modrak and the Board.

18. This Agreement contains the entire Agreement between Modrak and the Board with regard to the matters set forth in it, and shall be binding upon and inure to the benefit of their officials, officers, directors, attorneys, representatives, employees, associates, partners, agents, servants, executors, administrators, personal representatives, heirs, successors and assigns of each, and all other persons, firms, corporations, associations or partnerships or any other entity or persons connected therewith, except as set forth herein or as may be agreed to in writing between the parties.

19. In entering into this Agreement, Modrak has relied upon the legal advice of her

attorney or representative, who is the attorney or representative of her own choice, as to the terms of this Agreement which have been completely read and explained by her attorney or representative and those terms are fully understood and voluntarily accepted as being reasonable.

20. The terms of this Agreement and the Agreement itself shall be held in strictest confidence by all parties and shall not be publicized or disclosed in any manner whatsoever, except that: (a) either party may disclose this Agreement in confidence to their attorneys, accountants, auditors, tax preparers, and financial advisors; (b) the Board may disclose this Agreement as necessary to fulfill its obligation under the Open Public Records Act, as well as all other standard or legally required reporting or disclosure requirements; and (c) the parties may disclose this Agreement insofar as such disclosure may be necessary to enforce its terms or as otherwise required by law.

21. Both parties acknowledge and agree that they will not disclose, discuss or post the terms of the Agreement via electronic communication, including, but not limited to, e-mail or text messages; or via the internet or social media websites, including, but not limited to, Facebook, Twitter, blogs, NJ.com, or similar websites.

22. Both parties agree that, if asked about the Agreement by anyone, including any member of the media, they will respond only: "That the matter has been resolved to the mutual satisfaction of the parties."

23. Modrak acknowledges and agrees that if she is to violate any of the terms of this Agreement, including but not limited to breach of the provisions set forth in paragraphs 20 through 23, all of the Board's obligations shall cease and the Parties

will return to their original positions as if this Agreement never occurred and the tenure charges will be reinstated and proceed accordingly.

24. In any action commenced against a party to enforce the provisions of this Agreement, the moving party, if it is the prevailing party, shall be entitled to recover its reasonable attorneys' fees, costs and disbursements incurred in prosecuting the action.

25. For purposes of construction, this Agreement shall not be deemed to be drafted by any Party, and any ambiguity shall not be construed against any Party.

Attest:

Kathleen Gaylord, Board Secretary

Dated: April 27, 2015

LINDEN BOARD OF EDUCATION

BY: _____
Bryan Russell, Board President

Dated: 4-27-15, 2015

ANTOINETTE MODRAK

Witness

BY: _____
Antoinette Modrak

Dated: 3-13, 2015

Dated: 3-13, 2015

In addition, 6 vacation shall be rolled over into Modrak's bank effective 7-1-15. AFM AJB MM

AFM

Mark Tabakin
Attorney for the Board

3-13-15

as Witness 3-13-15

The Attorney Committee, upon recommendation of the Superintendent of Schools, presents the following motions to the Linden Board of Education for approval:

1. **BE IT RESOLVED** that the Board hereby approves the terms of the Settlement Agreement and General Release between the Board and Employee #19-13/14, a copy of which is on file with the Board Secretary

   BE IT FURTHER RESOLVED that the Board President and Secretary are hereby instructed to execute the Agreement and are authorized to take all action necessary to effectuate the terms of the Agreement.

I CERTIFY THE FOREGOING TO BE A TRUE COPY OF THE RESOLUTION ADOPTED BY THE BOARD OF EDUCATION OF LINDEN IN THE COUNTY OF UNION, NEW JERSEY, AT A MEETING HELD ON APRIL 27, 2015.

Kathleen A. Gaylord
Business Administrator/Board Secretary

4/28/15
Date

2. **BE IT RESOLVED** that the Board hereby approves the terms of the Settlement Agreement and General Release between the Board and Employee #20-13/14, a copy of which is on file with the Board Secretary.

   BE IT FURTHER RESOLVED that the Board President and Secretary are hereby instructed to execute the Agreement and are authorized to take all action necessary to effectuate the terms of the Agreement.

3. **BE IT RESOLVED** that the Board hereby approves the terms of the Settlement Agreement and General Release between the Board and Employee #21-13/14, a copy of which is on file with the Board Secretary

   BE IT FURTHER RESOLVED that the Board President and Secretary are hereby instructed to execute the Agreement and are authorized to take all action necessary to effectuate the terms of the Agreement.

   BE IT FURTHER RESOLVED that upon approval of the Agreement, Employee #21-13/14 will hereby be reassigned to a secretarial position within the District at the sole and exclusive discretion of the Superintendent and the Board effective April 28, 2015.

147-15

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Hearing
of Jason Ali

Borough of Keansburg School District,

"Petitioner,"

- and -

Jason Ali,

"Respondent."

DECISION APPROVING SETTLEMENT AGREEMENT

Agency Docket No. 29-2/15

Before
Robert C. Gifford, Esq.
Arbitrator

Appearances:

For the Petitioner:
Michael J. Gross, Esq.
Daniel R. Roberts, Esq.
Kenney Gross Kovats & Parton

For the Respondent:
James J. Uliano, Esq.
Chamlin Rosen Uliano & Witherington

On March 9, 2014, I was assigned as the arbitrator for the above referenced matter. Pursuant to my discussions with the parties' attorneys, a total of five (5) days were scheduled for this matter: March 26, April 1, April 2, April 28, and May 7, 2015. Settlement discussions took place on March 26th and April 1st. The hearing commenced on April 2nd, but the parties agreed to continue their settlement discussions in lieu of proceeding on the evidentiary record. The parties drafted a settlement agreement that was executed by the Respondent on April 20, 2015. The Board's next meeting was scheduled for April 28, 2015. I agreed to cancel the April 28th hearing date but kept the May 7th date in place in the event that the Board did not approve the settlement agreement.

On April 28, 2015, the Borough of Keansburg Board of Education [the "Petitioner"] formally executed and adopted the settlement resolving the tenure charges it filed with the State of New Jersey, Department of Education on February 12, 2015. The terms of settlement are included in the settlement agreement attached hereto. On May 7, 2015, I conducted a final conference with the parties' Counsel and the Respondent to discuss the terms of settlement.

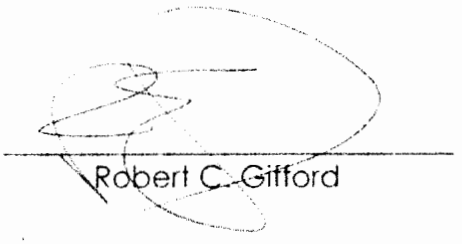
N.J.A.C. 6A:3-5.6 requires the arbitrator to issue a brief decision approving the settlement of tenure charges and explaining why the arbitrator is approving the terms of settlement.

The parties' settlement agreement expressly details the basis for resolution. I have thoroughly reviewed and considered the parties' reasons for settlement set forth therein. Having considered the stated reasons in conjunction with the issues raised in the Statement of Tenure Charges and the Statement of Evidence filed by the Petitioner and the Response to Tenure Charges filed by the Respondent, I am persuaded that the parties entered the settlement agreement knowingly and willingly and that the terms of the settlement agreement represent a reasonable basis for settlement that will serve the public's interest and are consistent with the public good.

Accordingly, and based upon the foregoing, I approve the parties' settlement agreement.

Accordingly, and based upon the foregoing, I approve the parties' settlement agreement.

Dated: May 8, 2015
Sea Girt, New Jersey



Robert C. Gifford

State of New Jersey }
County of Monmouth }ss:

On this 8th day of May, 2015, before me personally came and appeared Robert C. Gifford to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

KENNEY, GROSS, KOVATS & PARTON
130 Maple Avenue, Building 8
Red Bank, NJ 07701
(732) 530-7500
Attorneys for Keansburg Board of Education

IN THE MATTER OF THE TENURE CHARGES AGAINST JASON ALI, KEANSBURG BOARD OF EDUCATION, MONMOUTH COUNTY

COMMISSIONER OF EDUCATION
STATE OF NEW JERSEY

Administrative Action

Before: Robert Gifford, Arbitrator

AGENCY DOCKET NO. 29-2/15

SETTLEMENT AGREEMENT

The above-captioned matter having been filed with the Commissioner of Education and transferred to Arbitrator Robert Gifford for a hearing on Tenure Charges filed by Petitioner, the Keansburg Board of Education against Respondent, Jason Ali, and the parties to this matter having discussed the amicable resolution of this litigation without the allocation of further time and expense, the parties hereby agree as follows:

1. Jason Ali shall be suspended, without pay or benefits, from February 3, 2015 through June 30, 2015. During this period of suspension, Respondent shall not appear on school property or at any school-related extra-curricular/co-curricular activity.

2. Jason Ali shall be reinstated to active service with the District as of July 1, 2015, with health benefits.

3. Respondent's increment shall be withheld for the 2015-2016 school year.

4. Respondent shall be reassigned to a new school building effective September 1, 2015. The administration shall use reasonable efforts to advise Mr. Ali of his new assignment, sufficient to allow him to prepare for the same. Respondent's Corrective Action Plan for the 2014-2015 school year shall be continued for the 2015-2016 school year. Respondent further agrees that he shall not apply for any extracurricular or co-curricular/after school stipended positions in the future.

5. The District shall provide a letter to the Monmouth County Prosecutor's Office, advising that the District and Mr. Ali have resolved all outstanding employment issues related to his home instruction submissions.

6. In the event Mr. Ali shall choose to leave the District, he shall be provided with a neutral letter of reference.

7. The parties further agree that all monetary relief with regard to these tenure charges shall be satisfied through the terms of this Agreement.

8. Petitioner and Respondent each agree that they will keep this Agreement confidential to the extent permitted by law. The parties further agree that neither party will disparage the other, whether orally or in writing, nor will either party encourage any other person to do so.

9. Petitioner and Respondent each waive any and all claims, in any forum, arising out of or related to this matter or Respondent's employment with Petitioner, including but not limited to Respondent's suspension, reinstatement, placement on leave, the certification of tenure charges against him, any tenure related claims, and any and all other claims. This waiver is intended to be given the broadest possible reading and includes any claims which either party has, had, or could have had against the other party, its employees, members, and agents.

10. Each party shall bear their own attorneys fees and costs.

11. The terms set forth herein constitute the parties' entire agreement with regard to this matter. No other terms shall be implied or included. In the event that the Arbitrator does not approve this Agreement, it shall become null and void, and the parties shall resume the litigation of this matter;

12. The parties acknowledge that all terms of this Agreement are subject to the review and approval of the Arbitrator pursuant to N.J.A.C. 6A:3-5.6. As required by that regulation and in accordance with the standards established by the State Board of Education in In re Cardonick, the parties submit the following information in support of their mutual decision to resolve this matter:

    a. The Tenure Charges allege that during the course of his tenure Respondent committed several acts of Conduct Unbecoming by allegedly seeking and receiving overpayments for home instruction, central detention and academic support services. Respondent has denied such conduct, and has advised that the same were merely clerical errors;

    b. The parties, through counsel and with the assistance of the Arbitrator Robert Gifford, have identified terms of settlement which will amicably resolve the matter to the benefit of both parties, and will allow both parties to move forward without allocation of further time or expense involved in tenure litigation;

    c. Both parties, having had the opportunity to review this matter with their respective legal counsel, consent to this Agreement voluntarily and with the mutual interests of closure and moving forward;

d. Respondent, in entering this Agreement, represents that he does so with a full understanding or his rights and the effects and implications of all terms of this Agreement, and that he does so having thoroughly reviewed this matter with legal counsel;

e. The parties represent that this Agreement is in the public interest, as it adequately resolves this matter, and allows both parties to move forward without any further expenditure of public monies for the discovery, hearing, review, and possible appellate components of the litigation of tenure charges;

f. Respondent, in entering this Agreement, acknowledges that he has been advised of the Commissioner of Education's duty to refer tenure determinations to the State Board of Examiners in certain instances.

WHEREFORE, the parties to this matter are so agreed, and set their signatures on this 20th day of April, 2015

JASON ALI

KEANSBURG BOARD OF EDUCATION

JUDY FERRARO
PRESIDENT

WITNESS:

COREY LOWELL,
BOARD SECRETARY

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

In the Matter of the Tenure Charges Against

EDWARD J. MACK III

and

BOARD OF EDUCATION OF LINDEN PUBLIC SCHOOLS

Agency Docket No.: 286-9/14

AWARD OF ARBITRATOR

Hearings were held in the above-entitled matter on February 5, 2015 and on March 13, 2015 at the Linden Board of Education in Linden, New Jersey before Daniel F. Brent, duly designated as Impartial Arbitrator for the purpose of adjudicating the tenure charges filed by the Board of Education of Linden Public Schools against Edward J. Mack III pursuant to the TEACHNJ Act, NJSA 18A: 6-16, as amended by P.L. 2012, c. 26. These charges alleged that Respondent had engaged in conduct unbecoming a tenured maintenance staff member during the 2013-14 school year, gross misconduct, and other

cause requiring his dismissal. The Board of Education introduced documentary evidence setting forth in detail the basis for the charges in the instant case. The Respondent disputed the validity of the tenure charges. During the course of the hearings, the parties resolved their dispute amicably.

The terms and conditions of this voluntary resolution were reduced to a Settlement Agreement and Release that was executed by Respondent and witnessed by his attorney on March 27, 2015, and by the President of the Linden Board of Education and the Board Secretary on April 27, 2015. The Settlement Agreement and Release was ratified by the Linden Board of Education by a formal resolution adopted by the Board at its meeting on April 27, 2015, as certified by the Board Secretary on April 28, 2015.

The Settlement Agreement and Release was submitted to the Arbitrator for examination and approval. After duly considering the nature of the tenure charges, the Respondent's record of service to the Linden Public Schools, the absence of harm to any student, and the advantages and factors cited by the parties as the basis underlying their voluntary settlement, I hereby find the terms and conditions contained in the Settlement Agreement and Release between the Linden Board of Education and Respondent Edward J. Mack III dated April 27, 2015, as agreed upon by the Respondent and the Board, each of whom has been advised by independent legal counsel, to be reasonable,

consistent with the terms and intent of the TEACHNJ statute and applicable regulations, and in the best interest of both the parties and the public.

The Settlement Agreement and Release resolved all issues and allegations of misconduct, including the charge of conduct unbecoming a public school employee. Consequently, I accept the settlement as proposed by the parties in the Settlement Agreement and Release executed by the parties, and hereby issue this Award of Arbitrator incorporating the terms of the Settlement Agreement and Release, which Award will be effective as of April 27, 2015.

Princeton, New Jersey
May 5, 2015

Daniel F. Brent, Arbitrator

WEINER | LESNIAK LLP

ATTORNEYS AT LAW
www.weinerlesniak.com

STEVEN R. NEVOLIS
Associate

snevolis@weinerlesniak.com

April 29, 2015

VIA NEW JERSEY LAWYER'S SERVICE
Daniel F. Brent, Arbitrator
239 Shady Brook Lane
Princeton, New Jersey 08540

Re: ***In the Matter of the Tenure Hearing of Edward J. Mack, School District of the City of Linden***
Our File No.: LBOE172

Dear Mr. Brent:

As you are aware, this firm represents the Linden Board of Education in the above matter. Enclosed for your approval are one (1) original and two (2) copies of the Settlement Agreement and Release between the Board and Edward Mack, Edward Mack's Letter of Resignation effective October 31, 2018, and the Certified Board Resolution approving the Agreement at the Board's April 27, 2015 meeting.

If you require any further information, please do not hesitate to contact me. Thank you for your time and assistance in resolving this matter.

Very truly yours,

WEINER LESNIAK LLP

By: _____
Steven R. Nevolis
For the Firm

SRN
Enclosures
C: Woldoymyr Tyschenko, Esq. (via NJ Lawyer's Service w/enclosures)
Dr. Danny Robertozzi, Superintendent
Kathleen A. Gaylord, Board Secretary
Bryan Russell, Board President
920225_1

WEINER LESNIAK, LLP
629 Parsippany Road
P. O. Box 438
Parsippany, New Jersey 07054-0438
Phone: (973) 403-1100 Fax: (973) 403-0010
Attorneys for Petitioner
Linden Board of Education
Our File No: LBOE-172
888229_1

IN THE MATTER OF THE TENURE CHARGES AGAINST EDWARD J. MACK, III, SCHOOL DISTRICT OF THE CITY OF LINDEN, UNION COUNTY.

COMMISSIONER OF EDUCATION
STATE OF NEW JERSEY

AGENCY REFERENCE NO. 286-9/14

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and General Release ("Agreement") is made and entered into between the **Linden Board of Education** ("Board") and **Edward J. Mack** ("Mack"), collectively referred to as the "Parties".

WHEREAS, Mack is a tenured maintenance worker employed by the Board; and

WHEREAS, the Board certified tenure charges against Mack on or about September 23, 2014 for unbecoming conduct; and

WHEREAS, the matter was assigned to Daniel F. Brent to arbitrate the tenure proceedings; and

WHEREAS, the parties have reached an amicable resolution in resolving the tenure charges; and

WHEREAS, the Parties deem it to be in their best interests to set forth in a formal written agreement their respective rights, duties and obligations regarding the resolution; and

WHEREAS, the Parties have been afforded the opportunity to consider the terms of this Agreement with advice of counsel and/or a representative of their choice;

NOW, THEREFORE, in consideration of the promises and the mutual covenants herein contained, and for other good and valuable considerations, the Parties hereby agree as follows:

1. The recitals set forth above are incorporated herein by reference and made part of this Agreement as if set forth at length.

2. The **"Board"**, as used herein, shall at all times mean the Board of Education of the City of Linden, its affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, elected officials, officers, representatives, associates, partners, servants, employees, agents, attorneys, and successors, whether in their individual or official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith.

3. **"Mack"**, as used herein, shall mean Edward J. Mack, his heirs, representatives, privies, executors, administrators, assigns, successors-in-interest and predecessors-in-interest.

4. In consideration of the covenants set forth in this Agreement, the parties agree as follows:

a. Effective immediately, Mack shall be placed on a paid leave of absence through October 31, 2018, pursuant to N.J.S.A. 18A:30-7. During the period of his paid leave of absence, Mack shall be relieved of all duties and responsibilities of his employment with the Board.

b. During Mack's paid leave of absence, he shall forfeit all accrued, but unused time, including sick, vacation and personal days available to him (185 sick, 25 vacation, 3 article: 213 total). Mack shall not accrue any additional time off whatsoever during the duration of his paid leave.

c. During the entirety of Mack's paid leave of absence, his right of access to the Board and its property shall be no different than that of a member of the public at large. As such, Mack will be subject to all statutes, regulations and Board policies governing the visitation by the public to school property/events.

d. During the entirety of the paid leave of absence, Mack shall be subject to all statutes, regulations and Board policies governing the conduct of public employees of the Board and school-District employees in general.

e. Mack agrees to sign and submit to the Board contemporaneous with the execution of this Agreement an irrevocable letter of resignation in furtherance of retirement, effective October 31, 2018. Mack's resignation in furtherance of retirement shall be deemed to be accepted simultaneously with the Board's approval of this Agreement. In the event that the Board and/or Arbitrator Brent do not approve this Agreement, the Board shall return the signed letter of retirement and all terms of this Agreement shall become null and void. In accordance with his resignation in furtherance of retirement letter, Mack's employment with the Board shall automatically cease on October 31, 2018.

f. For the entirety of Mack's paid leave of absence, Mack's salary will be "red-circled" at his current salary of $64,038. As such, Mack expressly acknowledges and agrees that he shall not be entitled to any pay increases during his remaining employment with the Board, so long as the instant Agreement remains in effect.

g. Mack will not be reimbursed for the 120-day unpaid suspension he has already served as a result of tenure charges being filed against him. The suspension will remain on record as an unpaid suspension.

h. The Board shall withdraw the instant tenure charges against Mack which were certified on or about September 23, 2014 for unbecoming conduct.

i. The Board shall not bring any tenure or other disciplinary charges nor take any other adverse employment actions against Mack based upon the conduct alleged herein or as alleged in the tenure charges against Mack which were certified on or about September 23, 2104 for unbecoming conduct.

5. The Board shall provide Mack with reasonable assistance in forwarding documents to the Division of Pensions and Benefits so as to facilitate Mack's retirement from the District. The Board shall complete the forms needed for Mack to seek a retirement; however, Mack acknowledges and understands that the Board will take no further action with regard to Mack's retirement unless required by law. In response to any Certification of Service and Final Salary – Retirement form received by the Board from the Division of Pensions and Benefits, the Board shall certify that Mack is not currently on suspension in response to question 7(a) (check the box marked "NO") of the current form presently in use and the Board shall certify that Mack is not facing nor has he recently been considered for disciplinary action or indictment in response

to question 7(b) (check the box marked "NO"). Said form is attached hereto and incorporated by reference herein. Mack expressly agrees and understands that his resignation is final and irrevocable no matter what and regardless of whether or not his application for retirement is successful.

6. Mack expressly understands and agrees that the terms and payment set forth in this Agreement include any and all amounts that may ever be claimed by Mack or on his behalf, or by his attorneys, heirs, successors or assigns against the Board in connection with the resolution of the tenure charges certified by the Board against Mack. The parties covenant not to sue, initiate or continue any legal or administrative proceedings or appeals with regard to any or all claims released herein, provide; however, that this shall not preclude any claims pertaining to a breach or enforcement of this Agreement from being taken. This provision is subject to the limitation set forth in Paragraph 8 regarding Mack's reservation of rights and claims and ability to seek redress for any claims associated with environmental exposure or exposure to toxins or toxic chemicals.

7. In consideration of the mutual promises and exchanges made herein, the Parties agree and understand that this Agreement is a compromise settlement of all claims asserted and unasserted in connection with Mack's employment, tenure charges, terms and conditions of employment or payments made under this Agreement, subject to the reservations contained in Paragraph 8. By entering into this Agreement, neither party admits that it has violated New Jersey Statute, Title 18A; New Jersey Administrative Code, Title 6 and Title 6A; state or federal law or any contractual provisions that might exist. This Agreement is entered solely for the purpose of resolving disputed claims and neither the execution, delivery, nor performance of this

Agreement, shall constitute or be construed at any time or for any purpose to be an admission of fact or liability by any of the Parties.

8. The Parties acknowledge and agree that this Agreement is a full and complete settlement of any and all claims that have been asserted or can be asserted or may be asserted or could be asserted by either party against the other for compensatory damages, pain, suffering, emotional distress, stress, humiliation, embarrassment, mental anguish, medical expenses, punitive damages, interests, attorney's fees, costs of suit, loss of sick time, loss of vacation time, loss of benefits, consequential damages, reputation damages, breach of express or implied contract, interference in any contract, economic opportunity or prospective economic advantage which arose out of or could arise out of Mack's employment, tenure charges, terms and conditions of employment or payments made under this Agreement. Mack expressly reserves his right to assert any claims associated with environmental exposure or exposure to toxins or toxic chemicals while employed by the Board.

9. As an inducement for the Parties to enter into this Agreement, each Party does hereby remise, release and forever discharge all other Parties from any and all debts, obligations, suits, actions, causes of action, claims or demands, in law or in equity, which any one Party now has or hereafter may assert against the others arising out of the Board's certification of tenure charges against Mack, including, but not limited to, all claims, liabilities, costs and attorneys' fees under: (1) the Civil Rights Acts of 1964, as amended (42 U.S.C. 2000(e) et seq.); (2) the Americans with Disabilities Act; (3) the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1, et seq.); (4) any collective negotiations agreement; (5) Title 18A and its rules and regulations, including, but not limited to, Title 6A, including any tenure appeal; (6) the Constitution of the United States; (7) the Constitution of New Jersey; (8) wage and hour laws, federal and state; (9)

any other federal or state statute or common law; (10) any and all paid and/or unpaid medical and/or personal and/or family leave laws and regulations, federal and state including, but not limited to, FMLA and NJ FLA; (11) any and all federal and state tax laws and regulations, including, but not limited to, the Internal Revenue Code and New Jersey Tax provisions; (12) the New Jersey Tort Claims Act N.J.S.A. Title 59; (13) the Fourth and Fourteenth Amendments to the United States Constitution; and/or (14) other causes of action whether enumerated herein specifically or not. Nothing in this provision shall be deemed to bar either party from taking any and all necessary legal action to enforce the terms of this Agreement.

10. The Parties agree that in consideration of the promises set forth in this Agreement that neither party shall file: (a) an appeal before the Commissioner of Education seeking any type of relief whatsoever; (b) any grievances or arbitrations relative to Mack's employment; and (c) any type of judicial or administrative action in connection with Mack's employment, subject to the reservations contained in Paragraph 8 above and elsewhere. Mack agrees to release, acquit and forever discharge the Board from any and all claims which have been or may be made against the Board by any other person or organization on his behalf. The Board affirms that, as of the date of execution of this Agreement, they have no knowledge of any pending class action against it to which Mack could be a potential class member.

11. Mack and the Board shall each bear their own costs, expenses, attorney's fees and any other costs associated with these tenure proceedings and this Agreement. As further consideration for this Agreement, Mack and his attorney and/or representative agree that the sums set forth in this Agreement represents all of the monies which the Board has agreed and will ever agree to pay in connection with Mack's tenure charges.

12. This Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey.

13. Mack's and/or the Board's failure to contest a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other, or as a waiver of any subsequent breach by the other.

14. The parties hereby acknowledge and agree that they further expressly waive and assume the risk of any and all claims or damages which exist regarding Mack's tenure charges as of this date for which the Board and Mack do not know of or suspect to exists, whether through ignorance, oversight, error, negligence, or otherwise and which, if known, would materially affect their decision to enter into this Agreement.

15. Both parties acknowledge that this Agreement is subject to approval of the Board. If such approval is not given, this Agreement and all stipulations and acknowledgements, whether contained herein or attached hereto, shall be rendered null and void and the parties shall be returned to the status quo existing as of February 5, 2015. If approved, the Board's resolution approving this Agreement shall be attached and maintained with this Agreement.

16. Both parties acknowledge that this Agreement is subject to approval by Arbitrator Daniel F. Brent. If such approval is not given, this Agreement and all stipulations and acknowledgements, whether contained herein or attached hereto, shall be rendered null and void and the parties shall be returned to the status quo existing as of February 5, 2015.

17. This Agreement may be executed in counterparts but shall be enforceable only if executed by Mack and the Board.

18. This Agreement contains the entire Agreement between Mack and the Board with regard to the matters set forth in it, and shall be binding upon and inure to the benefit of their

officials, officers, directors, attorneys, representatives, employees, associates, partners, agents, servants, executors, administrators, personal representatives, heirs, successors and assigns of each, and all other persons, firms, corporations, associations or partnerships or any other entity or persons connected therewith, except as set forth herein or as may be agreed to in writing between the parties.

19. In entering into this Agreement, Mack has relied upon the legal advice of his attorney or representative, who is the attorney or representative of his own choice, as to the terms of this Agreement which have been completely read and explained by his attorney or representative and those terms are fully understood and voluntarily accepted as being reasonable.

20. The terms of this Agreement and the Agreement itself shall be held in strictest confidence by all parties and shall not be publicized or disclosed in any manner whatsoever, except that: (a) either party may disclose this Agreement in confidence to their attorneys, accountants, auditors, tax preparers, and financial advisors; (b) the Board may disclose this Agreement as necessary to fulfill its obligation under the Open Public Records Act, as well as all other standard or legally required reporting or disclosure requirements; and (c) the parties may disclose this Agreement insofar as such disclosure may be necessary to enforce its terms or as otherwise required by law.

21. Both parties acknowledge and agree that they will not disclose, discuss or post the terms of this Agreement via electronic communication, including, but not limited to, e-mail or text messages; or via the internet or social media websites, including, but not limited to, Facebook, Twitter, Blogs, NJ.com, or similar websites.

22. Both parties agree that, if asked about the Agreement by anyone, including any member of the media, they will respond only: "That the matter has been resolved to the mutual satisfaction of the parties."

23. The Board agrees that in response to inquiries as to Mack's employment with the Board including, but not limited to, inquiries from prospective employers that the Board shall limit any response to such inquiries to confirmation of Mack's title and position with the Board, the length of Mack's employment with the Board, that Mack has been continually employed with the Board since his employment with same began in October 1981, and that Mack's present salary is $64,038.00 per annum. All inquiries related to Mack's employment shall be responded to and directed to the Superintendent of Schools and only to the Superintendent of Schools. The provisions of this section of the Agreement shall not apply in the event that Mack provides the Board with a signed statement authorizing the release of information protected by this provision for prospective employers.

24. The Board and Mack acknowledge and agree that if either party violates any of the terms of this Agreement, including but not limited to breach of the provisions set forth in paragraphs 20-24, all of the duties and obligations under this Agreement shall immediately and automatically cease and the Parties will be returned to their original positions as if this Agreement never occurred and the tenure charges will be reinstated and proceed accordingly.

25. In any action commenced against a party to enforce the provisions of this Agreement, the moving party, if it is the prevailing party, shall be entitled to recover its reasonable attorneys' fees, costs and disbursements incurred in prosecuting the action.

26. Mack understands that, pursuant to the Older Workers Benefit Protection Act of 1990, if applicable, he has been advised to consult with an attorney before signing this

Agreement, had twenty-one (21) calendar days to consider the Agreement before signing it, and may revoke the Agreement within seven (7) calendar days after signing it. Mack further understands that the Agreement will not become effective or enforceable until the seven (7) day revocation period has expired. Timely revocation of this Agreement can be made in writing, signed by Mack, delivered to and received by counsel for the Linden Board of Education, Mark A. Tabakin, Esq., Weiner Lesniak, 629 Parsippany Road, Parsippany, New Jersey 07054 by no later than 5:00 P.M. on the seventh (7th) day after Mack signs this Agreement. Mack expressly understands and agrees that if he does not sign this Agreement, or if he revokes it within the Revocation Period, the Agreement shall not be effective or enforceable, and he will not be entitled to any of the payments and other benefits provided for in this Agreement until the Revocation Period expires. If the Agreement is revoked or not signed by Mack, the parties shall revert to the positions they were in as though the Agreement was never made.

27. For purposes of construction, this Agreement shall not be deemed to be drafted by any Party, and any ambiguity shall not be construed against any Party.

Attest:

Kathleen Gaylord, Board Secretary

Dated: April 27, 2015

LINDEN BOARD OF EDUCATION

BY: _____
Bryan Russell, Board President

Dated: 4-27-15, 2015

Witness

Dated: March 27, 2015

EDWARD J. MACK

BY: _____
Edward J. Mack

Dated: 3/27/15, 2015

Edward J. Mack, III
1025 Karen Terrace
Linden, New Jersey 07036

April 14, 2015

Danny A. Robertozzi, Ed.D.
Superintendent of Schools
Linden Public Schools
2 East Gibbons Street
Linden, New Jersey 07036

Dear Dr. Robertozzi:

I hereby tender my resignation in furtherance of retirement effective at the close of business on October 31, 2018.

Sincerely,

Edward J. Mack, III

The Attorney Committee, upon recommendation of the Superintendent of Schools, presents the following motions to the Linden Board of Education for approval:

1. **BE IT RESOLVED** that the Board hereby approves the terms of the Settlement Agreement and General Release between the Board and Employee #19-13/14, a copy of which is on file with the Board Secretary

   BE IT FURTHER RESOLVED that the Board President and Secretary are hereby instructed to execute the Agreement and are authorized to take all action necessary to effectuate the terms of the Agreement.

2. **BE IT RESOLVED** that the Board hereby approves the terms of the Settlement Agreement and General Release between the Board and Employee #20-13/14, a copy of which is on file with the Board Secretary.

   BE IT FURTHER RESOLVED that the Board President and Secretary are hereby instructed to execute the Agreement and are authorized to take all action necessary to effectuate the terms of the Agreement.

I CERTIFY THE FOREGOING TO BE A TRUE COPY OF THE RESOLUTION ADOPTED BY THE BOARD OF EDUCATION OF LINDEN IN THE COUNTY OF UNION, NEW JERSEY, AT A MEETING HELD ON APRIL 27, 2015.

Kathleen A. Gaylord
Business Administrator/Board Secretary

4/28/15
Date

3. **BE IT RESOLVED** that the Board hereby approves the terms of the Settlement Agreement and General Release between the Board and Employee #21-13/14, a copy of which is on file with the Board Secretary

   BE IT FURTHER RESOLVED that the Board President and Secretary are hereby instructed to execute the Agreement and are authorized to take all action necessary to effectuate the terms of the Agreement.

   BE IT FURTHER RESOLVED that upon approval of the Agreement, Employee #21-13/14 will hereby be reassigned to a secretarial position within the District at the sole and exclusive discretion of the Superintendent and the Board effective April 28, 2015.

149-15

OAL DKT. NO. EDU 3558-15
AGENCY DKT. NO. 51-3/15

B.C., on behalf of minor child, A.A.	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
v.	:	DECISION ON
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein.[1] The Commissioner returns the matter to the Office of Administrative Law for a plenary hearing – or such other proceedings as the ALJ and the parties determine – to resolve the underlying claim on the merits.[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 5/12/15
Date of Mailing: 5/12/15

[1] To the extent the ALJ intertwined his analysis of the irreparable nature of the harm and the degree or severity of the harm in his Initial Decision, the Commissioner notes that they are two separate factors under *Crowe, supra,* and *N.J.A.C.* 6A:3-1.6; here, petitioner failed to satisfy any of the four *Crowe* factors.

[2] Although it appears the ALJ recommended dismissal of the petition of appeal in his order denying emergent relief, this controversy must return to the OAL for resolution of the underlying claim on the merits. *See N.J.A.C.* 1:1-18.1.

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 03558-15
AGENCY DKT. NO. 51-3/15

B.C. o/b/o A.A.,
Petitioner,
v.
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL SCHOOL DISTRICT,
Respondent.

Brian M. Adams, Esq., for petitioner (Canellis & Adams, L.L.C., attorneys)

John B. Comegno, II, Esq., for respondent (Comegno Law Group, P.C., attorneys)

BEFORE **JOSEPH A. ASCIONE,** ALJ:

BACKGROUND AND PROCEDURAL HISTORY

Petitioner, B.C. o/b/o minor child, A.A., filed an application for emergent relief with the New Jersey Department of Education, Bureau of Controversies and Disputes. The application requested among other things that A.A.'s thirty-day sanction from extra-curricular activities for violation of the substance abuse policy be reversed to allow A.A.

to participate in lacrosse practices and games immediately at the Hunterdon Central Regional High School ("HCRHS"). Respondent Board of Education Hunterdon Central Regional High School ("Board") suspended A.A. from extracurricular activities for behavior it deemed as not adhering to the behavioral expectations for students participating in the Districts Ski and Snowboarding Club's Trip (Trip) to Stowe Mountain (Stowe), Burlington, Vermont during the period from February 27 through March 1, 2015. At issue is the propriety of the discipline imposed by the Board, given the behavior of A.A.

The case was filed at the Office of Administrative Law (OAL) on March 16, 2015, for a hearing on the requested emergent relief. This Administrative Law Judge held oral argument on March 26, 2015, at the OAL, Quakerbridge Plaza, Building 9, Quakerbridge Road, Mercerville, New Jersey.

FACTUAL DISCUSSION

This matter involves a challenge to the Board's policies on substance abuse and student conduct, which, in essence, outlines the efforts of the district to assist its students academically as well as protecting the welfare of the entire school community. As a result, the parties agree that the Board validly adopted random drug testing, substance abuse and code of conduct policies, and that those policies were in place as of September 2014, at the start of the 2014-2015 school year. In September 2014, students enrolled in the HCRHS either received copies of the policies or copies were made available on line, which contained behavioral expectations and established disciplinary measures for various infractions of the policies. Prior to acceptance in the Trip, the parents and A.A. received and agreed to be bound by an overnight trip procedure policy. One of the conditions, on page 3, at paragraph 3, included compliance with the substance abuse policy, and language confirmed a violation, "will result in disciplinary action... ." Further that policy in part provided on page 4, at paragraph 5, "... If alcohol and/or illegal drugs are found in a room, ALL those

occupying the room may be held accountable and sent home. If discovered on an individual, only that individual will be penalized. THERE IS ABSOLUTELY NO EXCEPTIONS to these rules."

A.A. is a twelfth grade student at HCRHS. A.A. has an interest in pursuing lacrosse. He is a member of the lacrosse team. He attended the Trip. While on the trip A.A., and his roommate, C.R., allowed another student in their motel room, K.J. K.J. brought with him hashish, a compressed cannabis substance.

HCRHS's teacher and chaperone for the Trip, Brendon Mahon (Mahon) advised HCRHS vice-principal Andrew Estrada (Estrada) of a February 27, 2015 incident, which occurred at approximately 8:45 p.m. in Burlington, Vermont. Estrada, at 11:18 p.m. by e-mail, advised Mahon and Suzanne Cooley (Cooley), the HCRHS principal that he would contact the parents. At the time of Estrada's e-mail, the two-hour window for drug testing under the policy had expired. Estrada or other staff contacted A.A.'s parents and they picked up A.A. from the Trip on the morning of February 28, 2015. Estrada, after unsuccessful attempts to contact the parents by phone, advised them by e-mail of the three-day suspension at 9:24 p.m. on Sunday, March 1, 2015.

Mahon's certification related that at approximately 8:45 p.m. on February 27, 2015, the smell of cannabis permeated the hall outside of room 114, A.A.'s and C.R.'s assigned room, and when the chaperone entered the room he discovery hashish and drug paraphernalia and K.J., another student. The police were called, and statements were obtained. K.J. admitted to the ownership of the hash and the paraphernalia. K.J. advised the police that there were more drugs in A.A.'s room mini refrigerator. The police issued a violation to K.J., but not to the other students. The possession, and/or consent to store within the room, the principal certified qualifies as a violation of the substance abuse policy. The principal also certified that K.J., on questioning, claimed he did not smoke in his own room as a result of his roommate's disinclination toward the hash. K.J. further provided the school with information that A.A. and C.R. had

discussed using their room on the bus trip up to Stowe. This information is hearsay, and is not accepted for the truth of the statement.

The Board's decision to suspend A.A. from school for three days, thirty-day loss of participation in extra-curricular activities, and loss of parking privileges is consistent with the 2014-2015 HCRHS Substance Abuse Policy Guidelines.

The petitioner argues that A.A. denies taking any drugs and supports his position with a negative urine test in the afternoon of March 1. The Board argues the timing of the test is unacceptable under the guidelines. The timing is an appropriate concern but under the circumstances, the chaperones were responsible for A.A. until the parents could arrive. Although notice was given the parents, it was not immediate as provided by the substance abuse policy, but rather after two hours, and they were six hours away from the location at the time of the incident. The chaperone may not have had a responsibility to complete the drug testing timely, but the HCRHS cannot rely on the absence of a timely drug test as authority to invoke the provision of the policy that concludes that an untimely drug test yields a positive test. This tribunal cannot determine whether the negative test is at the approved testing criteria, or whether time had an effect on the results. Estrada did confirm that the school blood test given on March 6, 2015 was clear, a requirement for the return to school. That test is not related to the HCRHS finding of a violation of the substance abuse policy.

Petitioner argues the penalty is arbitrary, capricious, unreasonable, and disproportionate to the offense, comparing it to the actions when random testing results in a positive finding. The random testing may provide a positive result if alcohol or drugs are consumed off school property and the policy is designed to provide counseling. This tribunal does not find the objectives of the policies in contradiction to each other or indicative that a comparison to each other is appropriate. The substance abuse policy is designed to address activities on school premises or on school sponsored trips or events.

HCRHS's position is that the February 27, 2015, initial interview by Mahon, is the first afforded due process hearing, the second occurred on March 3, 2015, with the principal Cooley, vice-principal Estrada, and District Superintendent, Christina Steffner. These hearings provided petitioner with an opportunity to understand the charges leveled and to respond to them. The parent's main concern was the thirty-day extra-curricular prohibition. The school represented that it is understands the serious implications to A.A. but the drug abuse policy is not flexible in the penalty because of the requirement of uniformity.

A.A. has been accepted into the following colleges, Moravian, McDaniel, Washington College, Vermont, U. Mass at Amhurst, Villanova, and is on the wait list for Richmond, Freeman and Gettysburg. Moravian, McDaniel and Washington College have already granted scholarship monies to A.A. for lacrosse. The irreparable harm claimed by petitioner is that some college's lacrosse scouts want to see A.A., and the family is not in a position to provide them with dates A.A. will play.

The Board represented that the thirty-day restriction on extra-curricular activities is being tracked from February 28 not a date in early March, so that the restriction will end on March 30, 2015. However, no practices can occur until March 31, 2015, and pursuant to New Jersey State Interscholastic Athletic Association (NJSIAA) rule at page 53, Section 7, six practice days are required until a student may play in a game. Violation of the NJSIAA rule could have an adverse effect on the entire team. Accordingly, if no practices are cancelled, and under the worst case scenario (practices do not occur on game days), the earliest A.A. may be able to play is April 11, 2015. A.A. would miss approximately half of the regular season.

LEGAL ANALYSIS AND CONCLUSION OF LAW

Petitioner claims that respondent's actions in this matter are arbitrary, unreasonable and capricious, and that respondent's actions violated their son's due process rights because of the proceedings before the HCRHS and Board. They also contend that the consequences of enforcing the substance abuse policy are punitive in nature and disciplinary, and inconsistent with the stated policies of educational and therapeutic approaches. While those are some of the stated policies, the policy is clearly a disciplinary policy designed to protect the individual student as well as the entire student community. N.J.A.C. 6A:16-7.1 in addition to discussing the due process procedures provides at N.J.A.C. 6A:16-7.1(d) that suspension of extra-curricular participation is authorized.

The Board maintains that its substance abuse and code of conduct policies are in accordance with all acceptable standards of the Department of Education, that its policies have a beneficial impact on defining positive student behavior and encouraging students to resist peer pressure regarding the negative impact of drugs and alcohol, and that the policies create a positive educational opportunity for the affected student. Participation in extra-curricular activities is not a right, but a privilege. Thus, the Board contends that, after having signed the conditions for participation in the Trip, and being subject to the school policies, neither the student nor the parents can now argue that the policies have no application to them. The parents and child agreed to the terms of the conditions when they all accepted the overnight policy form, and implicitly agreed to the Board's policies, but now disavow it because A.A. admitted an infraction, which is the direct subject of the Board's policies.

Petitioner here has the burden of persuasion, yet, it has chosen to support its application with the certification of a parent, not present at the time of the incident. The petition is lacking in any certification from A.A., denying the violation, or explaining the circumstances surrounding the presence of hash in his room.

N.J.A.C. 1:1-12.6(a) provides for the granting of emergency relief where authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case. In such circumstances, emergency relief pending a final decision may be ordered upon the application of a party. Subparagraph (f) of this section provides that temporary relief may be granted if there is a finding that immediate and irreparable harm will probably result, if there is the likelihood that the moving party will prevail, and if the relief is as limited in scope and as temporary as possible.

The foregoing regulation embodies the principles of law announced by the court in Crowe v. DeGioia, 90 N.J. 126, 132 (1982). These legal principles may be summarized as follows:

1. Emergency relief should not issue except when necessary to prevent irreparable harm. Harm is generally considered irreparable if it cannot be redressed adequately by monetary damages. In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. Pecuniary damages may be inadequate because of the nature of the injury or of the right affected.

2. Emergency relief should be withheld when the legal right underlying the claim of the requesting party is unsettled.

3. Emergency relief should not issue where all material facts are controverted. Thus, to prevail on an application for emergency relief, the party requesting the relief must make a preliminary showing of a reasonable probability of ultimate success on the merits. That requirement is tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo. The point of emergency relief is to maintain the parties in substantially the same condition when the final decision is issued, as they were when the litigation began.

4. The final test in considering the granting of emergency relief is the relative hardship to the parties in granting or denying relief. The relief granted should be no broader than necessary to preserve the status quo pending a full hearing on the merits.

When this standard is applied to the facts of this case, it is apparent that petitioner has failed to meet the criteria for such relief.

Irreparable harm

Having carefully considered the parties' respective arguments, I agree that A.A. will suffer harm by not participating in half of the lacrosse season and the loss of his senior parking privileges. The harm he is suffering, however, is directly caused by his actions. The fact that scouts may not be able to evaluate A.A. for scholarship purposes for a period of time appears to address financial issues, not the opportunity to attend a college with a lacrosse scholarship. Financial issues are not generally considered as irreparable. Petitioner however has failed to identify any college or scout that sought to watch petitioner to determine whether he would be admitted to a wait-listed school. Further, there will still be approximately six games left in the season after A.A. is again allowed to play. If anything, if the stay were to be granted, it could have an adverse impact upon the ability of the Board to maintain good order and discipline in the high school for the benefit of every one in light of its policies relative to its efforts to dissuade students from participating in drug and/or alcohol activities.

I **CONCLUDE** that while petitioner has not shown a cognizable educational harm which would occur as a result of the application of the extra-curricular prohibition and loss of senior parking space, further, if the harm is deemed to be an irreparable injury, such harm must be weighed against the harm to respondent. Petitioner has not satisfied the irreparable injury prong of the test. I **CONCLUDE** the greater harm would be to the HCRHS or Board, if the stay were to be granted at this time.

Right to underlying claim must be settled

As to the requirement that the right underlying the claim of a requesting party must be settled, it is clear that each school district is obligated to provide a thorough

and efficient system of education to all children residing in its school district. N.J. Const. (1947), Art. VIII, 1, N.J.S.A. 18A:33-1. To carry out this policy, local boards of education have been granted discretionary authority at N.J.S.A. 18A:11-1 (c) and (d) to adopt rules for the management of the public schools of the district, and to perform all acts and do all things necessary for the lawful and proper conduct of the public schools of the district.

In the present matter, counsel for respondent has represented that the respondent Board has duly adopted policies that have been announced and disseminated over time for the benefit of children within the school district. Petitioner concedes to the lawful promulgation of those policies. Further, the petitioner received and accepted the Overnight Trip Procedure to participate in the Trip. Despite the foregoing, petitioner now claims the HCRHS policies were incorrectly applied, or not properly adhered to, by the Board.

Board policies are entitled to a presumption of correctness, and will not be upset by the courts unless there is an affirmative showing that such decision is arbitrary, capricious or unreasonable. Thomas v. Bd. of Educ. of Morris Twp., 89 N.J. Super. 327, 332 (App. Div. 1965), affirmed, 46 N.J. 581 (1966). In assessing this, the local school board's factual determinations must be accepted if supported by substantial credible evidence. Quinlan v. Bd. of Educ. of North Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962). The policies of the Board provide a reasonable opportunity for compliance by all affected parties/families who wish to participate in extracurricular activities conducted by the Board.

In general, a board of education's actions are entitled to a presumption of lawfulness and good faith. Where board actions are challenged, the challenger bears the burden of proving that such actions were unlawful, arbitrary, capricious or unreasonable. Schuster v. Ed. of Educ. Montgomery Twp., 96 N.J.A.R.2d (EDU) 670, 676 (citing Schnick v. Westwood Ed. of Educ., 60 N.J. Super. 448 (App. Div. 1960), and

Quinlan v. Bd. of Educ. of North Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962)). The "arbitrary, capricious and unreasonable" standard of review imposes a heavy burden on challengers of board actions. This standard has been defined by the New Jersey courts as follows:

In the law, "arbitrary" and "capricious" means having no rational basis. Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is no room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling. [Piccoli v. Ed. of Educ. of Ramapo Indian Hills Regional School District, OAL Dkt. EDU 1839-98 (January 22, 1999) (citing Bayshore Sewage Co. v. Dent. of Envir. Protection, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd 131 N.J. Super. 37 (App. Div. 1974).]

In the absence of a clear showing of abuse of discretion, the Commissioner of Education will not substitute his or her own judgment for that of the board of education. Massaro v. Bd. of Educ. of the Boro. of Bergenfield, 1965 S.L.D. 84, 85. In Kopera v. Bd. of Educ. of West Orange, 60 N.J. Super. 288, 294 (App. Div. 1960), the Appellate Division stated, "The well established rule that action of the local board [of education] which lies within the area of its discretionary powers may not be upset unless patently without rational basis or induced by improper motives." See also G.M. v. Roselle Park Boro. Bd. of Educ., 95 N.J.A.R. 2d (EDU) 107, 109 (where the Commissioner adopted the decision of the ALJ when in a challenge to board action, the ALJ stated, "It is the management prerogative of boards of education that will not be usurped or assumed by the Commissioner of Education absent a definitive showing of bad faith or arbitrary actions taken in bad faith without a rational basis."). As long as the record reflects a rational basis for the action, as well as an absence of bad faith, a board's action shall be

upheld. In the G.M. case, supra, the ALJ, after a full hearing, found the board's decision to change geographic boundaries for kindergarten pupil placement, with a goal of evenly distributing the pupils at different schools within the district, to be a reasonable exercise of authority.

Petitioner cites G.D.M. and T.A.M. v. Board of Education of the Ramapo Indian Hills Regional High School District, 427 N.J. Super. 246 (App.Div. 2012) as authority for the proposition that prohibiting extra-curricular activities is impermissible. However, the facts of that case differ substantially from those present here. The challenge to the policy there prohibited student action whether on or away from the school. The Court found the policy to apply broadly without a showing of harm to the school. Here the overnight policy specifically proscribed the conduct of A.A. The Trip involved the middle school as well as the high school. The proscribed conduct involved an illegal substance that, although denied by A.A. as his, was located within his room. The policies before this tribunal are very specific and A.A. recognized the policy. The maintaining of disciple and safety of A.A. and all other students on this Trip cannot be viably questioned by petitioner.

Based upon the foregoing and after having considered all the arguments advanced as well as the proofs offered by both sides, I **CONCLUDE** that the right underlying petitioner's claim is settled against the petitioner's position. Students do not possess an absolute right to participate in extra-curricular activities. The determination whether or not they may attend is within the sole discretion of the board of education. This is particularly true where, as here, there are written substance abuse and code of conduct policies that permit the board to suspend the student and prohibit him from attending extra-curricular activities. A.A. does not possess a well settled right to participate in the extra-curricular activities. No authority has been set forth by petitioner guaranteeing his right to participate in lacrosse. Therefore, I **CONCLUDE** that petitioner has failed to establish the right to relief and has failed to show that the action of respondent is arbitrary, capricious and unreasonable, this having occurred after having

given them all due deference and a full and complete opportunity to present such arguments at the emergent relief hearing. In addition, petitioner failed to submit any proofs to show the actual adverse consequences that will attend the implementation of the policies against A.A. at this time.

Requirement to show reasonable probability of prevailing on the merits

The most difficult requirement for the moving party to establish in order to show entitlement to emergency relief is the third factor. In order to prevail on one's application for emergency relief, the party requesting the relief must make a preliminary showing of a reasonable probability of ultimate success on the merits. If the point of emergency relief is to maintain the parties in substantially the same condition of the final decision as when this matter began, it must be established by the moving party that they will probably win on the merits. It is with respect to this that petitioner has great difficulty. Petitioner must show that respondent's actions in this matter are arbitrary, capricious and unreasonable. Petitioner must show that respondent's actions violated petitioner's due process rights because of its purported failure to provide to petitioner an opportunity for redress from the Board, rather than just the Superintendant. Petitioner has not shown that the two hearings afforded him did not provide him with due process. Petitioner has not shown a reasonable probability of prevailing on this issue.

The circumstances are unfortunate for A.A., however, as a participant in a sports activity he knew the consequences of a violation of the policy. He cannot now be heard to object to its application to him.

Therefore, I **CONCLUDE** that petitioner has failed to show the likelihood of prevailing on the merits. Respondent's actions in applying its policies to prohibit A.A.'s participation in extra-curricular activities for thirty days due to the chaperone's certification of finding an illegal substance in his room on the Trip, no matter how regrettable and unfortunate for A.A., cannot be disturbed.

Relative hardship to the parties

The final test in considering the granting of emergency relief is the relative hardship to the parties in granting or denying relief in order to preserve the status quo pending a full hearing on the merits. As found hereinabove, there has been no actual showing of extraordinary hardship to A.A. other than his inability to engage in the extracurricular activity of lacrosse or park in his senior parking space. While A.A. has a substantial interest in participating in lacrosse and will suffer injury from non-participation, the Board also has a substantial interest in insuring that its disciplinary policies are applied so as to protect the safety and well-being of the students, the teachers, the administrators and other employees. Were it not to enforce its disciplinary policies, or treat A.A. differently than other students in the school, the Board would be sending the wrong message and possibly establishing a negative precedent. By contrast, I am concerned that the granting of a stay would promote a negative message regarding the ability of the Board to maintain good order and positive role modeling for its student community instead. Further, it could genuinely compromise the ability of the Board to actively participate as a community member and leader in providing a positive environment for the community youth. Petitioner has therefore not shown a reasonable probability of prevailing on this issue. And I so **CONCLUDE.**

Finally, I **CONCLUDE** that the Board has settled policies that the Board's policies have been properly enforced, and that the Board's policies are reasonable.

Consequently, I **CONCLUDE** that the respondent Board will suffer greater harm than the petitioner will if the requested relief is granted.

DECISION AND ORDER

Based upon the foregoing, I have **FOUND** that for purposes of deciding this application for emergency relief, petitioner has not established: (1) the existence of irreparable harm, (2) that petitioner's claim is based upon a settled right, (3) that petitioner is likely to prevail on the merits, or that (4) A.A. will suffer a relative hardship pending a full hearing on the merits. In view of the fact that petitioner has failed to establish all of the requirements for emergency relief, I **CONCLUDE** that petitioner's request should be **DENIED**.

Based upon the foregoing, it is hereby **ORDERED** that petitioner's request for emergency relief seeking to stay implementation of the Board's decision to revoke the right of A.A. to participate in lacrosse or receive his senior parking privilege is **DENIED.**

This Order disposes of all issues in controversy regarding this matter and the petition is **DISMISSED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

March 27, 2015

DATE

JOSEPH A. ASCIONE, ALJ

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LIST OF EXHIBITS

For petitioner:

P-1 HCRHS Overnight Trip Procedure
P-2 HCRHS Random, Drug Testing Policy
P-3 2014-15 HCRHS Substance Abuse Policy Guidelines
P-4 Email, dated February 27, 2015
P-5 Email, dated March 1, 2015
P-6 Letter, dated March 11, 2015
P-7 Letter, dated March 2, 2015
P-8 Lab Results
P-9 Letter, dated March 2, 2015
P-10 HCRHS Code of Conduct Report
P-11 Email, dated March 13, 2015

For respondent:

R-1 Map
R-2 2014-15 HCRHS Substance Abuse Policy Guidelines
R-3 HCRHS Overnight Trip Procedure
R-4 Hunterdon Central Regional Lacrosse Boys Varsity Schedule
R-5 Email, dated March 1 2015
R-6 Letter, dated March 2, 2015
R-7 HCRHS Code of Conduct Report
R-8 Handwritten note
R-9 Email, dated February 27, 2015

150-15

OAL DKT. NO. EDU 13729-14
AGENCY DKT. NO. 311-10/14

M.R., on behalf of minor child, M.R.R.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that the Interim Superintendent of the Washington Township Board of Education signed the agreement on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating the Interim Superintendent to sign the agreement on its behalf nor, in the alternative, is the agreement signed by the Board attorney – who is the Board's duly authorized representative in litigation – the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement and Release consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/12/15
Date of Mailing: 5/12/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 13729-14

AGENCY DKT. NO. 311-10/14

M.R. ON BEHALF OF MINOR CHILD, M.R.R.,

Petitioner,

v.

BOARD OF EDUCATION OF WASHINGTON, GLOUCESTER COUNTY,

Respondent.

George J. Singley, for petitioner (Singley & Gindele, LLC, attorneys)

Joseph F. Betley, Esq., for respondent (Capehart Scatchard, attorneys)

Record Closed: March 25, 2015 Decided: March 26, 2015

BEFORE **JOHN F. RUSSO, JR.**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 24, 2014, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

March 26, 2015
DATE

JOHN F. RUSSO, JR., ALJ

Date Received at Agency: 4-1-15

Date Mailed to Parties: 4-1-15
/bdt

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Attorneys for Respondent, Washington Township Board of Education

2015 MAR 26 A 9:10

M. R., individually and on behalf of M. R. Jr., Petitioners, vs. WASHINGTON TOWNSHIP BOARD OF EDUCATION, Respondent.	: : : : : : : : : : : :	NEW JERSEY DEPARTMENT OF EDUCATION OFFICE OF ADMINISTRATIVE LAW DOCKET NO.: EDU 13729-2014S AGENCY REFERENCE NO.: 311 10/4 **SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release ("Agreement") is entered into by and between M.R., individually and on behalf of his son, M. R. Jr. (collectively referred to as "Petitioners") and the Washington Township Board of Education ("Board") to resolve and settle all outstanding issues involved in this matter between the Petitioners and the Board.

WHEREAS, the Board is a local public board of education organized under Title 18A of the New Jersey Statutes with its principal offices located at 206 E. Holly Avenue, Sewell, Gloucester County, New Jersey 08080; and

WHEREAS, M. R., Jr. ("the Student") attended the Washington Township High School as a freshman for the 2013-2014 school year; and

WHEREAS, the Student's father is M.R., senior; and

WHEREAS, as a result of a July 29, 2014 disciplinary hearing before the Board arising from the Student's violation of the Washington Township High School Student Code of Conduct, the Board placed the Student in an alternative educational setting, specifically the Gloucester County Alternative School ("GCAS") for the 2014-2015 school year; and

WHEREAS, on or about September 9, 2014 Petitioners filed a Petition of Appeal and Request for Emergent/Expedited Hearing ("September 9, 2014 Petition of Appeal") challenging the Board's placement of the Student at GCAS; and

WHEREAS, on or about September 18, 2014 Petitioners withdrew the September 9, 2014 Petition of Appeal; and

WHEREAS, on or about September 23, 2014 Petitioners reinstated the September 9, 2014 Petition of Appeal and Request for Emergent/Expedited Hearing, bearing Agency Docket No. 311-10/14 and OAL Docket No. EDU-13729-2014S (the September 9, 2014 Petition of Appeal and September 23, 2014 Petition of Appeal, along with the requests for Emergent/Expedited Hearings, are hereinafter collectively referred to as "Petition of Appeal"); and

WHEREAS, on or about November 24, 2014 the Board filed an Answer to the Petition of Appeal; and

WHEREAS, after extension negotiations, and in order to resolve any and all disputes between the Parties without resorting to time-consuming and costly litigation, the Petitioners and the Board have agreed to a full and final settlement of all claims and matters asserted in the Petition of Appeal and any claims that could have been asserted in a state or federal court proceeding that relate directly or indirectly to the Petition of Appeal; and

WHEREAS, this Agreement, and the execution and implementation of same, shall not be construed or considered an admission of liability by the Board, its present and former Board members, officers, employees, agents and servants, and said liability being expressly denied.

NOW, THEREFORE, in consideration of the mutual promises and agreements contained herein, the Petitioners and the Board **AGREE AS FOLLOWS**:

1. The Student will continue in his placement at GCAS for the remainder of the 2014-2015 school year. Consistent with the terms of his removal from the Washington Township High School and his placement in the GCAS, the Student will not be allowed to participate in or attend any extra-curricular activities at the Washington Township Public Schools, nor will the Student be allowed on Washington Township Public Schools property, during his placement at the GCAS. Provided, however, that the Student will be allowed on School District property upon proper notice and approval of the High School administration for purposes of securing any documentation related to his anticipated re-entering Washington Township Highs School, including his participation in extra-curricular activities.

2. The Student will be eligible to return to the Washington Township High School for the 2015-2016 school year, and the Board's Administration shall recommend such return, at the conclusion of his placement at the GCAS if:

   a. The Student successfully completes his coursework at GCAS for the 2014-2015 school year;

   b. The Student successfully completes final examinations at GCAS for the 2014-2015 school year;

   c. The Student has no major attendance or disciplinary issues at GCAS during the 2014-2015 school year; and

d. The Student receives a positive recommendation from the staff at GCAS for his return to the Washington Township High School.

It is the understanding of the Parties that if the Student continues to perform at his current level of functioning at GCAS, he will meet the criteria for return to the Washington Township High School as set forth in this Agreement.

3. If the conditions set forth in Paragraph 2 of this Agreement are satisfied, the Student will have access to and be eligible to participate in summer activities at the Washington Township High School leading up to any fall sports for the 2015-2016 school year.

4. During the Student's placement at GCAS, he can submit medical and other documentation/information to the Washington Township High as required for his anticipated participation in any extracurricular activity offered by the Washington Township High School for the 2015-2016 school year.

5. **Release and Waiver**: The Petitioners agree to the following **RELEASES AND WAIVERS:**

a. For good and valuable consideration, the Petitioners **RELEASE, WAIVE AND FOREVER DISCHARGE** the Board (its former, present and future board members, officers, employees, agents, and servants) from any and all claims and causes of action, in law or in equity, whether known or unknown, whether asserted or unasserted, contingent or otherwise, arising from or relating directly or indirectly to M.F.'s education, placement, proposed placements, discipline, counseling, safety, and/or attendance within the Washington Township School District and any out-of-district placement. This Release and Waiver shall run from the beginning of time through the date of full execution of this Agreement.

This Release and Waiver includes, but is not limited to: (a) any and all claims asserted or which could have been asserted in the Petitioners' Petition of Appeal; (b) any and all claims asserted or which could have been asserted under the New Jersey Anti-Bullying Bill of Rights Act; (c) compensatory education; (d) reimbursement of any medical, behavioral, or education evaluations; (e) transportation; (f) expert witness fees; and/or (g) attorney's fees.

b. By way of further illustration, this Release and Waiver also includes, but is not limited to, any claim relating to the education of the Student in the Washington Township Public Schools and/or alleging a denial of FAPE, a denial of his safety, discrimination, state or federal constitutional rights violations, state or federal civil rights violations, monetary damages, pain and suffering, personal injury, property damage, reimbursement, attorney's fees and costs, and expert fees, claims or causes of action arising under state or federal statutes, regulations, or common law, including but not limited to the New Jersey statutes and regulations pertaining to special education, including N.J.A.C. 18A:46-1 et seq. and N.J.A.C. 6A:14 et seq., the New Jersey Law Against Discrimination, N.J.A.C. 10:5-1 et seq., the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., Section 504 of the Rehabilitation Act, 29 U.S.C. §701 et seq., the American with Disabilities Act, 42 U.S.C. §12101 et seq., the New Jersey Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2 et seq., the New Jersey Constitution, the United States Constitution, and the Civil Rights Act, 42 U.S.C. §1983, §1985, and §1988, the New Jersey Civil Rights Act, and the New Jersey Tort Claims Act N.J.S.A. 59:1-1 et seq.

c. This Release and Waiver does not limit any rights or obligations herein or bar an action to enforce the terms of this Agreement.

6. Within five (5) days of full execution of this Agreement, Petitioners agree to submit said Agreement to the New Jersey Office of Administrative Law and/or the Bureau of Controversies and Disputes for dismissal of the Petition of Appeal with prejudice.

7. **Miscellaneous:**

a. The Parties agree to refrain from taking any actions or making any statements, oral or written, critical or otherwise, in any medium whatsoever, relating to or concerning this dispute, which have the purpose of injuring each other's reputations or causing any person or entity to refrain from or cease any employment or business relationship with each other.

b. The Parties her eby verify, affirm and represent that they have each had the opportunity to discuss the terms of this Agreement with counsel, that they understand its contents and are entering into this Agreement voluntarily and with a full understanding of its meaning.

c. M. R. represents that he has the sole authority to enter into this Agreement, and that it shall be binding as if entered into by any other parent and/or guardian of the Student not a party hereto.

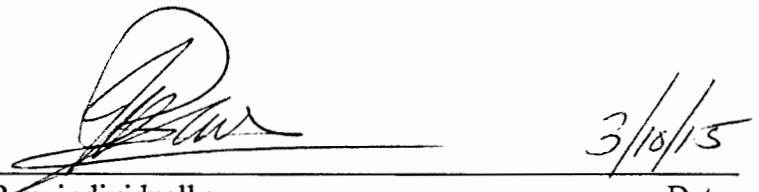
d. The terms and conditions of this Agreement shall be kept strictly confidential and will not be disclosed to any individual that is not acting directly on behalf of any party.

e. The provisions of this Agreement are severable and, if any part is found to be unenforceable, the other portion shall remain fully valid and enforceable.

f. This Agreement shall be governed and construed under the laws of the State of New Jersey.

g. This Agreement constitutes the full and complete agreement of the Parties and may not be changed or modified absent mutual written agreement of the Parties.

h. This Agreement is binding upon the Parties and their respective heirs, assigns or successors in interest.



3/10/15

Michael Rau, individually and on behalf of Michael Rau, Jr. — Date

Margaret Meehan, Acting Superintendent
Washington Township Board of Education — Date

f. This Agreement shall be governed and construed under the laws of the State of New Jersey.

g. This Agreement constitutes the full and complete agreement of the Parties and may not be changed or modified absent mutual written agreement of the Parties.

h. This Agreement is binding upon the Parties and their respective heirs, assigns or successors in interest.

Michael Rau, individually and on behalf of Michael Rau, Jr. — Date

Thomas Flemming, Interim Superintendent, Washington Township Board of Education — Date 3/24/15

OAL DKT. NO. EDU 10632-14
AGENCY DKT. NO. 185-7/14

DONNIE JOHNSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/12/15

Date of Mailing: 5/12/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10632-14
AGENCY DKT. NO. 185-7/14

DONNIE JOHNSON,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,
Respondent.

Jerry L. Tanenbaum, Esq., for petitioner (Mattleman, Kleinroth and Miller, PC, attorneys)

Perry L. Lattiboudere, Esq., for respondent (Adams, Gutierrez and Lattiboudere, attorneys)

Record Closed: March 26, 2015 Decided: March 31, 2015

BEFORE **SARAH G. CROWLEY**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 21, 2014, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement, and have prepared a Stipulation of Settlement received on March 26, 2015, indicating the terms thereof, which is attached and fully incorporated herein, (J-1).

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

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

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

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

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

March 31, 2015
DATE

Sarah G. Crowley
SARAH G. CROWLEY, ALJ

Date Received at Agency: March 31, 2015

Date Mailed to Parties: March 31, 2015

/mel

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 Stipulation of Settlement, received March 26, 2015

J-2 Board Resolution, received March 26, 2015

SETTLEMENT AGREEMENT AND RELEASE

Donnie Johnson v. City of Trenton Board of Education,
OAL Docket No. EDU-10632-2014S
Agency Docket No.: 185-7/14

This Settlement Agreement ("Agreement") is made this 7 day of March, 2015, by and between Petitioner, Donnie Johnson ("Petitioner" or "Johnson") and the Trenton Board of Education ("Respondent" or "Board") (hereinafter collectively referred to as the "Parties").

WHEREAS, on or about July 25, 2014, Johnson filed a Petition of Appeal with the State of New Jersey Department of Education challenging the non-renewal of her employment contract for the 2014-2015 school year ("Action"); and

WHEREAS, on or about August 20, 2014, the Board filed an Answer denying the allegations in Johnson's Petition of Appeal; and

WHEREAS, the matter was transmitted by the State of New Jersey Department of Education to the Office of Administrative Law for a hearing; and

WHEREAS, a hearing was scheduled for a hearing before the Honorable Sarah G. Crowley, A.L.J. on February 19, 2015 and February 20, 2015; and

WHEREAS, the Parties intend to adopt, by way of compromise, without any admission of liability, all claims which were either raised or could have been raised in the Action; and

NOW THEREFORE, in consideration of the foregoing and of the mutual agreements contained herein, and intending to be legally bound, the Parties agree as follows:

1. This Agreement sets forth all the terms and conditions of the Parties' agreement.
2. Respondent shall schedule a Donaldson Hearing for Petitioner at its April 2015 Board meeting. The Donaldson Hearing will be held in Executive/Closed Session. Petitioner may be represented by counsel or by one individual of her choosing. Due to the allegations asserted by Petitioner in the instant Action, Petitioner will be allotted no less

than thirty (30) minutes at her Donaldson Hearing to convince the Board to offer her reemployment. The time allotted to Petitioner for her Donaldson Hearing shall include any statements/comments by Petitioner, any statements/comments by her counsel or chosen representative, Petitioner's distribution and presentation of any documents/materials and any testimony by Petitioner's witness(es).

3. Petitioner fully understands that if her non-renewal is sustained by the Board in full compliance with the terms of this Agreement, she will not challenge or appeal the Board's decision in any manner. Respondent agrees that any non-renewal shall not bar Petitioner from applying for open positions in the District.

4. The Board agrees that it and its employees and representatives shall respond to any inquiry from any third parties concerning Johnson with a statement that its policy requires that it only confirm Petitioner's dates of employment, position, title and salary, and it shall limit itself thereto. The Board and its employees or representatives shall make no negative comments about Johnson, her work on behalf of the Board or her ability to provide work for other educational institutions or entities.

5. Respondent shall also pay to Johnson the sum of one thousand five hundred dollars ($1,500.00), which will be paid to Johnson no later than the April 2015 Board meeting.

6. In return for the above promises and commitments, Petitioner agrees to dismiss the instant Action with prejudice and will notify the Office of Administrative Law of same once this Agreement has been fully executed by Petitioner and the Board.

7. Petitioner releases the Board from any and all liabilities, claims, damages, and/or remedies of any type that she may have by reason of any matter, cause, act, or omission arising out of or in connection with her prior employment with the Board and the instant Action. This releases any and all claims arising under any federal, state, or common law,

contractual claims, claims for any tortious or negligent actions or other civil wrongs, attorneys' fees and all compensation claims. Petitioner further waives any claim for back pay and front pay. This release applies to claims arising prior to Johnson's execution of this Agreement that Petitioner knows about and those she may not know about as of the date of this Agreement.

8. This Agreement is a result of a compromise and accord to buy the Parties' peace. It is expressly understood and agreed that nothing contained in this Agreement is intended to be, nor shall be construed as, nor shall be represented by any party, their attorneys or their agents to be, as an admission or determination of liability by the Board, or its agents, employees or members, as to the validity of any claims asserted or assertable, as the Board continues to deny Petitioner's allegations and disclaims any responsibility for such claims. Nor shall this agreement be understood or construed as suggesting that any of Johnson's allegations or claims were in any way inaccurate or unfounded, and Johnson expressly denies any such construction or inference.
9. This Agreement shall not serve as a precedent for any other matter.
10. Petitioner acknowledges that she has entered into this Agreement voluntarily and hereby signs it without duress or coercion, and with the opportunity to consult counsel.
11. The Parties certify that they have had the opportunity to discuss this Agreement with counsel. They are fully satisfied with the services of their counsel with respect to both this Agreement and all other aspects of the Action and they enter into this Agreement knowingly, willingly and without any coercion or improper inducements.
12. This Agreement, and all of its terms, are and will remain confidential to the maximum extent permitted by law.
13. Should any provision of this Agreement be declared or determined by any court to be

illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not be part of this Agreement.

14. This Agreement may not be modified, altered, changed, discharged, terminated or waived, except upon express written consent of the Parties.
15. This Agreement shall be governed by the laws of the State of New Jersey.
16. The Parties agree that this Agreement may be signed in counterparts and that facsimile of signatures will have the same force and effect as original signatures
17. The Agreement is subject to the formal approval of the Trenton Board of Education.

PETITIONER, DONNIE JOHNSON

Donnie Reed Johnson 3/7/15

Witness:

Dated:

RESPONDENT, TRENTON BOARD OF EDUCATION

By: Barbara L. Wellington

Dated:

RESOLUTION AUTHORIZING APPROVAL OF SETTLEMENT AGREEMENT WITH DONNIE JOHNSON

WHEREAS,	the Trenton Board of Education has reviewed the Settlement Agreement and Release between Donnie Johnson and the Board of Education in regard to OAL Docket No. EDU 10632-2014S; and
WHEREAS,	the Board has voted on this date to approve the Settlement Agreement and Release; and
WHEREAS,	the Board designates and authorizes the Board President to execute the Settlement Agreement and Release on the Board's behalf; now therefore be it
RESOLVED	that the Trenton Board of Education approves the Settlement Agreement and Release between Donnie Johnson and the Board of Education

Denise Millington
Board President

Jayne S. Howard
School Business Administrator/Board Secretary

March 23, 2015
ADOPTED

152-15

OAL DKT. NO. EDU 15451-14
AGENCY DKT. NO. 320-11/14

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

The record of this matter, the proposed settlement agreement and general release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. According to the Agreement the first settlement payment is due on April 1, 2015. This date has preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of the settlement payment. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/12/15
Date of Mailing: 5/12/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 15451-14
AGENCY DKT. NO. 320-11/14

M.S. O/B/O MINOR CHILD, B.S.,
Petitioner,
v.
WEST ORANGE BOARD OF EDUCATION, ESSEX COUNTY,
Respondent.

Michelle Stover, petitioner, pro se

Stephen J. Christiano, Esq., for respondent

Record Closed: March 16, 2015 Decided: March 31, 2015

BEFORE **SANDRA ANN ROBINSON,** ALJ:

This matter was transmitted to the Office of Administrative Law November 24, 2014 for a hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached documents.

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

1. Both parties have voluntarily agreed to the settlement as evidenced by their respective signatures on the document;

2. Respondent has approved the settlement through the passing of a Motion by a unanimous vote of the members of the West Orange Board of Education on June 17, 2013. The Board President signed the settlement and the Board Secretary/Business Administrator Certified the roll call vote that authorized the settlement. A copy of the extract from the minutes of the West Orange Public Schools Board of Education, as recorded in the Official Minutes Book, is attached to the fully executed settlement agreement;

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

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

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

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

March 31, 2015 Sandra Ann Robinson

DATE **SANDRA ANN ROBINSON**, ALJ

Date Received at Agency: 4-2-15

Date Mailed to Parties: APR - 2 2015 Laura Sardiello

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

Stephen J. Christiano, Esq.
179 Eagle Rock Avenue
West Orange, NJ 07052
(973) 736-1636
Attorney for Respondent

2015 MAR 16 P 4:20

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
AGENCY DOCKET NO. 320-11/14
OAL DOCKET NO. EDU 15451-2014

M.S., ON BEHALF OF MINOR CHILD, B.S.,
Petitioner,

v.

SETTLEMENT AGREEMENT

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent.

The parties hereby stipulate as follows:

1. The petition is withdrawn with prejudice.
2. B.S. shall be permitted to remain a student in respondent's district so long as she meets school residency requirements.
3. Petitioner agrees to pay tuition to respondent in the amount of $1,500. Payments of $500 shall be made on April 1, May 1 and June 1, 2015. Any payment not made within 10 days of its due date shall cause the petitioner to be held in default, which shall allow respondent to seek a tuition award of $3,139 against petitioner, less payments made.
4. Checks or money orders for the tuition payments shall be payable to the West Orange Board of Education and mailed/delivered to Stephen J. Christiano, Esq.,

179 Eagle Rock Avenue, West Orange, NJ 07052.

5. This settlement resolves all claims petitioner may have against respondent.

Dated:

Michelle Stover, Petitioner

BOARD OF EDUCATION OF THE
TOWNSHIP OF WEST ORANGE

Dated: 3/10/15

By:
President

EXTRACT FROM THE MINUTES OF A MEETING
OF THE WEST ORANGE PUBLIC SCHOOLS
BOARD OF EDUCATION, WEST ORANGE, ESSEX COUNTY, NJ
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the West Orange School District, West Orange, in the County of Essex, New Jersey, convened in Regular/Work session on March 10, 2015 at 8:00 P.M., at West Orange High School, 51 Conforti Avenue, West Orange, NJ.

The following members of the Board of Education were present:
Mr. Charles, Mrs. Casalino, Mrs. Lab, Mrs. Mordecai, Mr. Robertson

The following motion was offered by Mrs. Lab and seconded by Mr. Robertson and adopted by the Board of Education by the following roll call vote:

Recommend approval of settlement agreement with M.S., OAL Docket No. EDU 15451-2014. The Board is expected to receive $1,500.

ROLL CALL: Ayes: Mr. Charles, Mrs. Casalino, Mrs. Lab, Mrs. Mordecai, Mr. Robertson

Abstain: None

CERTIFICATE

I, John Calavano, Board Secretary, of the West Orange Public Schools, West Orange, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on March 10, 2015, has been compared by me with the original minutes as officially recorded in my office in the minute book of said West Orange Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 11th day of March, 2015.

John Calavano
Board Secretary

153-15

C.C., on behalf of minor child, S.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

The petitioner claimed that the respondent Board and certain staff members substantially harmed his minor child, S.C., through its investigation of and response to alleged acts of Harassment, Intimidation and/or Bullying (HIB) by S.C. against a fellow student at their elementary school. S.C. received one half-day in-school suspension and was denied three recess periods. Petitioner claimed that the actions of the respondents were retaliatory, arbitrary, capricious and unreasonable, and that respondents themselves committed acts of HIB against S.C. Petitioner demanded to have the Board's determination that S.C. committed acts of HIB overturned and sought punitive damages. The Board filed a motion for summary decision, after which the ALJ granted Partial Summary Decision in favor of respondents, dismissing all but one of the issues: whether the Board acted arbitrarily, capriciously or unreasonably with respect to its investigation and response to the alleged acts of HIB.

The ALJ found, *inter alia*, that: the Board has implemented a formal policy on HIB pursuant to *N.J.S.A.* 18A:37-14; petitioner did not take issue with the underlying factual findings of the Board, and did not deny that S.C. made the statements attributed to him, but argued that S.C. was not treated fairly; the County Superintendent issued a Complaint Investigation Report in response to the concerns of S.C.'s father, which report found that the District had implemented approved HIB policies and procedures and that the choice of suspension as a consequence for the HIB findings was appropriate; the County Superintendent did not act in an arbitrary, capricious or unreasonable manner in addressing the procedural complaints of petitioner; S.C.'s action did constitute HIB as that term is defined by law; the HIB statute is intended to drive home the principle that cruel words will not be tolerated in a school environment; the consequence to S.C. was adequately restrained; and the actions of District personnel and the Board were consistent with the letter and spirit of *N.J.S.A.* 18A:37-14 and *N.J.A.C.* 6A:16-7.7. The ALJ concluded that the petitioner did not meet the burden of establishing that respondent's actions were arbitrary, capricious or unreasonable, and dismissed the petition.

Upon comprehensive review of this matter, the Commissioner concurred with the ALJ's findings and conclusions. Accordingly, the Initial Decision of the OAL was adopted as the final decision and the petition was dismissed.

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

May 12, 2015

153-15

OAL DKT. NO. EDU 10872-14
AGENCY DKT. NO. 216-8/14

C.C., on behalf of minor child, S.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the Board's decision in connection with S.C. was not arbitrary, capricious or unreasonable. Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/12/15
Date of Mailing: 5/12/15

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10872-14
AGENCY DKT. NO. 216-8/14

C.C. O/B/O MINOR CHILD, S.C.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,
Respondent.

C.C., o/b/o Minor Child **S.C.**, petitioner, pro se

Nicholas Celso, Esq., for respondent Board of Education of the Township of Jefferson, Morris County (Schwartz, Simon, Edelstein, & Celso, attorneys)

Record Closed: March 24, 2015 Decided: April 6, 2015

BEFORE **JESSE H. STRAUSS**, ALJ:

STATEMENT OF THE CASE

Petitioner C.C. o/b/o Minor Child S.C. (petitioner) filed a Petition with the Commissioner of Education claiming that the Jefferson Township Board of Education, (Board or District) its Superintendent, its Director of Special Services, and the Arthur Stanlick Elementary School (School) Principal and Guidance and Anti-Bullying

Specialist (Board or respondents) substantially harmed S.C. with respect to their investigation of and response to alleged acts of Harassment, Intimidation and/or Bullying (HIB) by S.C. at the School. Petitioner additionally claims that the actions of respondents were retaliatory, arbitrary, capricious, and unreasonable and that they committed acts of HIB against S.C. Petitioner demands that the Board's determination that S.C. committed acts of HIB be overturned and that "punitive damages be awarded for the substantial harm inflicted upon [S.C.] . . . ."

PROCEDURAL HISTORY

On or about August 11, 2014, petitioner filed its Petition against respondents. After respondents filed an Answer on August 28, 2014, the Department of Education Bureau of Controversies and Appeals transmitted the matter to the Office of Administrative Law (OAL) on August 29, 2014, for a hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. I granted Partial Summary Decision in favor of respondents on February 11, 2015, ordering the dismissal of those portions of the Petition with allegations against individual Board personnel named in their individual capacities; claiming that S.C. suffered "substantial harm"; and demanding punitive damages. The remaining issue is whether the Board acted arbitrarily, capriciously or unreasonably with respect to its investigations and responses to the alleged acts of HIB. I held a hearing on February 18, 2015, and closed the record on March 24, 2015, upon the receipt of closing briefs.

FACTUAL DISCUSSION

Petitioner does not dispute the facts gleaned from the Board's investigation. Rather, it disputes the quality of the investigation and the conclusions drawn by the Board after its investigation. Accordingly, I refer to the written statements of various individuals who were not called by either party as witnesses. Based on those uncontradicted statements, I **FIND** the following **FACTS**:

Lyndsey LaConti is the Anti-Bullying Specialist (ABS) and school counselor at the District's Arthur Stanlick Elementary School (School). Margaret Widgren is the District-

wide ABS. A teacher forwarded to LaConti an e-mail from a parent, M.G., who expressed concern about her son, G.C., being allegedly bullied by fellow fifth graders. G.C. had been complaining that D.S. and S.C. had been verbally bullying him. M.G. subsequently filed an HIB Incident Report Form on March 5, 2014, accusing D.S. and S.C. of emotional bullying by insulting and demeaning G.C. More specifically, she claimed that S.C. "calls my son names such as short, loser, dumb. He has also told him he is no good in basketball, that he will never make it to the NBA, and that he will drop out of HS and not be accepted into college. He also used some concerning comments such as: 'you will become a drug dealer.'" LaConti then began a ten-day investigation that entailed interviewing G.C., D.S., S.C., and nine other classmates on March 5. She had them write their own statements on March 5 after asking them open-ended questions about G.C.'s interactions with D.S. and S.C. She did not lead the students or suggest answers to them.

G.C.

> D. was calling me names like stupid dumb and a loser. Also saying that I would become a drug seller when I grow up and that I'll never get a real job. Also he said I'll never be tall that I'll be about 4'11 and stay little. That we were at recess when this happened. S.A. and H. were there when they heard this. **S.[C.] call** [sic] **me the same thing.** D. calls me and says I can't be in middle school because I'm to [sic] short and I'll never be a real basketball player and that I suck at basketball. S.[C.] has called me stupid, dumb, loser, I suck . . . . They made me feel annoyed and really mad when that [sic] say this. I'm trying to do my work and S.[C] says the names and then I get in trouble because the teacher thinks I'm talking to him. I'm embarrassed because they call me names in front of people. I feel like I'm being bullied by S.[C.] and D. After S**.[C.] told me that I suck in basketball** I said it back to him when we were going out. I wanted him to stop so I said that he sucks.

A.W.

> I'm in the class of G.[C.] and D.S. Something is going on between them. I don't know what is going on because I stay out of it. S.[C.] said something to G.[C.] but I don't remember what he said. G.[C.] didn't say anything back.

K.M.

D.[S.] is being disrespectful to G.[C.]. He often calls him rude and mean things as if he was trying to embarrass him. D.[S.] is being mean by calling names like shorty. D.[S.] also makes mean comments when he gets questions wrong in math like really G.[C.] or where is your math today. I think G.[C.] feels sad because he looks sad and scared when D.[S.] comes to say something mean. **S.[C.] is also mean to G.[C.] because [sic] comes and always makes fun of him. S.[C.] once said that G.[C.] is not smart and will never go through college and get a job or play basketball**. This happens during recess time in the classroom. When D. insults G.[C.], G.[C.] walks away. But when S.[C.] talks and insults G.[C.], G.[C.] tries to defend himself by saying something that he is good at what he does. G.[C.] feels sad when S.[C.] insults him, I can tell because he then would look sad.

B.T.

I'm friends with G.[C.] and D.[S.] but not really with S.[C.]. G.[C.] was talking about making it in the NBA but D.[S.] said G.[C.] was too short. I can't remember G.[C.] saying anything back to D.[S.] I feel that G.[C.] felt bad when he was called short. I never heard D.[S.] call G.[C.] dumb or anything. D.[S.] said that G.[S.] would drop out of college and become a drug dealer. D.[S.] said that to G.[C.] on the way to lunch about a week ago. I don't remember why he said it. I don't think G.[C.] said anything back but I do feel that G.[C.] felt mad at D.[S.]. **I think S.[C.] said something to G.[C.] that was mean.** But they are always near me in line and I try not to listen to them so I don't get in trouble by Dr. Cooke and my parents. D.[S.] talking about drug dealing.

A.G.

I've heard D.[S.] say that G.[C.] is not good at basketball. He has no friends and no one likes him. Tells him to go sit at a different table because he has no friends over here. D.[S.] stabbed G.[C.] with a plastic fork and knife at lunch but G.[C.] didn't do anything about it. D.[S.] never called G.[C.] dumb or stupid before but did call him short and make fun of him for that. I think G.[C.] feels bad about himself because

everyone **(S.[C.]) calls him short** and I don't think he likes it. **S[C.] said that G.[C.] is bad at basketball.** G.[C.] says that he is the best at basketball. G.[C.] tries to make the best out of it and make himself feel better. I feel bad for G.[C.] because **S.[C.] and D.[S.] make fun of him for lots of thing [sic], basketball, the way he looks and tells him that he has no friends.** This is happening at lunch time.

S.C.

I do not have a good relationship with G.[C.]. He has said that I am bad at basketball and I say stuff back to him. Sometimes he makes fun of other people. Rarely, I start stuff with him. I tell him that he is not so good at basketball either. He tells other people (C.A. G.) that he hopes her plane crashes and she dies. It used to happen at lunch until he moved to another table. Now it happens mainly in art (the argument about basketball). I do not call him a loser stupid dumb or short. I never said anything about him dropping out or becoming a drug dealer. This makes me feel upset because most of the stuff he is accusing me of is false. I have heard D.[S.] call him a drug dealer and he said he is bad at basketball. I heard him say this at lunch like two weeks ago.

D.S.

. . . Then I said whatever and started talking to A. I was talking to A. while S.[C.] and G.[C.] were arguing. I called, G.[C.] names jokingly like dumb and annoying. I didn't mean for him to take them seriously. I thought G.[C.] took them as a joke because he was laughing. I never said that he would drop out of school and become a drug dealer. I have never seen S.[C.] call G.[C.] names. I have seen them argue but that was about the seating at the lunch table. Me and G.[C.] were friends before the incident. Then I was told to stay away from him.

D.B.

D.[S.] teases G.[C.] by calling him names like loser, short, not smart. D.S. hits G.[C.]. Beginning of year he hit G.[C.]. He took a plastic knife and smacked him on the arm. Happens at lunch. D.[S.] says he is never going to be good at basketball. **S.[C.] support D.[S.] by saying yeah you're never going to be good at basketball.** Last month this

happened and G.[C.] moved his seat so it doesn't happen. Sometime G.[C.] [] at comment and something G.[C.] get [sic] upset. During class time S.[C.] does not make mean comments in class to G.[C.]. **S.[C.] does not make comment [sic] but goes along with D.[S.].** I don't think G.[C.] like [sic] being teased and when D.[S.] teases him I think he gets a little upset. A., M., N., F., K. may have heard.

F.C.

A and D.[S.] are making fun of G.[C.]. They call him names and laugh at him. I don't now [sic] what names they call him. When he is being made fun of he's mad but doesn't show it. He usually doesn't say anything back to them. This happens during lunch and recess. **S.[C.] doesn't make fun of G.[C.].** He just talks to other people.

N.J.

G.[C.] was sitting at the table at lunch. Then D.[S.], A. and A. told him he couldn't sit there. G.[C.] asked a teacher to come and help him. The teacher asked who got their firt [sic] and D.[S.] and M. said it was not G.[C.]. So G.[C.] moved to the other table even though he got there first. Nobody called G.[C.] any names. I never heard D.[S.] call G.[C.] any names. **I never heard S.[C.] call any names either.** I think G.[C.] felt really angry that he had to move.

M.S.

At lunch time D.[S.] told G.[C.] that he was to [sic] short to do sports and was stupid. D.[S.] told G.[C.] to sit with him and when G.[C.] came the table was full and told G.[C.] to go to the other table and called him names. Short, ugly, weird. (D.[S.] called G.[C.] those names). I think G.[C.] felt sad because D.[S.] was calling him names and told him to not sit by him. G.[C.] was crying. It makes me feel sad because if that was me I would not want to be hurt like that. **S.[C.] laughs at what D.[S.] says to G.[C.] and makes G.[C.] feel sad too but S.[C.] does not call G.[C.] names.** Sometimes G.[C.] is also mean to because he called me a bitch. I also think that D.[S.] made G.[C.] be mean to people. When D.[S.] started being mean to G.[C.], G.[C.] started to be mean to other people.

K.B.

> G.[C.] and D.[S.] used to be friends and now they aren't and I haven't heard D.[S.] say anything about him. I've heard D.[S.] say some things mean but I don't remember what he said. **I have never heard S.[C.] say anything about G.[C.] or call him names.**

Most of the student statements focused on comments by D.S. regarding characteristics of G.C. Some statements contained no references to such comments by S.C. LaConti, however, evaluated the statements of students K.M., A.G., and D.B. and determined that, aside from conduct by D.S., S.C. had also made negative comments to G.C. related to the characteristics of height, basketball skills, and intelligence, which supported the claims of G.C. against S.C. She further determined from the student statements that these comments were made during lunch period and made G.C. feel annoyed, upset, mad, and insulted.

LaConti prepared a report on March 5 based on the above investigation where she confirmed bullying by S.C. and that S.C. ". . . knowingly engaged in behavior with the specific objective of hurting, intimidating, or harassing another student." She further determined that the conduct was reasonably perceived as being motivated either by any actual or perceived characteristic; it took place on school property; and substantially disrupted or interfered with the orderly operation of the school or the rights of other students; and had the effect of insulting or demeaning a student. LaConti shared her report with School Principal Kelly Cooke. As a result of LaConti's findings, Principal Cooke proposed consequences to S.C. of one-half day of an in-school suspension and a denial of three days of recess. The proposed consequences were submitted to Superintendent of Schools Joseph Kraemer who approved them on March 21, 2014. The Superintendent subsequently presented a summary of allegations and factual findings at the next Board meeting on April 21, at which time the Board reviewed the Superintendent's report and acknowledged the findings.

The Board has implemented a formal policy on Harassment, Intimidation and Bullying, the preamble of which provides:

> The Board of Education prohibits acts of harassment, intimidation, or bullying of a student. A safe and civil environment in school is necessary for students to learn and achieve high academic standards. Harassment, intimidation, or bullying, like other disruptive or violent behaviors, is

> conduct that disrupts both a student's ability to learn and a school's ability to educate its pupils in a safe and disciplined environment. Since students learn by example, school administrators, faculty, staff and volunteers should be commended for demonstrating appropriate behavior, treating others with civility and respect, and refusing to tolerate harassment, intimidation, or bullying.
>
> [(P-7.)]

Subsequent to the action taken by the Board with regard to S.C., petitioners filed a complaint with the Interim Executive County Superintendent for the Morris County Office of the Department of Education alleging that the suspension imposed against S.C. was a violation of the Board's approved code of student conduct and also that there was a failure to provide S.C. due process. On May 14, 2014, the County Superintendent issued a Complaint Investigative Report. (R-1.) He determined based on a factual finding from his investigation that the Board-approved HIB policy and procedures contain all the required components under the Anti-Bullying Bill of Rights Act including a range of responses to incidents; the Board implemented the HIP policies and procedures; and under the HIB Policy and the Board's Code of Student Conduct, the choice of suspension as a consequence for the HIB findings was within the range of responses allowed. Although the County Superintendent noted that the Board's suspension proceedings policy (P-5) was not fully implemented, he found that there was no fatal effect in that S.C.'s father was afforded the opportunity to meet and discuss his concerns with the Principal prior to the short-term suspension being imposed and S.C. was allowed to provide a written statement to the ABS during the HIB investigation process. Although the County Superintendent subsequently required the Board to review its suspension proceedings policy with all principals and the School's safety team to include a teacher in the School, the County Superintendent did not require any corrective action specific to the Board's handling of the matters involving S.C.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The Legislature has strengthened the definition of HIB to include:

> [A]ny gesture, any written, verbal or physical act . . . whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic such as race, color . . . or by any other distinguishing characteristic . . . that

> substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging a student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or be severely or pervasively causing physical or emotional harm to the student.
>
> [N.J.S.A. 18A:37-14.]

Comprehensive regulations promulgated by the Department of Education further assist districts in complying with these statutory requirements. N.J.A.C. 6A:16-7.9. Petitioner does not take issue with the underlying factual findings of the Board and does not deny that S.C. made the statements attributed to him. Rather it argues that S.C. was not treated fairly, the investigation was faulty, the Board and its employees took missteps, and the Board did not follow proper suspension protocols when it imposed the one-half-day in-school suspension and the denial of three recess periods. It contends that the behavior of S.C. was not an act of HIB but was rather reflective of an ongoing unresolved conflict between the students involved and that both students engaged in verbal sparring throughout the ongoing unresolved conflict.

Petitioner argues that LaConti was not thorough in her investigation and failed to take into account that G.C. may have behaved in a manner that provoked the alleged HIB behavior. Petitioner also questions whether LaConti had received adequate training in investigating and evaluating HIB matters.[1] It is noteworthy that LaConti took statements from twelve students, but only S.C. made any claim that G.C. provoked S.C.'s behavior. Petitioner also complains that staff members did not follow the

[1] Although the District did not produce in discovery LaConti's Certificate of Attendance at a November 19, 2013, HIB training session, it was subsequently established that she did so. Petitioners have not established that LaConti lacked adequate training to conduct the investigation in this matter.

District's Pupil Discipline/Code of Conduct (P-4) and its Suspension Procedures (P-5) with regard to the imposed consequences of the Board's confirmed HIB and that there were systemic failures of employees at the School for not observing early signs of conflict among various students.

As indicated above, the County Superintendent issued a Complaint Investigative Report in response to a submission by S.C.'s father involving the procedural issues related to this matter. After conducting an investigation, the County Superintendent concluded that the District had implemented approved HIB policies and procedures and that the choice of suspension as a consequence for the HIB findings was within the range of responses allowed. He further concluded that a failure to fully implement the Suspension Procedures policy was remediated by other actions. Although the County Superintendent directed certain responses by the District and made additional recommendations, he did not conclude that the process by which the HIB investigation occurred, its findings and/or the implementation of a penalty was such that the District's actions had to be reversed. The determination of a county superintendent will not be modified or reversed in the absence of a showing that the county superintendent acted in an arbitrary, capricious or unreasonable manner. Wynne v. Camden Cty. Superintendent of Schools, 96 N.J.A.R.2d (EDU) 995, relying on Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). I **CONCLUDE** that the County Superintendent did not act in an arbitrary, capricious or unreasonable manner in addressing the procedural complaints of petitioner and that his determination stands regarding those issues.

I further **CONCLUDE** that S.C.'s actions constituted HIB, as that term is defined by law. From the various student statements that acknowledged interactions (some statements had no relevant information) between S.C. and G.C. and D.S. and G.C., it is evident that D.S. was the primary antagonist against G.C. Nevertheless, there is ample evidence within the unchallenged written student statements that S.C. engaged in verbal acts that are reasonably perceived as being motivated by distinguishing characteristics of height, intelligence, and sports proficiency within the meaning of the statute. They were not trivial statements. The comments were more than "ordinary

student conduct" as petitioner contends. They were made in front of other students.[2] The observation that these statements made G.C. feel bad, sad, scared, and insulted came not only from G.C. but from fellow students as well. S.C.'s comments created a hostile educational environment that interfered with G.C.'s education. The statute is intended to drive home the principle that cruel words will not be tolerated in a school environment. Consequences for students who violate this principle should be "varied and graded according to the nature of the behavior, developmental age of the student and the student's history of problem behaviors and performance." N.J.A.C. 6A:16-7.7(a)(2)(v)(1). The consequence to S.C. in this instance was adequately restrained. Indeed, consistent with my observation that D.S. was more of the antagonist than S.C., D.S. received a more severe penalty. (See P-1, Bate "Jeff 0199.") I **CONCLUDE** that the actions of District personnel and the Board were consistent with the letter and spirit of N.J.S.A. 18A:37-14 and N.J.A.C. 6A:16-7.7.[3]

As indicated above, petitioner takes issue with the fairness and completeness of the process followed in this matter by the Board and District personnel. However, the Commissioner will not overturn an action or the exercise of discretion by a local board unless that board acted in an arbitrary, capricious, or unreasonable manner. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008), <http://njlaw.rutgers.edu/collections/oal/> (citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966)); also see, Kopera, supra, 60 N.J. Super. 288. I **CONCLUDE** that petitioner has not met the substantial burden of establishing that the actions of the Board or its personnel were arbitrary, capricious, or unreasonable. Although petitioner is distressed with the overall treatment of S.C., there is no evidence to suggest that the Board or its personnel acted in bad faith or in utter disregard of the extant circumstances.

---

[2] I disagree with petitioner's argument that the student statements are inherently unreliable in the absence of school employees witnessing anything. There is nothing in the statute that requires corroboration of student statements by other evidence.

[3] Petitioner argues that the investigation was tainted by the claim that LaConti lacked adequate training for conduct an HIB investigation. This is an unavailing argument since the findings of HIB arose, not from LaConti's subjective impressions, but rather from the independent statements and words of various students.

ORDER

Based on the foregoing, I **ORDER** that the petition be **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

Apr. 6, 2015
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency: APRIL 6, 2015

Date Mailed to Parties: APRIL 7, 2015

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

APPENDIX

LIST OF WITNESSES

For Petitioner:

C.C.

For Respondent:

Lyndsey LaConti

LIST OF EXHIBITS IN EVIDENCE

For Petitioners:

P-1 Investigation Report Form; Investigation Flowchart and Timelines; Harassment, Intimidation, and Bullying Incident Report Form, Student Statements

P-2 LaConti Notes from Student Statements

P-3 School Safety Team-2013-2014

P-4 Pupil Discipline/Code of Conduct Policy, 5600

P-5 Suspension Procedures Policy, 5610

P-6 Excerpt from Department of Education Guidance on HIB

P-7 Harassment, Intimidation and Bullying Policy, 5512

For Respondent:

R-1 August 18, 2014, Interim Executive County Superintendent, Gerald J. Vernotica, Complaint Investigation Report

154-15

CHRISTOPHER KECHULA,

PETITIONER

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,

RESPONDENT.

AND

ALAN HUDSON,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In this consolidated case, petitioners – formerly employed as custodians for the respondent Board – alleged that their tenure rights were violated when their employment was terminated. The Board asserted that the petitioners' appeal rests solely on contractual claims – which do not require an interpretation of school law – and filed a motion to dismiss for failure to state a claim and lack of subject matter jurisdiction. Petitioners failed to answer the motion.

The ALJ granted the Board's motion to dismiss, finding that: petitioners were custodial workers employed by the Board before their respective termination dates; petitioners' positions did not require a certificate from the State Board of Examiners; and petitioners also filed grievances pursuant to their collective bargaining agreement. The ALJ concluded that, in light of petitioners' failure to respond to the motion to dismiss or provide any contrary legal or factual basis, the respondent's motion to dismiss must be granted. Accordingly, the petitioners' appeal was dismissed.

The Commissioner rejected the Initial Decision and remanded the matter for further proceedings, finding, *inter alia,* that: in order to determine whether the Commissioner has jurisdiction here, it is necessary to establish whether the Board appointed petitioners for a fixed term; Title 18A grants Boards of Education the discretion to determine which custodians, if any, will receive tenure benefits; and custodians appointed for a fixed term are excluded from statutory tenure, but may still negotiate contractual tenure rights over which the Commissioner lacks jurisdiction. Accordingly, the Commissioner remanded this matter to the OAL to determine whether petitioners were appointed for a fixed term and thereby excluded from statutory tenure under *N.J.S.A.* 18A17-3.

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

154-15

OAK DKT. NOS. EDU 2417-14 AND 4461-14 (CONSOLIDATED)
AGENCY DKT. NOS. 31-2/14 AND 46-2/14

CHRISTOPHER KECHULA,

PETITIONER

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

AND

ALAN HUDSON,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,

RESPONDENT.

The record in this matter, along with the Initial Decision of the Office of Administrative Law (OAL), have been reviewed. This controversy concerns whether petitioners, formerly employed as custodians for the Piscataway Board of Education (Board), possessed tenure rights pursuant to *N.J.S.A.* 18A:17-3 which were violated when the Board terminated their employment. Arguing that petitioners lacked tenure under *N.J.S.A.* 18A:17-3, the Board filed motions to dismiss the petitions of appeal for failure to state a claim upon which relief can be granted and lack of subject matter jurisdiction. Ultimately, the Administrative Law Judge (ALJ) granted the

Board's motions and dismissed both petitions. For the reasons stated herein, the Commissioner rejects the ALJ's Initial Decision and remands the matter for further proceedings.

Title 18A grants Boards of Education "discretion to determine which custodians, if any, are to receive the benefit of tenure." *Wright v. Bd. of Educ.*, 99 *N.J.* 112, 119 (1985). Custodians appointed for a fixed term are excluded from statutory tenure under *N.J.S.A.* 18A:17-3, which provides: "Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed" except for a reduction in force or "neglect, misbehavior or other offense." Custodians excluded from statutory tenure by virtue of fixed term appointment may, however, negotiate contractual tenure rights – over which the Commissioner lacks jurisdiction. *See Wright, supra,* 99 *N.J.* at 116 (holding contractual provision granting tenure to custodians after three years of employment is not barred by *N.J.S.A.* 18A:17-3 and falls within the scope of collective negotiations). Therefore, in order to determine whether the Commissioner lacks jurisdiction to hear and decide this matter under *N.J.S.A.* 18A:17-3, it is necessary to establish whether the Board appointed petitioners for a fixed term.

Upon her review of the record, the ALJ made the following three findings of fact:

1. Petitioners were employed with the Board as custodial workers until Hudson was terminated on December 19, 2013 and Kechula was terminated on January 9, 2014.
2. Their positions did not require certification from the New Jersey State Board of Examiners.
3. Petitioners have also filed grievances pursuant to their collective bargaining agreement. (Initial Decision at 2)

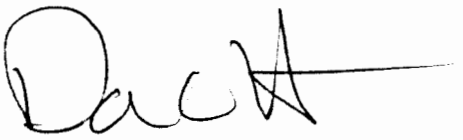
Based upon those findings, the ALJ granted the Board's motions and dismissed the petitions of appeal "in light of the petitioners' failure to respond to the motion or provide any contrary legal or factual basis" and determined that the Board's motions were "sufficient to support judgment in its favor as to the lack of jurisdiction of the subject of the petitioners' appeals." (Initial Decision at 2).

Notably, neither the petitions nor the Board's certification in support of its motion indicated whether petitioners were appointed for a fixed term of employment.

Because the record is devoid of information as to whether petitioners were appointed by the Board for a fixed term of employment, the Commissioner cannot conclude that petitioners lacked tenure rights under *N.J.S.A.* 18A:17-3. Absent a finding that petitioners were appointed for a fixed term – and thereby excluded from statutory tenure under Title 18A – the ALJ lacked the requisite factual basis to dismiss the petitions for lack of subject matter jurisdiction. Initially, the fact that custodians do not require certification from the New Jersey State Board of Examiners is an irrelevant, insufficient factual basis upon which to find that petitioners are not tenured custodial employees under *N.J.S.A.* 18A:17-3. In addition, it cannot be assumed that petitioners possess contractual tenure – and not statutory tenure – simply because they filed grievances and failed to respond to the Board's motions.

Accordingly, this matter is remanded to the Office of Administrative Law for a determination as to whether petitioners were appointed by the Board for a fixed term of employment and thereby excluded from statutory tenure under *N.J.S.A.* 18A:17-3.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 5/12/15

Date of Mailing: 5/12/15

*This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(CONSOLIDATED)

CHRISTOPHER KECHULA,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,
Respondent.

OAL DKT. NO. EDU 02417-14
AGENCY DKT. NO. 31-2/14

ALAN HUDSON,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,
Respondent.

OAL DKT. NO. EDU 04461-14
AGENCY DKT. NO. 46-2/14

Nancy I. Oxfeld, Esq., for petitioners (Oxfeld Cohen, attorneys)

David B. Rubin, Esq., for respondent

Record Closed: April 7, 2015

Decided: April 7, 2015

BEFORE **TIFFANY M. WILLIAMS**, ALJ:

This decision serves as a response to the request of the respondent, Piscataway Township Board of Education, to dismiss these consolidated matters for failure to state a claim and lack of subject matter jurisdiction. The motion filed by the respondent was unopposed by the petitioners. Accordingly, the motion is **GRANTED**.

The respondent asserts in its motion that the petitioners' appeal rests solely on contractual claims, which do not require an interpretation of school law. Picogna v. Board of Education of Cherry Hill, 249 N.J. Super. 322, 225 (App. Div. 1991). See also In the Matter of the Tenure Hearing of Jason Newby, School District of the Township of Hillsdale, Union County, Agency Dkt No. 256/9-12 (November 2, 2012). Moreover, the respondent alleges that based on conversations with the petitioners, they believe that they are alleging to have tenure rights, which it asserts would not extend to these employees. The respondent provided a certification of facts from the Board's Director of Human Resources as to the following, which I **FIND** as **FACT**:

1. Petitioners were employed with the Board as custodial workers until Hudson was terminated on December 19, 2013, and Kechula was terminated on January 9, 2014.

2. Their positions did not require a certificate from the New Jersey State Board of Examiners.

3. Petitioners have also filed grievances pursuant to their collective bargaining agreement.

In light of the petitioners' failure to respond to the motion or provide any contrary legal or factual basis, the respondent's motion is **GRANTED** as it is sufficient to support judgment in its favor as to the lack of jurisdiction of the subject of the petitioners' appeals.

It is so **ORDERED** that the petitioners' appeals are **DISMISSED**.

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

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

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

4/7/15
DATE

Tiffany M. Williams
TIFFANY M. WILLIAMS, ALJ

Date Received at Agency: 4/7/15

Date Mailed to Parties: APR -8 2015

jb

Laura Dardes
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

155-15

MELISSA KOLLAR,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF HARRISON, HUDSON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – formerly employed by the respondent Board as an athletic trainer – filed an appeal of her non-renewal in May 2013. Petitioner alleged that she attained tenure in September 2010, and was wrongfully terminated as a non-tenured staff member effective June 2013. The Board contended that petitioner was hired to the position of Athletic Trainer in October 2007, but was not issued the standard certificate for this position until January 2013; as such, petitioner had not attained tenure at the time of her non-renewal. Additionally, the Board asserted that the within appeal was late filed pursuant to *N.J.A.C.* 6A:3-1.3(i), as petitioner became aware that she needed to obtain a standard certificate in November 2012, but did not file her petition until May 2013.

The ALJ found, *inter alia,* that: the petition was timely filed; prior to 1999, the Department of Education did not issue certification for school athletic trainers, who were initially under the purview of the New Jersey Board of Medical Examiners (NJBOME); petitioner began employment as a school athletic trainer before current licensing requirements went into effect in 1999, and had been lawfully working under a certificate issued by the NJBOME; *Breitwieser v. Jersey City,* 286 *N.J. Super.* 633 (App. Div. 1996) is the controlling authority in this case, stating that teaching staff members must hold "proper certificates in full force and effect", and must have been employed by the board of education for three consecutive years in order to become tenured; further, in *Breitwieser*, service under an emergency certificate may be counted toward the service needed for tenure when that service is followed by the teacher obtaining a certificate in the same field as the emergency certificate; though she did not hold an emergency certificate, petitioner's situation herein was sufficiently analogous to *Breitwieser* that her period of employment as an athletic trainer before the effective date of the statute requiring the new certificate for athletic trainer must count toward the acquisition of tenure, as specified in *N.J.S.A.* 18A:28-4(b); and petitioner served in the position of athletic trainer for more than three consecutive years as required in *N.J.S.A.* 18A:28-5(a). Accordingly, the ALJ concluded that: petitioner acquired tenure on January 11, 2013, the date on which the State Board of Examiners issued her School Athletic Trainer certificate; she was wrongfully terminated on June 30, 2013; and should be reinstated as a tenured staff member effective on January 11, 2013.

Upon comprehensive review, the Commissioner rejected the Initial Decision and dismissed the petition, finding, *inter alia*, that: *N.J.S.A.* 18A:26-2.4 is the law that controls this controversy; while petitioner appears to have kept up-to-date with the requirements for maintaining her NJBOME license – which is one requirement for service as an athletic trainer – she appears to have made no attempt to keep current with educational certification requirements; no time toward tenure could begin to accrue to petitioner until January 10, 2013, when she was issued her Educational Services certificate with a School Athletic Trainer endorsement. Accordingly, when she was non-renewed on April 26, 2013, she had no tenure rights.

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

Issued 5/12/15

OAL DKT. NO. EDU 7845-13
AGENCY DKT. NO. 94-5/13

MELISSA KOLLAR,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF HARRISON, HUDSON COUNTY,	:	
RESPONDENT.	:	

Before the Commissioner is a dispute regarding the tenure status of petitioner in 2013, at which time she was employed by respondent as an athletic trainer. After careful consideration of the record, including the transcripts of three hearing days in the Office of Administrative Law (OAL), the Initial Decision of the OAL, and respondent's exceptions to same, the Commissioner concludes that petitioner had not earned tenure at that time.

There is little controversy regarding the material facts of this case. Rather, the parties disagree about the significance of those facts, and the application of the relevant law. For example, there is no dispute about the fact that – prior to the 2007 commencement of petitioner's employment with respondent – petitioner had earned New Jersey instructional certificates with endorsements to teach health, physical education and driver education. She had also secured an athletic trainer license from the New Jersey Board of Medical Examiners (NJBOME), and a certification from the National Athletic Trainers Association (NATA).

Petitioner's first employment as an athletic trainer in a school district was in 1991, when she was hired by the Paterson School District. At that time, the New Jersey Department of

Education (NJDOE) did not issue certification for athletic trainers, and the New Jersey Board of Medical Examiners (NJBOME) only required that athletic trainers be "registered." At some point subsequent to 1991, the NJBOME changed its policy concerning athletic trainers, and began to require that they obtain licenses, which petitioner did.[1]

In 1997, petitioner left her employment with the Paterson school district. Shortly thereafter she had an accident which led to her doctor's recommendation that she not work as an athletic trainer. The record indicates that petitioner's next jobs were in the Passaic and Orange School Districts as a health and physical education teacher from 1999 to 2002, and from 2002 to 2007, respectively. (P-8) In 2006 petitioner apparently started *per diem* athletic trainer work at Essex Community College and decided to look for a full time job as an athletic trainer. (1T15)

Petitioner was appointed to the position of Athletic Trainer in respondent's school district on or about October 15, 2007. (P-1) Petitioner testified that, at that time, respondent's job description did not require an educational services certificate with an athletic trainer endorsement, and she was not asked to produce one. (P-2; 1T17-18) It is, however, undisputed that in 1999, a law had been enacted requiring school athletic trainers to hold educational services certificates with athletic trainer endorsements. *See, N.J.S.A.* 18A:26-2.4; *see also N.J.A.C.* 6A:9-13.17 (now codified as *N.J.A.C.* 6A:9B-12.17).

It appears that at some point in 2010, the district focused on the certifications of its employees. It distributed forms to all staff members requiring them to update contact information and verifications concerning their certifications. On or about May 3, 2010, and again in September 2010, petitioner was given information update forms which asked for her contact information and her certifications. (R-6; R-10) On the forms, she filled in telephone

[1] The record indicates that petitioner let her NJBOME license lapse in March 2009, but reinstated it in June 2009. (R-23: 1T135-36)

numbers and emergency contact information. She did not correct the sections of the forms that stated that she held athletic trainer certification, because she believed that her NATA certification satisfied the inquiry. (1T60-61)

The Commissioner notes, however, that the update forms were designed to verify New Jersey educational certification. More specifically, they asked that the employees indicate whether their credentials were certificates of eligibility (CE), certificates of eligibility with advanced standing (CEAS), provisional certificates (PROV) or standard certificates (STAND CERT). Petitioner testified that she had not known what the above described certification abbreviations meant, and had never asked for clarification. (1T64) In fact, petitioner disclosed that, prior to 2012, she had never sought to ascertain what the DOE requirements for school athletic trainers were. (1T63) Nonetheless, she certified that what was set forth on the form, *i.e.*, that she held standard certification as an athletic trainer, was true. (1T65)

In May of 2010, petitioner's contract was not renewed, but she reapplied for the athletic trainer position and was rehired. Petitioner points out that in Superintendent Doran's June 25, 2010 letter to her advising her of her reappointment, he wrote that she would achieve tenure in the 2010-2011 school year. (P-3) The record indicates that petitioner served both that year and the following school year, *i.e.*, 2011-2012.

At the beginning of the 2012-2013 school year – on or about September 17, 2012 – petitioner was given and signed another update form. (R-11) This questionnaire had a more detailed format. On the second page it required an employee to designate the kind of certificate he or she held for each assignment. The types of certificates were fully identified at the bottom of the page and each was given a code number. For example, the code number for a certificate of eligibility was "7." (R-11 at 2) Employees were also asked whether they obtained their

certificates via the traditional route or the alternate route. (*Ibid.*) As regards the position of athletic trainer, petitioner entered a "1," the numerical code for standard certificate. (*Ibid.*)

Shortly after petitioner submitted the September 17, 2012 update questionnaire she was in an automobile accident, which precipitated workers compensation leave. (1T82-84) While she was on the workers compensation leave, Superintendent Doran advised her *via* certified letter, that respondent had discovered that she did not hold the required educational certificate for athletic trainer. (P-4) Petitioner was given sixty days paid leave to get the certificate and, at her request, respondent sent a letter to the New Jersey Board of Examiners (NJBOE) advising that petitioner would be employed, effective upon the issuance of her School Athletic Trainer certificate. (R-13; 1T92)

Petitioner testified that prior to Doran's advisement, she did not know that School Athletic Trainer certification existed. (1T26) After receiving the November 9, 2012 letter from Doran, she did not call anyone at respondent's school district or at the DOE; she just used the information attached to Doran's letter to go on the internet and apply for certification. (1T89-91) On December 28, 2012, the NJBOE evaluated petitioner's credentials and asked for proof of a bachelors degree from a regionally accredited college or university. (P-5) A delay in sending the proper transcripts to the NJBOE was caused by errors made by administrators at Montclair State College, 1T22, but petitioner's Educational Services certificate with a School Athletic Trainer endorsement was issued on January 10, 2013. (P-6; R-28; R-30)

On Friday, January 11, 2013, petitioner met with Superintendent Doran and Assistant Superintendent Confessore, at which time petitioner was told that she was reinstated and that her tenure would start accruing when she returned to work on Monday, January 14, 2013. (1T99-100) At that meeting they also spoke of respondent's incumbent job

description for school athletic trainer. Doran asked petitioner to look at other job descriptions that might be useful in improving it. (1T110) Doran wrote petitioner a letter dated January 11, 2013 memorializing the above mentioned meeting discussions, including the advisement that January 14, 2013 marked the onset of her tenure accrual. (P-7)

Petitioner testified that at her meeting with Doran and Confessore on January 11, 2013 she expressed disagreement that her tenure would only begin accruing on January 14, 2013. (1T99-100) She returned to work on January 14, 2013 and did not take any formal action regarding her belief that she was tenured; she did, however, speak with union representatives. (1T101-03) In April, petitioner received a "Rice letter" dated April 22, 2013 advising that her employment would be discussed at the respondent's April 25, 2013 Board meeting.[2] (R-15) Subsequently, petitioner received a letter dated April 26, 2013 from Doran advising that her contract had not been renewed. (R-16)

The School Athletic Trainer position was posted on April 26, 2013, with May 3, 2013 as the application deadline. (R-18) A new job description was attached to the posting. (R-17) Petitioner testified that she was not aware of the posting until the deadline or shortly before same. (1T118-21) She told Athletic Director Kim Huaranga that she wished to apply, and Huaranga advised that the deadline had been extended. (1T121; 1T123) Petitioner also acknowledged receiving an email dated May 9, 2013 from Celia Mariano of respondent's district (R-19) advising that the deadline to apply for the Athletic Trainer position had been extended to May 15, 2013. (1T123-25) Additionally, Doran testified that he had extended the application so that petitioner could apply. (3T89)

[2] Petitioner testified that she did not attend the meeting because it conflicted with her work schedule, and because a union member had told her that no one would be fired. (1T109)

Petitioner consulted a lawyer in May 2013. Subsequently, on May 14, 2013, petitioner both sent a petition to the Commissioner of Education and sent a letter to Doran stating: "I'm writing to express my interest in discussing the Athletic Training Position at Harrison H.S. for the 2013-2014 school year." (R-21) Petitioner testified that she sent said letter by regular postal service mail – as opposed to using the district's mail system. (1T123) Doran did not regard the letter as a bona fide application and did not respond, 3T91, nor did petitioner ever follow up on same. (1T163)

The law which controls this controversy is *N.J.S.A.* 18A:26-2.4, which provides in pertinent part: "To be eligible for appointment by a board of education as a school athletic trainer in any public school, an applicant shall possess an educational services certificate issued by the State Board of Examiners." [Emphasis added.][3]

When the law was enacted, the legislature included language which denoted that, for purposes of tenure eligibility, it did not intend to nullify the years of service which a certificated school athletic trainer may have accumulated prior to the 1999 law: "Notwithstanding the provisions of this section, any person who is employed as a school athletic trainer in a public school prior to the effective date of *P.L.* 1999, *c.* 87 (C.18A:26-2.4 et al.) may continue to be so employed pursuant to the provisions of *N.J.S.A.* 18A:28-4."

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[3] *See, also N.J.A.C.* 6A:9-13.17:

> (a) The athletic trainer endorsement is required for service as a school athletic trainer in grades preschool through 12 pursuant to *N.J.S.A.* 18A:28-4(b).
>
> (b) To be eligible for the school athletic trainer endorsement, a candidate shall:
>
> 1. Hold a bachelor's degree from a regionally accredited college or university; and
>
> 2. Satisfactorily complete the requirements established by the State Board of Medical Examiners for registration as an athletic trainer pursuant to *N.J.A.C.* 13:35-10.
>
> (c) An emergency certificate is not available for this endorsement.
> [Emphasis added.]

Thus, for example, if a school athletic trainer had begun employment in a district in 1990 and continued that employment beyond the August 1999 effective date of *N.J.S.A.* 18A: 26-2.4, all of his or her years of employment would count toward tenure – so long as the employee obtained an educational services certificate with a school athletic trainer endorsement.

The tenure statute, *N.J.S.A.* 18A:28-4, is not to the contrary. It provides that:

> No teaching staff member shall acquire tenure in any position in the public schools in any school district or under any board of education, who is not the holder of an appropriate certificate for such position, issued by the State Board of Examiners, in full force and effect, except that no board of education shall terminate the employment or refuse to continue the employment or reemployment of ...
>
> . . . b. a school athletic trainer appointed prior to the effective date of *P.L.* 1999, *c.*87 (*C.*18A:26-2.4 *et al.*) for the reason that the school athletic trainer is not the holder of a certificate, provided that the person is registered with or licensed by the New Jersey State Board of Medical Examiners, as applicable, as an athletic trainer. That person shall be issued the new certificate without being required to meet any additional qualifications, and any periods of employment as an athletic trainer prior to the effective date of that act shall count toward the acquisition of tenure to the same extent as employment after he effective date of that act.
>
> [Emphasis added.]

The foregoing statute reiterates the requirement that each teaching staff member must hold the proper certificate/endorsement. A provision added in 1999 also ordained that: 1) school athletic trainers who began service prior to 1999 and held the appropriate license from the NJBOME could not be terminated simply because they did not hold an educational services certificate with a school athletic trainer endorsement, and 2) their service prior to 1999 could be counted toward tenure. The new provision permitted the NJBOE to issue new endorsements to such school athletic trainers without requiring any additional qualifications.

What the new provision did not do was allow uncertificated employees to serve as school athletic trainers. The prohibition against penalizing school athletic trainers for not being

certificated prior to 1999 – by terminating their employment or extinguishing their tenure – did not and does not bestow upon them a waiver from their responsibility to obtain the appropriate certificate/endorsement. Each teaching staff member has "primary responsibility" for obtaining appropriate certification. *William Feldman v. Board of Education of the Township of Branchburg, Somerset County and Rebecca Gensel,* Docket No. A-2736-11T3 (App. Div., February 27, 2013) at 19-20. School officials share responsibility for verifying proper certification, but it is each individual educator's obligation to obtain any necessary certificates. *Sydnor v. Englewood Bd. of Ed.*, 1976 *S.L.D.* 113, 117 (Comm'r 1976). While petitioner appears to have kept up-to-date with the requirements for maintaining her NJBOME license – which is one of the requirements for service as a school athletic trainer – she appears to have made no attempt to keep up with educational certification requirements, even when she was asked to fill out "update forms" which used terminology which should have, at minimum, alerted her to the possibility that additional qualifications were necessary for her position and prompted further inquiry.

The present case has nothing to do with the 'tacking' of service under emergency or provisional certificates. Petitioner held no certificate at all until January 10, 2013. Only then could tenure begin to accrue. The Commissioner also notes that petitioner could have reapplied for the athletic trainer position in respondent's district. The record indicates, in fact, that the application deadline was extended to May 15, 2013 for her benefit. Yet petitioner did not apply. The only communication from her was a three sentence letter expressing her "interest in discussing" the position, which letter was dated one day before the application deadline.[4]

[4] As it was sent by regular mail, the Commissioner cannot conclude that respondent received it by the application deadline.

Accordingly, the Commissioner rejects the Initial Decision of the Office of Administrative Law and dismisses the petition.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 5/12/15

Date of Mailing: 5/12/15

[5] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 07845-13
AGENCY DKT. NO. 94-5/13

MELISSA KOLLAR,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF HARRISON, HUDSON COUNTY,

Respondent.

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

Karen Murray, Esq., for respondent (The Murray Law Firm, attorneys)

Record Closed: January 20, 2015 Decided: February 20, 2015

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

Kollar, an athletic trainer at Harrison High School, obtained her School Athletic Trainer certificate before she was non-renewed. Can Kollar tack on her service before she obtained her certificate to acquire tenure? Yes. Under Breitwieser v. Jersey City, 286 N.J. Super. 633, 42-43 (App. Div. 1996), a teacher must obtain or become eligible for a standard certificate in the appropriate field before the termination of employment.

PROCEDURAL HISTORY

On May 15, 2013, Kollar filed a petition against the Harrison Board of Education (Harrison). In her petition, Kollar alleges that she attained tenure on September 1, 2010, but was wrongfully terminated as a non-tenured staff member on June 30, 2013. Wherefore, Kollar demands that her termination be discontinued.

On June 3, 2013, Harrison filed its answer. In its Answer, Harrison states that Kollar was hired in October 2007 to the ten-month annual position of Athletic Trainer but was not issued the standard certificate for such a position until January 2013. As such, Harrison asserts that Kollar has failed to state a viable claim upon which relief can be granted and that this case should be dismissed.

On June 6, 2013, the Department of Education transmitted the case to the Office of Administrative Law as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On June 9, 2014, June 19, 2014, and July 1, 2014, I held the hearing.

By January 20, 2015, the parties submitted their closing briefs and I closed the record.

FINDINGS OF FACT

Based upon the testimony the parties provided, and my assessment of its credibility, together with the documents the parties submitted, and my assessment of their sufficiency, I **FIND** the following as **FACT**:

I.

In May 1988, Kollar became a student member of the National Athletic Trainers Association (NATA).

In May 1991, Kollar received a certificate from NATA as an Athletic Trainer.

In May 1991, Kollar also received a certificate from the Department of Education for Teacher of Driver Education.

In July 1991, Kollar received a certificate from the Department of Education for Teacher of Health and Physical Education.

On October 18, 2007, Harrison appointed Kollar to the position of Athletic Trainer, effective October 15, 2007.

Kollar remained in the position of Athletic Trainer for the 2007-08, 2008-09, and 2009-10 school years.

On May 7, 2010, the superintendent, James Doran, wrote to Kollar that she would not be offered another contract of employment for the 2010-11 school year.

On May 15, 2010, Kollar re-applied for the position.

On June 24, 2010, Harrison re-appointed Kollar to the position of Athletic Trainer for the 2010-11 school year.

In his notice, Doran wrote to Kollar that she would acquire tenure during the 2010-11 school year.

II.

On November 9, 2012, Doran wrote to Kollar that new State requirements for compiling and recording data on all certified professionals revealed that she did not hold the required educational certificate for School Athletic Trainer. More specifically, Doran wrote that in addition to the license from the Board of Medical Examiners, N.J.S.A. 18A:26-2.4 required Kollar to hold the educational certificate for School Athletic Trainer. Indeed, Doran testified that he told Kollar to get that certificate "with all deliberate speed."

Meanwhile, Doran contacted a private entity, Game Day, for per diem trainers in her absence.

On December 21, 2012, the assistant superintendent, Frederick Confessore, wrote to Kollar that she would be employed by Harrison in the capacity of Athletic Trainer, effective upon the issuance of her School Athletic Trainer certificate from the Department of Education.

On December 28, 2012, the Department of Education evaluated her credentials for a School Athletic Trainer certificate and determined that she still needed proof of a bachelor's degree from a regionally accredited college or university.

Kollar testified that she requested her undergraduate transcript from Montclair State College but Montclair State College sent her graduate transcript instead, which delayed her submission to the Department of Education.

On January 11, 2013, the Department of Education issued Kollar a certificate for School Athletic Trainer, which was posted online. On that same date, Doran wrote to Kollar that she would be reinstated as a School Athletic Trainer effective January 14, 2013. Moreover, Doran informed Kollar that her tenure would begin to accrue under her new certificate on that date, January 14, 2013.

III.

Kollar testified that such a School Athletic Trainer certificate from the Department of Education did not exist when she first began her career as an Athletic Trainer and that the only certificate that existed when she first began her career as an Athletic Trainer was the one from NATA, which she had always maintained.

IV.

On January 28, 2013, Doran received the School Athletic Trainer certificate from Kollar.

On April 22, 2013, Doran wrote to Kollar that Harrison would be discussing her employment at its meeting scheduled for April 25, 2013. Doran testified that he received no response from either Kollar or the Union. Meanwhile, Kollar testified that she understood she did not have to attend the meeting scheduled for April 25, 2013.

On April 26, 2013, Doran wrote to Kollar that she was employed by Harrison as a non-tenured staff member and that she would not be offered a contract for the 2013-14 school year.

Nevertheless, on that same date, April 26, 2013, Doran posted that Harrison was accepting applications for the position of Athletic Trainer for the 2013-14 school year and that the deadline to submit applications was Friday, May 3, 2013. Doran testified that he had expected Kollar to apply for the position and that Harrison had anticipated it would rehire her. Later that same date, on May 3, 2013, Doran posted that Harrison had extended the deadline to submit applications to Wednesday, May 15, 2013. Doran testified that Kollar had not applied for the position and that Harrison had extended the deadline because he had still expected Kollar to apply for the position and that Harrison had still anticipated it would rehire her. As Doran put it, he gave her the "benefit of the doubt" and wanted to go "the extra mile."

On May 14, 2013, Kollar wrote to Doran that she was interested in "discussing" the position. Kollar, however, never applied for the position. Indeed, Doran testified that he did not consider her letter to be an application. As Doran testified, "What was there to discuss?" In fact, Doran asserted that he even called her about the delay in her application but that she did not return his calls.

Doran testified that he ultimately stayed with Game Day because they did good work and he had received positive feedback about them. He also testified that Game Day was a lot cheaper—less than half the price of what he would have had to pay Kollar. In addition, no one, including Kollar, ever applied for the position. Finally, Doran resigned that he just couldn't understand why Kollar waited until the last minute to obtain her School Athletic Trainer certificate and why she wasn't more proactive in obtaining it.

CONCLUSIONS OF LAW

I.

A petitioner must file a petition no later than the ninetieth day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, which is the subject of the contested case. N.J.A.C. 6A:3-1.3(i).

In this case, Harrison argues that Kollar filed her petition out of time. More specifically, Harrison argues that Kollar learned on November 9, 2012, that she did not have the requisite School Athletic Trainer certificate and would have had to obtain one to continue employment with the school district. Thus, Harrison argues that Kollar would have had to have filed her petition objecting to her need for a School Athletic Trainer certificate on February 7, 2013.

In addition, Harrison argues that Kollar learned on January 11, 2013, that she did not have tenure and that her tenure would only begin to accrue as of that date so she would have had to have filed her petition objecting to her tenure status on April 11, 2013.

Since Kollar did not file her petition until May 15, 2013, Harrison argues that this case must be dismissed.

Harrison, however, is mistaken. On April 26, 2013, Doran wrote to Kollar that she was employed by Harrison as a non-tenured staff member and that she would not be offered a contract for employment for the 2013-14 school year. As such, I **CONCLUDE** that April 26, 2013, is the date of final action by the district board of education under N.J.A.C. 6A:3-1.3(i), that Kollar had until July 26, 2013, to file her petition, and that Kollar filed her petition challenging the determination that she was a non-tenured staff member who would not be offered employment for the 2013-14 school year on time.

II.

A.

A succinct recitation of tenure law is set forth in Breitwieser v. Jersey City, 286 N.J. Super. 633 (App. Div. 1996), which is the controlling authority in this case. In that case, the Appellate Division explained that the right to tenure is created and governed by statute, N.J.S.A. 18A:28-1, et seq., and that the statute sets for the conditions under which a public school teaching staff member, including an athletic trainer, can earn tenure. Breitwieser, supra, 286 N.J. Super. at 637.

Citing N.J.S.A. 18A:28-5, the Appellate Division explained that the teaching staff member must hold "proper certificates in full force and effect" and must have been employed by the board of education for three consecutive calendar years, three consecutive academic years together with employment at the beginning of the next succeeding academic year, or the equivalent of more than three academic years within any four consecutive academic years. Breitwieser, supra, 286 N.J. Super. at 637.

When Kollar was hired, N.J.S.A. 18A:28-5 appeared as follows:

§ 18A:28-5. Requirements for tenure

a. The services of all teaching staff members employed prior in the positions of teacher, principal, other than administrative principal, assistant principal, vice principal, assistant superintendent, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services, school athletic trainer and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect and school business administrators shared by two or more school districts, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this Title, after employment in such district or by such board for:

(a) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or

(b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

(c) The equivalent of more than three academic years within a period of any four consecutive academic years.

For the purposes of this chapter, tenure in any of the administrative or supervisory positions enumerated herein shall accrue only by employment in that administrative or supervisory position. Tenure so accrued shall not extend to any other administrative or supervisory position and nothing herein shall limit or restrict tenure rights which were or may be acquired pursuant to N.J.S. 18A:28-6 in a position in which the individual actually served.

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

Similarly, citing N.J.S.A. 18A:28-1, the Appellate Division explained that the very definition of a teaching staff member includes the prerequisite that the teaching staff

member holds a "valid and effective" standard, provisional, or emergency certificate. Breitwieser, supra, 286 N.J. Super. at 637-38.

When Kollar was hired, N.J.S.A. 18A:28-1 appeared as follows:

> § 18A:1-1. Definitions
>
> "Teaching staff member" means a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the State Board of Examiners and includes a school nurse and a school athletic trainer.
>
> [N.J.S.A. 18A:1-1.]

More emphatically, citing N.J.S.A. 18A:28-4, the Appellate Division explained that no teaching staff member, who is not a the holder of an "appropriate certificate" for such position issued by the State Board of Examiners, shall acquire tenure. Breitwieser, supra, 28 N.J. Super. at 638.

When Kollar was hired, N.J.S.A. 18A:28-4 appeared as follows:

> § 18A:28-4. Requirements for certain school personnel to acquire tenure, exceptions
>
> No teaching staff member shall acquire tenure in any position in the public schools in any school district or under any board of education, who is not the holder of an appropriate certificate for such position, issued by the State Board of Examiners, in full force and effect, except that no board of education shall terminate the employment or refuse to continue the employment or reemployment of
>
> a. any school nurse appointed prior to May 9, 1947 for the reason that such nurse is not the holder of such a certificate and the State Board of Examiners shall make no rule or regulation which will affect adversely the rights of any such nurse under any certificate issued prior to said date; or

> b. a school athletic trainer appointed prior to the effective date of P.L. 1999, c. 87 (C.18A:26-2.4 et al.) for the reason that the school athletic trainer is not the holder of a certificate, provided that the person is registered with or licensed by the New Jersey State Board of Medical Examiners, as applicable, as an athletic trainer. That person shall be issued the new certificate without being required to meet any additional qualifications, and any periods of employment as an athletic trainer prior to the effective date of that act shall count toward the acquisition of tenure to the same extent as employment after the effective date of that act.
>
> [N.J.S.A. 18A:28-4.]

In addition, the Appellate Division explained that these certificates are, in turn, governed by the regulations promulgated by State Board of Examiners. Breitwieser, supra, 286 N.J. Super. at 638.

Finally, the Appellate Division explained that the tenure statute should be liberally construed. Id. at 639.

B.

In this case, Harrison specifies that athletic trainers must hold a School Athletic Trainer certificate, citing N.J.S.A. 18A:2-2.4; that tenure cannot be required without one, citing, N.J.S.A. 18A:28-4; and that this law is well-settled, citing Breitwieser, supra, 286 N.J. Super. at 37.

Indeed, Harrison notes that the New Jersey Supreme Court has held that these precise statutory requirements must be met, citing Picogna v. Cherry Hill Board of Education, 143 N.J. 391, 400 (1996) ("Tenure arises only upon compliance with the precise conditions articulated in the statute.").

Moreover, Harrison reminds that the petitioner has the burden of proving that he or she has met these statutory requirements, citing Canfield v. Pine Hill Board of Education, 51 N.J. 400 (1968), rev'g on dissent, 97 N.J. Super. 483, 493 (App. Div.

1967) ("The burden of proving the right of tenure is upon plaintiff and ordinarily that right must be clearly proved.").

C.

Kollar argues that she earned tenure in her position as an athletic trainer and was improperly terminated from her position as an athletic trainer because she had served in her position as an athletic trainer for three consecutive calendar years, as N.J.S.A. 18A:28-5(a) requires.

In addition, Kollar argues that she earned tenure in her position as an athletic trainer and was improperly terminated from her position as an athletic trainer because she obtained the new certificate for athletic trainer without being required to meet any additional qualifications, as N.J.S.A. 18A:28-4(b) specifies, and because her period of employment as an athletic trainer before the effective date of the statute requiring the new certificate for athletic trainer count toward the acquisition of tenure, as N.J.S.A. 18A:28-4(b) further specifies.

Moreover, Kollar argues that she earned tenure in her position as an athletic trainer and was improperly terminated from her position as an athletic trainer because she obtained the new certificate for athletic trainer before she was non-renewed, as Breitwieser allows.

D.

Harrison argues in response that none of the cases Kollar cites are on point because Kollar did not hold an emergency or provisional certificate or even a certificate of eligibility.

III.

In this case, I agree with Kollar and her reliance on Breitwieser and reject the argument Harrison argues in response. In Breitwieser, Breitwieser attempted to acquire

tenure for service under a permanent certificate by tacking on an earlier period of service under an emergency certificate in a different field. Breitwieser, supra, 286 N.J. Super. at 635. The agency refused to permit the tacking on of an earlier period of service in a different field and the Appellate Division affirmed. Ibid.

More significant, however, is the reasoning. In its opinion, the Appellate Division explained that N.J.S.A. 18A:28-5 requires a teacher to hold "the proper certificate" when claiming tenure, that the "proper certificate" must be either a provisional or standard certificate, and that Breitwieser had to show that she has served the requisite period of time under that "proper certificate." Id. at 639-40. In addition, the Appellate Division explained that no teacher may acquire tenure solely upon service under an emergency certificate, no matter how long that teacher may have served under the emergency certificate, because holders of emergency certificates have not fully satisfied the educational prerequisites for standard certification, citing Kubas v. Linden Board of Education, 1980 S.L.D. 1172, 1179-80 (Commissioner of Ed.) ("Because of the uncertainty surrounding continued eligibility to teach, the protection of tenure laws was not intended to extend to holders of substandard certificates and has not been so extended.). Breitwieser, supra, 286 N.J. Super. at 640. Indeed, the Appellate Division explained that the requirement that teachers hold a non-emergency certificate to obtain tenure is appropriate because emergency-certified teachers are by definition unqualified to hold their positions and merely hold their positions temporarily, subject to termination and nonrenewal, as soon as the district locates a provisionally or permanently certified teacher. Id. at 641.

But the Appellate Division further explained that this does not mean that service under an emergency certificate can never be considered service under a "proper certificate" and counted toward tenure. Ibid.

To the contrary, the Appellate Division, citing and discussing six specific cases referred to as the K'Burg line of cases, explained that teachers have been allowed to tack service under emergency certificates to service under standard certificates. Ibid.

A.

First, the Appellate Division discussed K'Burg v. Lower Alloways Creek Board of Education, 1973 S.L.D. 636. In that case, K'Burg had been employed as a kindergarten teacher under an emergency certificate for nearly five years. Breitwieser, supra, 286 N.J. Super. at 641. She began in September 1968 and continued into the 1972-73 academic year. Ibid. In March 1973 she was informed that her employment would not be renewed for the 1973-74 academic year but she continued teaching through June 1973. Ibid. Although K'Burg held only the emergency certificate when she was non-renewed in March 1973, she obtained the standard certificate in April 1973, before the termination of her employment. Ibid. Thus, K'Burg claimed that she was tenured as of April 1973. Ibid. "She claimed that she was tenured under N.J.S.A. 18A:25 as of April 1973 because at that time she was the 'holder of a proper certificate in full force and effect'—a permanent certificate—and had been employed for more than three consecutive academic years." Breitwieser, supra, 286 N.J. Super. at 641-42. Thus, the Commissioner ruled in favor of K'Burg and allowed her to tack her service under her emergency certificate onto her service under her standard certificate. Id. at 642.

In Givens v. Newark Board of Education, 1974 S.L.D. 906, a ten-month period at the beginning of her employment was counted toward tenure, even though Givens did not receive a standard certificate until the end of the ten-month period, because she had applied for the standard certificate before the start of her employment and the delay in processing was not her fault. Breitwieser, supra, 286 N.J. Super. at 642.

In Smith v. Sayerville Board of Education, 1974 S.L.D. 1095, aff'd, 1976 S.L.D. 1120 (App. Div.), Smith taught for ten years under an emergency certificate and then became eligible for standard certification in the same subject while still employed. Relying on K'Burg, the Commissioner credited the service under the emergency certificate. Breitwieser, supra, 286 N.J. Super. at 642. Thus, Smith was granted tenure. Ibid.

In Salerno v. Newark Board of Education, 1980 S.L.D. 439, Salerno had served as a high school principal under an emergency certificate issued in October 1972,

received a permanent certificate for high school principal in July 1974, but was credited with the service under the emergency certificate. Breitwieser, supra, 286 N.J. Super. at 642.

Similarly, in Amato v. Hudson County Area Vo-Tech Schools Board of Education, # 350-84 (Nov. 8, 1984), Amato had worked as a job-placement coordinator under an emergency certificate beginning in February 1983, received the permanent certificate in March 1984, but was credited with the service under the emergency certificate. Breitwieser, supra, 286 N.J. Super. at 642.

Last, the Appellate Division discussed Smith v. Board of Education of Atlantic City Vo-Tech School, 1985 S.L.D. 704. In that case, Smith taught under an emergency certificate for ten years and then became eligible, but did not receive, the standard certificate in the same subject while still employed. Breitwieser, supra, 286 N.J. Super. at 642. Still the Commissioner could find no meaningful difference between Smith's eligibility for the standard certificate and Smith's possession of the standard certificate. Id. at 642-43. Thus, Smith was credited with the service under the emergency certificate. Ibid. More pointedly, the Appellate Division quoted the Commissioner in Smith who declared with emphasis that the teacher must either obtain or become eligible for a standard certificate in the appropriate field before the termination of employment. Ibid.

B.

In summary, the Appellate Division in Breitwieser wrote that service under an emergency certificate may be counted toward the service needed for tenure when that service is followed by the teacher obtaining a certificate in the same field as the emergency certificate:

> Our understanding of the K'Burg cases, consistent with the propose of the tenure scheme, treats them as standing for this more limited proposition: service under an emergency certificate may be counted towards the service needed for tenure only when that service is followed by the teacher ultimately obtaining a permanent certificate in the same field

> as the emergency certificate. Whatever their other factual variations, every one of the K'Burg cases involved a teacher who received a standard certificate in the same area in which that teacher had served under an emergency certificate.
>
> [Breitwieser, supra, 286 N.J. Super. at 644-45.]

Incidentally, the Appellate Division in Breitwieser further explained that a district may hope that a teacher who is teaching under an emergency certificate proves to be qualified rather than merely legally employable, and that the district may even expect that teacher to become qualified, but the failure of the teacher to earn the standard certificate in the same field indicates that the teacher never became qualified, and the hope the teacher proves to be qualified simply remains unfulfilled. Id. at 646. Under such circumstances, the Appellate Division continued, the service under the emergency certificate was not under the "appropriate certificate," for purposes of the tenure statute. Ibid. By contrast, a standard certificate in the same field, the Appellate Division noted, implicitly conveys an endorsement of the service under the emergency certificate, which is stronger and different in kind than that conveyed by renewal of the emergency certificate, and vindicates to a large extent whatever expectation the district had about the service and progress the teacher made toward the standard certificate. Id. at 646-67.

As will be seen below, such reasoning will find direct application in this case.

C.

Kollar also cites the unpublished Appellate Division decision of Ruiz v. Board of Education of the Borough of Fort Lee, A-4443-11 (App. Div. July 8, 2013), http://njlaw.rutgers.edu/collections/courts/, which follows Breitwieser. In Ruiz, the Commissioner determined, and the Appellate Division upheld, that tenure can be achieved through service under a provisional certificate so long as the teacher satisfies the conditional requirements of the provisional certificate. The Appellate Division noted with emphasis, just as it did in Breitwieser, that the determination was in keeping with the requirements of the standard certificate, which are only issued to those who have

met all the requirements for state certification. Ruiz, supra, A-4443-11 at *2. But in Ruiz, Ruiz was determined not to have obtained tenure because he had not met all of the requirements for state certification before he was terminated.

As will be seen below, such reasoning will also find direct application in this case.

IV.

The facts and circumstances of this case are no different in kind than the facts and circumstances of the K'Burg cases. Although Kollar did not hold an emergency or provisional certificate or certificate of eligibility before she obtained the School Athletic Trainer certificate from the State Board of Examiners, the fact remains that she did hold a proper certificate before she obtained the School Athletic Trainer certificate from the State Board of Examiners before she was non-renewed, just as the teaching staff members did in the K'Burg cases. Moreover, Kollar did not have to meet any additional qualifications for the position or certificate, which was emphasized more recently in Ruiz.

To parrot the language the Appellate Division used in Breitwieser, Harrison had hoped that Kollar, who had been teaching under the certificate provided by the Board of Medical Examiners, proved to be qualified rather than merely legally employable. Kollar then proved to be qualified when she obtained the School Athletic Trainer certificate from the State Board of Examiners, which vindicated the expectation Harrison had about the service Kollar had provided. Indeed, Harrison made it quite clear that it expected her to continue in her role as athletic trainer by providing her with a leave of absence to obtain the certificate from the State Board of Examiners and by extending the deadline to apply for the position of athletic trainer. The fact that Kollar did not take advantage of that courtesy and apply for the position is of no moment given my conclusion that she had already obtained tenure before then and did not have to reapply.

Finally, the facts remain that Kollar served in the position of athletic trainer for more than three consecutive calendar years, as N.J.S.A. 18A:28-5(a) requires, and that

her period of employment as an athletic trainer before the effective date of the statute requiring the new certificate for athletic trainer count toward the acquisition of tenure, as N.J.S.A. 18A:28-4(b) specifies.

Therefore, I **CONCLUDE** that Kollar acquired tenure on January 11, 2013, the date the State Board of Examiners issued her School Athletic Trainer certificate, that Kollar was wrongfully terminated as a non-tenured staff member on June 30, 2013, and that Kollar should be reinstated as a tenured staff member effective January 11, 2013.

ORDER

Given my findings of fact and conclusion of law, I **ORDER** that Kollar acquired tenure on January 11, 2013, that the termination of Kollar on June 30, 2013, be discontinued, and that Kollar be reinstated as a tenured staff member effective January 11, 2013.

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

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

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

2/20/15
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: 2-20-15

Date Mailed to Parties: FEB 23 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

For Petitioner:

Melissa Kollar

For Respondent:

Kimberly Huranga
William Hartman
Frederick Confessore
James Doran

Documents

For Petitioner:

P-1 Letter from Harrison to Kollar dated October 19, 2007
P-2 Job Description undated
P-3 Notice from Doran to Kollar dated June 25, 2010
P-4 Letter from Doran to Kollar dated November 9, 2012
P-5 Letter from Department of Education to Kollar dated December 28, 2012
P-6 Standard Certificate for School Athletic Trainer issued by State Board of Examiners to Kollar in January 2013
P-7 Letter from Doran to Kollar dated January 11, 2013
P-8 Resume of Kollar undated
P-9 Resume of Kollar undated
P-10 Letter from Division of Consumer Affairs to Kollar dated March 10, 2009

For Respondent:

R-1 Certificate for Teacher of Health and Physical Education issued by State Board of Examiners to Kollar in July 1991

R-2 Certificate for Teacher of Driver Education issued by State Board of Examiners to Kollar in May 1991

R-3 Certificate of Student Membership in the National Athletic Trainers Association, Inc. (NATA) issued by NATA to Kollar in May 1988

R-4 Certificate for Athletic Trainer issued by NATA to Kollar in May 1991

R-5 Employment Contract between Harrison and Kollar dated May 15, 2009

R-6 Certification History dated May 3, 2010

R-7 Application for employment dated September 1, 2007

R-8 Letter from Doran to Kollar dated May 7, 2010

R-9 Letter from Kollar to Doran dated June 15, 2010

R-10 Certification History dated September 15, 2010

R-11 Certification History dated September 12, 2012

R-12 Requirements for School Athletic Trainer Certificate undated

R-13 Letter from Confessore to Department of Education dated December 21, 2012

R-14 Letter from Kollar to Doran dated January 22, 2013

R-15 Letter from Doran to Kollar dated April 22, 2013

R-16 Letter from Doran to Kollar dated April 26, 2013

R-17 Job Description for Athletic trainer undated

R-18 Notice for Athletic Trainer dated April 26, 2013, with a deadline of May 3, 2013

R-19 Email from Harrison with a copy to Kollar dated May 9, 2013

R-20 Notice for Athletic Trainer dated April 26, 2013, with a deadline of May 15, 2013

R-21 Letter from Kollar to Doran dated May 14, 2013

R-22 Decision of Appeal Tribunal mailed October 21, 2013

R-23 Background check for Kollar undated

R-24 Certificate for Teacher of Physical Education issued by State Board of Examiners to Kollar in September 1989

R-25 Daily Login for April 29-30, 2013, and May 1-3, 2013

R-26 Daily Login for May 13-17, 2013

R-27 NJSBA Manual for Development of Job Descriptions revised September 2010

R-28 Standard Certificate for School Athletic Trainer issued by State Board of Examiners to Kollar in January 2013 and received by Harrison on January 28, 2013

R-29 Letter from Kollar to Doran dated May 14, 2013

R-30 Letter from Department of Education to Feintuch dated July 5, 2013

157-15LM

157-15

State of New Jersey

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

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

DAVID C. HESPE
Commissioner

May 13, 2015

Noel C. Crowley, Esq.
Crowley & Crowley
20 Park Place
Morristown, New Jersey 07960

Derlys Maria Gutierrez, Esq.
Adams Gutierrez & Lattiboudere, LLC
1037 Raymond Blvd., Suite 900
Newark, New Jersey 07102

Re: *Ali Feti v. Board of Education of the Borough of Netcong, Morris County, et. al., OAL Dkt. No. EDU 14826-13, Agency Dkt. No. 231-9/13.*

Dear Counsel,

I have considered the papers filed in connection with the petitioner's request for interlocutory review of the April 21, 2015 Order of Administrative Law Judge Ellen S. Bass denying the Motions for Summary Decision in the above-captioned matter. Upon full consideration of all of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10.

Accordingly, the petitioner's request for interlocutory review is hereby denied.*

Sincerely,

David C. Hespe
Commissioner

c: Honorable Ellen S. Bass
County Superintendent
State Law Library

DCH/MKD/JKH
Via Facsimile and Regular Delivery

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

158-15

MARGARET GOODE,	:	
PETITIONER	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
KEITH MILES AND HYE-WON GEHRING,	:	
RESPONDENTS.	:	

SYNOPSIS

The petitioner – a tenured teaching staff member employed in the Camden City School District – appealed the actions of the respondent school administrators relative to her teacher evaluations for the 2013-2014 school year. The petitioner sought, *inter alia*, the correction of alleged errors in respondents' evaluations of her performance, including the removal of "unfair, opinionated and biased Partially Effective and Ineffective judgments" that resulted in petitioner's classification as a "Partially Effective" educator, pursuant to the Teacher Effectiveness and Accountability for the Children of New Jersey (TEACHNJ) Act, *N.J.S.A.* 18A:6-123b and *N.J.A.C.* 6A:10-4.2; assurances regarding the training being provided to principals and evaluators to help teachers "grow and thrive in their classroom"; and a credit of three sick days that she purported to have used to deal with the stress caused by respondents' evaluations. Respondents moved to dismiss the petition as untimely, and because petitioner does not raise a cognizable claim over which the Commissioner has jurisdiction.

The ALJ found, *inter alia*, that: the petition was timely filed under the 90-day rule; all of the allegations set forth in the petitioner's appeal, and all of the relief requested therein, arise from the petitioner's 2013-2014 teacher performance evaluations; teacher evaluations are governed by the provisions of the TEACHNJ Act, and the corresponding regulations permit only a narrow review by the Commissioner of an annual summative rating of a teacher prior to the filing of tenure charges, and only under circumstances that are not present in the case at hand; petitioner therefore has asserted no cause of action arising under the TEACHNJ Act; further, the appeal process under TEACHNJ regulations requires the teacher to first appeal the evaluation to the chief school administrator, which petitioner did not do; and petitioner asserted no other claim over which the Commissioner has jurisdiction. Accordingly, the ALJ dismissed the petition for lack of jurisdiction.

Upon comprehensive review of the record, the Commissioner concurred with the ALJ that the matter is appropriately dismissed for failure to advance a cause of action over which the Commissioner has jurisdiction. Accordingly, the Commissioner adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

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

Issued 5/15/15

OAL DKT. NO. EDU 852-15
AGENCY DKT. NO. 228-8/14

MARGARET GOODE,	:	
PETITIONER	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
KEITH MILES AND HYE-WON GEHRING,	:	
RESPONDENTS.	:	

The record in this matter, along with the Initial Decision of the Office of Administrative Law, have been reviewed. None of the parties filed exceptions as permitted under *N.J.A.C.* 1:1-18.4. Upon full and independent consideration, the Commissioner concurs with the determination of the Administrative Law Judge (ALJ) that petitioner has not advanced a cause of action over which the Commissioner has jurisdiction.

Petitioner – a tenured teaching staff member – alleges that respondents acted improperly when conducting her annual summative educator evaluation during the 2013-2014 school year. Primarily, petitioner requests "the correction of errors in [her] evaluations 'by removing unfair, opinionated and biased Partially Effective and Ineffective judgments that [led] to [her] being categorized as a Partially Effective' educator."[1] (Initial Decision at 2) No tenure charges have been filed against her. Respondents filed a motion to dismiss in lieu of answer, arguing that: (1) the petition lacks a cognizable claim over which the Commissioner has jurisdiction and (2) that the petition was filed beyond the 90-day regulatory period. Ultimately, the Administrative Law Judge (ALJ) granted respondents' motion and

[1]Petitioner also sought removal of a "write-up" by respondent Miles from her personnel file, "assurance" that administrators were being properly trained to use the Danielson framework, and a credit of three sick days used due to stress following receipt of her evaluation. (Initial Decision at 2) Absent jurisdiction over a cognizable claim, the Commissioner lacks authority to award the remedies requested.

dismissed the petition because the Commissioner lacks jurisdiction, but rejected the argument that the petition was untimely filed.

Educator evaluations are governed by the Teacher Effectiveness and Accountability for the Children of New Jersey (TEACHNJ) Act, *N.J.S.A.* 18A:6A-117 *et seq.*, and the related regulations, *N.J.A.C.* 6A:10-1.1 et seq. Enacted in 2012, the Act aims to "raise student achievement by improving instruction through the adoption of evaluations that provide specific feedback to educators, inform the provision of aligned professional development, and inform personnel decisions." *N.J.S.A.* 18A:6-118. The Act empowers school districts to develop their own evaluation rubrics to assess teacher effectiveness, subject to review and approval by the Commissioner. *N.J.S.A.* 18A:6-122. Under the Act, evaluation rubrics must incorporate student growth objectives, or "multiple objective measures of student learning that use student growth from one year's measure to the next year's measure." *N.J.S.A.* 18A:6-123b; *N.J.A.C.* 6A:10-4.2. In addition, the evaluation standards adopted by districts must – at a minimum – include four defined annual rating categories for teachers: ineffective, partially effective, effective, and highly effective. *Ibid.*

Through implementation of a new educator evaluation system, TEACHNJ fundamentally changed the process by which teachers earn and maintain tenure. Specifically, the annual summative rating awarded to a teacher has a direct impact on whether the district must file tenure charges under the Act. For example, if a teacher receives a rating of either ineffective or partially effective – and subsequently receives a rating of ineffective the following year – the Act requires the district superintendent to forward a written tenure charge of inefficiency to the Commissioner against that teacher. *N.J.S.A.* 18A:6-17.3a(1). Or, if a teacher receives a rating of partially effective for two consecutive years, the district superintendent is required to forward a tenure charge of inefficiency to the Commissioner, except upon a finding of exceptional circumstances that would permit deferment pending the next annual evaluation. *N.J.S.A.* 18A:6-17.3a(2).

Once tenure charges are filed, the Act requires the Commissioner to appoint an arbitrator to hear the case unless he determines upon review of the charges that the evaluation process has not been

followed. *N.J.S.A.* 18A:6-17.3c. If the Commissioner refers the case to an arbitrator for determination, the arbitrator shall consider whether:

> (1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
> (2) there is a mistake of fact in the evaluation;
> (3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or
> (4) the district's actions were arbitrary and capricious. *N.J.S.A.* 18A:6-17.2a.

If the employee is able to demonstrate that any of the above circumstances occurred, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. *N.J.S.A.* 18A:6-17.2b. If the fact did not materially affect the outcome, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed. *Ibid.* The arbitrator's final determination is binding and cannot be appealed to the Commissioner. *N.J.S.A.* 18A:6-17.1e.

As indicated by the ALJ in her Initial Decision, TEACHNJ's corresponding regulations permit an exceedingly narrow review by the Commissioner of an annual summative rating prior to the filing of tenure charges – but under circumstances that are not present here. Specifically, *N.J.A.C.* 6A:10-4.2(f) provides that "if a teacher's student growth objective score was the sole cause for an ineffective or partially effective summative rating for the 2013-2014 academic year, the teacher may appeal the summative rating by February 1, 2015, or within 15 school days of receiving the summative rating, whichever is later, to the chief school administrator or designee." Thereafter, the chief school administrator's determination can be appealed to the Commissioner within 15 days. *Ibid.* In this case, petitioner is not arguing that her student growth objective score (SGO) was the sole cause for her partially effective rating, nor did she seek review of her SGO score from the chief school administrator.[2] (Initial Decision at 6). Apart from the limited review permitted by *N.J.A.C.* 6A:10-4.2(f), nothing else in the current regulations or the legislative history of TEACHNJ suggests an intent to afford teachers any

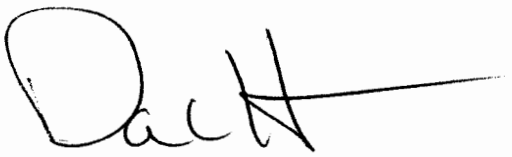
[2]The record reflects that petitioner received the highest possible SGO score – a 4.0.

other opportunity to seek the Commissioner's review of an annual summative rating absent the filing of tenure charges.

As a result, the Commissioner fully concurs with the ALJ's determination that petitioner has not advanced a cause of action over which the Commissioner has jurisdiction.[3] First, petitioner has acquired tenure and no tenure charges have been lodged against her. Second, the limited appeal provision contained within *N.J.A.C.* 6A:10-4.2(f) is not applicable to these facts. If tenure charges are filed against petitioner in the future, however, the process by which she was evaluated for the 2013-2014 school year will be subject to review by the Commissioner, and – unless he determines that the evaluation process has not been followed – also by the arbitrator appointed to hear the matter, thus affording petitioner due process. *N.J.S.A.* 18A:6-17.3c; *N.J.S.A.* 18A:6-17.2a. Nonetheless, at the present time, petitioner lacks a cognizable cause of action under TEACHNJ; therefore, the Commissioner lacks jurisdiction to award the remedies she seeks.

Accordingly, the Initial Decision of the Office of Administrative Law is adopted, respondents' motion to dismiss is granted, and the petition of appeal is dismissed.

IT IS SO ORDERED.[4]



COMMISSIONER OF EDUCATION

Date of Decision: 5/15/15

Date of Mailing: 5/15/15

[3] To the extent petitioner's allegations might be covered by other statutes or regulations, her remedies lie elsewhere.

[4]This decision may be appealed to the Appellate Division of the Superior Court, pursuant to *P.L.* 2008, c. 36. (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 852-15
AGENCY DKT. NO. 228-8/14

MARGARET GOODE,
Petitioner,
v.
KEITH MILES AND HYE-WON GEHRING,
Respondent.

Margaret Goode, petitioner, pro se

Robert M. Schwartz, appearing for respondents (Schwartz Law Group, LLC, attorneys)

Record Closed: February 15, 2015 Decided: March 26, 2015

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

The petitioner, Margaret Goode, a tenured teaching staff member employed by the State-Operated School District of the City of Camden, appeals certain actions taken by respondents Keith Miles and Hye-Won Gehring (respondents), who are administrators within the school district. The petitioner alleges that the respondents

acted improperly with respect to her teacher evaluations for the 2013–2014 school year. Respondents move to dismiss the complaint because (1) petitioner's petition of appeal was not timely filed in accordance with the ninety-day rule, and/or (2) the petitioner does not raise a cognizable claim over which the Commissioner has jurisdiction.

PROCEDURAL HISTORY AND FACTS

On August 21, 2014, the petitioner filed a petition of appeal with the Department of Education, Bureau of Controversies and Disputes (Bureau), alleging that respondents acted improperly with respect to her teacher evaluations for the 2013–2014 school year. As relief, she seeks (1) the correction of errors in respondents' evaluations of her "by removing unfair, opinionated and biased Partially Effective and Ineffective judgments that [led] to [her] being categorized as a Partially Effective" educator; (2) the removal of respondent Miles's June 3, 2014, "write up" regarding documentation of student-growth objectives from her personnel file; (3) assurance "that principals and evaluators are being properly trained to use the Danielson Framework as a tool to help teachers grow and thrive in their classroom [sic] and not being used to bully, harass, intimidate or threaten teachers in order to force them out"; and (4) a credit of three sick days "that [she] used because [her] blood pressure elevated after [she] saw Gehring's second bad evaluation and the nurse sent [her] home and told [her] to go to the doctor's, because the stress accumulated until it affected [her] health."

On August 25, 2014, the Bureau advised the petitioner that the matter could not move forward until the petitioner served the petition upon the respondents and then submitted proof of service to the Bureau. On September 11, 2014, the Bureau again advised the petitioner that it had not received proof of service, and notified her that "if this deficiency is not cured by Thursday, September 24, 2014, this matter will be considered withdrawn as a controversy before the Commissioner of Education." On September 17, 2014, the petitioner submitted proof of service to the Bureau.

On October 2, 2014, the petitioner amended her petition to include further allegations regarding a Corrective Action Plan related to her 2013–2014 evaluations. On December 3, 2014, and December 22, 2014, the Bureau advised the petitioner that

she had failed to submit proof of service of the amended petition. On January 5, 2015, the Bureau received the proof of service from the petitioner.

On January 13, 2015, the respondents filed a motion to dismiss in lieu of an answer because the petition "does not raise a cognizable claim over which the Commissioner of Education has jurisdiction" and/or because "given that the most recent factual claim in the petition occurred on June 4, 2014, and the petition was 'filed' on September 18, 2014, the petition must also be dismissed on the basis that it was filed beyond the ninety-day statute of limitations [under N.J.A.C. 6A:3-1.3(i)]."

On January 15, 2015, the matter was transmitted to the Office of Administrative Law for determination as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The threshold issue is jurisdiction.

LEGAL ANALYSIS AND CONCLUSION

I. The petition of appeal should not be dismissed under the ninety-day rule.

An interested person may file a petition with the Commissioner of Education to hear and decide a controversy or dispute arising under the school laws. N.J.A.C. 6A:3-1.1; N.J.S.A. 18A:6-9. A petitioner shall "serve such petition upon each respondent, together with any supporting papers the petitioner may include with the petition," and "shall file proof of service on each respondent . . . and the original petition and supporting materials, if any, with the Commissioner c/o the Director, Bureau of Controversies and Disputes, New Jersey State Department of Education." N.J.A.C. 6A:3-1.3(a). A "petitioner shall file a petition no later than the ninetieth day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the contested case hearing." N.J.A.C. 6A:3-1.3(i). This is commonly referred to as the "ninety-day rule." Nonetheless, the ninety-day rule "may be relaxed or dispensed with by the Commissioner, in the Commissioner's discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." N.J.A.C. 6A:3-1.16.

In this matter, the petition was filed on August 21, 2014, which was within ninety days of June 3, 2014, which is latest date of respondents' actions that are the subject of the petition.[1] To the extent the ninety-day rule applies to petitions that were filed within the relevant ninety days, but without proof of service, strict adherence to the rule would be inappropriate.

Although the petitioner filed her original petition with the Bureau, she did not follow all of the requirements set forth in N.J.A.C. 6A:3-1.1, because she failed to provide the Bureau with proof that she had served the petition on respondents. The Bureau gave the petitioner an opportunity to cure this procedural deficiency by September 24, 2014, and she complied by providing proof of service on September 17, 2014. Under these circumstances, the petition should not be dismissed based on the ninety-day rule.

II. The petition should be dismissed because the petitioner has advanced no cause of action over which the Commissioner has jurisdiction.

The Commissioner has "jurisdiction to hear and determine . . . all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the State board or of the commissioner." N.J.S.A. 18A:6-9. All of the allegations set forth in the petition and amended petition, and all of the relief requested therein, arise from the petitioner's 2013–2014 teacher performance evaluations.

The 2012 "Teacher Effectiveness and Accountability for the Children of New Jersey (TEACHNJ) Act," N.J.S.A. 18A:6-117 to -129, and the regulations promulgated thereunder, N.J.A.C. 6A:10-1.1 to -9.1, were designed "to raise student achievement by improving instruction through the adoption of evaluations that provide specific feedback to educators, inform the provision of aligned professional development, and inform

[1] The date of the "write up" from respondent Miles is "June 3, 2014." Respondents do not address the petitioner's amended petition, which includes actions that occurred on a later date, in their motion to dismiss.

personnel decisions." N.J.S.A. 18A:6-118(a). A district board of education annually shall adopt and submit for approval by the Commissioner evaluation rubrics for all teaching staff members. N.J.A.C. 6A:10-2.1. The evaluation rubrics shall have four defined annual ratings: ineffective, partially effective, effective, and highly effective. Ibid. "Ineffective" or "partially effective" means "the employee receives an annual summative evaluation rating of 'ineffective' or 'partially effective' based on the performance standards for his [or her] position established through the evaluation rubric adopted by the board of education and approved by the commissioner." N.J.S.A. 18A:6-119.

The TEACHNJ Act and regulations provide only one basis for a teacher to appeal to the Commissioner.

> If a teacher's student growth objective score was the sole cause for an ineffective or partially effective summative rating for the 2013–2014 academic year, the teacher may appeal the summative rating by February 1, 2015, or within 15 school days of receiving the summative rating, whichever is later, to the chief school administrator or designee. Within 15 school days of receiving the appeal, the chief school administrator or designee shall notify the teacher of the decision. If the chief school administrator or designee agrees the student growth objective score was the sole cause for an ineffective or partially effective summative rating, the teacher's student growth objective score weight shall be adjusted from 15 percent to one percent and the teacher practice score weight shall be increased accordingly. Any decision of the chief school administrator with regard to recalculating a teacher's percentage weight and annual summative rating in accordance with this provision may be appealed directly to the Commissioner no later than 15 school days following the chief school administrator's or designee's decision notification to the teacher. The Commissioner shall review whether the annual summative rating was directly and numerically caused by the student growth objective score and may decide the matter on a summary basis.
>
> [N.J.A.C. 6A:10-4.2(f).]

Here, the petitioner does not allege, and the papers do not show, that her student-growth-objective score was "the sole cause for an ineffective or partially effective summative rating for the 2013–2014 academic year." Thus, she has not asserted a cause of action arising under the TEACHNJ Act. Moreover, the appeal process under the TEACHNJ regulations requires a teacher to first appeal the rating to the chief school administrator, and if the teacher is dissatisfied with the outcome of that appeal, he or she may thereafter appeal the decision to the Commissioner. Thus, even if the petitioner's rating was based solely on her student-growth-objective score, she did not follow the proper appeal procedure by appealing first to the chief school administrator.

Lastly, the petitioner has not asserted any other claim over which the Commissioner has jurisdiction, such as an allegation that she was improperly dismissed or reduced in salary under the tenure laws.

CONCLUSION

In conclusion, the petitioner filed her petition within the ninety-day period and it was served in accordance with the directive of the Bureau shortly thereafter. Under these circumstances, dismissal on the basis that the petition was not served within ninety days is not warranted. Accordingly, the petition shall not be dismissed based on the ninety-day rule. However, because the petition does not raise a cognizable claim over which the Commissioner has jurisdiction, the petition shall be dismissed on that basis.

ORDER

Based upon the foregoing, the motion to dismiss the petition and the amended petition is hereby **GRANTED**.[2] The petition and the amended petition are hereby

[2] This Initial Decision encompasses both the original petition and the amended petition, as no claims were set forth in either which would be cognizable under the jurisdiction of the Commissioner.

DISMISSED without prejudice to the petitioner filing a complaint within the jurisdiction of the Commissioner.

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

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

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

March 26, 2015
DATE

Susan Scarola
SUSAN M. SCAROLA, ALJ

Date Received at Agency: March 26, 2015

Date Mailed to Parties: 3-27-15

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159-15

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

---X

In the Matter of the TENURE hearing of the

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY
Complainant,

and

ELIZABETH CORBACHO-MUSNGI,
Respondent.

Agency Dkt. No. 314-10/14

OPINION AND AWARD

---X

Before **MELISSA H. BIREN, Esq.**, Impartial Arbitrator

APPEARANCES:

For the Complainant
Purcell, Mulcahy, Hawkins, Flanagan & Lawless, LLC
Robert Tosti, Esq.

For the Respondent
Caruso Smith Picini, PC
Nicholas Poberezhsky, Esq.

Pursuant to *N.J.S.A. 18A:6-16,* as amended by *P.L. 2012, c 26* ("TEACHNJ"), the tenure charges brought by the State Operated School District of the City of Newark, Essex County (the "District") against Elizabeth Corbacho-Musngi ("Corbacho-Musngi") were referred to me for a hearing and decision. I conducted a hearing at the offices of Caruso Smith Picini, PC on February 3, 2015, February 19, 2015 and April 7, 2015. The record closed on April 17, 2015 upon the arbitrator's receipt of the parties' post hearing memoranda and supporting authorities.

Both parties were represented by counsel and had a full opportunity to adduce evidence, to cross-examine each other's witnesses and to make argument in support of their respective positions. A stenographic record of the proceedings was taken. Neither party has raised any objection to the fairness of this proceeding. The evidence adduced, the legal authorities cited and the positions and arguments set forth by the parties have been fully considered in the preparation and issuance of this Opinion and Award.

The Charges and Procedural Background:

A Statement of Charges, dated August 25, 2014, was served upon Corbacho-Musngi alleging chronic and excessive absenteeism, absence without leave and other just cause, as follows:

CHARGE ONE: CHRONIC AND EXCESSIVE ABSENTEEISM

1. On or about September 2003, Respondent began her employment with the District as a teacher and has attained tenure since that time.
2. Respondent has been chronically and excessively absent from her teaching duties for several years now.
3. During the 2010-11 school year, Respondent incurred approximately forty-two (42) absences in sick and personal days...
4. During the 2011-12 school year, Respondent incurred approximately sixty-nine (69) absences in sick and personal days...
5. During the 2012-13 school year, Respondent incurred approximately forty-seven (47) absences in sick, personal and bereavement days...
6. During the 2013-14 school year, Respondent incurred approximately One hundred twenty six (126) absences in sick, personal and AWOL days...
7. Respondent failed to meet an acceptable level of attendance under District and State guidelines for several years now.
8. Respondent's amount of absence from the classroom constitutes excessive absenteeism which adversely impacted the instruction to students, regardless of whether Respondent's absences were authorized by contract or otherwise caused by legitimate medical reasons.
9. Respondent was previously warned about her excessive absenteeism and that continued absenteeism would result in more harsh discipline...
10. Respondent's pattern of excessive absenteeism over the foregoing period caused a substantial interruption in the continuity of educational instruction and had a corresponding adverse impact upon the instruction to students of the District.
11. Respondent's conduct and pattern of excessive absenteeism as described above are sufficient to warrant dismissal from employment.

CHARGE TWO: ABSENCE WITHOUT LEAVE

12. The District restates the allegations contained in Charge One and reallege and incorporate them by reference as if fully set forth at length herein.
13. During the 2013-14 school year, Respondent was assigned to The Early Childhood School as a pre-kindergarten teacher.
14. In August of 2013, Respondent was previously warned about her excessive absences and that continued absenteeism would result in more harsh discipline...
15. During the 2013-14 school year, Respondent applied for intermittent family leave of absence pursuant to the Family Medical Leave Act of 1993 ("FMLA")...

16. Respondent was denied an FMLA leave from December 3, 2013 until March 3, 2014 because she did not qualify due to insufficient hours worked. Respondent was granted a leave of absence due to illness from January 9, 2014 through January 28, 2014 without pay with a scheduled return to work date of Tuesday, January 28, 2014...
17. Respondent failed to return to her assigned location on January 28, 2014...
18. Respondent failed to contact the District with regard to her continued unauthorized absence from the District beyond January 28, 2014...
19. On March 28, 2014 and April 4, 2014, the District corresponded with Respondent providing formal notice that her failure to return to work on January 28, 2014, coupled with her failure to provide the District with notice of her intentions to return to work resulted in her being marked AWOL and that, as a result, the District would be taking disciplinary action against her...
20. The District's March 28, 2014 correspondence also indicated that an immediate response regarding her absences was required...
21. Respondent failed to respond to the District's March 28, 2014 or April 4, 2014 correspondence.
22. Respondent failed to provide the District with any notice of her intention to return to work.
23. Respondent's AWOL resulted in additional costs to the District and caused a substantial disruption to the continuity of educational instruction and had a corresponding adverse impact upon the students of the Newark Public Schools.
24. Respondent's failure to follow the District's directive as well as her actions in failing to report her absences constitute acts of unbecoming conduct and serve to substantially disrupt and/or interfere with the orderly operation of the District and the school.
25. Respondent's unbecoming conduct and disregard of District directive touches upon her character and highlight her propensity to engage in prohibited behavior.
26. Respondent's actions in being AWOL since January 28, 2014 as well as her failure to respond to the District's request for a response is extremely inappropriate and highly egregious in and of itself given the heightened standards of conduct to which educators are held to.
27. Respondent's willful, inappropriate and unbecoming conduct as described above constitutes Conduct Unbecoming of a Teacher sufficient to warrant dismissal from employment and/or reduction in salary.

CHARGE THREE: OTHER SUFFICIENT CAUSE

28. The District restates the allegations contained in Charge One and Two and reallege and incorporate them by reference as if fully set forth at length herein.
29. The cumulative effect of Respondent's absenteeism, AWOL and misconduct as set forth above constitutes other sufficient cause sufficient to warrant dismissal or a reduction in salary.

On October 20, 2014, the State District Superintendent of Newark Public Schools, Cami Anderson, determined that there was "probable cause to credit the evidence in support of the charges."[1] Respondent filed an Answer to the tenure charges on November 6, 2014, and an Amended Answer on December 4, 2014.

The tenure charges were referred to me on November 17, 2014. An initial request for an extension of time under TEACHNJ due to scheduling difficulties was granted. During the first hearing on February 3, 2015 the parties discussed settlement. During the second hearing on February 19, 2015, the parties continued settlement discussions and counsel for both parties then represented that a settlement had been reached. Thereafter, however, the settlement was not finalized. A further extension of time was granted under TEACHNJ to allow the case to proceed to a hearing on the merits on April 7, 2015 and for the issuance of a decision.

At the end of the day on April 2, 2015, Respondent filed a voluminous Motion to Dismiss. Given the late filing of the motion, prior to a holiday weekend and just two business days prior to the scheduled hearing, the motion was not considered. At the start of the hearing, however, Respondent moved to preclude the District's presentation of any witnesses due to the District's failure to provide a complete summary of their testimony as required by TEACHNJ. Respondent had not previously raised this issue during two prior hearing dates, many communications regarding the hearing and a prior conference call regarding witnesses. In addition, information as to earlier disclosures by Claimant's counsel[2] to verify whether such a statement had been previously provided was not readily available at the hearing. Therefore, under the unique circumstances of this case, including the inability to adjourn the hearing again to resolve the issue, Respondent's motion was denied and the hearing went forward on the merits. Respondent also raised concerns regarding Claimant's failure to produce documents relating to the Respondent's FMLA leaves despite multiple requests and the arbitrator's order that such documents be produced. This issue will be addressed in the discussion below.

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[1] Although Anderson's Certificate of Determination indicates that Respondent filed a response to the notice of charges prior to her determination of probable cause, the Affidavit of Service indicates that no response was received.

[2] Although the same law firm represented the District throughout the proceedings, a different attorney was assigned after the initial stages.

Background:

The following is a summary of the relevant evidence in this case. Corbacho-Musngi is a tenured teacher in the District. She is a pre-school teacher. Corbacho-Musngi began working in the District in September 2003 and over the years has been assigned to several schools, including the old Belmont-Runyon, the new Belmont-Runyon, Clifton Avenue and Chancellor Avenue Annex schools.

It is undisputed that Respondent was absent 42 times during the 2010-2011 school year, 69 times in 2011-2012, 47 times in 2012-2013 and 126 times in 2013-2014. (See District Exhibits 1-4.) Homere Breton, Executive Legal Assistant for the District's Talent Office, testified that his office prepared the information contained in the charges regarding Corbacho-Musngi's absences. Breton acknowledged that Corbacho-Musngi had been granted both consecutive and intermittent FMLA leave during the 2010-2011 and 2011-2012 school years. He also admitted that approved FMLA days cannot be used for purposes of imposing disciplinary action. (Tr. at 40, 51.) Nonetheless, Breton testified that the number of absences contained in the Statement of Charges and supporting documentation include the gross number of absences, i.e., total absences, including leave days pursuant to the parties' collective bargaining agreement as well as approved FMLA leave days. When asked if he could calculate the number of FMLA days included in the absence totals, Breton testified that he could not. (Tr. at 37.) He testified that there are clerks in his office who are charged with reviewing time records and information from the Health Services Department in order to determine whether absences are properly considered approved FMLA leave. While the clerks would have the information as to which absences are properly considered FMLA, that information was not considered in preparing the charges. Nor was that information produced to the Respondent notwithstanding multiple requests.

Jeanne Ramirez, now CIO (Vice Principal) at Elliot Street School, was Corbacho-Musngi's Vice Principal for three years, including the last three years listed in the Statement of Charges. According to Ramirez, District policy requires that employees be given a letter when they reach five absences and again when they reach 12 absences. A meeting is held to discuss the absences. After 18 or more absences, disciplinary action can be imposed. For purposes of disciplinary action, absences do not include personal days or

bereavement leave; they do include sick leave. Ramirez also confirmed that disciplinary action cannot be imposed in connection with FMLA approved absences. She testified that she was provided information as to which absences were approved FMLA leave, but she was not asked to produce this information in connection with this proceeding.

Ramirez was unaware of any letter regarding attendance being issued to Corbacho-Musngi during the 2010-2011 or 2011-2012 school years, notwithstanding that the charges allege excessive absenteeism in those years. Ramirez issued the first letter addressing attendance under the District's policy on December 21, 2012 after six sick days. A meeting was held to discuss absences. (District Exhibit 6.) On January 23, 2013, Ramirez issued a second letter, after 11 sick days. A meeting was held to discuss attendance. (District Exhibit 7.) On May 29, 2013, Corbacho-Musngi was referred for disciplinary action, after 18 or more absences. (District Exhibit 9.) Ramirez did not know what discipline was imposed.[3]

Ramirez testified that in the 2013-2014 school year, the year with the highest number of absences, a long-term substitute qualified to teach the students was retained to teach Corbacho-Musngi's class for the second part of the school year. Ramirez and other teachers all provided assistance to the long term substitute. On direct examination, Ramirez testified that she had no communication with Corbacho-Musngi after February 1, 2014 and that she did not know that Corbacho-Musngi would be absent for the rest of the school year. On cross-examination, however, when shown copies of multiple text messages between Corbacho-Musngi and Ramirez during the period from January 9, 2014 through February 21, 2014, Ramirez confirmed that the text messages were accurate. (Respondent Exhibit 2.)[4]

Corbacho-Musngi testified at length as to the reasons for her absences over this period of time, including the periods for which FMLA leave had been approved. In February 2009, her brother died unexpectedly of heart failure at age 46. In April 2009, her uncle died of brain cancer. In November 2009, her husband died of prostrate cancer at age

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[3] Corbacho-Musngi testified that she worked for three days without being paid as discipline; in other words, she received a fine equal to three-days pay. This is the only discipline she has ever received in connection with absenteeism prior to these tenure charges.

[4] Ramirez' first reaction when shown the text messages after testifying that there was no contact between her and Corbacho-Musngi was "does she have a right to make a copy of my text messages?" (Tr. at 81.)

45. She testified that she and her children watched her husband's health decline due to cancer until his death. The psychological impact of his death was significant, not only upon Corbacho-Musngi but also upon her children, especially her oldest daughter who was ten years old at the time of her father's death. (Corbacho-Musngi is not charged with excessive absenteeism during the 2009-2010 school year.)

Following her husband's death, in 2010 Corbacho-Musngi was diagnosed with severe depression, panic/anxiety attacks and post-traumatic stress. Her daughter was similarly diagnosed. As Corbacho-Musngi was improving, her daughter was not. Notwithstanding individual and family counseling, her daughter's psychological health deteriorated. In early 2012, she discovered that her daughter was cutting herself and in February 2012 her daughter was admitted to a psychiatric ward. Once released, she went to a high intensity outpatient program from March to June 2012.

Thereafter, Corbacho-Musngi began suffering from what was ultimately diagnosed as restless leg syndrome. Her symptoms became especially bad by November 2013. She testified that when she would get ready to go to sleep, her legs would start to kick uncontrollably. As a result, she was unable to sleep. She became so sleep-deprived that she was no longer able to function. Her mother moved in with her to help care for the children. She suffered from loss of memory and balance. She applied for another FMLA leave, but the request was denied, as she was not eligible for another leave. Corbacho-Musngi testified that she tried coming to work from November until January until it became impossible for her to continue teaching due to lack of sleep. Although she was not eligible for FMLA, a leave of absence was granted in January 2014. Upon her return to work on January 28, 2014, Ramirez stopped by her class and seeing her condition, sent Corbacho-Musngi home. She did not return to work for the remainder of the 2013-2014 school year, although as discussed below, Corbacho-Musngi testified she was in contact with Ramirez and the school regarding her absence.

Corbacho-Musngi was diagnosed with restless leg syndrome in January 2014. After trying various treatments over a period of time, the condition is now under control. In April 2014, however, while still suffering the effects of restless leg syndrome, Corbacho-Musngi fell down the stairs in her home. She broke the right side of her jaw and fractured her left cheekbone. She was hospitalized and had surgery. Her mouth was wired shut for a

period of time and she was taking pain medicine. She was bedridden for several months. With her face broken in two places, she experienced "intense headaches and dizziness" and was not able to get around. (Tr. at 138.) In May, she developed an abscess and required another operation. This recurred in July, with a final operation in August 2014.[5] She is now fully recovered.

During this time, Corbacho-Musngi testified that she was unable to come to work. She and Ramirez exchanged text messages throughout January and February 2014 regarding her absences. In addition, she testified that she continued to call Sub-Finder and spoke to Ms. Woijuck, a secretary at the school, about her absences. At one point, after her jaw was wired and she could barely speak, she called the school and spoke to Woijuck. Corbacho-Musngi testified: "It was very hard for [Woijuck] to understand me because I was wired shut, but I told her what was going on and that I wasn't going to be able to make it back for the rest of the year, and she said don't worry about it, that she will put it in and I don't have to call anymore." (Tr. at 161.)

Corbacho-Musngi testified that she did not receive the District's March 28, 2014 and April 4, 2014 letters regarding her absences until May 2014 as she was not residing at the address to which they were sent. Her aunt, who suffers from dementia, was living at this address and had not told her that she received these letters. The letters indicated that she was considered AWOL and directed that she contact the Administrative Operation Services regarding her intent to return to work. (District Exhibit 10.) When Corbacho-Musngi finally received the letters, she asked her mother to drive her to the District offices, where she submitted the medical documentation with respect to her absences. (Respondent Exhibit 5.) This was just prior to her second operation in May 2014 for the abscess. She testified that she had planned to give the documentation to the District when she returned to work; she did not think that she needed to submit the medical documentation all along. When asked whether she thought it advisable to tell the District that she was under a doctor's care during this period, she responded: "You're absolutely right, and I'm sorry that I – again, that was my mistake, and I was just not thinking clearly." (Tr. at 135.)

[5] In October 2014, after she returned to work for the 2014-2015 school year, she had a PICC line inserted in her arm to remedy repeated infections. She missed two days of work, when the line was inserted and removed. She has not had any problem since that time.

Corbacho-Musngi learned during the summer 2014 that Clinton Avenue School was being closed and teachers reassigned. Other teachers told her that she was assigned to the Chancellor Annex. She confirmed this assignment with the school over the summer and reported to the school at the start of the 2014-2015 school year as a preschool 3 teacher assigned to her own class with an assistant. On October 27, 2014 she was advised that she was suspended due to these tenure charges. Corbacho-Musngi testified that if returned to the classroom, she would not have a problem with absenteeism. The issues causing the absences have now been remedied. She is recovered from the surgeries and her restless leg syndrome is now under control; she is not feeling any of the effects of the fall or of the restless leg syndrome. (Tr. at 117.)[6]

Positions of the Parties:

On this record, the District argues: (a) that the Commissioner of Education has long held that chronic and excessive absenteeism may warrant dismissal even where legitimate illness and approved leaves were involved; (b) that this standard has been affirmed by arbitrators; (c) that the District need not prove the adverse impact of chronic absenteeism on students' achievement; (d) that while Corbacho-Musngi's "personal family circumstances over the time since her husband passed away in 2009 have been tragic, the inquiry should not end there" (Closing Memorandum at p. 5); (e) that chronic absenteeism has been held to constitute "incapacity", "unbecoming conduct" and/or "just cause" warranting dismissal; and (f) that the tenure charges and termination should be sustained.

Respondent, on the other hand, contends: (a) that the number of absences alleged in the tenure charges inappropriately include FMLA approved leave, personal days and bereavement days which the District's own witnesses concede cannot be used for discipline; (b) that the tenure charges should be dismissed due to the District's failure to comply with disclosure and discovery obligations, including the failure to produce documentation as to Corbacho-Musngi's FMLA approved leave days; (c) that disciplinary

[6] Respondent also called Mario Cardinale, a former Superintendent in other NJ school districts, as an expert witness. He testified about accommodations that the District might have offered to Corbacho-Musngi and that additional counseling would have been appropriate prior to commencing tenure charges.

action for excessive absenteeism may not be based solely on the sheer number of absences, but should take into account the reasons for the absences; (d) that the "harrowing circumstances" in this case provide "more than ample justification for Respondent's absences during the relevant calendar years" (Closing Memorandum at p. 9); (e) that the District had not imposed an increment withholding, or made any accommodations to assist Corbacho-Musngi, prior to seeking dismissal; (f) that Corbacho-Musngi's observations and evaluations were, by and large, extremely positive, without a negative end of year evaluation during her entire career with the District; (g) that the evidence demonstrates that Corbacho-Musngi "has the ability to be an effective teacher who would benefit her students" (Closing Memorandum at p. 9); (h) that there is no evidence that the District's operations or students were adversely impacted by Respondent's absences; (i) that Corbacho-Musngi was in contact with the school about her absences and was not AWOL; (j) that Corbacho-Musngi has indicated that if returned to the classroom, she will "dramatically improve" her attendance issues (Closing Memorandum at p. 9); (k) that under all of these circumstances, termination is not the appropriate penalty; and (l) that Corbacho-Musngi should be returned to the classroom with a lesser penalty.

Discussion:

On the record before me, including my assessment of witnesses' credibility and the probative value of evidence, I find that the District has established that Corbacho-Musngi engaged in conduct unbecoming her position as a tenured teacher, but termination is not warranted under the particular circumstances of this case. The reasons for these conclusions are set forth below.

First, the absences set forth in the tenure charges for the 2010-11 and 2011-12 school years impermissibly include approved FMLA leave.[7] The District's own witnesses testified that Respondent had approved FMLA leave during these school years and, moreover, that FMLA days cannot be considered in making disciplinary decisions. Significantly, Breton, the person who prepared the information and signed the tenure

[7] The number of days listed also included personal and bereavement days that Ramirez testified cannot be used for purposes of imposing discipline under District policies.

charges, testified that based on the information available at the hearing, he could not determine how many days during those school years were FMLA approved and, therefore, not properly considered for disciplinary purposes. Further, both Breton and Ramirez testified that this information is available, yet the information was not produced to Respondent despite multiple requests and the arbitrator's direct order.[8] Based on the above, therefore, in deciding whether to sustain the tenure charges against Corbacho-Musngi, I will not consider the absences for 2010-11 and 2011-2012.

Second, while not considering the absences for these two years improves Corbacho-Musngi's overall attendance record, it is undisputed that she was absent on 47 days during the 2012-2013 school year and 126 days during 2013-14 school year.[9] Approximately 170 absences over a two-year period is an excessive number of absences. That these absences were due to legitimate reasons does not require dismissal of the tenure charges. As the District states, chronic and excessive absenteeism, even if for legitimate reasons, can warrant imposition of discipline, including discharge. In a case involving 197 absences over a six-year period, one ALJ found that:

> excessive or chronic absenteeism of a tenured employee, even if related to legitimate medical or health problems, has been held to constitute "incapacity," "unbecoming conduct," and/or "just cause," within the meaning of N.J.S.A. 18A:6-10, to warrant dismissal from employment."

The Commissioner of Education upheld this decision in June 2012. *IMO A. Dugan and Jersey City BOE,* 2012 N.J. AGEN LEXIS 249. See also, *IMO Lenore Francis and Jersey City Board of Education, Hudson County, NJ,* Agency Dkt. No. 285-9/12 (Arbitrator Walt De Treux, 1/10/13); *IMO Lisa Rosa – Jersey City BOE,* 2011 NJ AGEN LEXIS 390 (9/1/11); *Camden School District v Rucker,* OAL Docket No. 4327-92 and 6204-92 (12/30/92).

Further, contrary to Respondent's argument, it is not necessary for the District to produce "direct, tangible, evidence that its operations or its students were adversely impacted by Respondent's absences." (Closing Memorandum at p. 10.) As set forth by the

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[8] In so finding, I accept the District counsel's representation that he requested the documents from the District.

[9] This number includes personal and bereavement days, despite Ramirez' testimony that these days are not considered by the District in imposing discipline.

ALJ in *Metallo v Union City Board of Education* (May 12, 2003) aff'd State Board (January 7, 2004):

> It is not necessary for a school district to prove a direct correlation between student achievement and a teacher's attendance to validate concerns about the effect of a teacher's absence on the educational program. As the Commissioner has recognized, '. . . the repeated absences of a teacher from his classroom, however legitimate, will have negative impact on instruction and compromise the basic purpose of the District in the most fundamental obligation of an educator to the student.' (citations omitted.)

Id., at p. 13. See also, *Camden Board of Education v Ricker,* OAL Docket No. 4327-92 and 6204-92 (ALJ Duncan, 12/30/92).[10]

Nonetheless, it is not true that a finding of chronic and excessive absenteeism requires discharge in all instances. In deciding whether discharge is warranted, it is appropriate to consider the reasons for the absences and, more importantly, whether the underlying reasons for the absences have abated such that the pattern of absenteeism will not continue in the future if the teacher is returned to the classroom. *See e.g., School District of the City of Elizabeth, Union County v Ramos,* Agency Dkt No. 261-9/14 (Arbitrator Randi Lowitt, 1/5/15); *Passaic Board of Education v Viani,* OAL Dkt. No. EDU 2535-90, 1991 WL 419896 (ALJ Reiner, 12/9/91); *Board of Education of the Toms River Regional School District, Ocean County v. Marsden,* (OAL Dkt No. EDU 1188-84 (ALJ Tylutki, 8/26/85). As will be discussed more fully below, the circumstances in this case warrant giving Corbacho-Musngi an opportunity to return to the classroom, rather than termination.

Third, Corbacho-Musngi is also charged with being absent without leave ("AWOL") during the 2013-2014 school year. The District has not proven these charges and, therefore, Charge Two must be dismissed. The essence of this charge is that Corbacho-Musngi failed to return to work on January 28, 2014 following an authorized leave of absence,[11] and that she was thereafter absent without notifying the District that she would be absent or the reason for the absence. Corbacho-Musngi, however, testified that she did return to work on January 28, 2014 as required and that when Ramirez came by her

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[10] I note that in this case, a long term licensed substitute teacher was retained to cover Corbacho-Musngi's pre-school class during the spring 2014, covering many of the absences during that school year, reducing some of the negative impact of the absenteeism upon the students.

[11] It is undisputed that Corbacho-Musngi was ineligible for another FMLA leave at this time.

classroom, she told Corbacho-Musngi to go home. This testimony is supported by the fact that the absence on January 28, 2014 is designated as "Administratively Excused." (District Exhibit 4.)

Further, despite Ramirez's testimony on direct-examination that after this date Corbacho-Musngi did not communicate with her regarding her absences, documentary evidence, authenticated by Ramirez, established that Corbacho-Musngi communicated by text message with Ramirez through February 2014. In addition, Corbacho-Musngi testified that she continued to call Sub-Finder and that she called Woijuck to keep the school apprised of her situation and absences. She spoke to Woijuck when her jaw was wired following surgery and told Woijuck that she would not be able to return to school for the remainder of the school year. According to Corbacho-Musngi, Woijuck told her that it was not necessary to continue to call. Significantly, the District provided no evidence to rebut this testimony. That the District hired a long-term substitute for Corbacho-Musngi's classroom also suggests that the District was aware that Corbacho-Musngi would be absent for a prolonged period of time.

The tenure charges also allege that Corbacho-Musngi failed to respond to the March 28, 2014 and April 4, 2014 letters regarding her absence. Corbacho-Musngi acknowledged that she did not timely respond to the letters the District sent, as they were sent to an address where she was not living at the time. When she received the letters, however, she acted promptly to provide medical documentation to the District. Corbacho-Musngi testified that she planned to submit the medical documentation upon her return to school. She admits she was wrong in failing to submit the documentation on an ongoing basis, stating that she was "not thinking clearly" during this period. (Tr. at 135.) While this testimony does not excuse her failure to respond to the letters in a more timely manner or to produce the medical documentation on an ongoing basis, on this record it does not require a finding of AWOL particularly given the unrebutted testimony that Corbacho-Musngi was calling Sub-Finder and communicating with the school as to her situation and her inability to return to school for the remainder of that school year.[12]

[12] I also note that the District apparently did know of her intent to return to school for the 2014-2015 school year. She called the new school during the summer to confirm her assignment and started at the school with

Accordingly, on this record, the District has established that Corbacho-Musngi is guilty of chronic and excessive absenteeism and, therefore, conduct unbecoming as a result of the approximately 170 absences over a two year period, most in 2013-2014. She is not guilty of being AWOL as charged. Charge Two, therefore, is dismissed.

Finally, as to penalty, there are mitigating factors to support a lesser penalty than termination as sought by the District. As a preliminary matter, I note that there is no evidence that Corbacho-Musngi had any attendance issues in the years before her husband's illness and subsequent death in 2009. The evidence also establishes that Corbacho-Musngi's observations and evaluations were satisfactory in prior school years. (Respondent Exhibits 7 and 4.) Further, despite the District's claim of excessive absenteeism over a four year period and the District policy for addressing absenteeism on an ongoing basis, Corbacho-Musngi was disciplined only once prior to tenure charges seeking her dismissal. Corbacho-Musngi did not receive any letters, warnings or discipline prior to the letters Ramirez issued on December 21, 2012 and January 23, 2013 and the subsequent imposition of a three-day fine. Nor was any other discipline imposed, such as increment withholding, after the three-day fine. Indeed, there is little evidence of counseling or progressive discipline.

In addition, Corbacho-Musngi's circumstances were, indeed, "tragic" as described by the District, and "harrowing" as described by Respondent. Her absenteeism problems started with the death of three family members, including her husband, and continued due to the psychological impact of her husband's death on her and her daughter (who required hospitalization and significant care) and then the onset of restless leg syndrome followed by a serious fall resulting in her face being broken in two places. More importantly, however, on this record I am persuaded by Corbacho-Musngi's testimony that the causes of the absences have been addressed and have abated, that she is now able to return to work and that she is confident that she will be able to be regular in her attendance. Significantly, the series of events causing the excessive absenteeism is not likely to recur. It is now several years since the unfortunate death of her husband. The psychological issues she and her daughter faced following his death appear to have abated with treatment and the

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an assigned class at the start of the school year. She continued to work until suspended at the end of October 2014.

passage of time. Following the diagnosis of restless leg syndrome and treatment, the illness is now controlled by medication and she no longer suffers from the adverse effects. Finally, she has recovered from the serious damage incurred by her fall in the spring 2014, which was the cause of a significant number of absences during that school year.

Under all of the circumstances of this case, therefore, with particular focus on the conclusion that it is not likely that the pattern of absenteeism will continue, it is appropriate to provide Corbacho-Musngi with an opportunity to establish that she again can be an effective teacher with regular attendance who will benefit the students in her class and be a credit to the District. Corbacho-Musngi is on notice, however, that should the problem with excessive absenteeism continue, she will likely face additional tenure charges and she may not be given another opportunity to return to the classroom as a District employee.

Although Corbacho-Musngi's employment with the District is not being terminated, her pattern of excessive absenteeism as proven in this case warrants a significant penalty. Accordingly, Corbacho-Musngi shall be suspended without pay from the date of this Opinion and Award through the end of the 2014-2015 school year. Further, she shall not be entitled to back pay for the 120-day period she was suspended without pay pending resolution of these tenure charges. She shall be reinstated to her teaching position at the start of the 2015-2016 school year, with an increment withheld for the 2015-2016 school year.

By reason of the foregoing, I issue the following:

AWARD

a) Charge 1 is sustained to the extent consistent with the findings in this Opinion and Award; by these actions, Elizabeth Corbacho-Musngi engaged in conduct unbecoming a tenured teacher. All other charges are dismissed.

b) For the violation set forth above, the penalty shall be a suspension without pay from the date of this Opinion and Award through the end of this school year, and further reduction in salary equal to the salary withheld during the 120-day suspension period without pay pending resolution of these tenure charges, and,

upon her return, the withholding of a salary increment for the 2015-2016 school year only. The District shall reinstate the Respondent to her teaching position at the start of the 2015-2016 school year.

Dated: May 12, 2015

Melissa H. Biren, Arbitrator

State of New Jersey)

County of Essex)

On this 12th day of May 2015 before me personally came and appeared MELISSA H. BIREN, to me known to be the individual described in and who executed the foregoing instrument and acknowledged to me that she executed the same.

Robert D. Agree
Notary Public

ROBERT D AGREE
ID # 2429835
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires February 8, 2018

160-15

In the Matter of the Tenure Hearing of

Lat Sall,
State-Operated School District
of the City of Paterson,
Passaic County, NJ

Re: Tenure Charges Against Lat Sall
Agency Docket No. 305-10/14

Opinion and Award

Tia Schneider Denenberg, *Arbitrator*

APPEARANCES

FOR THE DISTRICT:

Carol R. Smeltzer, *Assistant General Counsel*
Paterson Public Schools

FOR THE TEACHER:

Albert J. Leonardo, *Counsel for Respondent*
Bucceri & Pincus

BACKGROUND

JOINT STATEMENT OF FACTS AND EXHIBITS
I. Procedural History

1. Respondent began his employment as a teacher with the Paterson Public Schools ("District") on September 17, 2002.

2. Respondent became tenured in his teaching position on September 18, 2005.

3. On October 7, 2014, the District certified tenure charges of unbecoming conduct and/or other just cause for dismissal against Respondent to the Commissioner of Education (See Joint Exhibit J-1 - Tenure Charges, attached hereto) and suspended him without pay effective October 8, 2014.

4. On October 28, 2014, Respondent submitted his answer to the tenure charges to the Commissioner of Education (See Joint Exhibit J-2 - Answer to Tenure Charges, attached hereto).

5. On November 10, 2014, the Commissioner of Education determined that the tenure charges, if true, would warrant dismissal or reduction in salary and assigned this case to hearing before Arbitrator Tia Schneider Denenberg ("Arbitrator Denenberg").

6. A hearing on the tenure charges is scheduled for December 17, 18, and 19, 2014.

II. Facts Agreed to by the Parties

7. For the 2013-2014 school year, Respondent was assigned to the School of Education and Training ("SET") located in the John F. Kennedy Educational Complex ("JFK") as a French teacher.

8. The 2013-2014 school year was Respondent's first year working at J.F.K.

9. Sixth period at JFK began at 12: 14 p.m. as set forth in the school's bell schedule (See Joint Exhibit J-3, "Bell Schedule".)

10. The attendance records, disciplinary referral form and final grades of Y.P. for the 2013-2014 school year are attached hereto as Joint Exhibit J-4.

11. Student O.N. was assigned to Respondent's class for the 2013-2014 school year.
[Joint Exhibit 1]

The Sworn Tenure Charges of Unbecoming Conduct and/or Other Just Cause for Dismissal, contains the following charges:

CHARGE ONE

On or about May 13, 2014, Mr. Sall was involved in a verbal altercation with female student Y.P. After this verbal altercation, Y.P. proceeded to leave the area of the classroom. Mr. Sall pursued her through the hallway, leaving his class unattended. Y.P. then began to walk down a flight of stairs. Mr. Sall shouted at her **"you're dirty and stink, go home and take a shower"** or words to that effect.

As she proceeded down the stairs, Mr. Sall leaned over the railing at the top of the stairs and deliberately spit at her. Mr. Sall behaved in this way in the presence of another student, A.B.

This conduct by Mr. Sall constitutes unbecoming conduct and/or other just cause for dismissal.

CHARGE TWO

Throughout the 2013-2014 school year, Mr. Sall exhibited a pattern of aggressive behavior towards his students and his building principal, Ms. MaryAnn Perotta. The behavior exhibited by Mr. Sall caused Ms. Perotta to become concerned for the safety and well[-]being of his students.

This conduct by Mr. Sall constitutes unbecoming conduct and/or other just cause for dismissal.

CHARGE THREE

Under New Jersey's school laws, specifically N.J.S.A. 18A:30-1, sick leave is defined as:

> [T]he absence from his or her post of duty, of any person because of personal disability due to illness or injury, or because he or she has been excluded from school by the school district's medical authorities on account of a contagious disease or of being quarantined for such a disease in his or her immediate household.

On or about December 11, 2013, in contravention of N.J.S.A. 18A:30-1, Mr. Sall utilized his sick leave to attend a job interview at International High School.

This conduct by Mr. Sall violates the NJ School Laws as well as Board policy and constitutes unbecoming conduct and/or other just cause for dismissal.

CHARGE FOUR

On or about October 31, 2013, Mr. Sall displayed his students' French tests, with their names and scores attached, on a wall in his classroom in violation of the students' privacy rights. Moreover, in an apparent attempt to embarrass and humiliate one student, Mr. Sall wrote the following on the student's test paper which was posted on the wall: "You need to behave better in class. Stop being loud and fighting." Mr. Sall was directed to remove these tests from the wall and he did not comply with this directive.

This conduct by Mr. Sall constitutes unbecoming conduct and/or other just cause for dismissal.

CHARGE FIVE

On or about September 25, 2013, Mr. Sall met with Mr. Suarez, Director of ESL/Bilingual/World Languages, and Ms. Houry Yeganeh, Supervisor of World Languages, regarding his assignment. At that meeting, Mr. Sall demanded a transfer out of John F. Kennedy High School. Mr. Sall told Mr. Suarez and Ms. Yeganeh that he "wants out of the building", that he is "unhappy" and "doesn't want to be there," or words to that effect. Mr. Sall conducted himself in a hostile, belligerent, irrational and insubordinate manner at the meeting. His conduct included making the following threatening comment to Mr. Suarez and Ms. Yeganeh, "I don't want to do anything that's gonna make me flip" or words to that effect. Mr. Sall kept insisting that he "wants out."

Mr. Suarez advised Mr. Sall that there are consequences for his actions and that there would be consequences if Mr. Sall "flipped." Mr. Suarez further advised Mr. Sall that there were no other available French class positions in the district and that he would have to remain where he had been assigned.

This conduct by Mr. Sall constitutes unbecoming conduct and/or other just cause for dismissal.

CHARGE SIX

For the 2012-2013 school year, Mr. Sall was assigned as a French teacher at HARP Academy. On or about February 5, 2013, Mr. Sall requested a transfer from HARP Academy to another school for the upcoming school year. When Mr. Sall requested the transfer, he advised Ms. Maria Santa, Assistant Superintendent, that he would like to transfer to John F. Kennedy High School or, if that was not available, International High School.

For the 2013-2014 school year, the district assigned Mr. Sall to John F. Kennedy High School in accordance with his request. On the first day of school, Ms. MaryAnne Perrotta, principal of the School of Education and Training at John F. Kennedy High School ("SET"), introduced herself to Mr. Sall. As principal of the school/academy to which he was assigned, Ms. Perrotta was Mr. Sall's immediate supervisor. Upon introducing herself, Mr. Sall told Ms. Perrotta that: (a) he doesn't know why he is assigned to JFK; (b) he's very angry about the transfer; (c) he wants to go back to the school he was transferred from and (d) he will go back to the school he was transferred from. Mr. Sall was hostile and inappropriate during this interaction with his new supervisor.

This conduct by Mr. Sall constitutes unbecoming conduct and/or other just cause for dismissal.

CHARGE SEVEN

Charges One through Six are incorporated herein, as if set forth at length. This conduct by Mr. Sall, when viewed as a whole, constitutes an ongoing pattern of unbecoming conduct and/or other just cause for dismissal.

[Joint Exhibit 1]

Conference calls involving the arbitrator and the parties were conducted on November 6, November 14, and November 25, 2014, to discuss preliminary matters before the hearing. The respondent filed several motions, primarily seeking disclosure by the district of contact information (addresses, phone numbers) for potential witnesses, including students and their parents or guardians. The respondent also wished to send a private investigator to contact them directly. After extensive discussion and submissions, the arbitrator adopted the suggestion of the district that the respondent write letters to each prospective student witness for hand-delivery by the school attendance officer to the student's home. The contact procedure respected the privacy of potential witnesses while allowing the teacher a reasonable opportunity to secure witness testimony. Although winter weather occasioned some delay in delivery, several students testified in support of the accused teacher.

The parties were afforded an opportunity to present evidence and argument at the hearings, which were held on December 17 and December 18, 2014. A stenographic record of the hearing was transcribed in two volumes. They are cited herein as Tr. I and Tr. II. The following witnesses testified under oath or affirmation:

For the District (Petitioner):

A. B.,[1] High School Student
Y. P.,[2] High School Student
Joaquin Perez,[3] District Security Officer
Pablo Maute,[4] School Resource Officer
Robert Pleasant,[5] School Resource Officer
James Smith,[6] Executive Director of School Security

For the Teacher (Respondent):

J. L.,[7] High School Student

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[1] A.B. was a twelfth-grade student at the John F. Kennedy Educational Complex, which comprises four specialized schools, at the time of the incident at issue. He is enrolled in Passaic County Community College [Tr. I, p. 26].

[2] At the time of the hearing, Y.P. was in the tenth grade [Tr. I, p. 59].

[3] Joaquin Perez has been the District Security Officer in Paterson for 20 years. He prepared a disc with three files taken from the Kennedy's security system [Tr. I, pp. 98-99, Petitioner Exhibit 1]. He said, "I recorded the incident that happened" [Tr. I, p. 104]. He explained that, although the camera is always on, "If there's no image, it will stop. Can vary from a minute, or two, or three, but as soon as there's movement, it will continue recording again" [Tr. I, p. 100]. The footage is encrypted, and it is not possible to tamper with it.

[4] Mr. Maute joined the Paterson Police Department in 1984 and was promoted to detective in 1989. In 2006 he became a detective sergeant in the major crimes division, serving in that position until his retirement in 2011. He is employed by the Paterson district as a security officer assigned to the Kennedy complex [Tr. I, pp. 110-111].

[5] Mr. Pleasant served in the Paterson Police Department for 25 years, working in the narcotics division, a criminal investigation task force, and the juvenile division [Tr. I, pp. 128-130]. He has been a school resource officer in the Paterson district since September, 2013.

[6] Mr. Smith attended the Paterson Police Academy and served as a police officer in that city for more than 26 years, retiring as a captain. [Tr. I, pp. 157-159]. Captain Smith, as he is still known, is the Executive Director of School Security in the Paterson district, a position he has held for more than 12 years. His duties include developing safety and security plans.

[7] J. L. is a 15-year-old in the second year at the STEM Academy in the John F. Kennedy Educational Complex [Tr. II, p. 8].

T. M.,[8] High School Student
Y. R.,[9] High School Student
Gennaro Tortoriello,[10] Paterson Education Association (PEA) Representative
Eman Hijjawi,[11] Teacher
Omar Khalil,[12] Teacher
Lat Sall,[13] Teacher (Respondent)

At the outset of the hearing, the respondent moved to exclude witnesses from the hearing room when not testifying. The district did not object, except that it wished Captain Smith to stay throughout as well as testify. The district challenged the presence of the union representative, Mr. Tortoriello, who was also on the witness list.

It was determined that Mr. Tortoriello would be testifying mainly about policy issues and that the district had instructed Captain Smith to limit his testimony to the following matters: "the background of the Paterson public schools and community, what our city is like, and why you recommended any charges in this case" [Tr., I, pp. 6-7]. Since neither person would be a fact witness to the central events in the case, the arbitrator permitted both to remain in the hearing room in order to assist the advocates. The respondent, who testified on his own behalf, also remained throughout the hearing, as did his wife. In addition, students, when testifying were accompanied by parents, and several teacher union officials were in attendance.

The evidentiary record was closed at the end of the hearing. Briefs and replies were filed. During the proceeding, the commissioner granted deadline extensions, making the award due on May 20, 2015.

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[8] T. M. is a student in the School of Education and Training at the. Kennedy complex [Tr. II, p. 18].

[9] Y. R. has been a student in the Kennedy complex for three years [Tr. II, p. 22].

[10] Mr. Tortoriello, who is a Special Education resource teacher, has been employed at the Kennedy complex for six years. He has been a PEA building representative and serves on the union's executive board [Tr. II, pp. 27-31].

[11] Ms. Hijjawi has been employed for 14 years as a teacher of Arabic at the Kennedy complex [Tr. II, pp. 46-47].

[12] Mr. Khalil has been employed at the Kennedy complex for 15 years. He is a social studies teacher [Tr. II, pp. 58-59].

[13] The respondent has been employed at the Kennedy complex for 12 years as a teacher of French. He holds a bachelor's degree from Rutgers University and a master's degree in education from Saint Peter's College [Tr. II, pp. 75-77, 108]. He is certified to teach French and psychology, and is provisionally certified as a principal [Respondent Exhibit 2].

DISCUSSION

A number of students and colleagues testified as character witnesses.[14] The issue before the arbitrator is not, however, his overall pedagogical merits but rather his conduct toward a hostile student. In its opening statement, the district leveled the following accusation against the respondent:

> Although the district's tenure charges consist of seven separate charges, the heart of this case is charge number one; specifically, Mr. Sall's gross misconduct in dealing with student Y.P. on May 13, 2014. It is the district's position that Mr. Sall's behavior on that occasion, in and of itself, warrants his removal from his tenured position.
>
> [Tr. I, p. 11]

Charges Two to Seven were subsequently withdrawn [Tr. I, p. 16].

The threshold question in Charge One is whether the teacher directed abusive language at Y.P. and spit at her, as the district has contended. She gave the following account of the incident during her testimony:

> I was going to class and he wouldn't let me in. He came by the door and said I can't come in without going to see the principal. I said, Give me my write-up for I could leave. He said the security guard would take me. I said, Give me my write-up. So I pulled the paper and it ripped. It was the paper and I left. While I was going down the stairs, he went by the railing and said, you dirty, you stink, so go take a shower. So then I spazzed out, like I was upset. Then while I was going down, he spit at me, but I moved.
>
> [Tr., I, p. 66]

She said that when she looked up, she could see spittle coming toward her: "It was too much of a spit to be by accident" [Tr., I, p. 63].

The teacher denies uttering the words attributed to him or spitting. He submitted a written account on the day of the incident:

> Ms. Y., a student in my French I class, walked in late in my classroom and was stopped at the door. I told her that I had filled out a disciplinary referral form for her and she had to go with the security guard to see Mr. Pierce, an administrator who is in charge of discipline. The student said she was not going to see Mr. Pierce, pushed me to re-enter the classroom and ordered me to give her the disciplinary referral. I told Ms. Y. she could not take the disciplinary referral and the normal

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[14] The character witnesses painted a flattering portrait of the teacher. J.L.—"a good teacher....[H]e made sure you understood, but he didn't force it too hard" [Tr. II, p. 11]. T. M.---- "a teacher who likes to teach, who loves his job" [Tr. II, p. 19]. Y.R.—"Energetic, active, very helpful to students when we don't understand.... Even when they're failing, he would try the best to help them pass [Tr. II, p. 23]. Mr. Tortoriello—"an innovative teacher" [Tr. II, pp. 28, 33]. Ms. Hijjawi—"a nice person, very dedicated to his job, very good with his colleagues.... [H]e care[s] about students" [Tr. II , p. 48].

> procedure is to have a security guard escort her to see Mr. Pierce. I stepped out and called the security guard to take the student to Mr. Pierce' office. Ms. Y. started to yell and curse at me, calling me names, insulting both my mother and father. She refused to go with the guard, continued cursing in front of the security guard and walked out. Then, the officer returned to his post after the departure of the student. Ms. Y. came back to my class five (5) minutes later. While I was standing at the door, she snatched the disciplinary referral from me, tore it in two pieces, and continued cursing at me in the hallway. She finally took the stairs to go down and was at least 12 feet away from me when I told her from the staircase that a security guard has to escort her. She replied saying all what I can do is bla, bla, bla, bla, and making fun of how I talk. From the staircase, I told Ms. Y. that she was the one who was doing the incessant bla, bla, bla, bla talk by being both very disrespectful to her teacher and refusing to follow school rules. She accused me of spitting at her while I was talking and said she was going to get me fired.
>
> It is also important to mention that Ms. Y. had previously displayed the same type of behavior and was written up twice by me. I also followed up with two separate phone calls to her mother who apologized for her daughter's behaviors and said she would talk to her. There were also times when she walked out of the classroom super frustrated because I did not let her use her cell phone in class. The next door Special Education teacher has seen Ms. Y. being disrespectful to me in many occasions.
>
> [Respondent Exhibit 8]

A.B., who happened to be alongside Mr. Sall on the stairwell landing, submitted a handwritten description of the incident that is quite different from the teacher's:

> The student went downstairs then the teacher said you are dirty nasty go home and take a shower and he spit on her. Then she came back to upstairs making loud and crying. Teacher said to me that did I see everything what she did.
>
> [Petitioner Exhibit 7]

A.B. repeated this version of events almost verbatim in his testimony at the arbitration hearing: "He say, you are dirty, nasty, and go home and take a shower. Go home and take shower." Then, according to the student witness, the teacher "spit on her. He spit on her" [Tr. I, pp. 27-28].

The teacher disputed A.B.'s accuracy when "he said that he, that he saw Mr. Sall spit, that's wrong." The teacher also challenged the student's description of his language: "You see, those words don't come across my mind at all because I never use them. Never" [Tr. II, p. 121]. He believed that Y.P. was motivated by anger to fabricate the allegation.

The video footage adds some details. Owing to the camera angles and the lack of fine image resolution, it does not show spitting conclusively. However, the teacher is seen bending over the rail with his face down and his shoulders hunched—a position at least consistent with spitting at the female student as she descended the stairs. Approaching the bottom of the stairs, Y.P. looks up and abruptly jogs to her left, as if dodging something falling from above. She again looks up and points her finger as if to confirm the source of what she avoided.

The video shows the girl sweeping by A.B. as she bounded back up the stairs and into the hallway. In passing, he said, she told him that "you are a witness."[15] In the hallway she met Mr. Robinson, the Special Education teacher whom Mr. Sall was later to mention in his post-incident statement. Mr. Robinson provided the following description of the encounter on a K-12 Disciplinary Referral Form:

> While standing on the second floor hallway in front of the library a young lady Y. P. came running towards me. She was angry visually upset. I asked her [what's] wrong. She said to me that "the teacher spat at her he tried to spit on me and told me I was dirty and need to take a shower." The young lady then took off [g]oing down stairs saying she was going to see the principal. The teacher she was complaining about is her French teacher Mr. Sal[l].
>
> [Petitioner Exhibit 7]

The similarity of the two students' accounts is striking. The boy and the girl were not acquainted with each other and lacked an opportunity to coordinate their narratives. Yet the story told to Mr. Robinson closely matched A.B.'s statement and testimony. Furthermore, A.B. was an accidental bystander who had no obvious reason to invent a tale that would inculpate the teacher, since he was not studying French and had no prior dealings with him. A.B. seemed to be genuinely startled by what he characterized as the "bad words" he heard from the teacher [Tr. I, p. 27]. The student's testimony was not impeached during the hearing. The version of events conveyed to Mr. Robinson by Y.P. also deserves to be given weight as form of "excited utterance," a declaration under pressing circumstances whose spontaneity tends to rule out premeditated fabrication. Taken together, these factors compel a finding that the teacher over-reacted to an unruly student in the manner charged.

The arbitrator accepts that Y.P. was a chronic irritant for the teacher. He testified that the interactions with her

> were not positive....They transfer her to my class, and she had disciplinary, many disciplinary problems. I wrote her up many times. I have spoken to her mother, and the behavior didn't change..... [S]he is using the cell phone in the class while instruction is going on. We can't, we cannot have that. We cannot allow that. She used to use profanity in the classroom. You cannot do that. She had, she used to fight kids again inside the classroom, and I said no.... She never cooperated. She didn't want to cooperate at all. I had to, I had to, to keep on going over and over for her, I mean, to do what I wanted her to do.
>
> [Tr. II, pp. 82, 84-85]

Y.P. was disruptive, disrespectful and foul-mouthed, even to the point of accusing the teacher's "beloved deceased mother of being a whore" [Tr. II, p. 90]. Nevertheless, in coping with provocation of that kind, a teacher is obliged to act with restraint and

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[15] A.B.'s answers to questions posed by security officers, titled "Sworn Statement" [Petitioner Exhibit 3].

emotional control. Spitting is a gesture of contempt. It is repulsive, demeaning, and calculated to damage a student's self-esteem, as is suggesting that the student is somehow unclean.

Captain Smith, an experienced law enforcement officer with broad knowledge of the district, testified that the community served by the Kennedy complex consists largely of minorities living in impoverished and crime-ridden neighborhoods. Almost all students qualify for free or reduced-cost lunches. Perhaps half of each freshman class fails to graduate. He thus regards the students as at-risk: "When I say 'at risk,' I mean at risk of dropping out of high school" [Tr. I, p. 161]. He added:

> ...[W]e have a lot of children, students here that are low self-esteem to begin with. After being repeated by numerous witnesses that you're dirty, you stink, go home, take a shower, spitting on them, this kind of like shocks the [conscience] of the community, and myself, also, because I place myself in a situation, how would I feel if that was my child, and how would I react. And based on all those considerations, I felt that Mr. Sall had no place teaching our children here in Paterson.
>
> [Tr. I, pp. 164-165]

The teacher contends that he was never warned against leaving the classroom to follow a hostile student. However, a few months before the May incident (on February 19, 2014) there had been an incident, involving the teacher and another student (O.N.). He had followed the student to the Main Lobby of the building to remonstrate with her, believing that she had misbehaved by throwing books out of a window.[16] Officer Maute testified that she was

> very agitated, and saying, Get him off me. Get him off me.... And I saw Mr. Sall coming down pushing, moving kids away from him, trying to get to the student.... I grabbed Mr. Sall, I said, What are you doing? He keeps walking. And I'm walking along with him. He saying, I'm going to get her. I want to get inside. I said, What? Are you crazy? You want to lose your job?
>
> [Tr. I, p. 117]

Although school authorities did not issue a formal warning or otherwise impose a disciplinary penalty, an Operational Security Team Investigative Report was prepared by Officer Pleasant. It summarized a meeting that was held on February 27:

> ...Mr. Sall and this writer discussed other actions that could have been taken or other actions that should be taken in the future to protect himself and students. Principal Perrotta and Mr. Sall discussed the write up of students (class management) when a student is in noncompliance. All parties discussed actions that should be taken when confronted with a hostile or violent student.

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[16] The teacher's counsel objected to questioning Officer Maute about an incident related to a charge that has been withdrawn. The arbitrator admitted the testimony, however, because it pertained to the issue of whether the teacher had been previously cautioned about his response to disruptive students.

> These actions consisted of teachers submitting an incident report and contacting security to remove violent or hostile students which he did indeed.
>
> As per Principal Perrotta it was suggested that there should be no teacher student contact unless an emergency. Should the identity of the student be obtained the teacher should not pursue a student through the hallways who has voluntarily left the class. It was suggested that the teacher submit an incident to the proper administrators who would then follow-up with disciplinary actions. It was suggested that teachers remain calm as possible when dealing with students who display hostility or anger. In conclusion the meeting ended with all parties in agreement.
>
> [Petitioner Exhibit 6]

Officer Pleasant also testified about the meeting described in the report. The principal, he recalled,

> spoke about other measures that could have been—that could have taken place, what could have been done differently to avoid the situation. This consisted of informing Mr. Sall that he should never have any contact, physical contact, with the student unless it's an extreme emergency or for the safety of a child. It was explained to him that being that he knew the student, he could have just submitted a report and let the administrators handle it as far as if any disciplinary action should be taken place, such as suspensions. He was informed that he should, at no time, follow a student down a hallway for any reason when a student is hostile or upset. It was spoken about, if the student's hostile, upset, the security guard should be notified to remove the student.
>
> [Tr. I, pp. 137-138]

Captain Smith acknowledged that he was unaware of the February incident when he recommended dismissal for the May incident. Even "a one-time isolated incident," he reasoned, "doesn't excuse the fact that it occurred.... [B]ut when I found out later on that there was some type of warning given, then it made my charge even more justified, in my opinion" [Tr. I, pp. 166-167].

The first incident does render the second more serious. The teacher was put on notice in February that leaving the classroom to pursue a misbehaving student through the building was anathema to the principal and the school's security staff.[17] Yet despite the clear words of caution directed at him, the teacher evidently did not accept the message. He implausibly maintained that he was being praised: "They told me, Sall, you did the right thing. Everything that you did was fine." Similarly, he could not recall being told "you cannot follow a student or you cannot do this or that. No, I don't remember that" [Tr. II., pp. 122-123].

Considering Officer Maute's remark about job loss, Mr. Pleasant's suggestions about handling hostile students, and the principal's face-to-face instruction not to pursue students, the teacher had ample reason to know that following Y.P. into the stairwell would be regarded as a deliberate abdication of his responsibilities. He went after the student for

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[17] O.N. was suspended for five days [Petitioner Exhibit 4].

refusing to take the referral form and present herself at the disciplinarian's office, whereas he should have heeded the principal's call to remain calm and turn the matter over to a security officer. Instead, he allowed the guard to return to his post and needlessly followed the student into the stairwell. The teacher disputes what happened in the stairwell, but he plainly left himself vulnerable by placing himself there.

CONCLUSION

For the reasons discussed above, and after considering all arguments and the entire record, the arbitrator finds that the accusation of verbal abuse and spitting (Charge One) has been proven by a preponderance of the evidence and that the teacher therefore engaged in unbecoming conduct. Although Mr. Sall appears to be a capable teacher with multi-lingual skills and good performance reports, by reacting intemperately to an aggressive student in defiance of a clear caution, he gave the district grounds for doubting his self-control. Thus, taking all the circumstances into account, the district has shown just cause for removing the respondent from his tenured teaching position.

Tia Schneider Denenberg
Arbitrator

In the Matter of the Tenure Hearing of

Lat Sall,
State-Operated School District
of the City of Paterson,
Passaic County, NJ

Re: Tenure Charges Against Lat Sall
Agency Docket No. 305-10/14

Award of Arbitrator

The undersigned arbitrator, having been appointed, pursuant to P.L 2012, c 26, to hear and decide the above-captioned matter, awards as follows:

The allegation of unbecoming conduct in Charge One has been proven, affording the district just cause to remove the respondent, Lat Sall, from his tenured teaching position in the Paterson School District.

Tia Schneider Denenberg
Arbitrator

DATED: May 13, 2015

I, Tia Schneider Denenberg, do hereby affirm that I am the individual described in and who executed this instrument, which is my award.

Tia Schneider Denenberg
Arbitrator

State of New York
County of Columbia

On this 13th day of May, 2015, before me personally came and appeared TIA SCHNEIDER DENENBERG, to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed the same.

Ralph Peters Hubbell, Jr.
Notary Public State of New York
No. 4793303
Qualified in Dutchess County
Commission Expires October 31, 2015

161-15

RON RODA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

This matter was remanded to the OAL for consideration of petitioner's explanation for his non-appearance at a scheduled prehearing telephone conference in February 2015. Petitioner had filed a *pro se* challenge of respondent's determination to deny his application for teacher certification after petitioner's certifications in both Pennsylvania and Maryland were revoked in the wake of his plea to several counts of identity theft and forgery in Lancaster County, PA, Court of Common Pleas.

On remand, the ALJ found that: petitioner failed to participate in the February 3, 2015 prehearing conference; his sole excuse was that he was working on the day of the prehearing conference; petitioner failed to provide an argument as to why the actions of the Board of Examiners were incorrect; and accordingly the excuse for his failure to appear was not accepted. The ALJ concluded that petitioner's reason for his failure to appear was not good cause for same, and accordingly, the failure to appear was not excused. Further, the ALJ determined that the respondent acted within its discretion in denying petitioner's application for a teaching cerification. The petition was denied.

Upon review, the Commissioner concurred with the ALJ that the petitioner's explanation did not show good cause for his failure to appear at the OAL hearing. Accordingly, the Initial Decision of the OAL was adopted for the reasons expressed therein, and the petition was dismissed.

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

Issued 5/20/15

OAL DKT. NO. EDU 3575-15
(EDU 9228-14 ON REMAND)
AGENCY DKT. NO. 102-4/14

RON RODA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the explanation provided by petitioner, Ron Roda, did not show good cause for his failure to appear at the hearing at OAL. Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein and the petition is hereby dismissed.[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/20/15
Date of Mailing: 5/20/15

[1] In the Initial Decision, the ALJ states that the file is to be forwarded to the New Jersey State Board of Examiners. In light of the fact that this matter is being dismissed for failure to prosecute, there is no provision that would require the file to be forwarded to the Board of Examiners.

[2] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
FAILURE TO APPEAR
OAL DKT. NO. EDU 03575-15
On Remand of EDU 9228-14
AGENCY DKT. NO. 102-4/14

RON RODA,
Petitioner,
v.
NEW JERSEY STATE BOARD OF EXAMINERS,
Respondent.

Ron Roda, petitioner, pro se

Frederick H. Wu, Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: March 31, 2015 Decided: April 9, 2015

BEFORE **JOSEPH A. ASCIONE,** ALJ:

Petitioner Ron Roda (Roda), brought an emergent relief application to the Commissioner of Education seeking an order from this tribunal and/or the Commissioner compelling respondent, New Jersey State Board of Examiners (SBE) to issue a teaching certification. On November 6, 2013, the Examiner's blocked the certification due to petitioner's June 16, 2005, plea in Pennsylvania, Lancaster County

Court of Common Pleas, to multiple counts of identity theft and forgery. Lancaster County Court of Common Pleas sentenced petitioner to seven years probation, the offenses carried exposure to incarceration for up to seven year. Pennsylvania revoked petitioner's certification on November 15, 2006. Sometime thereafter, petitioner gained employment as a teacher in Maryland. On January 17, 2012, the certification authority in Maryland, based upon the Pennsylvania conviction, revoked petitioner's teaching certification. Petitioner's position is that he entered the plea, against advice of his counsel, to protect his family and in an attempt to save his marriage. Petitioner's wife is the alleged victim of the crimes charged. Petitioner attempted to reapply in Pennsylvania for his teaching certification. Pennsylvania denied the application as the State requires a ten-year passage of time from the date of sentencing to consider expungement of the conviction.

On April 11, 2014, petitioner made an application for emergent relief to the New Jersey State Commissioner of Education. On July 23, 2014, the New Jersey State Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-8.2. A hearing was conducted on July 28, 2014, and an order denying emergency relief was entered on July 29, 2014. On August 27, 2014, the then Acting Commissioner of Education approved the OAL decision, however, the matter was returned to the OAL to conduct a hearing on the merits. On September 3, 2014, the OAL sent petitioner notice of a prehearing telephone conference on February 3, 2015, at 3:30 p.m. Petitioner did not communicate that day with the office of the OAL. On February 4, 2015, petitioner had telephone communication with the OAL and the OAL advised petitioner that his reason for failure to contact the OAL on February 3, 2015, would be required to be in writing. On February 5, 2015, a facsimile transmittal set forth petitioner's reason for failure to appear as his work schedule. Petitioner also expressed confusion as to the requirement for a hearing as New Jersey had reciprocal laws to Pennsylvania. The latter would not consider reinstatement of his teaching license until ten years elapsed after the criminal conviction, which will occur in June of 2015. The OAL marked the file failure to appear and returned it to the transmitting agency. On March 16, 2015, the New Jersey State Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) pursuant to N.J.A.C.

1:1-8.2, and N.J.A.C. 1:1-18.7(a), to ascertain if the ALJ rejected the February 5, 2015, communication of the petitioner as sufficient to excuse the failure to appear pursuant to N.J.A.C. 1:1-14.4(c)(2). The Initial Decision of this date responds to the Commissioner's March 16, 2015, remand.

STATEMENT OF FACTS

The following facts are not disputed, and I **FIND**:

1. On September 3, 2014, the OAL gave petitioner notice of a telephone prehearing conference in OAL DKT NO: EDU 09228-14 on February 3, 2015, at 3:30 p.m..

2. On February 3, 2015, petitioner did not contact the OAL and the OAL could not reach petitioner by phone.

3. On February 4, 2015, at approximately 1:41 p.m., petitioner contacted the OAL and advised of his awareness of the February 3, 2015, telephone conference call but was working (OAL-1). Petitioner also advised he could not facsimile a writing of his reason for missing the telephone conference call as he was at work.

4. On February 5, 2015, the OAL received a facsimile from petitioner advising of his work on February 3, 2015, as the only reason for his failure to appear on February 3, 2015. That same date, the undersigned rejected the petitioner's submission as good cause to excuse the failure to appear on February 3, 2015.

5. Petitioner may be in a position to restore his teaching certification in the State of Pennsylvania, after June 2015. Under the present circumstances, the petitioner nor the undersigned is aware of any exclusion to allow the issuance of a teaching certification prior to that time.

LEGAL DISCUSSION

The OAL provided petitioner a hearing on emergency relief. The OAL denied petitioner's obligation. The OAL has provided petitioner an opportunity to conference the matter to schedule a hearing date. Petitioner failed to participate in said proceeding and his sole excuse was other work. This is direct evidence of his failure to participate to prosecute his claim. He has failed to provide an argument as to why the actions of the Department of Education are incorrect. Accordingly, the undersigned did not accept his excuse for his failure to appear on February 3, 2015.

CONCLUSION

I **CONCLUDE** that petitioner's reason to be excused from his participation on February 3, 2015, at the prehearing telephone conference is not good cause for the failure to appear for said hearing and as a result thereof, pursuant to N.J.A.C. 1:1-14.4(c)(2), petitioner's failure to appear is not excused.

For the foregoing reasons, the jurisdiction of the within matter with the OAL is terminated and the file is to be forwarded to the New Jersey State Board of Examiners. Respondent's determination to deny petitioner's application for a teaching certification is within its discretion, which has been exercised reasonably considering the SBE's concern for the welfare and safety of the students, and public.

ORDER

It is hereby **ORDERED** that petitioner's petitioner is **DENIED** for the unexcused failure to appear on February 3, 2015, pursuant to N.J.A.C. 1:1-14.4(c)(2).

It is hereby **ORDERED** that petitioner's request for relief from the actions of the New Jersey State Board of Examiners is **DENIED** in all respects. This Order disposes of all issues in controversy regarding this matter.

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

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

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

April 9, 2015

DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 4/9/15

Date Mailed to Parties: 4-13-15

lam

APPENDIX

LIST OF WITNESSES

For Petitioner:

None

For Respondent:

None

LIST OF EXHIBITS

For OAL:

OAL-1 E-mail regarding contact with petitioner on February 4, 2015.

162-15

JENNIFER JORDAN	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTH HUNTERDON-VOORHEES REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY, RICHARD BERGACS, MICHAEL HUGHES, CHARLES SHADDOW AND PATRICIA RALEIGH,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner – a non-tenured guidance counselor formerly employed by the respondent Board – appealed the non-renewal of her contract following her notification via hand-delivered letter dated May 8, 2014 that the Superintendent would recommend against her renewal for the 2014-2015 school year. The petition was filed on August 11, 2014. In lieu of an answer, the Board filed a motion to dismiss the petitioner's complaint, asserting that the appeal was time-barred pursuant to *N.J.A.C.* 6A:3-1.3(i). The petitioner asserted that the May 8, 2014 letter was a Rice notice of the recommendation to the Board for formal action, and not a final action within the meaning of *N.J.A.C.* 6A:3-1.3(i). The petitioner further contended that the Superintendent's recommendation at the May 13, 2014 Board meeting was the final action in this matter, and therefore the within petition was timely filed.

The ALJ found, *inter alia*, that: the time for filing a petition is clearly set forth at *N.J.A.C.* 6A:3-1.3(i), which provides that a petition of appeal before the Commissioner must be filed no later than the 90th day from the date of receipt of the notice of a final order or ruling; pursuant to *N.J.S.A.* 18A:27-4.1(b), a non-tenured employee who is not recommended for renewal by the superintendent is considered non-renewed without any action by the board of education; in this matter, the Board took no action with regard to petitioner's non-renewal at the May 13, 2014 meeting or thereafter; case law has consistently determined that the ninety-day limitations period commences with the first written notice. The ALJ concluded that the within petition was not timely filed pursuant to *N.J.A.C.* 6A:3-1.3(i), and the petitioner has not set forth any compelling reason to relax the timely filing requirement. Accordingly, the ALJ granted the Board's motion for summary decision, denied petitioner's cross-motion, and dismissed the petition.

Upon careful review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter for the reasons stated therein, and dismissed the petition.

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

May 29, 2015

162-15

OAL DKT. NO. EDU 11825-14
AGENCY DKT. NO. 218-8/14

JENNIFER JORDAN	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTH HUNTERDON-VOORHEES REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY, RICHARD BERGACS, MICHAEL HUGHES, CHARLES SHADDOW AND PATRICIA RALEIGH,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL), along with the parties' exceptions filed in accordance with *N.J.A.C.* 1:1-18.4, have been carefully reviewed.

In her exceptions, petitioner reiterates and recasts the arguments she advanced at the OAL, which do not warrant additional discussion here. In its reply exceptions, respondents maintain that – as a threshold issue – petitioner's appeal was untimely filed and therefore should be dismissed.

Upon full consideration of the record, the Commissioner concurs with the Administrative Law Judge that the instant petition is appropriately dismissed because it was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i). The Commissioner likewise concurs that petitioner has failed to set forth any compelling reason to relax the timely filing requirement.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons stated therein, respondents' motion for summary decision is granted, petitioner's cross-motion is denied, and the petition of appeal is hereby dismissed.[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/20/15

Date of Mailing: 5/20/15

[1] Because petitioner's claim is barred on procedural grounds, the Commissioner notes that no opinion on the merits of the appeal is herein expressed or should be inferred.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 11825-14
AGENCY DKT. NO. 218-8/14

JENNIFER JORDAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE NORTH HUNTERDON-VOORHEES REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY, ET AL.,
Respondents.

John R. Lanza, Esq., for petitioner (Lanza & Lanza, attorneys)

Rita F. Barone, Esq., for respondents (Purcell, Mulcahy, Hawkins, Flanagan & Lawless, attorneys)

Record Closed: January 16, 2015 Decided: March 2, 2015

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondents, Board of Education of the North Hunterdon-Voorhees Regional High School District, et al., have moved, in lieu of Answer, to dismiss petitioner's complaint asserting that the petition is time barred pursuant to N.J.A.C. 6A:3-1.3(i). Petitioner cross moved for summary decision that respondent school board's action to not renew the petitioner's employment contract was improper.

The original Petition of Appeal was filed with the Department of Education on August 11, 2014. The Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on September 16, 2014. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The parties filed several briefs in support of the motion and cross motion and the record closed on January 16, 2015.

FACTUAL DISCUSSION

This matter arises from the decision of the Superintendent not to renew Jordan's contract. She had been employed as a guidance counselor by the Board from January 26, 2011 to June 30, 2014. By letter dated May 8, 2014, petitioner was informed that the Superintendent would recommend against renewal of her employment with the Board of Education for the 2014-2015 school year. This letter was signed by JoAnn F. Keffer, Director of Human Resources, and hand delivered to petitioner on May 8, 2014. The letter further advised petitioner that should any discussion be needed, the exchange will take place in executive session at the Board of Education meeting scheduled for May 13, 2014, unless petitioner advises the Board in writing of her desire for a public discussion. On May 13, 2014, petitioner, through her attorney, hand delivered a letter to the Board of Education outlining her position that she should be rehired for the 2014-2015 school year and requesting that the Board discuss the matter in public. Petitioner appeared at the May 13, 2014 meeting and addressed the Board of Education during the public portion of the meeting. The Board of Education took no formal action on the Superintendent's recommendation at the May 13, 2014 meeting or

thereafter. Petitioner filed her petition with the Commissioner of Education on August 11, 2014. There is no assertion that petitioner is a tenured employee.

LEGAL ANALYSIS AND CONCLUSION

In support of the motion, respondents contend that petitioner was notified of the non-renewal of her contract by letter dated May 8, 2014, and that the petition was filed more than ninety days after receipt thereof. Moreover, there is no reason for relaxation of the ninety-day time limit.

Petitioner maintains that the letter dated May 8, 2014, was not the final action of the School District. Petitioner requested a public discussion before the Board and she was granted an opportunity to discuss her non-renewal at the Board of Education meeting on May 13, 2014. Petitioner maintains that the ninety-day period begins with the Superintendent's recommendation to the Board of Education on May 13, 2014, and that relative to this date the filing of the petition was timely. Thus, the issue is whether the ninety-day period in which to file the petition began with receipt of the May 8, 2014 letter, or as of the May 13, 2014 Board of Education meeting.

N.J.A.C. 1:12-5, governing motions for summary decision, permits early disposition of a case before the case is heard if, based on the papers and discovery which have been filed, it can be decided "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:12-5(b). The provisions of N.J.A.C. 1:12-5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. To survive summary decision, the opposing party must show that "there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. Failure to do so entitles the moving party to summary decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995).

Moreover, even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving

party] must prevail as a matter of law." Id. at 536. This tribunal is required to do "the same type of evaluation, analysis or sifting of evidential materials as required by Rule 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial." Id. at 539-540. Like the New Jersey Supreme Court's standard for summary judgment, summary decision is designed to "liberalize the standards so as to permit summary [decision] in a larger number of cases" due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Id. at 539 (citation omitted).

There is no genuine issue as to any material fact in this matter in relation to the time limit in N.J.A.C. 6A:3-1.3(i). The material facts are as follows:

1. Petitioner was employed by respondents as a guidance counselor during the 2013-2014 school year and prior thereto.

2. By letter dated May 8, 2014, Director of Human Resources JoAnn F. Keffer advised petitioner that the Superintendent will recommend against renewal of her employment with the Board of Education for the 2014-2015 school year.

3. The May 8, 2014 letter was hand delivered to petitioner on May 8, 2014.

4. Petitioner requested an opportunity to discuss the matter with the Board of Education in public at the May 13, 2014 meeting. This request was granted.

5. The Board of Education took no formal action on the Superintendent's recommendation at the May 13, 2014 meeting or thereafter.

6. Petitioner filed her petition with the Commissioner of Education on August 11, 2014.

The applicable regulation is N.J.A.C. 6A:3-1.3(i), which provides in pertinent part as follows:

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

The ninety-day limitation period has been upheld by the Supreme Court of New Jersey as "a fair and reasonably-necessary requirement for the proper and efficient resolution of disputes under the school laws." Kaprow v. Board of Educ. of Berkeley Tp., 131 N.J. 572, 582 (1993). The Court further stated as follows:

> The limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration. Because education disputes frequently involve conflicting claims to one teaching position, the remedy is to award the prevailing party the position with back pay. The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. Ibid.

Petitioner asserts that the May 8, 2014 letter was a Rice notice of the recommendation to the Board for formal action and not a final action within the meaning of N.J.A.C. 6A:3-1.3(i). See Rice v. Union County Regional School Bd. Of Ed., 155 N.J. Super. 64 (App. Div. 1977). In petitioner's view, the Superintendent's recommendation at the May 13, 2014 meeting was the final action in this matter. N.J.S.A. 18A:27-4.1(b) states, in pertinent part:

> A board of education shall renew the employment contract of a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call of the majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons. A non-tenured officer or employee who is not recommended for renewal by

> the chief school administrator shall be deemed non-renewed.

Pursuant to N.J.S.A. 18A:27-4.1(b), a non-tenured employee who is not recommended for renewal by the superintendent is considered non-renewed without any action by the board of education. In this matter, the Board of Education took no action with regard to petitioner's non-renewal either at the May 13, 2014 meeting or thereafter.

The ninety-day period commences when a district employee "knew or should have known" that he or she was not going to be offered a new contract for the following academic year. Nissman v. Board of Educ., 272 N.J. Super. 373, 379 (App. Div.) certif. den., 137 N.J. 315 (1994). Various school law cases address a situation where a teacher is given written notice of non-renewal of a contract for the following school year and then tries some means other than an appeal to the Commissioner to persuade the local school board to change its determination. The teacher typically contends that subsequent action in regard to the effort to change the determination constitutes the action which commences the ninety-day period. However, the consistent determinations are that the first written notice begins the ninety-day limitations period. See Pacio v. Lakeland Reg'l High School Dist. Bd. of Educ., 1989 S.L.D. 2060, (the first written communication provided to a staff member of an action by the Board initiates the 90-day timeline); Wise v. Bd. Of Ed. Of the City of Trenton, decided by the Commissioner September 11, 200, aff'd State Bd. January 4, 2001 (when a teaching staff member receives notice that his contract will not be renewed is when the 90-day period is initiated). See also LeMee v. Bd. Of Ed. Of the Village of Ridgewood, 1990 S.L.D. 663, 667, wherein the Commissioner concurred that the day petitioner received notice that her contract was not renewed was the date that the ninety-day timeline commenced, notwithstanding the request to appear before the Board of Education to try to convince the board to change its decision and offer a contract of employment.

In this case, the notice of non-renewal was issued in accordance with N.J.S.A. 18A:27-10, which provides as follows:

> On or before May 15 in each year, each non-tenured teaching staff member continuously employed by a board of education since the preceding September 30 shall receive either
>
> a. A written offer of a contract for employment from the board of education for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or
>
> b. A written notice from the chief school administrator that such employment will not be offered.

This section requires written notice that employment will not be offered for the next school year by May 15. Written notice pursuant to this section certainly should alert the non-renewed teacher to the consequences. While the May 8, 2014 letter received by petitioner in this case was signed by the Director of Human Resources and not the chief school administrator, there is no requirement under N.J.A.C. 6A:3-1.3(i) that the requisite notice that triggers the ninety-day limitations period come from the chief school administrator.

The first written notice was the letter dated May 8, 2014, advising petitioner that her contract would not be renewed for the 2014-2015 school year. Petitioner received this letter on May 8, 2014. The petition in this matter was filed on August 11, 2014, which was more than ninety days after May 8, 2014. Therefore, I **CONCLUDE** that the petition in this matter was not filed within the ninety-day time limit set forth in N.J.A.C. 6A:3-1.3(i).

Rules may be relaxed where strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice. N.J.A.C. 6A:3-1.16. An example would be where there is a compelling public interest. DeMaio v. New Providence Board of Education, 96 N.J.A.R.2d (EDU) 449, 453. Petitioner contends that an extension of time in which to file her petition should be granted pursuant to N.J.A.C. 12:20-3 which provides, in pertinent part, that a late appeal shall nevertheless be considered if the filing was delayed for good cause. Good Cause is defined as

where the delay was due to circumstances that were not reasonably foreseeable or were beyond the petitioner's control. N.J.A.C. 12:20-3(i).

Petitioner asserts that the May 8, 2014 letter was misleading and should be considered a Rice notice as opposed to a notice of non-renewal. In Suarez v. State-Operated School District of the City of Jersey City, Hudson County, 2005 N.J.AGEN LEXIS 533 p. 7 OAL Dkt. No. EDU 11077-2004, Agency Dkt. No. 218-8/14 (Initial Decision September 13, 2005 (Commiss'r Dec. October 28, 2005) the commissioner ruled that the ninety-day period commenced when the petitioner received notice, prior to any action by the board of education, indicating that the superintendent had decided not to renew her contract. This letter was not signed by the superintendent and it preceded any formal action by the board. The commissioner found that "the ninety-day period commences when a teacher knows or should have known that he or she will not be offered a contract for the next year. Id. at Page 4. Here, petitioner knew or had reason to know that her employment would not be renewed upon receipt of the May 8, 2014 letter. Petitioner has not advanced a compelling public interest or good cause sufficient to relax the ninety-day time limit in N.J.A.C. 6A:3-1.3(i), and there does not appear to be any reason to do so.

Based upon the above, I **CONCLUDE** that petitioner failed to file her petition within the ninety-day time limit in N.J.A.C. 6A:3-1.3(i) and that therefore the petition in this matter should be dismissed.

Accordingly, it is **ORDERED** that:

1. Respondents' motion for summary decision is **GRANTED;**

2. Petitioner's cross motion is **DENIED;** and

3. The petition in this matter is **DISMISSED.**

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

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

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

March 2, 2015
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: March 2, 2015

Date Mailed to Parties: March 2, 2015

cmo

163-15R

OAL DKT. NO. EDU 4517-15
(EDU 8005-14 ON REMAND)
AGENCY DKT. NO. 117-5/14

Y.P., on behalf of minor child, L.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, GLOUCESTER COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record, settlement agreement (Agreement), and Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed – mindful of the Commissioner's March 27, 2015 determination that the prior Agreement submitted did not comply with *N.J.A.C.* 6A:3-1.13(d) as it was neither signed by the Board's attorney, nor contained a copy of the Board's resolution approving the settlement and designating the Superintendent to sign the Agreement on its behalf. Since the file now contains a copy of an April 1, 2015 Board resolution approving the settlement and designating the Superintendent to sign the Agreement on its behalf, the Commissioner can approve the within Agreement in its present form.

Accordingly, the Initial Decision recommending approval of the parties' settlement as the final decision in this matter is hereby adopted, and the matter is dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/20/15
Date of Mailing: 5/20/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 04517-15
AGENCY DKT. NO. 117-5/14

Y.P. ON BEHALF OF L.P.,
Petitioner,
v.
TOWNSHIP OF MONROE BOARD OF EDUCATION, GLOUCESTER COUNTY,
Respondent.

Y.P., petitioner, pro se

Katrina Geary, Esq., for respondent (Trimble & Armano, attorneys)

Record Closed: April 21, 2015 Decided: April 24, 2015

BEFORE **SARAH G. CROWLEY**, ALJ:

This matter was transmitted to the Office of Administrative Law on April 1, 2015, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement, and have prepared a Settlement Agreement, indicating the terms thereof, which is attached and fully incorporated herein, (J-1).

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures, as well as the certified minutes from the Board's meeting approving the settlement.

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

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

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

April 24, 2015
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: 4-27-15

Date Mailed to Parties: 4-27-15

/mel

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 Settlement agreement, received April 21, 2015

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 Settlement agreement, received April 21, 2015

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OFFICE OF ADMIN LAW

TRIMBLE & ARMANO
By: Katrina M. Geary, Esquire
Attorney ID No.: 011382011
Washington Professional Campus
900 Route 168, Suites B1- B2
Turnersville, NJ 08012
Phone: (856) 232-9500
Attorneys for Respondent,
Monroe Township Board of Education

Y.P. on behalf of minor child, L.P.,

Petitioner

vs.

BOARD OF EDUCATION OF MONROE TOWNSHIP (GLOUCESTER COUNTY)

Respondent.

OFFICE OF ADMINISTRATIVE LAW
STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

Agency Ref. No.: 117-5/14

OAL Docket No.: EDU 8005-14

SETTLEMENT AGREEMENT & RELEASE

THIS SETTLEMENT AGREEMENT AND RELEASE (hereinafter "this Agreement") is made and entered this 28 day of January, 2015, by and among Yvette Parker ("Y.P.") on behalf of her minor child, Lamar Parker (hereinafter "L.P."), and the Monroe Township Board of Education.

Trimble & Armano
Attorneys at Law
900 Route 168
Suites B1- B2
Turnersville, NJ 08012
856-232-9500

WHEREAS, Y.P. is the parent and/or legal guardian of L.P.; and

WHEREAS, at all times relevant hereto, L.P. was a student in the Monroe Township Public Schools administered by the Monroe Township Board of Education; and

WHEREAS, Y.P., on behalf of L.P., filed a Petition of Appeal with the State of New Jersey, Department of Education; and

WHEREAS, no hearing has taken place and no decision has been issued in this action; and

WHEREAS, the parties have resolved amicably all differences related to the subject petition and wish to terminate and end the litigation related to the subject petition except as may be created under this Agreement;

NOW THEREFORE, in consideration of the foregoing, the mutual covenants and promises hereinafter contained, and for good and valuable consideration the receipt and sufficiency of which are hereby acknowledged by each party to the other, Y.P., on behalf of L.P. and the Monroe Township Board of Education, each intending to be legally bound hereby, covenant and agree as follows:

1. Terms. Mr. Charles M. Earling, Superintendent of Monroe Township Public Schools on behalf of the Monroe Township Board of Education has agreed to reduce L.P.'s disciplinary record from ten (10) 3-7 school assignments to five (5) 3-7 school assignments for the April 16, 2014 date of incident.

2. Release.

(a) In consideration of the undertakings and promises hereunder, Y.P., on behalf of L.P., hereby unconditionally releases and forever discharges Monroe Township Board of Education and its successors assigns, from any and all claims for fees and costs, from each and every action, charge, claim, right, liability or demand of any kind or nature identified in the subject petition.

Trimble & Armano
Attorneys at Law
900 Route 168
Suites B1- B2
Turnersville, NJ 08012
856-232-9500

(b) This Release shall not include any claims not specifically or implicitly raised in the subject petition.

(c) Nothing contained herein shall be interpreted as preventing the parties from filing a lawsuit to enforce the terms of this Agreement.

3. Dismissal With Prejudice. Y.P., on behalf of L.P., agree that the subject petition shall be dismissed with prejudice and that Petitioner will cooperate with Respondent in drafting and executing any additional documentation required by the Court to effectuate the dismissal of the subject petition.

4. Confidentiality. In consideration of this Agreement, all parties agree and acknowledge that the terms of this Agreement are intended to be confidential, and all parties agree not to disclose directly or indirectly any of the terms of this Agreement, or the negations leading to the execution of this Agreement to any person not a party to this Agreement other than as follows: to (1) a party's attorney, for the sole purpose of obtaining legal advice; (2) a party's accountant, and/or financial advisor, for the sole purposes of obtaining accounting or financial advice; (3) such government officers, including courts or equivalent forums, as may be required by law, or any other disclosures as otherwise required by law; and (4) as might be required by defendants under New Jersey Open Public Records, or other laws or regulations that require Public School Districts to announce or otherwise publish the terms of the settlement.

Similarly, Respondent, Monroe Township Board of Education may additionally make disclosures as follows: (1) to the full Board of Education; (2) to the Board of Education Solicitor; (3) any current or future insurers if required to identify claims

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Attorneys at Law
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Suites B1- B2
Turnersville, NJ 08012
856-232-9500

and/or loss history; (4) to the extent any portions of this settlement must be made a part of public record under New Jersey or Federal Law; and (5) any such government officers, as may be required by law.

Irrespective of the language above, it is expressly agreed by the parties that all personal identifiers, including inter alia, name, birth date, or social security number, will be redacted from any information required to be disclosed by a court or pursuant to other state or federal law.

5. **No Admissions**. This Agreement is not and shall not in any way be construed to be an admission by MONROE TOWNSHIP BOARD of EDUCATION that it has acted wrongfully and/or illegally in any manner with respect to Y.P. and/or L.P., and the settlement of this matter shall not be construed by any person or in any court, agency or tribunal whatsoever as a present or past admission of liability.

6. **Amendments**. This Agreement may not be modified, altered, amended, changed, waived or terminated, except pursuant to a writing signed by both parties.

7. **Entire Agreement**. This writing contains the entire agreement of the parties hereto with respect to the subject matter thereof, and no agreements, promises, covenants, representations, warranties or indemnities have been made, given or relied upon by any of the parties hereto, other than those that are expressly herein set forth.

8. **Voluntariness**. All parties agree that they have each had an opportunity to review this agreement with their respective attorneys. They further agree that they enter into this agreement voluntarily.

Trimble & Armano
Attorneys at Law
900 Route 168
Suites B1- B2
Turnersville, NJ 08012
856-232-9500

9. **Counterparts.** This agreement may be signed by the parties in counterparts on separate copies of the Agreement and all signature pages shall be incorporated into the parties' Agreement as if all the signatures are affixed on one (1) page.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement effective as of the date first hereinabove written.

Witnessed or Attested By:

Maureen Hobson

Yvette Parker

YVETTE PARKER, *Pro Se Petitioner*

STATE OF NEW JERSEY :
: §
COUNTY OF GLOUCESTER :

I certify that on January 28, 2015, YVETTE PARKER, personally came before me and acknowledged under oath, to my satisfaction, that this person: (a) is/are named in and personally signed this document; and (b) signed, sealed and delivered this document as his/her act and deed.

Notary Public of New Jersey

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OFFICE OF ADMINISTRATIVE LAW

Trimble & Armano
Attorneys at Law
900 Route 168
Suites B1- B2
Turnersville, NJ 08012
856-232-9500

Witnessed or Attested By:

Lisa Schulz
Business Administrator/
Bd. Secretary

Charles M Earling

CHARLES M. EARLING,
Superintendent of Monroe Township
Public Schools

STATE OF NEW JERSEY :
: §
COUNTY OF GLOUCESTER :

I certify that on 2/3/, 2015, CHARLES M. EARLING, Superintendent of Monroe Township Public Schools, personally came before me and acknowledged under oath, to my satisfaction, that this person: (a) is/are named in and personally signed this document; and (b) signed, sealed and delivered this document as his/her act and deed.

Notary Public of New Jersey
Katrina M. Geary, Esquire
Attorney-At-Law of the State of New Jersey.

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Attorneys at Law
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Monroe Township Public Schools

MAPLE GROVE ADMINISTRATION BUILDING
75 E. ACADEMY STREET
WILLIAMSTOWN, NJ 08094
(856) 629-6400 • Fax (856) 262-2499

CHARLES M. EARLING
Superintendent of Schools
ANTHONY T. PETRUZZELLI, Ed.D.
Assistant Superintendent/Elementary
LISA SCHULZ
Business Administrator/Board Secretary
RALPH E. ROSS, SR.
Human Resources
JOHN L. BERSH, Ed.D.
Supervisor of Special Services

April 14, 2015

CERTIFIED BOARD MINUTES

At the April 1, 2015 regular meeting of the Monroe Township Board of Education, the Board took the following action:

A motion by Mr. Hamilton, seconded by Mr. Ayres, to grant approval of the settlement agreement on the matter of Y.P. o/b/o L.P. vs MTBOE and to designate the Superintendent to execute the agreement on behalf of the MTBOE.

The motion was carried by a unanimous roll call vote.

Lisa Schulz
Business Administrator/Board Secretary

SEAL:

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OFFICE OF ADMIN LAW

164-15

OAL DKT. NO. EDU 3686-15
(ON REMAND NO. EDU 2793-13)
AGENCY DKT. NO. 9-1/13

BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, MIDDLESEX COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF JAMESBURG, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the Settlement Agreement (Agreement), and the Initial Decision on Remand of the Office of Administrative Law (OAL), have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. On January 22, 2015, the Commissioner remanded this matter to OAL based upon a determination that the prior settlement agreement recommended for adoption by the Administrative Law Judge did not include the requisite approval from each Board of Education – as required by *N.J.A.C.* 6A:3-1.13(d).

Upon review of the revised record on remand, the Commissioner finds that the deficiencies have been corrected and that the Agreement contains the requisite Board approvals. Therefore, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/20/15
Date of Mailing: 5/20/15

* This decision may be appealed to the Superior Court, Appellate Division pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03686-15

AGENCY DKT. NO. 9-1/13

ON REMAND

OAL DKT. NO. 02793-13

BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, MIDDLESEX COUNTY,

Petitioner,

v.

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

Respondent.

Mary H. Smith, Esq., for petitioner

Nathanya G. Simon, Esq., for respondent (Schwartz, Simon, Edelstein & Celso, attorneys)

Record Closed: April 1, 2015 Decided: April 8, 2015

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

This case was remanded to the Office of Administrative Law on February 26, 2013, because the Initial Decision did not contain copies of the board resolution for each board of education. Both board resolutions are now attached. Having reviewed

the board resolutions, together with the settlement agreement, which is again attached, I **FIND** that the parties have voluntarily agreed to settle this case as evidenced by the signature of the president of the board of education for Jamesburg on the settlement agreement, the signature of the president of the board of education for Monroe on the settlement agreement, the signature of the county superintendent of schools for Middlesex County on the settlement agreement, the signature of the board secretary for Jamesburg on its board resolution, and the signature of the board secretary for Monroe on its board resolution.

Having found that the parties have voluntarily agreed to settle this case, I **CONCLUDE** that the settlement agreement, together with the board resolutions, fully dispose of all issues in controversy, and are consistent with law.

I also **CONCLUDE** that the settlement agreement, together with the board resolutions, meet the requirements of N.J.A.C. 1:1-19.1, and that the settlement agreement, together with the board resolutions, should be approved.

Having approved the settlement agreement, I **ORDER** that the parties comply with the terms of the settlement agreement and that these proceedings be concluded.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for his consideration.

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

4/8/15
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: 4-10-15

Date Mailed to Parties: APR 10 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

dr

Agreement

THIS AGREEMENT made on this 23 day of October, 2014, between the Jamesburg Board of Education in the County of Middlesex in the State of New Jersey (hereinafter referred to as "Jamesburg") and the Monroe Township Board of Education in the County of Middlesex in the State of New Jersey (hereinafter referred to as "Monroe");

WHEREAS, Jamesburg sends its students to the high school of Monroe ("Monroe Township High School" or "High School"); and

WHEREAS, the parties have executed an Agreement made as of March 2011 regarding tuition due from Jamesburg to Monroe; and

WHEREAS, Monroe's certified tuition calculation includes an allocation of general fund expenditures as well as an allocation of annual interest charges on the bond indebtedness relating to the construction of the Monroe Township High School; and

WHEREAS, Jamesburg has alleged that it is unable to pay the arrearages in tuition it owes to Monroe and has disputed this amount; and

WHEREAS, Monroe has filed a Petition of Appeal with the Commissioner of Education, Agency Ref. No. 9-1/13, OAL Dkt. No. EDU02793-2013N, alleging that Jamesburg owes past due tuition to Monroe; and

WHEREAS, the matter is pending in the Office of Administrative Law; and

WHEREAS, the parties desire to amicably resolve the dispute.

W I T N E S S E T H:

NOW THEREFORE, in consideration of the agreements, covenants and conditions herein contained, the parties agree as follows:

1. The parties acknowledge that the certified tuition rate used by Monroe for calculating the actual tuition rate and the "Current Indebtedness" includes an allocation of general fund expenditures as

well as an allocation of annual interest charges on the bond indebtedness relating to the construction of the Monroe Township High School.

2. Jamesburg acknowledges that: (1) it owes past due tuition to Monroe for the years 2011-12 and 2012-13, $615,213.00 and $333,898.00, due in the 2013-14 and 2014-15 school years respectively; and (2) it may owe additional tuition for the 2013-2014 and 2014-2015 school years (collectively the "Current Indebtedness"). If the tuition amount due from Jamesburg continues to decrease as shown in the trend from the 2011-12 and 2012-13 school years, the parties anticipate that the certified tuition for the 2013-14 school year could decrease from the 2012-2013 school year and Monroe may eventually owe Jamesburg a credit in which case Monroe may apply any such credit against the Current Indebtedness.

3. Jamesburg acknowledges that it has received a school warrant demand from Monroe for payment of the Indebtedness.

4. Jamesburg agrees to pay the Current Indebtedness owed to Monroe upon the terms set forth in this Agreement.

5. The parties anticipate that the High School tuition rate will decrease in future school years, because the High School costs are anticipated to increase slightly and enrollment is anticipated to steadily increase, thus driving the tuition rate per pupil down. The parties acknowledge and agree that in the event the change in the High School tuition rate does not result in Jamesburg's ability to pay the Current Indebtedness in a seven (7) year timeframe, Monroe may re-file its Petition of Appeal in accordance with Paragraph 9 below.

6. The State Certified Tuition and the NJ Department of Education budget tuition figures for the High School are set forth as follows:

YEAR	STATE CERTIFIED TUITION	DOE BUDGET TUITION (This DOE software calculation does not include bond interest cost)
2007-08	$ 15,990.00	$ 13,704.00
2008-09	$ 17,957.00	$ 13,893.00
2009-10	$ 17,965.00	$ 14,126.00
2010-11	$ 17,363.00	$ 14,691.00
2011-12	$ 16,564.00	$ 16,107.00
2012-13	$ 15,900.00	$ 15,264.00
2013-14	N/A	$ 14,685.00
2014-15	N/A	$ 14,291.00

7. Jamesburg agrees to budget and pay to Monroe the Current Indebtedness on the terms as set forth in this Agreement until the Current Indebtedness is satisfied. Jamesburg shall pay $14,291.00 per student for 267 students for a total payment of $3,815,697 each school year even if Monroe's estimated tuition rate and/or Jamesburg's estimated number of students attending the High School in any school year is projected at a lesser amount. Monroe shall apply any difference between the $3,815,697 and the actual total tuition amount owed by Jamesburg to Monroe, as certified by the state from the A4-1/A4-2 tuition calculation, to the Current Indebtedness. In the event the estimated per pupil tuition rate is higher than $14,291.00 in any school year and/or in the event the estimated number of students attending the High School in any school year is higher than 267 students, the total amount that Jamesburg shall pay to Monroe as estimated tuition for that school year shall be calculated based upon these higher figures.

8. As acknowledged that Monroe continues to expand its housing capacity and continues to grow its population and Jamesburg does not have the capacity for development and that Jamesburg's enrollment has remained constant other than for normal fluctuations in household size, Monroe shall not charge Jamesburg and Jamesburg shall not be responsible for any further debt services associated with the construction of a new high school, or additions or renovations to the existing High School.

9. In consideration of Jamesburg's approval and execution of this Agreement, Monroe will voluntarily dismiss its Petition of Appeal without costs against any party but Monroe may re-file its Petition of Appeal without regard to any Statute of Limitations or time limitations under any rules or

regulations or otherwise and no defense will be raised by Jamesburg that the reassertion of the claim is untimely for any of the years in which tuition is past due now or in the future.

10. This Agreement shall not become effective and enforceable until: (1) Jamesburg and Monroe approve this Agreement by resolution; and (2) the Agreement is signed by both parties. Once effective, the Agreement shall continue in full force and effect until Jamesburg pays the total Current Indebtedness to Monroe, at which time the Agreement shall expire.

11. This Agreement shall be made part of an Order of the Commissioner of Education dismissing the Petition of Appeal and Counterclaim.

IN WITNESS WHEREOF, the Parties, by their duly authorized representatives, have executed this Agreement on the date shown by their signatures below.

JAMESBURG
BOARD OF EDUCATION

ROBERT CZARNESKI
President

10-23-14
Date

ATTEST:

Beth Brooks
BETH BROOKS
Business Administrator/Board Secretary

10/23/14
Date

MONROE TOWNSHIP
BOARD OF EDUCATION

Kathy Kolupanowich
KATHY KOLUPANOWICH
President

10/23/14
Date

ATTEST:

MICHAEL C. GORSKI, CPA
Business Administrator/Board Secretary

10/23/14
Date

This Agreement is consented to by the Middlesex County Superintendent of Schools on behalf of the County Superintendent and on behalf of the New Jersey Department of Education.

Dated: 11/6/14

Middlesex County Superintendent of Schools

JAMESBURG BOARD OF EDUCATION

RESOLUTION APPROVING SETTLEMENT

BE IT RESOLVED that the Jamesburg Board of Education hereby accepts and approves the negotiated Settlement Agreement (the "Agreement") by and between the Jamesburg Board of Education and the Monroe Township Board of Education in the matter entitled Monroe Township Board of Education v. Jamesburg School District Board of Education, OAL Docket No. 02793-2013N; Agency Reference No. 9/1/13, subject to the terms and conditions set forth therein; and

BE IT FURTHER RESOLVED that the Jamesburg Board of Education authorizes the Board President and the Business Administrator/Board Secretary to execute the Agreement on behalf of the Board; and to take such further steps as may be necessary to effectuate the within settlement and carry out this action of the Board.

On Thursday October 23, 2014 at the Board of Education regular meeting a motion to approve the Settlement Resolution was made by Mr. Maresca and seconded by Mrs. Newton and that the Jamesburg Board of Education approved the Settlement Resolution.

ROLL CALL VOTE: VOTING (8) AYES (8) NAYS (0)

Mr. Brucato
Mr. Cicoria
Mr. Czarneski
Mrs. Czarneski
Mr. Hansen
Mr. Maresca
Mrs. Newton
Mr. Rutsky

I, Beth Brooks, Board Secretary of the Jamesburg Board of Education, in the county of Middlesex, State of New Jersey, HEREBY CERTIFY that the above extract from the minutes of a meeting of the Board of Education duly called and held on October 23, 2014 has been recorded in my office in the Minute Book of the governing body and is true, complete and correct copy thereof and of the subject matters referred to in the extract.

IN WITNESS THEREOF, I have hereunto set my hand and affixed the corporate seal of the Jamesburg Board of Education this 28th day of January 2015.

Beth Brooks

Beth Brooks, Board Secretary

MONROE TOWNSHIP BOARD OF EDUCATION
423 BUCKELEW AVENUE
MONROE TOWNSHIP, NJ 08831
www.monroe.k12.nj.us

Ph.: (732) 521-1500
Fax: (732) 521-1628

Michael C. Gorski, CPA
Business Administrator / Board Secretary

I hereby certify that the following is a true and exact excerpt from the minutes of the Public Board of Education Meeting held on October 15, 2014, at which time a quorum was present:

A motion was made by Mr. Chiarella and seconded by Mr. Kaufman to approve the Settlement Agreement in the matter entitled Monroe Twp. Bd. of Educ. v. Jamesburg Bd. of Educ., Agency Ref. No. 9-1/13, OAL Dkt. No. EDU 02793-2013 N. The Board President, and the Business Administrator/Board Secretary as the attesting witness, is authorized to execute the aforementioned Settlement Agreement on behalf of the Board. Roll Call 8-0-0-1-1 Motion Carried with Mr. Czarneski recusing.

Respectfully submitted,

Michael C. Gorski, CPA
Business Administrator/Board Secretary

165-15

OAL DKT. NO. EDU 4516-15
AGENCY DKT. NO. 65-3/15

D.A., on behalf of minor child, S.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter, with the following observation. Paragraph 1 of the Settlement Agreement references an action which may have already taken place, and has therefore preceded consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

Provided that the parties have either successfully implemented the settlement terms or have agreed upon a mutually satisfactory alternate date for the effectuation of same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/20/15

Date of Mailing: 5/20/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4516-15

AGENCY DKT. NO. 65-3/15

D.A. o/b/o/ MINOR CHILD, S.E.,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRIC FOR THE CAMDEN CITY SCHOOL DISTRICT, CAMDEN COUNTY,

Respondent.

Sandra Simkins, Esq., for petitioner. (Director and Supervisor of the Children's Justice Clinic, Rutgers School of Law, Camden, New Jersey, attorney)

James Rolle, Jr., Esq., for respondent (Bryant Lawrence Horsley, Jr., General Counsel, attorney)

Record Closed: April 16, 2015 Decided: April 23, 2015

BEFORE **JOSEPH A. ASCIONE**, ALJ:

This matter was transmitted to the Office of Administrative Law on April 1, 2015, for determination as a contested case, pursuant to N.J.A.C. 1:1-8.2, N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13

The parties have agreed to a settlement and have prepared a Settlement Agreement, indicating the terms thereof, which is attached and fully incorporated herein as exhibit J-1.

Petitioner has executed a Notice of Withdrawal form, which is attached hereto as exhibit J-2.

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

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

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

3. The Notice of Withdrawal effectively withdraws the Petition of Appeal based upon the settlement.

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

I **CONCLUDE** that the Settlement Agreement and Notice of Withdrawal fully disposes of all issues in controversy and is consistent with the law. **NO FURTHER ACTION** is required to be taken in regard to this matter and the matter **MAY BE CLOSED**.

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

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

April 23, 2015
DATE

Joseph A. Ascione
JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 4-27-15

Date Mailed to Parties: 4-27-15

/lam

APPENDIX

LIST OF WITNESSES

For Appellant:

None

For Respondent:

None

LIST OF EXHIBITS

Joint

J-1 Settlement Agreement

J-2 Withdrawal of Hearing

CHILDREN'S JUSTICE CLINIC
RUTGERS SCHOOL OF LAW – CAMDEN
217 North Fifth Street
Camden, New Jersey 08102
(856) 225-2363
Jared E. Dorfman & Yasha K. Shahidi
Certified Legal Interns
Sandra Simkins, Esq.
Supervising Attorney
Attorneys for Minor, SHAUN EDMONDS

RECEIVED
2015 APR 16 P 3:36
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

4/16/15
5-2
FAX

D.A., on behalf of minor child S.E., Petitioners	:	**BEFORE THE COMMISSIONER OF EDUCATION**
v.	:	**OAL DOCKET NO. EDU**
	:	**Agency Ref. No.**
CAMDEN CITY SCHOOL DISTRICT Respondent	:	**VERIFIED PETITION OF APPEAL**

Notice of Withdrawal

As stated on the record before Judge Ascione, on Thursday April 9, 2015, Petitioners move to withdraw this matter. Parties have negotiated and agreed to the attached settlement.

Sandra Simkins, Esq.
Director and Supervisor of the Children's Justice Clinic

Jared E. Dorfman
Certified Law Student

Yasha K. Shahidi
Certified Law Student

Dated: 4/16/15

RECEIVED
2015 APR 16 P 3:36
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

J-1
4/14/15
Sent

CHILDREN'S JUSTICE CLINIC
RUTGERS SCHOOL OF LAW – CAMDEN
217 North Fifth Street
Camden, New Jersey 08102
(P)(856) 225-2363
(F)(856)225-6666
Jared E. Dorfman & Yasha K. Shahidi
Certified Legal Interns
Sandra Simkins, Esq.
Supervising Attorney
Attorneys for Minor, SHAUN EDMONDS ("S.E.")

D.A., on behalf of minor child S.E.,	:	**BEFORE THE OFFICE OF ADMINISTRATIVE LAW**
Petitioners	:	
v.	:	**DOCKET NO.: EDU 04516-2015 S**
	:	**AGENCY REF. NO.: 65-3/15**
CAMDEN CITY SCHOOL DISTRICT	:	
Respondent	:	

Settlement Agreement

The Parties have agreed upon the following terms as a resolution to the above captioned matter:

1. Home Instruction will begin no later than Tuesday, April 14, 2015, at **583 Raritan Street, Camden, NJ 08105.**
2. Home instructors will set forth an official education plan that will provide the means for S.E. to complete his junior year by June 30, 2015.
3. Parties agree that the District will merely provide the means for S.E. to complete the coursework required to finish his junior year to be eligible for promotion as a senior by June 30, 2015; however, S.E. remains responsible for completing the provided coursework to finish junior year by June 30, 2015.
4. The District takes no position regarding the possibility of S.E. returning to the Camelot program at Camden High. Petitioner understands that S.E.'s return to the Camelot program is the sole decision of the administrators of the Camelot program, and not the Camden City School District.
5. The District is not including an alternative placement at Woodrow Wilson High School as a part of this settlement. Petitioner understands that the District makes no representations as to Camelot's position regarding S.E.'s return to Camelot, and that Camelot may attach conditions to S.E.'s return to the program.
6. Upon execution of this agreement, Petitioner agrees to withdraw the petition with prejudice.

Dated: 4-16-2015

Deneen Anderson, Petitioner, ***on behalf of*** **S.E.**
Parent and legal guardian of minor S.E.
(856) 540-8794

Dated: 4/16/15

Sandra Simkins, Esq.
Director and Supervisor of the Children's Justice Clinic
Attorney for Petitioner

Dated: 4/16/15

Jared E. Dorfman
Certified Law Student

Dated: 4/16/15

Yasha K. Shahidi
Certified Law Student

Dated: 4/15/15

James Rolle, Jr., Esq.
Attorney for Respondent, Camden City School District

Dated: 4/15/15

Anna Shurak
Chief School Support Officer

166-15A

166-15

STATE BOARD OF EXAMINERS DOCKET NO. 1213-107
OAL DOCKET NO. EDE 944-13
AGENCY DOCKET NO. 9-9/14A

IN THE MATTER OF THE	:	
REVOCATION OF THE CERTIFICATES	:	COMMISSIONER OF EDUCATION
OF RONALD MORENO BY THE	:	DECISION
STATE BOARD OF EXAMINERS.	:	

Order of Revocation by the State Board of Examiners, July 24, 2014

For the Respondent-Appellant, Ned P. Rogovoy, Esq.

For the Petitioner-Respondent State Board of Examiners, Lauren A. Jensen, Deputy Attorney General (John Jay Hoffman, Acting Attorney General of New Jersey)

Appellant challenges the determination of the New Jersey State Board of Examiners (Board) that his actions warranted the revocation of his teaching certificates. On appeal, he asserts that the ALJ "failed to recognize certain blatant inconsistencies in the facts presented" and takes issue with the State Police's involvement in the underlying investigation of his conduct.[1] (Appellant's Brief at 1-3). In response, the Board argues that its determination was not arbitrary, capricious or contrary to law and that it appropriately deferred to the credibility determinations made by the Administrative Law Judge (ALJ) following four days of hearing at the Office of Administrative Law (OAL). (Board's Appeal Brief at 29)

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute his judgment for that of the Board so long as the appellant

[1]Although appellant criticizes the manner in which the State Police conducted its investigation and attempts to assert a conspiracy theory of some sort, the Commissioner finds no evidence in the record to support appellant's contentions in this regard.

received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious or unreasonable. *N.J.A.C.* 6A:4-4.1(a).

Initially, the Commissioner notes that appellant's objections to the Board's decision are fundamentally rooted in his disagreement with the ALJ's credibility determinations and the resultant weighing of testimonial and documentary evidence. The legal standard with respect to objections of this type is well established,[2] and in the present instance, the Commissioner finds the ALJ's credibility and fact determinations, as adopted by the Board, to be both clearly explained in the Initial Decision and sufficiently supported by the record. The Commissioner further finds that appellant has offered nothing in his papers that would warrant disturbing the deference to which the ALJ – as finder of fact with the greatest opportunity to observe the demeanor of witnesses – is entitled to in this regard. *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987).

Upon careful consideration of the record, including the hearing transcripts and all submissions, the Commissioner finds that the record fully supports the Board's determination that the appellant engaged in unbecoming conduct – vis-à-vis his inappropriate relationship with an eighteen-year old student – despite his self-serving testimony to the contrary. Specifically, as detailed in the Initial Decision, the consistent and credible testimony offered by two students, two school administrators, and two State Police detectives established that: 1) appellant was observed touching the student's leg and putting his hand up her skirt during a school field trip; 2) appellant allowed the student to rest her head on his shoulder at an awards ceremony and

[2] *N.J.S.A.* 52:14B-10(c) states in pertinent part: "The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record."

while riding a bus; 3) appellant allowed the student to enter his hotel room twice during a school field trip; 4) appellant drove the student home after a field trip; 5) appellant exchanged 1,857 text messages with the student between April 18 and May 11, 2012, some of which were sexually explicit; and 6) appellant and the student admitted to the two State Police detectives that they engaged in a consensual sexual relationship which began after the student's 18th birthday. Additionally, the inconsistent testimony offered by both appellant and the student with whom he maintained the inappropriate relationship wholly contradicted their prior admissions to State Police detectives and was found to be incredible by the ALJ. Although appellant obviously disagrees with the revocation of his certificates, it is clear from the record that he was afforded due process throughout the proceedings. In view of appellant's disturbing lapses in judgment and blatant disregard for the boundaries that must be maintained between teacher and student, the Commissioner finds that revocation of his certificates was the appropriate penalty.

Because there is nothing in the record to suggest that the Board's decision to revoke the appellant's certificates – based on the nature and extent of the unbecoming conduct proven during the hearing at the Office of Administrative Law – was arbitrary, capricious or unreasonable, the Commissioner finds no basis upon which to disturb the decision of the State Board of Examiners.

Accordingly, the decision of the State Board of Examiners is affirmed for the reasons expressed therein.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 5/12/15
Date of Mailing: 5/20/15

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDE 944-13
AGENCY DKT. NO. 1213-107

IN THE MATTER OF THE CERTIFICATES OF RONALD MORENO.

Lauren A. Jensen, Deputy Attorney General, for petitioner State Board of Examiners (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Ned P. Rogovoy, Esq., for respondent Ronald Moreno

Record Closed: April 4, 2014 Decided: May 19, 2014

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In the matter, the New Jersey Department of Education's State Board of Examiners (hereinafter "petitioner" or "Examiners") issued an Order to Show Cause against respondent Ronald Moreno (hereinafter "Moreno") who is the holder of (1) Teacher of Elementary School Certificate of Eligibility, dated July, 1994; (2) Teacher of Data Processing Certificate of Eligibility, dated July, 1994; (3) Teacher of Computer Science Technology Certificate of Eligibility, dated September 1994; (4) Teacher of

Elementary School certificate, dated July, 1997; (5)Teacher of Data Processing certificate, dated July, 1997; (6)Teacher of Computer Science Technology certificate, issued in July 1997 and; (7)Teacher of Law Enforcement certificate, issued in October 2010, which was based upon information supplied to petitioner by the Cumberland County Technical Education Center (hereinafter the "Center "), where Moreno had been employed as a teacher in 2012. The matter arose from allegations that Moreno had engaged in inappropriate conduct with an eighteen-year-old student known as A.H. during the course of her enrollment in his law enforcement class, which purportedly happened during her senior year at the Center. It is noted that, although A.H. was already an adult at the time, she and all of the other students referenced in this matter shall only be referred to by their initials in the interest of consistency and privacy. Moreno filed an answer in which he denied the occurrence of the incidents.

As a result of the issuance of the Order to Show Cause, petitioner transmitted the matter to the Office of Administrative Law (OAL) where the matter was heard on September 25 and 26, and November 19, 2013 as well as on January 30, 2014, at the OAL. Upon its conclusion the parties were afforded the opportunity to obtain final transcripts, after which a briefing schedule was set. Upon their receipt, the hearing record closed on April 4, 2014.

TESTIMONY OF THE WITNESSES

In this matter, eight witnesses testified. Their relevant testimonies are summarized as follows:

Bonnie Marano

Bonnie Marano is employed by the Center as a guidance counselor, where she has been employed since December 1, 2009. She knows respondent Moreno as being a former co-worker there. They were both part of the four-person chaperone team which escorted a group of students who had been selected by the Center to participate in the New Jersey Skills USA State Championship contest at the Garden State Exposition Center, Somerset, New Jersey, which occurred between March 30 and 31,

2012. The estimated time of departure was 11:30 a.m., which included an overnight stay in the immediate area of the Garden State Exposition Center. All the students had signed a Student Code of Conduct and Agreement to Attend, which included, among other things, a statement that transportation home from the Center on Saturday night was the responsibility of the parent or guardian. All students had to be picked up within one half-hour of their arrival back at the Center, which was scheduled to allow for return at approximately 11:00 p.m. on Saturday, March 31, 2012. It further stated that "under no circumstances will [the Center] chaperones be able to provide transportation to a student's home." (P-2.) In relevant part, it also stated that all students were to be in their rooms by 11:00 p.m. and remain there until competition time the following morning. Students were not permitted to be in any other member's rooms without permission from the advisor. Further, room checks would be performed to ensure students were in the re-assigned rooms at the proper times. The female students were assigned to a single room at the Holiday Inn, Somerset, while the male students were in another room. The chaperones were similarly separated, with Moreno, the only male chaperone, having his own room. They also arranged to have those two chaperone rooms used as respective male/female lounges after the night's sleepover so that the students could use them as changing rooms the next day after they completed their respective competitions in order to prepare for the dinner/awards ceremony banquet. Most of the participants wore uniform basic clothing for the competition, but could then change into more fashionable clothing for the banquet. Student A.H., a finalist in the Criminal Justice competition, signed her Code of Conduct and Agreement to Attend on January 31, 2012. It was also signed by her parent- guardian L.L. on the same date.

Pursuant to the 11:00 p.m. curfew, Marano personally sealed the male and female students into their respective rooms by placing two pieces of tape across each unit door, with a big piece of masking tape on the top and clear scotch tape on the bottom. She noted that the students had only been told about the presence of the scotch tape and not the masking tape. At 5:30 the next morning, Marano conducted a check of the students' doors at which time she noticed that both tapes on the door to A.H.'s room were broken. Marano immediately became frantic. She knocked on the door and then discovered that only two female students were there, neither of whom was A.H. She then looked for her in the dining room area and searched other parts of

the hotel for approximately five minutes. At that time she returned to the hallway at which point she saw A.H. standing at the door to Moreno's room. A.H. claimed that she had gone there to wake him up. Marano then knocked on the door at which point Moreno admitted to her that A.H. had been in there. She noted that A.H. had also told her that she had also been in Moreno's room.

Later that day, at approximately 3:30 p.m., Marano went to Moreno's room to ask him a question. She knocked on the door but not did not get an answer. She then knocked a second time and this time she announced her name so that anyone inside would know it was her, but she still got no answer. She knocked a third time and said that she was coming in. She opened the door and saw A.H. lying on the bed alone in the room. A.H. was fully clothed and the bed was made. A.H. was lying on top of the comforter on her stomach. A.H. looked over and told Marano that Moreno was in the bathroom. Marano then asked A.H. to tell him to find her when he came out. A few minutes later Moreno did come out and verified that he had been in the bathroom when Marano had come to his room.

The awards ceremony took place that evening. While at the ceremony, A.H. complained of being hot and not feeling well at some point. Moreno took her into a separate side room off the main dining room where some other students and chaperones were located and he had her sit down. Moreno proceeded to fan A.H., and one of the other students told Marano, and commented that the interaction between the teacher and the student was "creepy." Marano tried to side-step the discussion with that student, however. But later, during the actual awards ceremony, A.H. sat next to Moreno and rested her head on his shoulder pretty much the entire time. At one point Moreno got up and A.H. followed. Marano believes that they both returned at some point.

After the ceremony, they all piled in the bus, except for Marano who drove the van, and they all headed back to Gloucester County immediately after the program because all of the luggage had been pre-loaded. Before driving back, however, Marano took roll call on the bus at which point she observed Moreno and A.H. sitting together there. A.H. had her head on his shoulder once again. They arrived back at the school

at approximately 11:00 p.m. with Moreno arriving approximately five minutes before the bus. As part of the written procedures in place, all the students were supposed to call their homes one hour before their ride back in order to confirm travel arrangements to their respective homes. In addition, pursuant to the announced policy in place, the adult staff would wait a half-hour until the arrival of the drivers. If a driver did not show by then, the local police could have been notified for assistance. All the students got picked up except for A.H. Instead, Marano saw A.H. get into Moreno's car and they drove away pretty quickly as they got back to the school. Marano thought that this was very inappropriate and viewed this in the context of the culmination of events starting with the morning's observation of A.H. being at Moreno's room at the Holiday Inn.

On cross-examination, she acknowledged that she did not see A.H.'s clothing or hair being mussed up, either at the door to Moreno's room or later when she found A.H. on the bed in Moreno's room. In addition, A.H. never told her that she was ill that weekend. It was only after she saw Moreno fanning A.H. at the ceremony side room that another student may have told her that A.H. hadn't been feeling well that day. In any event Marano did not think that it was appropriate for A.H. to have been in the boys' lounge room at all that afternoon.

A. C.

A.C. was a senior student at the Center in 2012 and was a classmate of A.H. in the forensic science-criminal justice class which was run by respondent Ronald Moreno. They were both also part of an honor guard, whose adviser was also Moreno. In May 2012, Moreno escorted the honor guard team to a trip to Washington, D.C. in order to participate in a law enforcement memorial tribute for "fallen" officers as well as to perform an honor guard ceremony at the United States Capitol. They stayed approximately three nights. There were about seven students from the honor guard who attended the outing, along with several chaperones, including the bus driver and his wife along with Moreno. During one of the nights, which was May 14, 2012, they celebrated the birthday of A.C. by going to an Italian restaurant in the D.C. area. They sat at a rectangular table, with A.H. sitting at the head of the table and Moreno to her left. A.H. was not feeling well that night. At one point A.C. saw Moreno's right arm

under the table near the legs of A.H. as if reaching toward the head of the table in her direction. A.C. nudged her tablemate at which point Moreno saw her and then casually and nonchalantly moved his arm back in a normal motion. Nothing else unusual happened that night at the dinner.

However, the next day they returned to Gloucester County on the bus. Initially, A.H. sat next to A.C., but after they went to a rest stop in Delaware, A.H. moved forward several seats and sat next to Moreno. A.C. saw A.H. rest her head against Moreno and fall asleep, which she was able to observe in the rearview mirror adjacent to the bus driver. After A.H. left the seat to move forward, A.C. observed that she left her cell phone on the seat, at which point A.C. and a male student (who knew the password of A.H.) entered her password on that cell phone and proceeded to observe more than fifty text messages between A.H. and Moreno, which included (1) a discussion about the dinner, (2) the seating arrangements on the bus, (3) Moreno indicating about A.H. not wearing any panties, (4) how thinking about A.H. made Moreno "hard," and (5) how she would be coming to his seat, among other messages. When A.C. saw the context of the messages, she was in shock. But it never occurred to A.C. at the time to record any of the statements word for word. She did not disclose this to the school at first. Instead, she initially only reported this to her mother because she felt that it was not appropriate to do such things. A.C. also did not report her observations immediately because she saw Moreno as being a good teacher and did not want to get him into trouble. As a result, after A.C. told her mother about it, her mother then called Superintendent Elliott. A.C. was then directed to Superintendent Elliott and on May 29, 2012, she told her what she had observed in the text messages. (P-6.) In the intervening time, A.C. admitted that she did discuss the texts with other students as well as both of her parents. At the hearing A.C. was then shown the written prepared report by Elliott, especially the bulleted text comments. She had never seen that report before. A.C. also noted that she had been suspicious about the relationship between A.H. and Moreno for a period of time. He would frequently walk A.H. out of a little hallway from the building to the busses, even though he would not walk others out in a similar fashion. A.C. also thought it was odd that A.H. would sit in the back of the class with Moreno after a lesson.

On cross-examination A.C. recalled that on the return trip from Washington on May 15, 2012, Moreno sat in the first or second seat behind the bus driver, while the wife of the bus driver was either adjacent to him or slightly ahead of him. She recalled that, although A.H. had been sick during the two days before, she did not appear to be sick on the return trip. A.C. also recalled that approximately four people saw A.C. attempt to access A.H.'s cell phone on the bus, all the while A.C. was looking at A.H. to make sure that she was not going to return to the seat in order to observe that A.C. had been spying on her.

On further cross-examination, she indicated that she did not personally have "frequent" one-to-one conversations with Moreno. Also, unless Mareno called a student to the back of the classroom to talk, it appeared that only A.H. would go back there. A.C. acknowledged that she races motorcycles and there were two times when Moreno did go to her races and arranged for a photographer there. He never made any inappropriate remarks to her at any time. A.C. also noted that she never texted him or vice versa or, as she then stated, not that she remembers. A.C. admitted that she would talk to him on the phone about the honor guard and matters relating to it, although she does not remember how she got his phone number. A.C. also indicated that she liked A.H. and never criticized her for what she wore. When further asked by counsel, she indicated that she did not know if A.H. had worn panties the night of A.C.'s birthday dinner in Washington since the students got individually dressed in a bathroom.

N.M.

N.M. is now twenty years old. He previously attended Millville Senior High School and then the Center, which attendance at the Center was during his junior and senior years in high school. His teacher in the law enforcement course during both years was respondent Ronald Moreno. According to N.M.'s best recollection, his fellow classmates included A.H. and A.C., both of whom participated with him in police week in Washington, D.C. in approximately March 2012. They were all members of the Center's honor guard. During one of the nights in Washington, they attended a dinner at a local restaurant. A.C. sat to his left and a guest of the bus driver was seated to his right. He drew a sketch of the seating arrangements at the hearing. (R-1.) He saw nothing

inappropriate by or between Moreno and A.H. at the dinner but noted that he was focused on talking to his fellow classmate J. during the course of the dinner.

However, on their way home from Washington, he recalled that something did happen regarding A.H. and Moreno. N.M. sat at a window seat, while A.C. was one seat behind and to the right of him. Initially, A.H. sat with A.C. but then at some point A.H. got up and moved to sit with teacher Moreno when they left a rest stop. He first saw A.H.'s cell phone before A.C. picked it up and showed it to him because the seats were low and he could see the phone on the now empty seat vacated by A.H. He initially thought nothing of it, however, but then A.C. mouthed the words to him "what's the code?" N.M. did not offer the phone to A.H. because he and other students had had suspicions about her over time so they wanted to investigate it. Having used A.H.'s cell phone many times, N.M. knew her phone password. When the phone was opened, he observed sexual text messages such as having sex, touching and other such things. Moreno's name was on several of the text messages. When shown the recitation of the texts messages in Exhibit R-6, he identified several of the passages contained there, to wit, "I got my period;" "That's good. Have you ever had sex while you had your period?" and references made to panties and juices. N.M. indicated that he was a little upset with what he saw because he had known A.H. since sixth grade, he knew her troubled past, and how older men had taken advantage of her over time. He was going to say something to the school authorities but does not know why he did not. Instead, N.M. spoke to A.C. who was then called in to the school superintendent's office before he did anything further with her about it.

On cross-examination, N.M. acknowledged that he never confronted A.H. about the information he had observed but he claimed that he did not have enough courage to do it. He admitted that he had snooped on her password and snooped on her text messages. N.M. noted that A.H. and A.C. had been acquaintances but were perhaps somewhat jealous of each other, although not regarding his personal attention to A.H. N.M. then noted that by the end of the school year his friendship with A.H. had eventually fizzled out and he never talked to her about it all. Regarding his suspicions, N.M. had noticed that A.H. and teacher Moreno were always together whether it was at school or on a field trip. In addition, there were rumors floating around the student body

which indicated that Moreno would give a lot of attention to those who wanted it but not to those who did not. This was the total basis for his ongoing suspicions.

Dina Elliott, Ed.D.

Dina Elliott, Ed.D., has been the superintendent of the Center since January 2012. Her district encompasses 900 students with a tenth through twelfth grade class level as well as adult programs. There are also forty full-time students as well as special education students from grades nine through twelve. Most of the students, however, are juniors and seniors, who take a specialized course part of the day. The school consists of eighteen technical programs for which they have a full staff in the technical trade areas. The Center is located in one school facility in Bridgeton, Cumberland County, New Jersey, and is a receiving district for several schools, including Vineland, Bridgeton, Millville, and Cumberland Regional at Seabrook. The instructor in the law enforcement/homeland security course requires one to have an extensive background in law enforcement, which can also include military background. The honor guard at the Center is part of that class environment. Respondent Ronald Moreno was the instructor for that program for a period of time.

Dr. Elliott indicated that she has known A.C. for a period of time. In January 2012, A.C. was halfway through her senior year at the Center. In approximately May of that year, Dr. Elliott received a telephone call from the mother of A.C. who indicated that A.C. did not feel comfortable going to school any longer. As a result, she met with and had a discussion with A.C. who reported that during the law enforcement class trip to Washington, D.C. in May, she had learned of a number of facts of some serious nature regarding Moreno and a student at the school. As result of that conference, Dr. Elliott typed up notes from that meeting which reflected the observations recited to her by A.C. They included A.C.'s claim that an inappropriate relationship existed between Moreno and the student A.H. Further, and in particular, on May 14, 2012, while at a dinner in Washington, D.C., A.C. saw Moreno put his hand on the leg of A.H. When Moreno saw that A.C. had made the observation, he then removed his hand. On the way home, A.H. moved away from her seat next to A.C. and sat with Moreno for part of the time. A.C. also reported that A.H. had been texting with Moreno prior to that seat change on

the return bus trip. A.C. read the text messages after A. H. left the seat, which were inappropriate. Dr. Elliott reduced to writing a series of comments which A.C. said she had observed in the text messages, which are contained in Exhibit P-6, all of which are highly inappropriate and sexually explicit. Based upon that discussion with A.C., Dr. Elliott initially called the Board of Education solicitor. She then called the Bridgeton State Police Barracks located in Deerfield Township. She spoke initially with a desk sergeant who thereafter transferred her to Detective Sergeant Brian Smith. He indicated that he intended to assign the matter to two detectives, Detective Barilotti and Detective Austin to investigate. Dr. Elliott met with them both and related the information she received from A.C. Moreno and his union representative were then summoned for a meeting, after which he was summarily suspended without further notice on May 29, 2012. (P-7.) Dr. Elliott later met with A.C. again on May 30, 2012, at which time A.C. indicated that when she had gone back to class on May 29, 2012, Moreno questioned her about why she had been with Dr. Elliott.

Dr. Elliott found out that the relationship between Moreno and A.H. had begun in March 2012, at a time when A.H. was already eighteen years old. As a result, no criminal charges were filed against Moreno since the State Police reported to her that there was apparently a consensual relationship present between the two of them at the time. She made further notes of the matter accordingly on May 29 and 30, 2012. The Board of Education took action to accept the suspension with pay and to pursue tenure charges at its July 28, 2012, meeting. However, Moreno immediately thereafter filed a notice to retire from his position. Dr. Elliott thereafter contacted Robert R. Higgins, Ph.D., Director, Office of Licensure and Credentials in the Department of Education on July 9, 2012, regarding the involvement of Moreno and an improper relationship with a student in their district. (P-11.). On July 11, 2012, Moreno advised Dr. Elliott in writing that he had resigned his position effective June 30, 2012, for purposes of retirement. (P-12.) The Board of Education accepted his resignation on July 19, 2012, to be effective July 1, 2012. (P-13.)

Dr. Elliott further noted that prior to the complaints registered to her by A.C., she had received information in April 2012, that Moreno had taken a student home after the Skills USA academic competition in March 2012, which was a violation of the rules of

the Center. The chief chaperone on the trip, Bonnie Marano had also reported other suspicious activities by him during that trip, and as a result, she had reviewed the report prepared by Marano at that time. (P-1.) Dr. Elliott met with Moreno and his union representative as a result of those allegations, and he received a letter reprimand/written warning regarding the transportation violation on April 5, 2012. (P-3.) On cross-examination, Dr. Elliott acknowledged that she had determined that the allegation of unbecoming conduct was not established regarding his other actions on that trip. She also conceded that she never called the parent of A.H. about how she had gotten home that night. But Moreno admitted to Dr. Elliott that he had driven A.H. home. Moreno had told her that A.H.'s home situation was not the best and that he and his wife were trying to help her. Moreno told Dr. Elliott that he was concerned that an alcoholic parent might have been picking A.C. up that night and that is why he drove her home himself.

Further, the notes which Dr. Elliott took regarding her meeting with A.C. on May 29, 2012, were from statements made to her by A.C. But A.C. never produced any written documents herself. Dr. Elliott also acknowledged that her husband is a State trooper, a staff sergeant assigned to the Woodstown station. She also admitted that the person who took over the job left by Moreno is a retired State trooper named Lopez. However, Dr. Elliott indicated that she never spoke to her husband regarding the Moreno matter at any time.

Detective Sergeant Arthur Barilotti

Detective Sergeant Arthur Barilotti has been employed by the Division of State Police for seven years and he is now assigned to the Woodstown station. He was previously assigned to the Bridgeton station at which time he received a phone call from Detective Sergeant Smith, who advised him about a phone call he had received from Dr. Elliott of the Center. He and Detective Austin were assigned to conduct an investigation. They met with Dr. Elliott and two of representatives from the Center, at which time Dr. Elliott provided them with her written synopsis of her conversations with A.C. (P-6.) As a result of that initial contact, Moreno was escorted to the station in

handcuffs and with his cell phone. A communications data warrant was needed, which they did not have. Moreno did not consent to the search of the cell phone accordingly.

Upon their arrival back at the station, the detectives initially spoke to A.H., the alleged victim, regarding the actions by Moreno at the Washington, D.C. dinner in which he allegedly put his hand up A.H.'s skirt. She admitted that it did happen. A.H. admitted that they were in a relationship which started back in March 2012. She also indicated that after the first trip in March, she and Moreno had had consensual sex. The detectives determined that she was eighteen at the time. They then spoke to Moreno about what had happened on the bus on the way back from Washington, D.C. He admitted and confirmed that there were text messages between them on the phones and that he and A.H. had been in a sexual relationship. Moreno admitted having had intercourse with her at some point and that he did put his hand up her skirt at the dinner table in Washington, D.C., but he contended that he never had intimate relations with her on school property.

On cross-examination Detective Sergeant Barilotti admitted that he never conferred with A.C. about the truthfulness of her allegations. He also noted that, while initially talking to A.H, they had determined that there were no crimes involved so did they did not pursue any criminal investigation regarding Moreno accordingly. He also admitted that he knows Sergeant Elliott and knew at the time of his arrival at the Center that Dr. Elliott was the wife of Sergeant Elliott. But Detective Sergeant Barilotti noted that he never spoke to Sergeant Elliott about this matter at any time whatsoever. He noted that the entire investigation involving the interview of both parties at the station lasted approximately two-and-a-half hours. He also noted that the confirmation by both Moreno and A.H. regarding Moreno having put his hand up the dress of A.H. confirmed the observations of A.C. from the dinner in Washington, D.C.

Detective Gregory Austin

Detective Gregory Austin has been employed by the Division of State Police for nine years and has served as a detective for two years. He was involved in the investigation concerning respondent Ronald Moreno along with Detective Sergeant

Barilotti. He noted that he was never involved with any school investigation at the Center prior to that time and did not know the superintendent (Elliott) when he was so assigned. He was initially aware of the fact that it involved a purported inappropriate relationship between a teacher and student and included text messages and written statements of those texts. After the initial interview with the Center authorities, Moreno was confronted by the detectives and agreed to go back to the station with them where he was placed in an interview room. However, they determined to interview the student victim first, A.H., after she had shown up there voluntarily at their invitation. After that initial interview with A.H., they determined that no crime had been committed since she was eighteen years old at the time of the interaction between her and Moreno. Detective Austin recalled that A.H. confirmed the information supplied earlier by Dr. Elliott of the Center. In particular, A.H. confirmed and admitted that a sexual relationship had existed with Moreno. She also indicated that she had strong feelings for Moreno. As result of that conversation, Detective Austin determined to speak with Moreno to confirm the relationship. Moreno did confirm it. Moreno was sixty-three years old at the time. His conclusion was that all of the allegations were confirmed, there was no crime, and the investigation concluded. Detective Austin indicated on cross-examination that it is not unusual for five troopers to be involved in any investigation since some of them may only just have been part of the process after having taken a phone call.

A.H.

A.H. also testified in this matter. She is now twenty years old. She was born on October 10, 1993. She completed her vocational studies at the Center in June 2012, at a time when she was then eighteen years old, but she actually graduated from Vineland High School at that time. As a result, as of October 2011, she would have been eighteen years old. Respondent Ronald Moreno was her teacher during her junior and senior years at the Center, at which time he taught her in the area of law enforcement. She was also part of the school honor guard at the Center which included marching and discipline. There were six to seven members of the team at any given time. They practiced approximately three times per week during school hours at the time that other students practiced law enforcement techniques. In both of A.H.'s years on the team,

there were three female students on the team, which included herself, A.C. and one other female student. They never practiced on weekends. They attended two trips during her senior year, which included a trip to Somerset, NJ to the Skills USA competition and then a trip to Washington, D.C. in April 2012 to participate in a police event.

During the Somerset skills trip, she indicated that she had not been feeling well during the two-day/one-night trip since she has epilepsy and suffers with grand mal seizures. She noted that during her junior year she had actually been hospitalized for it. She roomed with two other girls at the Holiday Inn in Somerset, New Jersey. She brought with her a blue shirt and black pants for the competition. After the competition, a party was planned for that evening so she changed at the hotel, packed, and headed for the party and the awards ceremony. On the way into the awards ceremony she was overwhelmed and had to be escorted to another room by Moreno and other students. After the ceremony they left for home and she sat with Moreno. She was feeling better at the time. She called her stepfather to pick her up but he was drunk so she asked Moreno to give her a ride home, because her mother cannot drive. Before she did so A.H. gave the head chaperone Bonnie Marano a hug and then she drove off with Moreno to her house, which was fifteen minutes away, where he dropped her off. He did not walk her to the door.

She also noted that during their junior year, Moreno had put his cell phone number on the blackboard on the first day of school so that anyone could access him. She does not recall her cell phone number which she had at the time. She did admit that she did text Moreno in her senior year, especially when she was depressed. She had had no relationship with her own father and her relationship with her own mother was also not good. She now works in a diner.

The honor guard trip to Washington, D.C. was held to honor Police Week and fallen police officers. The chaperones included Moreno and the bus driver, Mr. Gambino, and his wife. They all stayed at the Wingate Hotel where A.H. bunked with A.C. and S.B. She felt much better on this trip. At one point they celebrated the birthday of A.C. at a local Italian restaurant. A.H. wore a white dress. She admitted

that when she was questioned by the State Police about that dinner, she told them that Moreno had "felt her up." At the same time A.H. testified she denied that he actually put his hand up her dress or that he engaged in any improprieties with her at the dinner or any other time on the trip. On the bus trip home, she claimed that she sat with A.C. the entire way and denied ever sitting with Moreno at anytime on the trip home. She claimed that she did not know that A.C. had looked at her cell phone on that trip home. When she was shown the bulleted comments in Exhibit P-6, she claimed that she had never seen them before and denied ever sending or receiving any text messages to or from Moreno at all. She indicated the phone never left her possession at any time and that she had no reason to know why A.C. said those things about her. They did not have any reason to have ill will between them. A.H. also indicated that neither A.C. nor anyone else ever came to her to question her or to say that they had seen such messages on her phone. She claimed that she had been located in an aisle seat on the bus and recalls having fallen asleep on the trip home with A.C. The date of May 15, 2012, was the date of the return trip from Washington.

After that trip, Bonnie Marano and the school nurse spoke to A.H. several times and indicated that they were her friends and wanted her to be okay. All of this made her suspicious. A couple days later, on her way to her allergist, a lady she still lives with called her and told her that a police officer had called looking for her. The next thing she knew, a State police detective called her on the phone and then met her at her doctor's office at which time the trooper took her car keys and her phone. A.H. eventually got her car keys back and she followed him into the State police barracks at which time she was told that Moreno was already inside "confessing;" whatever it was, she did not know. A.C. was then met by three State troopers who told her that she did not do anything wrong. She claimed that she made "stuff up" with them because they said that what she had told them initially was not true. A.C. denies ever having had sex with Moreno at anytime but admitted that she did tell the troopers about having had feelings for him. She also admitted that she had told the State police about Moreno putting his hand up her dress but maintained that it was also a lie.

After the events, it seemed like no one would talk to her. But her fellow classmates would leave notes about them wanting to have their teacher Moreno back in

school. A.H. did not go back to school during the last week even though Moreno was no longer her teacher, since he had been let go from school. She admitted that she did text Moreno after that because she needed someone to talk to and that he listened to her while she was depressed.

On cross-examination, A.H. was asked about the Somerset, New Jersey Skills USA competition. She admitted that she had left her hotel room but that she was only trying to wake everyone up to get ready for the day's activities, including Moreno. She also admitted that she did rest her head on his arm at some point during the evening ceremony but she denied putting her hand on him on the way home. They returned at approximately 11:00 p.m. and she admitted that he did drive her home.

A.H. returned for additional examination at the January 30, 2014, hearing and cross-examination was continued at that time. When shown the State Police report of their investigation (P-16) she denied having made any statement about having feelings for Moreno, which were contained in that report. A.H. then denied having made any of the statements at all to the State Police. On redirect examination she stated that Moreno did not put his hand on her at the Washington, D.C. dinner. She claimed that during the questioning by the State Police, in frustration, she had agreed with the State Police that whenever Moreno had said to the State Police she agreed with. She also claimed that during the dinner Moreno actually sat between two boys, and she drew a sketch which illustrated the seating positions of the parties at that dinner. (R-2.) She once again contended that she never sat with Moreno on the bus trip home from Washington. He also never drove her home that time. A.H.'s boyfriend at the time, J.K., took her home. On recross-examination, A.H. admitted that she would text Moreno a lot at school. And on one occasion Moreno and his family even came to her diner where she worked. In view of her very difficult background and upbringing, A.H. had no one else to turn to except for Moreno who was the only male figure in her life who could provide her with appropriate emotional support. For example, at one time in March or April 2012, A.H. ran out of her anti-depressant medicine so she contacted Moreno who helped her get to a community health care doctor, who was able to treat her for suicidal and anxiety problems. As a result, A.H. was not surprised about the amount of text messages which were generated between them. That package of

messages and message summary was produced by the Deputy Attorney General at the hearing. (P-18, 19 and 20.) She indicated that none of the text messages were about sex.

Ronald Moreno

Ronald Moreno testified on his own behalf. He is presently sixty-five years old. A 1967 high school graduate, he attended Rutgers University at Camden where he majored in computer science and criminal justice, ending in 1974. After serving in and ultimately receiving his honorable discharge as result of his engagement in Search and Rescue Operations in the United States Air Force, he joined the Camden Police Department in 1972, where he rose to the rank of lieutenant before completing his twenty-five years of service in 1997. He has been married since 1989 and is the parent of three children. Upon his retirement from the police department, he became a member of the Center in 1997 and worked there in tenured status until 2012. At that time Dina Elliott became the superintendent of the facility in January 2012. Prior to her arrival Moreno had never been involved with any discipline whatsoever. After the incidents which were directed against him in March and April 2012, he chose to resign because (1) he became upset because he had been suspended due to purported inappropriate text messaging, despite not even knowing the contents; (2) developing high anxiety and high blood pressure as a result of those charges; (3) having a daughter at a residential facility; (4) it wasn't worth it to jeopardize the students at the Center, and (5) he already had a police pension and one from military service. Moreno made the decision without any legal advice whatsoever. He also found that that the teacher who was appointed to replace him was a retired State trooper and he had been told that Superintendent Elliott intended to have a State trooper on the job.

The honor guard was an extracurricular activity which Moreno started in 2011. He did not personally select the members of the guard, and that included A.H. He also noted that A.H. was one of his students during her junior and senior years. His class composition included students who were with him for a half-day in a receiving-district setting after having spent the earlier part of the day in their regular district schools. He recalled that A.H. participated in the Skills USA competition in the spring of 2012 along

with K.C., who was her boyfriend at the time. They both wanted to go and wound up training together for the event. They were transported to and from the event on a bus. A.H. sat with him Moreno both ways. But she was never alone with Moreno in his room at the event. Moreno first saw A.H. on the day of the skills competition when she knocked on his door to wake him up. An awards banquet was scheduled for that evening. However, upon their arrival at the banquet, A.H. felt ill, which was compounded by the fact that the banquet hall was packed shoulder-to- shoulder with people. As a result, he and A.H. moved to a side room for a while but then returned to the main room. Moreno admits that she put her head on his shoulder in a "dozy" fashion when they were back in the banquet room. She also followed him when he got up to get her water in the back of the room. They both returned to their original seats. After the ceremony, A.H. sat next to him on the way home after they were underway for barely ten minutes. Sometime into the trip, A.H. called her mother about the pickup but found out that her stepfather was then intoxicated and could not drive. At that point, A.H. could not go home with K.C. due to a breakdown in their relationship. So Moreno drove her home, carried her bags to her house, and then left her there. Thereafter, Superintendent Elliott asked him about the drive home and reminded him that it was against policy to drive a student home. As a consequence, Moreno never drove her home any time after that. Dr. Elliott nonetheless sanctioned him with a written reprimand for the incident involving the drive home.

Moreno then testified about the honor guard trip to Washington, D.C. in May 2012. He personally arranged the trip which was to last approximately five days. The honor guard routinely practiced twice a week to get ready. They were transported back and forth by a school bus which was driven by an off-duty Washington Township police officer, whose wife also served as a chaperone on the trip. On the trip down Moreno sat alone in the front seat. During the dinner at the Italian restaurant to celebrate A.C.'s birthday Moreno confirmed the seating arrangement which had been testified to by A.H. except that A.C. was directly across from him and not the other female student. He denied ever touching A.H. during the dinner. Moreno also indicated that A.H. never sat with him on the way back on the bus. Instead, she sat with A.C. and he recalled that she fell asleep on A.C. He indicated he had no contact with A.H. other than seeing her on the bus. Upon their return to the school, Moreno went back into the school since it

was still in session and it was still daylight hours. Sometime thereafter, which he recalled may have been two weeks later, he was summoned to the office of Superintendent Elliott where he was confronted by two State Police troopers. Dr. Elliott read a letter to Moreno suspending him for text messaging he had purportedly done with A.H.. He then left with one of the State troopers after he was searched. They took his cell phone and keys, handcuffed him, and one of them escorted him to their car where they waited approximately twenty minutes before the second trooper emerged from the building (after remaining there with Superintendent Elliott) before they transported him to the State Police barracks in Bridgeton. Moreno was not Mirandized but was left locked in a room for a couple of hours before the troopers reappeared. At that time the two State troopers (detectives) appeared and said that A.H. had "confessed." They then said there were going to be no charges against him since everything had been consensual, but they still wanted to confirm that the stories matched, relating to Moreno having his hand on her leg and up her dress. This questioning went on for another hour. Moreno was also told that although there were no charges being brought by the State Police, the school was still in the process of investigating the matter. He felt that there was trickery involved in this process in the manner in which they tried to question him about the events. The troopers never asked him for a statement. There was no tape recording and there was no sign-off of any summary of any exchange between him and the two detectives. Moreno only first saw the State Police report (P-16) when his attorney showed it to him. When shown page 36 of that report by his attorney at the due process hearing, he denied having made any of the admissions which were contained in that recitation. After the interview process was completed, the troopers told him that he could ride back to his car with A.H. The troopers never drove him back themselves.

Regarding the text messaging, Moreno indicated that every year for two years he has given his cell phone number to all of his students which is placed on the classroom blackboard at the beginning of the semester. He has never been aware of any school prohibition on giving out either one's cell phone or home phone number. Regarding A.H., she had significant emotional issues, like 80% of the other students in his classes and some of whom were also special education students, all of which caused him to text her frequently. A.H. had had three suicide attempts. He personally interceded in one of

her suicide attempts which involved her having a gun at a lake. In a second attempt, A.H. wanted to take pills and did not want to live anymore but he convinced her to dump them into a toilet. In a third case, Moreno was aware that she had injected heroin in her leg and threatened an overdose. The bulk of the exchanges he had with her were generated pursuant to text messages accordingly. She also pleaded with him about her mother's brother having molested her and was concerned than her mother smoked marijuana on a daily basis. All of this bothered A.H. and she shared those thoughts with Moreno routinely. As a result, all in all he wanted to "keep her alive" since her upsets became an everyday type of issue. There was, as he described it "one hump over another." In the process, Moreno, as well as his wife, has done a lot of social work in his life, including having hosted Russian exchange students. His wife knew all along that he would get text messages from various students. Moreno also noted that he had previously texted A.C. regarding her own personal, mostly social, problems and had her phone number accordingly. He even attended two of her motorcycle events and worked with a photographer to record the events for her. At the same time, Moreno attended events on behalf of other students as well, such as N.M.'s wrestling matches and other students' basketball games and ROTC competitions. As he described it, he would "go that extra mile" for special education students as well as single parent family situations because he wanted to show those students that he really cared for them. He still does mission volunteer work in Philadelphia. He indicated that he never did anything inappropriate with A.H. At the same time, he had noticed that there appeared to be some tensions between A.C. and A.H., the latter of whom was very popular. In the process, Moreno would observe A.C. make faces and mimic A.H. She would also make the point of talking to A.H.'s boyfriend, K.C., a lot, except when A.H. was present.

Regarding Dina Elliott, Moreno felt that she was initially very open with him and even wanted her husband to check out his program at school. But she also thought that there should be a greater emphasis on State Police practices and not corrections procedures which he had been conducting in his class. It was Moreno's understanding that Elliott's husband is a sergeant in the Division of State Police and is the supervisor over the two detectives who investigated him and A.H. His replacement as an instructor at the Center was a retired State trooper. He even wrote to the Division of State Police regarding information about the "unfounded investigative report" relative to his matter

(R-4) on August 23, 2012, which request was denied by that office in a responding letter dated October 22, 2012 (also R-4.)

On cross-examination, Moreno indicated that he never recalled ever seeing any signed copies of the permission forms which were utilized on the Skills USA conference trip but he assumed that there was probably a briefing by Bonnie Marano with the students beforehand regarding the requirements of the trip. He helped her apply the curfew tape to all the students' doors after they were bedded down at the hotel. After the students checked out of their rooms the next morning they placed their luggage in their respective chaperones' rooms so that they could then go to the competition, change their clothes as necessary later on, and attend the dinner before the entire group left for home. Once they arrived back at the school late that night Moreno admitted that he drove A.H. to her house. It was his contention that it was a common practice that either a chaperone or another student would drive a student home. No one ever called the police to perform that function even though the permission slips indicate that would be the protocol. At the same time Moreno admitted that he never consulted with any of the other chaperones before driving A.H. home that night. He also acknowledged that in his answers to the interrogatories which were preferred against him in this matter, he failed to mention that he did receive a discipline for that infraction even though the question was, "Set forth in detail any other disciplinary action, including verbal or written warnings, taken against you during the course of your career in education." (P-21, DOE page 58 at question 9.) He only stated that he had no discipline by stating, "None that I remember." (P-21, DOE page 72 at answer 9.) His follow-up explanation at the due process hearing was that the official written warning which was generated as a result of that incident was part of this current matter not any prior matter.

He also contended that although Dr. Elliott was well aware of the emotional issues involving A.H. and that he was aware that the guidance department met with her at least once a week in that regard, Moreno told Dr. Elliott that he was also counseling her about her issues. On further cross-examination, he was directed to the text message log which was culled from the text messages between him and A.H. (P-20). Regarding the high volume of text messages which were generated in the afternoon of

Friday, April 27, 2012, he surmised that he was probably off from work that day but he had no actual facts to support that assertion. Ordinarily, the students, including A.H., would be in class with him in the afternoon session at that time.

He also maintained that A.C. was mistaken about him having put his hand up A.H.'s dress. As a result, all of the allegations which were contained in the State Police report (P-16) were inaccurate, totally false and wrong. The troopers were, as he described it, "lying" when they wrote their report about the investigation. In addition, he volunteered that A.C. never entered his room the morning of the Skills USA competition.

On redirect examination, he noted that the trip permission slip instructions indicated that all chaperones were to have cell phone numbers available for the use of anyone who tried to reach them "during the trip." (P-2.)

LEGAL DISCUSSION AND ANALYSIS

As indicated herein above, the State Board of Examiners of the New Jersey Department of Education issued an Order to Show Cause regarding a revocation proceeding against Ronald Moreno, who is the holder of (1) Teacher of Elementary School Certificate of Eligibility, dated July, 1994; (2) Teacher of Data Processing Certificate of Eligibility, dated July, 1994; (3) Teacher of Computer Science Technology Certificate of Eligibility, dated September 1994; (4) Teacher of Elementary School certificate, dated July 1997; (5) Teacher of Data Processing certificate, dated July, 1997; (6) Teacher of Computer Science Technology certificate, issued in July 1997 and; (7) Teacher of Law Enforcement certificate, issued in October 2010. The Order to Show Cause was issued on November 30, 2012, after which he appealed on January 15, 2013. It was based upon information received from the Center, which reported that Moreno had retired from his teaching position following allegations that he had been involved in an inappropriate relationship with a student.

In accordance with the provisions of N.J.S.A. 18A:6-38, the Board of Examiners is the State agency entrusted with the issuance and revocation of certificates to teach in

public schools and, as such, it may revoke or suspend a certificate of any certificate holder on the basis of "demonstrated inefficiency, incapacity, conduct unbecoming a teacher or other just cause." N.J.A.C. 6A: 9-17.5.

"Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

The Board of Examiners bears the burden of proof relative to the charges and which must be established by a preponderance of the credible evidence. In re Grossman, 127 N.J. Super. 12 (App. Div. 1974), certif. denied, 65 N.J. 292 (1974). Determining whether a charge has been proven by a preponderance of the evidence usually resolves itself down to a credibility determination by the finder of fact. Credibility contemplates an assessment of a witness's story in light of its rationality, internal consistency, and manner in which it hangs together with other evidence. In re Schulman, 92 N.J.A.R. 2nd (BDS) 16, 27 (citing Carbo v. United States, 314 F. 2nd 718 (9th Cir. 1963)).

Further, the Board must show by a preponderance of the competent relevant and credible evidence that respondent engaged in the conduct alleged in the Order to Show Cause. In re Papadaniil, EDE 8H21-00, Initial Decision (March 13, 2002), adopted Bd. of Exam'r (May 9, 2002) http://lawlibrary.rutgers.edu/oal/search.html.

In relevant part, the Order to Show Cause in this matter charged respondent Moreno as follows:

> [T]he [Center/ reported that Moreno had placed his hand on the leg of a student, A.H., during a dinner outing on a school trip. Another student alleged that she read text messages between A.H. and Moreno which included references to Moreno being "hard," lotion/soap, animals having sex, a discussion mentioning that A.H. got her period, and Moreno asking "Have you ever had sex while you had your period?" and a text from Moreno regarding the end of the trip and taking A.H. home and parking "out of view of the security cameras."

In addition, the Center had also advised the Board that in interviews with the Division the State Police both A.H. and Moreno had admitted that they were engaged in a consensual relationship which began after the student's eighteenth birthday and that the State Police did not file any charges against Moreno accordingly.

Based upon the foregoing, the Board of Examiners found just cause for consideration of the revocation of Moreno's certificates based upon his conduct in engaging in an inappropriate relationship with a student. The Order to Show Cause ordered Moreno to show why his various certificates should not be revoked under the circumstances.

Where proof consists primarily of witness testimony, a careful analysis of credibility is necessary in order to make critical findings of fact and the choice of accepting or rejecting the witness' testimony or credibility rests with the finder of facts. See Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). "Firmly entrenched in decisional law and court rule is the concept that the question of credibility is preeminently one for the trial court, since it hears the case, sees and observes the witnesses, hears them testify, and has better opportunity to judge their credibility than the reviewing court." Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961) (citing Capozzoli v. Capozzoli, 1 N.J. 540 (1949)). For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation of mankind that it can be approved as probable under the circumstances. Spagnuolo v. Bonnet, 16

N.J. 546, 554-55 (1954); Gallo v. Gallo, supra, (both citing In re Perrone's Estate, 5 N.J. 514, 522 (1950)). A fact finder "is free to weigh the evidence and to reject the testimony of a witness even though not contradicted when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, supra, 5 N.J. at 521-522; See also D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

The Board of Examiners has repeatedly deferred to the findings of the administrative law judge in due process hearings. In re Certificates of Schiavo, EDE 08425-04, State Board of Examiners (May 4, 2006); In re the Certificates of Ferriera, EDE 03390-04, State Board of Examiners (September 22, 2005); In re Certificates of Grendysa, EDE 00985-03, State Board of Examiners (January 17, 2008).

Credibility is defined as: "The quality that makes something (as a witness or some evidence) worthy of belief." Blacks Law Dictionary (Ninth Edition).

Accordingly, credibility does not mean determining who is telling the truth, but rather requires a determination of whose testimony is "worthy of belief" based upon numerous factors. Credibility is not based on who presented the most witnesses. Instead, it is "the interest, motive, bias, or prejudice of a witness [that] may affect his credibility and justify the . . . [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952), certif. denied, 10 N.J. 316 (1952) (citation omitted). The process entails observing the witnesses' demeanor, evaluating their ability to recall specific details, evaluating the consistency of their testimony under direct and cross-examination, determining the significance of any inconsistent statements and otherwise gathering a sense of their candor with the court. Thus, "[c]redibility involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963).

It is in light of all the above that I have considered the proofs presented in this matter. In the process, I have attached the appropriate weight to the respective testimonies of all the witnesses, and their interests in the outcome of this matter. In that regard, I note that, as to this first incident, the principal Skills USA chaperone, Bonnie Marano, was in the key position to make certain observations regarding the conduct by Moreno which formed the backdrop of the accumulated inappropriate interactions between Moreno and A.H. during the overnight stay, the full day at the competition as well as on the drive home to the Center and back to the home of A.H. Although Moreno was ultimately only cited by the Center with having violated the drive home policy, his clearly repeatedly physically close contact with A.H. during those two days was improvident at best and created the opportunity for the appearance of unbecoming conduct in his role as a teacher with a student. His recognition and testimonial acknowledgement that the student was already undergoing school counseling for emotional issues did not translate into him being allowed to assume a similar role with her. If anything, it should have served as a sizable red flag for him to ensure that the student would not misconstrue any of his best noble intentions, which could have further added to and/or compromised her apparent deep seated emotional dilemmas and/or confusions. As a result, Moreno's repeated close-quarter interactions with A.H. at the Skills USA competition were clearly inappropriate and ill-advised.

In that regard, and after considering the testimony of each of the parties therein, I **FIND** that the relevant facts are that Moreno and A.H. did make admissions and admitted to Marano that A.H. had been in Moreno's room in the early morning, which occurred after A.H. violated the field trip protocol by breaking out of her assigned room before she was supposed to leave it with the other female students. Their respective denials of her status in his room in the early morning at the due process hearing were not believable under the circumstances since I am satisfied that Bonnie Marano had no vested interest in attempting to fabricate the occurrence of those admissions, while, at the same time, both Moreno and A.H. clearly did have such an interest since they were apparently cultivating a personal, close relationship for their respective reasons. Under those circumstances, it is no wonder that Marano was, as she described it, "frantic" when she discovered that the tape security to the girls' hotel room had been broken in the early morning hours, which resulted in her conducting an immediate frenzied search

for A.H. and which search ended at the entrance to Moreno's hotel room. It is also noteworthy that the statements made by A.H. to the State Police during the ensuing investigation indicated that she began to have feelings with Moreno after that class trip in March 2012, and that those feelings began with a hug she had had with Moreno during a study session while at that class trip. (P-16 at DOE page 35.) This further corroborates the fact that Moreno began to loom as a key figure in the eyes of A.H. at that time.

The subsequent interactions between Moreno and A.H. during the rest of that day were also equally disturbing and unsettling. They all illustrated an unhealthy and inappropriate nexus between a teacher and student, the perception of which reflected unbecoming conduct by Moreno. In that regard, I **FIND** that the afternoon presence of A.H. in the male-only hotel room (which was now used as a holding area for the luggage of and as a changing room for the male students in the afternoon) which was in the custody and control of Moreno, and who later admitted to Marano was also in the room at the same time, was highly inappropriate and totally inexcusable. Had A.H. been so sick and incapacitated as to have had need to rest and recover from some illness at the time, she should have been directed to Bonnie Marano immediately by Moreno. Instead she wound up in his room where Marano found her clothed and alone on top of the made-up bed. Soon thereafter, Moreno admitted to Marano that he was in the bathroom when Marano arrived.

Then, A.H.'s physical reliance upon Moreno at the dinner reception caused another student to question Marano by asking her if she thought that the face fanning interaction between the student and instructor was "creepy." This was followed up by A.H. later resting her head on the shoulder of Moreno during the ceremony and by her then getting up and following him out of the room at which point Marano overheard another student immediately comment, to the effect, "what's up with those two?" The trip home on the small bus was another example of the student A.H. resting her head on the shoulder of Moreno (also observed briefly by Marano as she did a head count before driving back separately) and was equally unsettling, disturbing and inappropriate. All of this was followed up by Moreno quickly taking A.H. home from the school in violation of the announced and agreed-to policy regarding acceptable transportation options. Based upon all of the foregoing, there is no justifiable excuse to have allowed for the sum total of those actions on the Skills USA trip by Moreno, as so credibly reported by Bonnie Marano (P-1) under the circumstances. All of those actions by Moreno reflected unbecoming conduct by a teacher with a student. The issuance of only a written warning by the Center cannot diminish the seriousness of his infraction regarding the drive home policy, much less the sum total of his excessively close and inappropriate contact with A.H. at the various denoted times during the preceding two

days. And I so **FIND**. Further, all of those interactions reflected poorly upon Moreno as a proper role model and served to add to his highly diminished overall credibility.

There was also an issue in this matter raised regarding the text messaging which was generated between Moreno and A.H. over time. In that regard there was a focus on the text messaging exchange among the two of them between April 18 and May 11, 2012, which consisted of 1,857 text messages. (P-18, 19 and 20.) Since the contents of those messages could not be ascertained, retrieved or produced at hearing, one cannot conclude that an inappropriate relationship was reflected in those exchanges. However, it is the sheer massive volume of them alone which casts doubt regarding any innocent relationship between a teacher and student. Further, many of the text messages occurred at all times of day and night, including at 3:21 a.m. on April 19, 2012. That most certainly raises additional questions regarding the existence of a unhealthy relationship between a teacher and student. In addition, it is most curious that a number of exchanged text messages even occurred during hours when it was presumed that Moreno would have been teaching the law enforcement class of which A.H. was a member. Thus, even though the Board never confirmed the status of Moreno and A.H. on those occasions (i.e., whether he or she was absent from school or whether or not school was actually in session on those occasions), the inference which was attached to those proofs under the circumstances was never successfully rebutted by respondent. As a result, I am satisfied and **FIND** that the accumulated and vast amount of text exchanges was highly excessive and inappropriate, and, in the process, it demonstrated unbecoming conduct by a supervising adult over a student. This would have existed regardless of whether or not the student involved manifested the level and extent of the emotional issues raised with reference to A.H. by Moreno herein. However, the fact that Moreno contends that the student had such emotional difficulties further exacerbated the seriousness of concerns about the vast number of text messages between them since Moreno clearly had no authority to assume such responsibility on her behalf. His actions in that regard went way beyond reasonable limits and reflected negatively upon his role as a teacher.

The matter involving the observations by A.C. regarding the actions by Moreno at the Washington, D.C. dinner table was also the subject of concern raised in the Order to Show Cause. A.C. contends that she saw Moreno with his hand on the leg and briefly up A.H.'s skirt. Upon observing her awareness of that event, A.C. maintained that Moreno removed his hand. Moreno denied the occurrence of that event and attempted to illustrate how A.C. could not have been able to make such an observation from her seating position. However, after examining the sketches made by A.C, N.M., and A.H., (P-17, R-1 and R-2) and considering the testimony offered, I **FIND** that it is entirely plausible that A.C. made those observations as she did. And in light of the fact that I found the overall testimony of A.C. to be highly credible and worthy of belief, her account of that event was accepted as being true. This also became evident when the proofs regarding the content of the text messages from A.H.'s cell phone were also evaluated in this matter since the contents of a number of those messages totally conformed with observations of the actions of Moreno putting his hand on A.H.'s leg and up her skirt. As a result, although Moreno attempted to discredit the testimony of A.C. regarding her ability to make those observations there, I **FIND** that those observations were sufficiently credible in their own right in view of the relative positioning and seating of the attendees at A.C.'s birthday dinner.

I am also satisfied and **FIND** that the petitioner has carried its burden to demonstrate that a highly inappropriate and most graphically intimate, disturbing and sexually explicit interplay of text messages occurred between Moreno and A.H. in the display of messages which was observed and scrutinized by both A.C. and N.M., the latter of whom had the password code access to the A.H.'s phone. In that regard, I **FIND** that all of this occurred after A.H. moved from her seat next to A.C. while the bus was stopped at a rest area in Delaware on the way home, left her cell phone behind on that seat, and then sat next to and leaned on the shoulder of Moreno during the next part of the trip. Curiously, but not surprisingly, these head-resting actions are consistent with and reminiscent of what had occurred at the Skills USA competition banquet dinner and on the ride home from Somerset. Also, athough one cannot condone the admitted snooping and spying by both of those fellow students (A.C. and N.M.) on the ride home from Washington, D.C., their indiscretions in that regard cannot excuse or diminish the scurrilous nature of the text exchanges between the teacher and student. If anything,

those text messages were so outlandishly and flagrantly graphic as to make their truthfulness more believable than not under the circumstances. Further, and as noted above, some of those text messages appeared totally consistent with the observations by A.C. regarding Moreno putting his hand on A.C.'s leg and reaching up the dress of A.H. at the restaurant dinner table.

In the process, although A.H. attempted to suggest that A.C. manifested such jealousy as to cause her to fabricate the circumstances attendant to her table observations and her observed text messages on A.H.'s cell phone, I am not satisfied that A.H. has demonstrated the sufficiency of any such proofs by a preponderance of the credible evidence. The fact that, at the direction and urging of her mother, A.C. ultimately divulged her concerns to Superintendent Elliott and then recited her observations to the State Police detectives demonstrated sufficient consistency so as to make her observations credible and believable. Her testimony at hearing was also consistent with the report by Dr. Elliott. In the process, I find that it is highly unlikely and improbable that A.C. would have run the incredible risk of fabricating such a disturbing account to either Superintendent Elliott or the State Police. Further, the testimony of N.M. totally corroborated the testimony of A.C. about the content of the text messages, both of whom I found to be credible and worthy of belief under the circumstances. By contrast, both Moreno and A.H. had a highly vested interest in denying any interactions regarding the scandalous allegations of inappropriateness between the significantly older teacher and his student.

In addition, the conflicting and contradictory testimony by A.H. at the due process hearing over two days added further suspicion regarding the credibility of her responses there. By her own varying admissions and testimony, she initially testified that she had told the State Police various things about her intimate involvement with Moreno (i.e., "made things up") but then claimed on the second day of her testimony that she never did. After having closely scrutinized her responses from the hearing, I found her to be much less than credible and her testimony not worthy of belief. Her vested interest in protecting Moreno was obvious and that made her testimony dubious at best. It was also noted that it was admitted that A.H. was driven to the hearing by Moreno on both occasions, which adds greater concern for the opportunity for them to have coordinated their stories in the face of the highly credible testimony of six witnesses to the contrary prior to their individual presentations.

The charges of unbecoming conduct by Moreno were egregious and shocking since they demonstrated a highly unwholesome relationship between a teacher and student. Under those circumstances, it is entirely understandable why Superintendent Elliott and the Board at the Center acted as quickly as they did in order to address the serious allegations of such misconduct. Moreno's ongoing intimate interactions with A.H. were highly inappropriate and contrary to the good order and moral fabric of the Center. The fact that various students had their suspicions and made negative comments about them over a period of time further inflamed the good order of that institution. In addition, A.C. was so upset about what she had witnessed that she did not want to return to that school, which illustrates the adverse impact of Moreno's misconduct.

In addition, the claims and allegations by Moreno about some nefarious conspiracy to harpoon his career at the Center by Dr. Elliott and the Division of State Police were incredible at best. After having considered all the testimony in that regard, I **FIND** that he has failed to demonstrate and sufficiently corroborate any credible proofs to support or prove that assertion. In addition, his steadfast denial about what he told the State Police detectives and his claim that they "lied" about what was said to them by both Moreno and A.H. strains credible limits and shocks the conscious. Here is someone who had spent a career in local law enforcement and yet he had the temerity to attempt to discredit these law enforcement officers as he did. It is virtually inconceivable that these State Police officials would had jeopardized their professional status or would have exposed the Division of State Police to such scandal or malfeasance by creating facts which were not true. In the same way, and after having attached the appropriate weight of the testimony of Moreno, I found his testimony and his defenses to be incredible and lacking any viable validity whatsoever. Curiously, his wife never appeared to provide testimony regarding the relationship between him and A.H. or lend any other level of validity to his assertions regarding his purported altruistic outlook on life and volunteer involvements in his community.

Therefore, based upon all of the relevant proofs and after having attached the appropriate weight to the testimony of all the witnesses, as well as their interest in the outcome, I **FIND** that the bulk of the relevant facts show that Moreno engaged in an unwholesome and inappropriate relationship with A.H., as set forth in the Order to Show Cause herein.

It is also problematic that A.H. was an emotionally fragile young woman at the time, which merely added to the probability and reality of her attraction to a teacher at a time when her background of negative influences had seriously impacted upon her. The notion that she was suicidal was a horrendous burden for anyone to carry or with which to contend. But that did not give leave for Moreno to have invested in her life the way he did since the consequences of and risks attendant to such effort were so negatively significant in their own right. Needless to say, however, as I have found herein above, Moreno went well above and beyond innocent interaction and, in the

process, he overstepped his authority, position and responsibility as a teacher to a very large and totally unsavory degree.

The law is generally well settled that an inappropriate contact between a teacher and a student would be found to be a sufficient basis to warrant revocation. In re The Certificates of Papadaniil, EDE 8821-00, State Board of Examiners Decision (May 9, 2002) (in which a teaching certificate was revoked predicated upon a teacher's sexual relationship with a student); In re Certificate of Cantillon, EDE 10433-06, State Board of Examiners Decision (July 17, 2008) (in which the teacher maintained an inappropriate out-of-school relationship with a seventeen-year-old female student at the school); In re Castel, EDE 5768-08, State Board of Examiners Decision (October 12, 2010) (in which a tenured teacher's contact with two middle school female students was inappropriate where he would pull the girls from their classes, would bestow additional attention on the girls, and left voicemail messages for one student which included offers to "hang out", "party" and "go to dinner"; In re Certificates of Nieves, State Board of Examiners (March 2, 2006), aff'd., SB No. 19-06 (N.J. Bd. of Educ. December 6, 2006) aff'd. per curiam, No. A-2627-06T3, 2008 N.J. Super. Unpub. LEXIS 2568 (App. Div. April 7, 2008), in which a teacher engaged in an exchange of inappropriate and suggestive notes during class with an eighth-grade student.

Thus, while I am cognizant of the potential adverse impact that these findings and conclusions can have on Moreno and his future career plans, one cannot change the facts which have been presented in this matter. He violated his role as a teacher over a student and demonstrated unbecoming conduct, which adds to the problematic nature of his supervisory role as a teacher over students.

CONCLUSION AND ORDER

Based upon all the foregoing, I **CONCLUDE** that the petitioner Board of Examiners has demonstrated unbecoming conduct by respondent Ronald Moreno by a preponderance of the credible evidence.

It is **ORDERED** that all of the teaching credentials listed herein of respondent Ronald Moreno are hereby **REVOKED.**

I hereby **FILE** my initial decision with the **STATE BOARD OF EXAMINERS** for consideration.

This recommended decision may be adopted, modified or rejected by the **STATE BOARD OF EXAMINERS**, which by law is authorized to make a final decision in this matter. If the State Board of Examiners does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

May 19, 2014
DATE

JOHN R. FUTEY, ALJ

Date Received at Agency: May 19, 2014

Date Mailed to Parties: May 19, 2014

mph

APPENDIX

LIST OF WITNESSES

For petitioner:

Bonnie Marano

A.C.

N.M.

Dina Elliott, Ed.D.

Detective Sergeant Arthur Barilotti

Detective Gregory Austin

For respondent:

A.H.

Ronald Moreno

LIST OF EXHIBITS

For petitioner:

P-1 Statement by Bonnie Marano, April 2, 2012

P-2 Skills USA letter to parents and agreement to attend

P-3 Letter from Dina Elliott to Ronald Moreno, dated April 5, 2012

P-4 Cumberland County Board of Vocational Education Policy 4119.25

P-5 Law Enforcement CTTEC yearbook page

P-6 Notes by Dina Elliott, dated May 29, 2012

P-7 Letter from Dina Elliott to Ronald Moreno, dated May 29, 2012

P-8 Statements of Dina Elliott, dated May 29 and 30, 2012

P-9 School security incident report

P-10 E-mail from Gene Mercoli to Dina Elliott, dated July 1, 2012

P-11 Letter from Dina Elliott to Robert R. Higgins, dated July 9, 2012

P-12 Letter from Ronald Moreno to Dina Elliott, dated July 11, 2012

P-13 Letter from Dina Elliott to Ronald Moreno, dated July 19, 2012

P-14 Letter from Robert R. Higgins to Dina Elliott, dated July 20, 2012

P-15 Letter from the Dina Elliott to Robert R. Higgins, dated August 8, 2012

P-16 New Jersey State Police investigation report

P-17 Sketch by A.C.

P-18 Call records

P-19 Text message records

P-20 Text message record summary

P-21 Interrogatories by petitioner and answers by respondent

For respondent:

R-1 Sketch by N.M.

R-2 Sketch by A.H

R-3 Division of Pensions State Police Retirement System List, dated September 25, 2012

R-4 Letter from Ronald Moreno to New Jersey State Police, dated August 23, 2012 and reply from State Police, dated October 22, 2012

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF	:	STATE BOARD OF EXAMINERS
RONALD MORENO	:	ORDER OF REVOCATION
_____	:	DOCKET NO: 1213-107

At its meeting of September 21, 2012, the State Board of Examiners (Board) reviewed information it had received from the Cumberland County Technical Education Center (CCTEC) regarding Ronald Moreno. CCTEC reported that Moreno retired from his position following allegations that he was involved in an inappropriate relationship with a student. Specifically, CCTEC alleged that Moreno had placed his hand on the leg of a student, A.H., during a dinner outing on a school trip. Another student alleged that she read text messages between A.H. and Moreno which included references to Moreno being "hard," lotion/soap, animals having sex, a discussion mentioning that A.H. got her period and Moreno asking "Have you ever had sex while you had your period?' and a text from Moreno regarding the end of the trip and taking A.H. home and parking "out of view of the security cameras." CCTEC also informed the Board that in interviews with the State Police, both A.H. and Moreno admitted that they were engaged in a consensual sexual relationship which began after the student's 18th birthday. The State Police did not file any charges against Moreno. Moreno currently holds Teacher of Elementary School and Teacher of Data Processing Certificates of Eligibility, both issued in July 1994, a Teacher of Computer Science Technology Certificate of Eligibility, issued in September 1994, Teacher of Elementary School, Teacher of Data Processing and Teacher of Computer Science Technology certificates, all issued in July 1997 and a Teacher of Law Enforcement certificate, issued in October 2010. After reviewing the above information, at its November 30, 2012 meeting, the Board voted to issue an Order to Show Cause to Moreno as to why his certificates should not be revoked.

The Board sent Moreno the Order to Show Cause by regular and certified mail on December 5, 2012. The Order provided that Moreno must file an Answer within 30 days. Moreno responded on December 21, 2012. In his Answer, Moreno stated that he did not know what CCTEC had reported to the Board, but denied all of the allegations in the Order to Show Cause as to his conduct. (Answer, ¶¶ 3, 4). He also denied that there was cause to consider revoking his certificates and left the Board to its proofs. (Answer, ¶ 5).

Since there were material facts in dispute, the Board transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case. Administrative Law Judge (ALJ) John R. Futey heard the matter on September 25, 26, and November 19, 2013 as well as on January 30, 2014. The record closed on April 4, 2014, and the ALJ issued an Initial Decision on May 19, 2014. *In the Matter of the Certificates of Ronald L. Moreno*, Dkt. No. EDE 944-13 (Initial Decision, May 19, 2014).

In that decision, ALJ Futey found that, in March 2012, while on a school field trip, A.H. violated protocol by leaving the hotel room she shared with other female students prior to the time she was allowed and wound up in Moreno's hotel room, where she was eventually discovered by the female chaperone, Bonnie Marano. (Initial Decision, slip op. at 26). The ALJ also found A.H.'s presence in Moreno's hotel room later in the afternoon while he was in the bathroom "highly inappropriate and totally inexcusable." *Id.* at 27. ALJ Futey determined that there was "no justifiable excuse" for Moreno's actions on that field trip including, allowing A.H. to rest her head on his shoulder during an awards ceremony and while riding on the bus home, and driving A.H. home once the bus arrived back at the school. *Id.* at 27, 28. The ALJ concluded that "all of those actions by Moreno reflected unbecoming conduct by a teacher with a student." *Id.* at 28. In addition, after noting that Moreno and A.H. had exchanged 1,857 text

messages between April 18 and May 11, 2012, the ALJ stated that he found the "accumulated and vast amount of text exchanges was highly excessive and inappropriate, and, in the process, it demonstrated unbecoming conduct by a supervising adult over a student." *Ibid.* ALJ Futey also found credible the testimony of A.C. and N.M., fellow students of A.H. *Id.* at 29-30. A.C. had testified that, at a dinner in Washington, D.C. during a field trip chaperoned by Moreno, she observed Moreno put his hand on A.H.'s leg and briefly up her skirt. *Id.* at 29. N.M. and A.C. both testified that, on that same trip, they looked at A.H.'s cell phone, which she had left on her bus seat after she went to sit next to Moreno. *Ibid.* Both A.C. and N.M. testified that they saw many sexually explicit text messages between A.H. and Moreno on A.H.'s phone. *Ibid.* Although ALJ Futey did not condone A.C. and N.M.'s "snooping and spying," he noted that "their indiscretions in that regard cannot excuse or diminish the scurrilous nature of the text exchanges between the teacher and student." *Id.* at 30. In contrast to A.C. and N.M.'s credible testimony, the ALJ found that A.H. "to be much less credible and her testimony not worthy of belief." *Id.* at 31. ALJ Futey determined that A.H. had a vested interest in protecting Moreno, which made her testimony "dubious at best." *Ibid.*

After assessing the evidence and "having attached the appropriate weight to the testimony of all the witnesses," ALJ Futey concluded that the facts demonstrated that Moreno had engaged in "an unwholesome and inappropriate relationship with A.H., as set forth in the Order to Show Cause herein." *Id.* at 32. After determining that the Board had demonstrated the allegations of unbecoming conduct against Moreno by a preponderance of the credible evidence, ALJ Futey ordered the revocation of his certificates. *Id.* at 33. Neither party filed Exceptions in the case.

The Board must now determine whether to adopt, modify or reject the Initial Decision in this matter. At its meeting of July 15, 2014, the Board reviewed the Initial Decision. After full and fair consideration of the Decision, the Board voted to adopt the Initial Decision.

There is no doubt that the ALJ is in the best position to render credibility determinations in this matter. Accordingly, the Board will defer to those findings. As noted above, after assessing the evidence and the credibility of the witnesses, ALJ Futey concluded that the Board had amply demonstrated that Moreno engaged in conduct unbecoming a teacher vis-a-vis his inappropriate relationship with A.H., which warranted the revocation of his certificates. (Initial Decision, slip op. at 33).

"Teachers ... are professional employees to whom the people have entrusted the care and custody of ... school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. Unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. *Redcay v. State Bd. of Educ.*, 130 *N.J.L.* 369, 371 (Sup. Ct. 1943), *aff'd*, 131 *N.J.L.* 326 (E & A 1944). In this case, Moreno's action of inappropriately touching a student's leg and putting his hand up her skirt, without more, certainly satisfies that requirement. His added behavior of exchanging sexually explicit texts with her, allowing her to rest her head on his shoulder on numerous occasions, allowing her to enter his hotel room while on school field trips and driving her home from a field trip only amplifies the litany of his offenses. Moreno's conduct amply demonstrates that he crossed a boundary that should exist between teacher and student. Finally, although ALJ Futey recognized, as does the Board, the potential damage a revocation would have on Moreno's future career plans, ultimately it is Moreno who is

responsible for his conduct as a whole and that conduct warrants revocation. The Board therefore adopts the Initial Decision in its entirety.

Accordingly, on July 15, 2014, the Board voted to adopt the Initial Decision and ordered to revoke Moreno's certificates. On this 24th day of July 2014, the Board formally adopted its written decision to adopt the Initial Decision in this matter, and it is therefore ORDERED that Ronald Moreno's Teacher of Elementary School, Teacher of Data Processing, and Teacher of Computer Science Technology Certificates of Eligibility, and his Teacher of Elementary School, Teacher of Data Processing, Teacher of Computer Science Technology and Teacher of Law Enforcement certificates are hereby revoked, effective immediately. It is further ORDERED that Moreno return his certificates to the Secretary of the State Board of Examiners, Office of Licensure, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

Robert R. Higgins, Secretary
State Board of Examiners

Date of Mailing: 7/29/14

Appeals may be made to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-38.4.

RRH/MZ/th

120-15

'20-15

st. john's UNIVERSITY

The Center for Labor and Employment Law

David L. Gregory
The Dorothy Day Professor of Law
Executive Director, Center for Labor and Employment Law
Tel 718 990-6019
Fax 718-990-6649
gregoryd@stjohns.edu
St. John's University
School of Law
8000 Utopia Parkway
Jamaica, Queens, NY 11439

SETTLEMENT CONSENT AGREEMENT Ag.Dkt.No 368-- 12/14

IN THE MATTER OF THE TENURE CHARGES

AGAINST

RESPONDENT KAREN L. MAGLIACANO

BROUGHT BY

NEW PROVIDENCE SCHOOL DISTRICT

Consistent with the requirements pursuant to NJAC 6A: 3-5-6

Settlement of this case is justified by the need for an expeditious resolution. The parties engaged in sophisticated motion practice. Inclement weather compelled several postponements of otherwise viable hearing dates. Several witnesses are significantly inconvenienced. According to the terms of the Settlement achieved at the hearing on March 12, 2015, Respondent is resigning and will receive fifteen months of compensation. The District achieves a guaranteed result in an expeditious manner at a relatively modest cost.

David L. Gregory, Arbitrator
~~March~~ June 30, 2015

Nj arb settlement March 30 2015

SCIARRILLO CORNELL
MERLINO, MCKEEVER & OSBORNE, LLC
Attorneys at Law

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CONTROVERSIES & DISPUTES
2015 JUN 30 A 11: 20

E-mail: edlawgroup@sciarrillolaw.com

June 30, 2015

Sent via Facsimile (609) 292-4333
M. Kathleen Duncan, Director
State Commissioner of Education
Bureau of Controversies and Disputes
New Jersey Department of Education
100 Riverview Plaza
P.O. Box 500
Trenton, New Jersey 08625-0500

Re: New Providence Board of Education
In the Matter of the Tenure Hearing of Karen Magliacano

Dear Ms. Duncan:

Please find enclosed a copy of the signed Settlement Agreement, General Release and Waiver and a Letter of Resignation in regards to the above matter.

If you have any questions, please do not hesitate to contact me.

Thank you,

Very Truly Yours,

SCIARRILLO, CORNELL, MERLINO, McKEEVER & OSBORNE, P.C.

Anthony P. Sciarrillo
APS/klb
Enclosures

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2015 JUN 30 A 11: 20

SEPARATION OF SERVICE AGREEMENT

This Agreement is hereby made this 25th day of June, 2015, by and between Karen Magliacano (hereinafter "Ms. Magliacano") and the NEW PROVIDENCE BOARD OF EDUCATION (hereinafter the "Board") (collectively the "Parties").

WHEREAS, the Board is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1, and is entrusted with maintaining and conducting the public schools of the New Providence Public School District;

WHEREAS, Ms. Magliacano is tenured in the position of Athletic Trainer with the New Providence Board of Education; and

WHEREAS, Ms. Magliacano is currently employed by the Board as New Providence High School Athletic Trainer; and

WHEREAS, Ms. Magliacano has been on administrative leave from the District beginning October 10, 2014; and

WHEREAS, Ms. Magliacano shall resign from employment with the District effective uponthe datge of her signature on this Agreement; and

WHEREAS, the Board and Ms. Magliacano have engaged in good faith discussions concerning Ms. Magliacano's future separation from employment with the Board and have reached an agreement, which they wish to memorialize herein; and

WHEREAS, the Board and Ms. Magliacano wish to fully and finally resolve any and all claims, complaints, charges and actions of any kind whatsoever, whether known or unknown, which either party may have against them as provided herein;

WHEREAS, Ms. Magliacano has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate;

NOW THEREFORE, the Board and Ms. Magliacano, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the Parties, agree as follows:

1. SEPARATION PAY AND BENEFITS: Within thirty (30) days of execution of the approval of this Agreement, Ms. Magliacano shall receive a lump sum severance payment of Ninety Two Thousand Nine Hundred Seventy Nine Dollars ($92,979) less the required deductions provided by law, in consideration of her years of service as a Board employee.

   Within thirty (30) days of execution of the approval of this Agreement, Ms. Magliacano

will receive a separate payment of One Thousand Three Hundred Forty Dollars and Twenty Four Cents ($1,340.24) representing payment for four (4) days she worked during Summer 2014.

Ms. Magliacano shall continue to receive health benefits from the Board until December 31, 2015. Ms. Magliacano shall be required to continue make contributions towards the cost of her health benefits in accordance with P.L. 2011, Ch. 78.

2. RESIGNATION DATE: Ms. Magliacano agrees to sign and submit to the Board, simultaneously with this Separation of Service Agreement, an irrevocable letter of resignation from all employment with the Board effective the date Ms. Magliacano signs this Agreement. The irrevocable letter of resignation shall be in the form attached hereto as Exhibit "B." The letter of resignation and this Agreement shall be subject to Ms. Magliacano's right to rescind pursuant to the Older Workers Benefit Protection Act, 29 U.S.C. 626(F)(1)(G), within seven (7) calendar days after the signing of this Agreement. The procedure for Ms. Magliacano to revoke this Agreement is set forth in paragraph 8 herein. If Ms. Magliacano does not rescind her letter of resignation and this Agreement within seven (7) calendar days of the signing of them, her resignation and this Agreement shall be binding and irrevocable. The Board shall accept Ms. Magliacano's letter of resignation simultaneously with the acceptance of this Agreement via resolution at a regular meeting of the Board.

3. CONTINGENCY: This Agreement is contingent upon immediate receipt by the Board of an irrevocable letter of resignation effective on the date Ms. Magliacano signs this Agreement. The irrevocable letter of resignation shall be provided contemporaneously with the execution of this Agreement by both parties.

4. CONSIDERATION: In further consideration of this Agreement, and in addition to the compensation Ms. Magliacano shall receive as required by Paragraph 1 of this Agreement, the Board agrees to withdraw all references to the previously filed tenure charges from Ms. Magliacano's personnel file.

   Ms. Magliacano specifically waives any and all other payments she may ordinarily be due under her employment contract with the District or under the Education Association Collective Bargaining Unit with the District. The payments identified in Paragraph 1 of this Agreement represent all payments due and owing Ms. Magliacano with respect to the Agreement and her employment with the Board.

5. RELEASE: Ms. Magliacano hereby releases, waives and forever discharges any and all past, present or future claims that relate to any action that predates this Agreement that she may have against the Board, including but not limited to, any and all claims for back pay or any other claim related to her absence from work and/or her employment with the Board. Ms. Magliacano acknowledges that she has the opportunity to consult with legal counsel and representatives of her choice regarding this Agreement and the General Release and Waiver that accompanies it prior to executing it; and that she represents that she has read this Agreement and the General

Release and Waiver and fully understands them and agrees to be bound by them. Ms. Magliacano also acknowledges that she has been given a reasonable period of time within which to consider this settlement and the terms of this Agreement and General Release and Waiver prior to executing them.

6. WAIVER: Ms. Magliacano agrees to waive any and all claims or demands which Ms. Magliacano now has or may have had against the Board; and in recognition of and in consideration for Ms. Magliacano's promise to provide the Board with a Release of all claims against it. Ms. Magliacano agrees that she will not reapply nor be eligible for employment with the Board after signing this Agreement.

7. OLDER WORKER BENEFIT PROTECTION ACT OF 1990: To comply with the Older Workers Benefit Protection Act of 1990, this Agreement advises Ms. Magliacano of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Agreement as follows:

a. Ms. Magliacano fully understands the terms and conditions of this Agreement;

b. Ms. Magliacano has been advised to consult with an attorney to review the Agreement;

c. Ms. Magliacano specifically waives her right to pursue any claims under the Age Discrimination in Employment Act;

d. Ms. Magliacano does not waive any rights or claims under the Age Discrimination in Employment Act that may arise after the date the waiver is executed.

e. Ms. Magliacano is receiving consideration above and beyond anything of value to which she already is entitled;

f. Ms. Magliacano has been given at least twenty-one (21) calendar days within which to consider this Agreement; and

g. Ms. Magliacano has seven (7) calendar days from the date of the execution of this waiver to revoke it.

8. CONFIDENTIALITY: This Agreement shall remain confidential to the maximum extent permitted by law and neither party shall disclose the terms of this Agreement to third parties. Ms. Magliacano may disclose the terms of this Agreement to her immediate family, tax advisor and attorney who shall be subject to the confidential provision of this agreement, and also maintain the confidentiality of this Agreement. A copy of this Agreement shall not be maintained in Ms. Magliacano's personnel file.

9. ENTIRE AGREEMENT: This Agreement and General Release and Waiver contain

the entire Agreement and understanding between the Parties and constitutes a full and final agreement in any and all issues relating to this matter, except that the Parties reserve their right to enforce this Agreement, if necessary.

10. CHOICE OF LAW: This Agreement shall be governed by the laws of the State of New Jersey.

11. SEVERABILITY: If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

13. BINDING EFFECT: The Parties shall be bound by the terms and conditions of this Agreement.

14. APPROVAL: The terms and conditions of this Agreement and Ms. Magliacano's irrevocable letter of resignation are subject to ratification and approval by the New Providence Board of Education.

15. VOLUNTARY AGREEMENT: The Parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement.

16. ADMISSION OF LIABILITY: The Parties' entry into this Agreement shall not constitute nor shall it be interpreted as an admission of wrongdoing or guilt, or liability in any manner on either of the Parties' part. Any such obligation or liability on either Party's part is expressly denied. The Parties have entered into this Agreement solely to compromise disputed claims.

17. OPPORTUNITY TO CONSULT WITH COUNSEL: The Parties acknowledge that each has been given the opportunity to consult with an attorney or a representative of their own choosing with respect to this Agreement and reviewed with their attorney or representative all the terms and conditions of this Agreement prior to executing this Agreement. Each Party signs this Agreement freely and voluntarily and without coercion or duress. The Parties further acknowledge that they fully understand the duties and obligations enumerated herein and have been informed of their legal rights and obligations.

18. BREACH: If either party breaches this Agreement, the breaching party shall bear the costs of the non-breaching party of any litigation or efforts to have such breach corrected or compensated for, including but not limited to, reasonable attorneys' fees.

19. RATIFICATION: The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the

Board to its terms. Upon ratification of this Agreement, the Board authorizes its Board President to execute same on its behalf.

20. GOOD FAITH AND NONDISPARAGEMENT: The Parties expressly agree that they shall act in good faith to ensure implementation of this Separation of Service Agreement and General Release and Waiver. The Parties mutually agree to refrain from making any derogatory comments, written or oral; retaliation or disparagement, in any manner, against the other party or their families, family members, agents, officials, administrators, representatives and employees.

    The Board agrees that in the event it receives any inquiries or reference requests for Ms. Magliacano that its comments shall be limited to an acknowledgement of her position, length of employment, salary history, and effective resignation date.

21. COBRA: Nothing contained within this Separation of Service Agreement shall alter Ms. Magliacano's rights to continuation of health insurance through Federal law, i.e. the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA") upon separation from employment with the Board as of the date which coincides with the date that Ms. Magliacano no longer receives health insurance as provided by the Board.

22. MODIFICATIONS: This Agreement may not be altered, amended or modified except in writing, signed and duly authorized by all Parties.

23. EXECUTION IN COUNTERPARTS AND FACSIMILE SIGNATURES: This Agreement may be executed in two (or more) counterparts each of which, when executed and delivered shall be deemed to be an original, and of which counterparts, taken together, shall constitute one and the same agreement. An original signature transmitted by facsimile shall be deemed to be an original for purposes of this Agreement and for the accompanying letter of resignation.

IN WITNESS WHEREOF, the Parties hereunder set their hands and seals to this Agreement effective on this 11th day of June, 2015.

On Behalf of the Board:

KAREN L. MAGLIACANO

By: 6/25/15
DAVID C. HASENKOPF
Board of Education President

WITNESS

Dated: June 11, 2015

JAMES TESTA,
Business Administrator

Dated: June 25, 2015

GENERAL RELEASE AND WAIVER

In consideration for the promises and undertakings described in the Separation of Service Agreement dated June 11, 2015, I hereby release, waive and discharge the New Providence Board of Education, and its present and former board members, officers, employees and representatives, and their estates and/or heirs thereof from any and all claims which I, my estate and/or heirs may have against any of them. This releases and waives all claims, known and unknown, resulting from anything which has happened up to now, including claims for attorney's fees.

Without limiting the scope of the foregoing provision in any way, I specifically release all claims which were or could have been asserted by me. I also release and waive all claims relating to or arising out of any aspect of my employment to date with the New Providence Board of Education, including but not limited to, all claims under Title VII of The Civil Rights Act, The Civil Rights Act of 1991 and the laws amended thereby; Sections 1981 through 1988 of Title 42 of the United States Code; the Employee Retirement Income Security Act of 1974; the Immigration Reform Control Act; the Fair Labor Standards Act; the Occupational Safety and Health Act; the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act of 1990, the Americans with Disabilities Act; the Family and Medical Leave Act of 1993; the New Jersey Family Leave Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Wage and Hour Act, and any related federal, state or local law claims, and any claims of discrimination based on race, age, sex, religion, color, creed, handicap or disability, citizenship, national origin and any other factor prohibited by any federal, state or local law, rule, regulation or guideline; any claim for wrongful discharge; any contract of employment, express or implied; any provision of the Constitution of

the United States or the State of New Jersey; and any other law, common or statutory, of the United States, the State of New Jersey or any other state; any claims for the negligent and/or intentional infliction of emotional distress or specific intent to harm; any claims for attorneys' fees, costs and/or expenses; any claims for unpaid or withheld wages, severance pay, benefits, bonuses, deferred compensation, and/or other compensation of any kind; and/or any other federal, state or local human rights, civil rights, wage and hour, wage payment, pension or labor laws, rules and/or regulations, and all claims growing out of any legal restrictions on the New Providence Board of Education's right to hire and/or terminate its employees.

I agree not to seek any employment at any time with the New Providence Board of Education.

I also promise not to sue and waive all claims against the New Providence Board of Education covered by the Separation of Service Agreement and this General Release and Waiver. If one party breaches this promise by suing the other for any such claims, the breaching party will pay all costs and expenses the other party incurs defending against the suit, including reasonable attorney's fees and costs. Notwithstanding the foregoing, the Parties reserve their right to enforce the terms of this Separation of Service Agreement and General Release and Waiver.

I acknowledge that I was advised to consult with attorneys regarding this General Release and Waiver; and that I have read and fully understand it and agree to be bound by it. I also acknowledge that I have been given a reasonable period of time within which to consider this settlement and the terms of this General Release and Waiver prior to executing it.

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CONTROVERSIES & DISPUTES
2015 JUN 30 A 11: 21

ACKNOWLEDGMENT

I HAVE CAREFULLY READ AND FULLY UNDERSTAND THE TERMS AND CONDITIONS OF THIS RELEASE AND WAIVER. I ACKNOWLEDGE THAT I HAD THE OPPORTUNITY TO REVIEW THIS RELEASE AND WAIVER WITH ANYONE OF MY CHOOSING, AND TO DISCUSS WITH SUCH PERSONS THE TERMS AND CONDITIONS OF THIS RELEASE AND WAIVER AND MY RIGHTS UPON EXECUTION. I AGREE AND ACKNOWLEDGE THAT NO REPRESENTATIONS CONCERNING THE TERMS OR EFFECT OF THIS RELEASE WERE MADE BY THE NEW PROVIDENCE BOARD OF EDUCATION OR ITS ATTORNEYS OTHER THAN AS SET FORTH IN THE DOCUMENT AND THAT I HAVE VOLUNTARILY SIGNED THIS RELEASE AND WAIVER AS MY OWN FREE ACT WITH FULL KNOWLEDGE OF ITS TERMS AND CONDITIONS, WHICH ARE FINAL AND BINDING UPON ME.

I FURTHER UNDERSTAND THAT THIS AGREEMENT SHALL NOT BECOME EFFECTIVE OR ENFORCEABLE FOR A PERIOD OF SEVEN (7) DAYS FOLLOWING THE EXECUTION OF THIS AGREEMENT AND THAT I MAY REVOKE THIS AGREEMENT BY DELIVERING A WRITTEN NOTICE OF ANY SUCH DECISION TO THE NEW PROVIDENCE BOARD OF EDUCATION WITHIN THIS SEVEN-DAY PERIOD.

DATED: June 11, 2015

Karen L. Magliacano

Karen Magliacano
Name (Please Print)

STATE OF NEW JERSEY:
: SS:
COUNTY OF :

I CERTIFY that on June 11, 2015, Karen L. Magliacano, personally came before me and acknowledged under oath, to my satisfaction, that she is named in and personally signed this document.

Dated: June 11, 2015

By: [signature]
Attorney-at-Law

May 27, 2015

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2015 JUN 30 A 11: 21

David M. Miceli, Ed. D., Superintendent
356 Elkwood Ave.
New Providence, NJ 07974

Re: Letter of Resignation

Dear Dr. Miceli,

Please accept this letter as notice of my resignation from employment with the New Providence School District effective at the close of business on May 28, 2015.

Thank you,

Karen L. Magliacano

167-15

NEWARK TEACHERS UNION, LOCAL 481, AMERICAN FEDERATION OF TEACHERS, AFL-CIO AND JOHN ABEIGON,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY AND CAMI ANDERSON,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioning Education Association (Association) sought declaratory and injunctive relief to compel respondent Cami Anderson – Superintendent of the State-Operated School District of the City of Newark – to attend all Newark Public Schools Advisory Board (SAB) meetings in order to comply with her obligations pursuant to *N.J.S.A.* 18A:7A-47(b). An emergent relief hearing was held on May 21, 2014 in the Office of Administrative Law (OAL), and petitioners' request for emergent relief was subsequently denied by the Commissioner on July 23, 2014. Respondents filed a motion for summary decision, which was opposed by the petitioners.

The ALJ found, *inter alia*, that: there are no material facts at issue, and the matter is ripe for summary decision; contrary to petitioners' assertions, *N.J.S.A.* 18A:7A-47(a) and (b) do not clearly state that a State-Operated School District Superintendent is required to appear at board meetings; rather, the statute states that the superintendent **may** meet with the board as frequently as necessary; there is no statutory requirement that the superintendent meet with the board; meetings are entirely within the discretion of the State-appointed superintendent; there is no dispute that reports to the board have been made by Superintendent Anderson or by some individual acting in that capacity; the petitioners' attempt to require the superintendent to attend SAB meetings is misplaced as the statute clearly does not mandate that the superintendent personally attend each SAB meeting; and the superintendent has fulfilled all of her requirements under *N.J.S.A.* 18A:7A-47(a) and (b). The ALJ concluded that the respondents are entitled to summary decision, and ordered the petition dismissed.

Upon comprehensive review, the Commissioner concurred with the findings and conclusions of the ALJ and adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

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

Issued 5/21/15

OAL DKT. NO. EDU 6177-14
AGENCY DKT. NO. 125-5/14

NEWARK TEACHERS UNION, LOCAL 481, AMERICAN FEDERATION OF TEACHERS, AFL-CIO AND JOHN ABEIGON,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY AND CAMI ANDERSON,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioners and the District's reply thereto.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) – for the reasons outlined in the Initial Decision – that the petitioners' application for injunctive relief to compel the Superintendent to attend all School Advisory Board meetings should be dismissed. Moreover, the Commissioner finds the petitioners' exceptions unpersuasive, largely reflecting arguments and objections previously raised before the ALJ and clearly taken into account by him in granting summary decision in favor of the District. Accordingly, for the reasons expressed therein, the Initial Decision is adopted as the final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/21/15
Date of Mailing: 5/21/15

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 06177-14
AGENCY DKT. NO. 125-5/14

NEWARK TEACHERS UNION, LOCAL 481,
AMERICAN FEDERATION OF TEACHERS,
AFL-CIO AND JOHN ABEIGON,
Petitioners,
v.
STATE-OPERATED SCHOOL DISTRICT OF
THE CITY OF NEWARK AND CAMI ANDERSON,
Respondents.

Colin M. Lynch, Esq., for petitioners (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Ramon E. Rivera, Esq., for respondents (Scarinci & Hollenbeck, attorneys)

Record Closed: March 10, 2015 Decided: April 15, 2015

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondents have filed a Motion seeking Summary Decision denying and dismissing the petitioners' application for declaratory and injunctive relief compelling the

respondent, Cami Anderson, the Superintendent for the State-Operated School District of the City of Newark, to attend all Newark Public Schools (NPS) Advisory Board meetings in order to comply with her obligations pursuant to N.J.S.A. 18A:7A-47(b). On May 20, 2014, petitioners filed a Petition of Appeal with the Commissioner of Education (Commissioner), who transmitted this matter to and filed with the Office of Administrative Law for emergent relief on May 21, 2014. After oral argument on June 10, 2014, an Order denying the petitioners' request for emergent relief was entered on June 11, 2014. The Commissioner denied the petitioners' request for emergent relief on July 23, 2014.

On February 2, 2015, respondents filed a Motion for Summary Decision along with the supporting documents as follows: Certification of Charlotte Hitchcock, Esq., and the Certification of Shana Don with Exhibits and a Certification of Service. On February 17, 2015, petitioners field a letter brief in opposition to the respondents' motion. Respondents filed a letter brief in reply to the opposition papers submitted by the petitioners. After reviewing the motions submitted by the parties, the record closed March 10, 2015.

FACTUAL DISCUSSION

A summary of the pertinent **FACTS** are presented as follows:

1) The District of the City of Newark is a State-Operated School District in accordance with N.J.S.A. 18A:7A-1 et seq. since 1995.

2) The District operates and administers the public schools and provides educational services to the residents thereof.

3) The petitioner, Newark Teachers Union (NTU), is the majority collective negotiations representative for all certified teaching staff members employed by the respondent with the exception of supervisory personnel.

4) Respondent, John Abeigon, is a resident and taxpayer of the City of Newark, within which the respondent School District operates and administers the public schools and provides educational services to the residents. Abeigon is the Director of Operations for the NTU.

5) A State-Operated School District Superintendent may be appointed by the State Board of Education upon the recommendation of the Commissioner of Education. Respondent, Cami Anderson, was appointed by the State Board of Education in May 2011 pursuant to N.J.S.A. 18A:7A-35.

6) As the State District Superintendent for the District, respondent Anderson is empowered to convene and schedule meetings of the District's Board of Education pursuant to N.J.S.A. 18A:7A-47(b).

7) In the 2013-2014 school year, the District's School Advisory Board (SAB) held monthly business and regular meetings regarding the School District.

8) Superintendent Anderson scheduled and attended SAB meetings from the beginning of the school year, October 15, 2013, through February 18, 2014.

9) On January 28, 2014, the scheduled SAB meeting took place and the public comment was raucous and tumultuous. During the course of this meeting, the District was unable to properly conduct business or engage in any meaningful dialogue with the Advisory Board.

10) In response to the nature of the SAB meeting, the District issued an "Open Letter to Newark Families" on February 25, 2014. The District stated that the monthly meetings were no "longer focused on achieving educational outcomes for children" and the NPS Leadership—including Superintendent Anderson—would no longer attend these meetings "until the SAB can commit to ensuring a space conducive to open dialogue with the community."

11) In order to continue to provide the community with the reports previously delivered at the School Advisory Board meetings, the District's letter provided that "NPS will videotape its monthly update, traditionally presented at the SAB meeting and distribute it directly on its website and on Channel 77, the Newark community cable network." This open letter was posted on the SAB website on that same date.

12) In a separate statement addressing the District's decision, members of NPS Leadership published individual statements regarding the current state of the SAB meetings. The publicly available statements went on to detail the District's commitment to engagement with the community and dedication to a free, open and productive dialogue.

13) Despite the District's Open Letter, Superintendent Anderson attended the SAB meetings on March 18, 2014, and May 20, 2014. In addition, members of the NPS leadership, on behalf of Superintendent Anderson, attended subsequent monthly meetings in February, March, April and May.

14) Specifically, Charlotte Hitchcock, Esq., in her capacity as General Counsel and Chief of Staff for the District and on behalf of the Superintendent, attended SAB meetings on February 18, 2014; February 25, 2014; March 18, 2014; March 25, 2014; April 29, 2014; May 20, 2014; and May 27, 2014, subsequent to the February 25, 2014, "Open Letter." Furthermore, Arsen Zartarian, Deputy General Counsel for the District, in his capacity as the Board Secretary and Valarie Wilson, in her capacity as the District's Business Administrator, also attended the following SAB meetings: February 18, 2014; February 25, 2014; March 18, 2014; March 25, 2014; April 29, 2014; May 20, 2014; and May 27, 2014. As such, District representatives were in attendance at all SAB meetings for the 2013-2014 School Year, since the February 25, 2014 "Open Letter."

15) The State District Superintendent has continued to attend other certain meetings, provided information, reports and engage with the public, as well as her deputies and members of the NTU leadership team.

16) NTU does not necessarily represent the interests of the general Newark community, the families, students, or its taxpayers.

17) Nowhere does petitioner, Abeigon, allege that his tax funds have been used improperly by the State-Operated School District or that any tax monies have been spent by the District for invalid purposes.

Based upon the above, the respondents' motion for summary decision is considered.

LEGAL DISCUSSION AND CONCLUSIONS

Standard for Motion for Summary Decision

The New Jersey Uniform Administrative Procedure Rules (N.J.A.C. 1:1-1.1, et. seq.) provide that a party may move for summary decision upon all or any of the substantive issues at any time after a case is deemed contested. Applications for a summary decision after a matter has been transmitted to the OAL must be filed with the Administrative Law Judge in accordance with applicable rules of the Office of Administrative Law. N.J.A.C. 6A:3-1.12(b).

Under N.J.A.C. 1:1-12.5(b), a summary decision may be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. Ibid. The standard is substantially the same as that governing a motion under Rule 4:46-2(c) for summary judgment in civil litigation. Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523-36 (1995). Based on this review, the court or agency must determine "whether the competent evidential materials presented, when viewed in light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 523.

Respondents have filed a Motion for a Summary Decision. A summary decision is appropriate in this case because there exists no genuine issue of material fact. Accordingly, a summary decision was granted based on the finding of facts and the applicable law as set forth herein.

The Appeal Made by the Petitioners Fails to Present a Viable Claim

In this case the appeal made by the petitioners claim that the State-appointed superintendent violated N.J.S.A. 18A:7A-47(b) by failing to attend SAB meetings. It appears that the petitioners' claim is based on the alleged fact that Superintendent Anderson failed to attend all SAB meetings.

In 1995, the Newark Public School System was placed under State control by the Commissioner of Education pursuant to the then-applicable Public School Education Act of 1975 (PSEA). This action included the removal of the local board of education and stripping it of any authority for the operation of the school district. N.J.S.A. 18A:7A-1 et seq. The local board's authority was placed entirely in the hands of a State-appointed superintendent of schools. Ibid. The local school board then transformed into an "advisory committee," which has been subsequently referred to as the School Advisory Board.

In 2005, the PSEA was amended and a quality single accountability continuum (QSAC) was established, modifying the manner in which the State evaluated the thoroughness and efficiency of all public schools in the State. Under QSAC, public school districts are evaluated in five areas of district effectiveness. N.J.S.A. 18A:7A-10. A school district's capacity and effectiveness are assessed through the use of "quality performance indicators." Based upon district compliance with these indicators, the Commissioner assesses "district capacity and effectiveness and place[s] the district on a performance continuum that . . . Determine[s] the type and level of oversight and technical assistance and support the district receives." N.J.S.A. 18A:7A-10.

Intervention is required where the Commissioner determines, based upon a variety of factors, that there exists an "insufficient local capacity to ensure that the public school district will provide a thorough and efficient education to the students in the public school district." N.J.A.C. 6A:30-6.2(b)(5).

In a complete take over, such as Newark, the Commissioner will intervene in each of the five areas of school functioning. Here, the Commissioner appointed a "highly skilled professional" to provide oversight as the State-appointed superintendent. N.J.A.C. 6A:30-6.1. The State-appointed superintendent is authorized by State to "perform such duties and possess such powers as deemed appropriate by the Commissioner" and maintains the authority of the school board as under PSEA. N.J.S.A. 18A:7A-35; see also N.J.S.A. 18A:7A-38 and N.J.S.A. 18A:7A-42(A)(3).

The State-appointed superintendent has the power to perform all acts and do all things consistent with law necessary for the proper conduct, maintenance and supervision of the schools in the district. N.J.S.A. 18A:7A-35(e).

Despite the petitioners' claim, nowhere in N.J.S.A. 18A:7A-47(a) and (b) does it clearly state that a State-Operated School District Superintendent is required to appear at the board meetings. As set forth in the statute, it states:

> (b) The State district superintendent **may** meet with the board as frequently as necessary for the effective operation of the school district. **The meetings of the board shall be convened and scheduled at the direction of the State district superintendent** and the State district superintendent **shall** determine the agenda. At the meetings, the State district Superintendent **shall** report to the board on all actions taken and on pending actions in a timely fashion and provide an opportunity for a full discussion by the board and by the public of those actions. Meetings shall be conducted pursuant to the provisions of the "Open Public Meetings Act." P.L. 1975, c. 231 (C.10:4-6 et seq.). On a regular basis, but no less than twice each year, the board of education shall report in writing directly to the State district superintendent concerning its assessment of the progress of the district. Copies of the report shall be forwarded to the commissioner and the State board. The State district superintendent shall make such clerical and

> other resources available as are necessary for the effective operation of the board of education.
>
> [N.J.S.A. 18A:7A-47(b) (emphasis added).]

The Legislature was free to **require** the State district superintendent to do certain acts and in a certain manner, but did not. The only overt direction to the superintendent is that the superintendent **may** meet with the board. This is clearly not a statutory requirement. These meetings are entirely within the discretion of the State-appointed superintendent. The meetings of the board **shall** be scheduled at the direction of the State district superintendent and the State district superintendent **shall** determine the agenda. It is clear that Superintendent Anderson has fulfilled these requirements.

In addition, the Legislature, by statute, required that the State district superintendent to report to the board on all actions taken and on pending actions in a timely fashion. However, the statute is silent on the mode of reporting. The statute could have stated that the State district superintendent report to the board in person, but it did not so state. There is no dispute that reports to the board have been made by Superintendent Anderson or by some individual in that capacity, including the General Counsel and Chief of Staff for the District; the Deputy General Counsel for the District (Board Secretary); and the District's Business Administrator. Accordingly, the District representatives were in attendance at all SAB meetings since the February 25, 2014 "Open Letter."

From a clear reading of the statutory language, the obligations of the State-appointed superintendent are set forth should such a meeting be convened by the State district superintendent. N.J.S.A. 18A:7A-47. The petitioners attempt to require the State-appointed superintendent to attend SAB meeting is misplaced. It is the State-appointed superintendent who has the discretion to convene such meetings and should such meetings be called to order, then the superintendent must perform certain duties at such meetings. The statute clearly does not mandate that the State-appointed superintendent personally attend the SAB meeting. Petitioners have failed to cite any properly binding case or statute to this effect.

Pursuant to N.J.S.A. 18A:7A-47(a), the board of education has only the right, powers and privileges of an advisory board. Gillespie v. Dep't of Educ., 397 N.J. Super. 545 (App. Div. 2008), generally examining the role of the board of education in a State-operated school district under N.J.S.A. 18A:7A-15. All the powers and authority of the board of education are vested in the State-appointed superintendent in a district under a full state intervention. N.J.S.A. 18A:7A-49(f), (g). There is no doubt that the board's authority is vested with the State-Appointed Superintendent Anderson.

In Brown v. State-Operated School District of Jersey City, 93 N.J.A.R.2d 874 (1993), an Administrative Law Judge found that:

> The takeover legislation clearly was designed to repose substantial authority in the superintendent to implement the laws and the rules of the State Board which normally would be the province of the local board of education as the Commissioner noted in the Mantone case, it is "without question that N.J.S.A. 18A:7A-35(e) empowers the Superintendent to engage in all necessary activities to allow the district to be fully functional."
>
> [Ibid.]

As set forth above, clearly Superintendent Anderson has the discretion to convene meetings with the SAB.

Lastly, the State district superintendent shall provide an opportunity for a full discussion by the board and by the public of the actions. This role too has been fulfilled by Anderson whereby meetings were scheduled, reports presented, and open discussions transpired. Superintendent Anderson attended SAB meetings in March and May 2014 and her delegates attended each and every meeting of the SAB.

During the 2013-2014 school year, the Distinct held over 100 meetings with the local community. In addition, Superintendent Anderson continued to make reports to the community at large, including the SAB, as well as attend meetings. Also, the General Counsel and Chief of Staff, as well as the Deputy General Counsel, Board

Secretary, and Business Administrator have attended SAB meetings on February 18, 2014; February 25, 2014; March 18, 2014; March 25, 2014; April 29, 2014; May 20, 2014; and May 27, 2014.

I **CONCLUDE** that the respondents have shown in their moving papers that they are entitled a decision denying the petitioners' appeal to require the superintendent to attend SAB meetings.

ORDER

Accordingly, I **ORDER** that respondents' motion for summary decision be and hereby is **GRANTED**. I further **ORDER** that petitioners' petition be **DENIED** and is hereby **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

April 15, 2015
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: April 15, 2015

Date Mailed to Parties: April 15, 2015

jb

In the Matter of the Tenure Hearing of

Marie Ebert,
State-Operated School District
of the City of Newark
Essex County

Agency Docket No. 49-3/15

Ruling on Respondent's Motion to Dismiss

Tia Schneider Denenberg, *Arbitrator*

APPEARANCES

FOR THE PETITIONER:

Christina Michelson, *Scarinci Hollenbeck*

FOR THE RESPONDENT:

Nancy I. Oxfeld, *Oxfeld Cohen*

BACKGROUND

On November 20, 2014, the parties and the arbitrator opened hearings by telephone in the tenure charges filed by the district against Marie Ebert [Agency Docket No. 267-9/14] and agreed to postpone two other hearings scheduled for November 21 and 22. In a Ruling on Respondent's Motion to Dismiss, issued on January 30, 2015, the arbitrator dismissed the charges for failure to comply with statutory time limits. The ruling stated, in relevant part: "[T]he dismissal is without prejudice to the district's right to file charges again in a manner that fully comports with applicable statutory provisions" [at p. 19].

Subsequently, the district filed "amended" tenure charges against the respondent, alleging inefficiency and unbecoming conduct, pursuant to Section 25 and Section 8 of TEACHNJ [Agency Docket No. 49-3/15]. In a telephone conference held on April 8, 2015, the arbitrator advised the parties that, in light of her January 31, 2015, decision in *Rinita Williams, SOSD of Newark* [Agency Docket No. 241-8/14], she was inclined to dismiss the Section 25

charge of inefficiency. As requested, the arbitrator gave the parties permission to file submissions. Hearings were scheduled for June 11 and 12 at the offices of Scarinci Hollenbeck.

On April 20, 2015, the respondent submitted a motion to dismiss the charges. On April 30, 2015, the district replied, opposing the motion to dismiss.

DISCUSSION

The respondent asserts, among other contentions, that the district's amended tenure charges were not filed in a timely manner and, therefore, must be dismissed. The district maintains that its filing was timely and that the charges are properly before the arbitrator.

A review of the applicable statutes and regulations, along with the court's decision in *Cowan* [224 N.J. Super. 737 (App. Div. 1988)], demonstrates that: (1) once tenure charges are filed with the district, the tenured employee has 15 days to submit a written statement of position and evidence; and (2) upon receipt of the employee's statement of position and evidence, or upon expiration of the allotted 15-day time period, the district superintendent shall determine within 45 days whether there is probable cause to credit the evidence in support of the charges and whether such charges are sufficient to warrant a dismissal or reduction in salary. Here, the record demonstrates that the determination of probable cause was made within 45 days of the respondent's response to the amended tenure charges. See District's Opposition to Respondent's Motion to Dismiss, Exhibits B-H. Accordingly, I reject the respondent's claim and find that the filing of amended tenure charges was timely.

For the reasons detailed in the *Williams* decision and discussed with the parties in the April 8 telephone conference, I grant the respondent's motion to dismiss the inefficiency charge that is based on Section 25 of TEACHNJ. The charge relies on teacher evaluations in the 2012-2013 school year. Nothing in the record warrants a departure from my conclusion in *Williams* that such evaluations could not support removal under Section 25.

The respondent also seeks dismissal of the inefficiency charge filed under Section 8 on the ground that inefficiency can be charged only under Section 25. The district, in response, contends that in cases where "the requirements for inefficiency tenure charges under Section 25 have not been met, the inefficiency charge must be evaluated under Section 8" [District Brief, p. 12].

In enacting Section 25, the legislature introduced a comprehensive framework for resolving tenure charges of inefficiency, clearly intending that the provision would succeed Section 8 as the regular procedure for dealing with such disputes. With regard to inefficiency, Section 25 is meant to supplant Section 8. Nowhere did the legislature express an intention to maintain indefinitely two incompatible procedures for trying such charges. In addition, nothing indicates that the legislature envisioned an inefficiency charge brought under Section 25 reverting to a charge under Section 8 as a fallback tactic.

In this instance, however, the tenure dispute arose during the transition to Section 25 as the designated procedure for resolving a charge of inefficiency, and the charge was originally based on both Section 25 and Section 8. Although a charge involving 2012-2013 evaluations may not be brought under Section 25, no similar impediment prevents the district from seeking removal according to the requirements of Section 8.

The amended tenure charge of unbecoming conduct also is properly before the arbitrator under Section 8. Since Section 25 does not provide an alternative framework for bringing charges of that kind, Section 8 remains the standard procedure for reviewing accusations of unbecoming conduct.

In sum, both charges—inefficiency and unbecoming conduct—shall be heard on June 11 and 12, 2015.

Tia Schneider Denenberg
Arbitrator

In the Matter of the Tenure Hearing of

Marie Ebert,
State-Operated School District
of the City of Newark
Essex County

Agency Docket No. 49-3/15

Ruling of Arbitrator

The undersigned arbitrator, having been appointed, pursuant to P.L. 2012, c 26, to hear and decide the above-captioned matter, rules as follows:

Both charges shall proceed to a hearing, as noted in the opinion.

Tia Schneider Denenberg
Arbitrator

Dated: May 21, 2015

State of New York
County of Columbia

On this 21st day of May, 2015, before me personally came and appeared TIA SCHNEIDER DENENBERG, to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed the same.

Ralph Peters Hubbell, Jr.
Notary Public State of New York
No. 4793303
Qualified in Dutchess County
Commission Expires October 31, 2015

171-15L

State of New Jersey

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DEPARTMENT OF EDUCATION
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DAVID C. HESPE
Commissioner

May 28, 2015

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Re: *Bd. of Educ. of the City of Hoboken v. New Jersey State Dept. of Educ. and Bd. of Trustees of the Hoboken Dual Language Charter School*, Agency Dkt. No. 98-4/14

Dear Counsel:

I have reviewed the materials filed in connection with the Hoboken Board of Education's (Board) Motion to Stay the March 20, 2015 decision granting Hoboken Dual Language Charter School's (HoLa) application for charter renewal and expansion, pending appeal of this decision to the Superior Court, Appellate Division.

Pursuant to *N.J.A.C.* 6A:3-1.6(b), a motion for stay is considered an extraordinary remedy that may only be issued upon a finding that petitioner has met each prong of the four-pronged standard for the granting of interim relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Thus, a stay may be granted where necessary to prevent irreparable harm, where the legal right underlying the movant's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Id.* at 132-134.

Upon review of the parties' submissions, I find that the Board has failed to meet the standard required for a stay of the March 20, 2015 decision. Most notably, the Board has failed to establish a likelihood of success on the merits. In its papers, the Board argues that it has established a likelihood of success on the merits for several reasons, including the following: the Commissioner failed to consider HoLa's segregative effect on the Hoboken School District (District); the Commissioner failed to consider the funding impact of HoLa on the District's budget; the March 20, 2015 decision failed to address HoLa's practices and policies; and the

Commissioner violated his duty to enforce the thorough and efficient education clause of the New Jersey Constitution.

Following the Board's appeal to the Appellate Division of the Commissioner's original decision dated March 28, 2014 that renewed and expanded HoLa's charter,[1] the matter was remanded to the Commissioner for further analysis of demographic statistics and other data in light of the Board's claim that HoLa's expansion would create a racial divide within the District. In connection with the remand, the Department afforded all interested parties an opportunity to submit documentation relevant to the reconsideration of HoLa's application for renewal and expansion. In addition to a thorough review of the submitted materials, the Office of Charter Schools also conducted its own review of data to determine if HoLa is having a segregative effect on the District.

Prior to the issuance of the March 20, 2015 decision, the Department considered the concerns presented by the Board and thoroughly reviewed all of the documentation submitted by the Board and HoLa. Moreover, the March 20, 2015 decision fully outlines the analysis preformed by the Department and provides ample support for its determination that HoLa is not having a segregative effect on the District. In its papers, the Board has not presented any evidence indicating that the March 20, 2015 decision granting HoLa's application for charter renewal and expansion was arbitrary, capricious or unreasonable. As a result, the Board has failed to demonstrate a likelihood of success on the merits.

In light of the fact that all of the *Crowe* prongs must be met in order for a stay to be granted, it is not necessary to analyze the three remaining factors. Accordingly, the Board's request for a stay of the March 20, 2015 decision is hereby DENIED.[2]

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library

DCH/MKD/JKH

[1] Pursuant to *N.J.A.C.* 6A:11-2.3(b), prior to the renewal of the charter, the Department completed a comprehensive review of HoLa.

[2] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

170-15M L

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State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

May 22, 2015

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Re: *J.M., on behalf of minor child, T.M. v. Board of Education of the Monmouth Regional High School District*[1]*, Monmouth County,*
Commissioner Decision No. 124-15R

Dear Parties:

I have reviewed the materials filed in connection with petitioner's motion for reconsideration of the Commissioner's decision upholding the Board's determination that Coach McGee's conduct did not constitute harassment, intimidation or bullying under *N.J.S.A.* 18A:37-13 *et seq.*

Initially, the Commissioner finds that petitioner's motion for reconsideration was timely filed. *N.J.A.C.* 6A:3-1.15(b) provides that "any party may make a motion for reconsideration...of the Commissioner's decision within 10 days of the filing of the Commissioner's decision." Pursuant to *N.J.A.C.* 6A:3-1.14, Commissioner decisions are deemed filed three days after the date of mailing to the parties. "Day" means business day when the

[1]When the original petition was filed, the respondent was erroneously identified as the Board of Education of the Town of Tinton Falls.

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period specified is less than seven days. *N.J.A.C.* 6A:3-1.2. In this case, the Commissioner's decision was mailed to the parties on Thursday, April 2, 2015, and is therefore deemed filed as of Tuesday, April 7, 2015. Petitioner's motion for reconsideration was received on Friday, April 17, 2015 – exactly 10 days later – and within the time frame provided by *N.J.A.C.* 6A:3-1.15(b).

However, petitioner has failed to demonstrate she is entitled to reconsideration. Pursuant to *N.J.A.C.* 6A:3-1.15(b)2, a motion for reconsideration shall be considered by the Commissioner based upon the following:

i. Claim(s) of mistake, provided, however, that disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake" for purposes of this section;
ii. Newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence;
iii. Newly ascertained misrepresentation or other misconduct of an adverse party, where such misrepresentation could not have been previously known; or
iv. Reversal of a prior judgment on which the present matter is based.

In her motion, petitioner does not argue that she has satisfied any of the prerequisites set forth in *N.J.A.C.* 6A:3-1.15(b)2; rather, she expresses her disagreement with the outcome of the Commissioner's decision and the analysis upon which it is based. As noted by the Board in its response, petitioner had the opportunity to present her case at the Office of Administrative Law. Having had that opportunity, any argument by petitioner that certain factual issues were not addressed at the hearing is unpersuasive. Petitioner elected not to present testimony from T.M. or any eyewitnesses and was unable to meet her burden of establishing that the Board's decision was arbitrary, capricious or unreasonable. On the other hand, the Board's witnesses were found to be credible by the Administrative Law Judge – and the Commissioner must defer to the ALJ's credibility determinations.[2]

Finally, to the extent petitioner contests the fact that her exceptions were not considered because she failed to provide proof of service as required by *N.J.A.C.* 1:1-18.4, it is noted that petitioner belatedly submitted said proof of service along with her motion for reconsideration. Even so, petitioner is not entitled to reconsideration on that basis since the required proof of service should have been supplied when her exceptions were filed in accordance with the regulation.

[2]The ALJ's credibility determinations are entitled to deference from the Commissioner, absent a finding that they are arbitrary, capricious, unreasonable or unsupported by the record. *N.J.S.A.* 52:14B-10(c); *In the Matter of the Tenure Hearing of Dominic Costanzo*, Commissioner Decision No. 142-14, decided April 4, 2014.

Accordingly, petitioner's motion for reconsideration is hereby DENIED.

IT IS SO ORDERED.[3]

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library

DCH/MKD/DCS

Via Regular Mail

[3]This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

179-15

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

SYNOPSIS

Petitioner – a teaching staff member formerly employed in respondent's school district -- alleged that she is entitled to reinstatement as a tenured teacher because the respondent improperly refused to permit her to rescind her resignation. Petitioner's intent to resign effective October 31, 2014 was memorialized in a settlement agreement and simultaneous letter of resignation to respondent dated July 24, 2014. A clause within the parties' settlement agreement stated that the petitioner had seven calendar days from the date of the execution of the agreement to rescind her resignation. By letter dated July 29, 2014, petitioner requested that her resignation be rescinded for personal reasons. The respondent refused to permit petitioner to rescind or withdraw her resignation. Petitioner contended that the separation agreement was not enforceable once she exercised her revocation rights, which had been expressly agreed upon by the parties. Further, petitioner argues that respondent's action violated petitioner's rights under the Older Workers' Benefit Protection Act. The respondent filed a motion for summary decision, asserting that the petitioner's claims should be dismissed for lack of jurisdiction.

The ALJ found, *inter alia,* that: there are no material facts at issue herein, and the matter is ripe for summary decision; the Commissioner's jurisdiction is defined by statute, and is limited to "controversies and disputes arising under the school laws" (*N.J.S.A.* 18A:6-9); case law has held that where a controversy does not arise under Title 18A, it is outside of the jurisdiction of the Commissioner, even if the dispute pertains to school personnel; the Commission has consistently declined to exercise jurisdiction over contractual disputes; petitioner herein cites no provisions of the school laws in support of her claims; and petitioner's belated claim that her letter of resignation was not accepted by the school district prior to its rescission – and therefore places this matter within the purview of school law – cannot be considered herein as that argument was not among the allegations presented in petitioner's appeal. Accordingly, the ALJ concluded that the petition of appeal must be dismissed for lack of jurisdiction.

Upon comprehensive review, the Commissioner concurred with the findings and conclusion of the ALJ, and adopted the Initial Decision as the final decision in this matter. The petition was dismissed for lack of jurisdiction.

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

Issued 6/1/15

OAL DKT. NO. EDU 15338-14
AGENCY DKT. NO. 312-10/14

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

This matter involves whether the Commissioner's jurisdiction encompasses a contractual dispute regarding petitioner's employment in the district. The record and the Initial Decision of the Office of Administrative Law have been independently reviewed, along with petitioner's exceptions – filed pursuant to *N.J.A.C.* 1:1-18.4 – and respondent's reply to the exceptions. Upon full consideration of the controversy, the Commissioner concurs with the Administrative Law Judge's (ALJ) findings, conclusions, and ultimate determination – for the reasons stated in the Initial Decision – to dismiss the petition for lack of jurisdiction.

The material facts are not in dispute. Petitioner's intent to resign from her position as a tenured special education teacher effective October 31, 2014 was memorialized in a settlement agreement executed by the parties.[1] (Petition, ¶ 2-5) In accord with the terms of the agreement, petitioner simultaneously tendered a letter of resignation to respondent. (Petition, ¶ 4) Five days after she executed the agreement – and one day after the agreement was executed by the State district superintendent – petitioner sent a follow-up letter rescinding her

[1]Petitioner signed the agreement and simultaneously submitted her letter of resignation on July 24, 2014. The State district superintendent signed the agreement on July 28, 2014, on behalf of respondent.

letter of resignation. (Petition, ¶ 5-6) However, the district replied that it was "not amenable" to petitioner rescinding or withdrawing her letter of resignation. (Petition, ¶ 7)

In her petition of appeal, petitioner alleged that either: 1) the agreement is not an enforceable contract because she revoked her resignation one day after the agreement was executed; or 2) the agreement is an enforceable contract and respondent violated the agreement as well as the Older Workers' Benefit Protection Act, *P.L.* 101-433, 29 *U.S.C.A.* § 626(f), when it failed to accept her "notice of rescission."[2] (Petition, ¶ 8-12) As a consequence, petitioner requests reinstatement to her tenured teaching position. In response, the district filed a motion for summary decision asserting that the petition must be dismissed for lack of jurisdiction under *N.J.S.A.* 18A:6-9.

Upon review, the ALJ concluded the matter was ripe for summary decision and granted respondent's motion since petitioner failed to allege any claims arising under school law.[3] To the extent petitioner belatedly raised an issue potentially cognizable under school law in her brief opposing respondent's motion – namely, that "a school employee's resignation is not binding unless and until it is accepted by the local board of education" – the Commissioner concurs with the ALJ that the petition contains "no factual allegations...related to her newly raised claim that her letter of resignation was not accepted by the District prior to its rescission." (Initial Decision at 5-6) Furthermore, the petition was never amended.[4] On the contrary, the

[2]Paragraph 10 of the parties' agreement states: "To comply with the Older Workers Benefit Protection Act of 1990, if applicable...Blackwell...has seven (7) days from the date of the execution of this Agreement to revoke it. Blackwell understands that she may rescind this Agreement within seven (7) calendar days of signing it[.]" Via letter dated July 29, 2014, petitioner requested that her letter of resignation be rescinded for personal reasons.

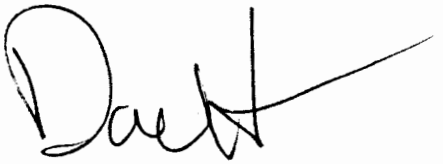
[3]*N.J.A.C.* 6A:3-1.4 requires that a petition include "a statement of the specific allegation(s) and essential facts supporting them which have given rise to a dispute under the school laws."

[4]Once a petition of appeal is transmitted to the OAL, it can only be amended via the filing of a motion to be determined in accordance with applicable OAL rules. *N.J.A.C.* 6A:3-1.7(b). The record does not contain any information indicating that petitioner ever filed a motion to amend her petition of appeal.

claims set forth in the petition concern only the interpretation of the parties' settlement agreement and federal law. As indicated in the Initial Decision, neither petitioner's contract claim nor her federal claim fall under the Commissioner's jurisdiction to hear and decide controversies arising under the school laws. *N.J.S.A.* 18A:6-9; *Bd. of Educ. v. Twp. Council of E. Brunswick*, 48 *N.J.* 94, 102 (1966) ("Where the controversy does not arise under the school laws, it is outside the Commissioner's jurisdiction even though it may pertain to school personnel"). Additionally, the Commissioner is not persuaded by petitioner's exceptions, which substantially reiterate the arguments presented below and endeavor to reframe the allegations in school law terms while ignoring the context out of which this dispute arose: *i.e.*, the parties' settlement agreement.

Accordingly, the Initial Decision is adopted as the final decision in this matter, respondent's motion for summary decision is granted, and the petition is dismissed for lack of jurisdiction.

IT IS SO ORDERED.[5]



COMMISSIONER OF EDUCATION

Date of Decision: 6/1/15

Date of Mailing: 6/1/15

[5]This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 15338-14
AGENCY DKT. NO. 312-10/14

WANDA BLACKWELL,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Nancy I. Oxfeld, Esq., for petitioner (Oxfeld Cohen, attorneys)

Brenda Liss, Esq., for respondent (Riker, Danzig, Scherer, Hyland and Perretti, attorneys)

Record Closed: April 9, 2015 Decided: April 21, 2015

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Wanda Blackwell (Blackwell), a teaching staff member formerly employed by the State-Operated School District of the City of Newark (the District), alleges that she is entitled to reinstatement as a tenured teacher of special education

because the District improperly refused to permit her to rescind her resignation. The District replies that Blackwell's claims should be dismissed for lack of jurisdiction.

Blackwell filed her appeal with the Commissioner of Education (the Commissioner) on October 22, 2014. An answer was filed on behalf of the District on November 19, 2014, and the matter transmitted to the Office of Administrative Law (OAL) as a contested case on November 20, 2014. The District filed a motion for summary decision on February 17, 2015. Blackwell filed opposition to the motion on March 31, 2015; the District replied on April 9, 2015, and the record closed.

FINDINGS OF FACT

The pertinent facts are not in dispute and I **FIND**:

Blackwell was employed by the District as a tenured teacher of special education, when she agreed to resign from her position of employment via a settlement agreement executed by her on July 24, 2014. The agreement was signed by the State District Superintendent of Schools, Cami Anderson, on July 28, 2014. In accordance with its terms, Blackwell tendered a letter of resignation dated July 24, 2014, which confirmed that she would be leaving her position of employment effective October 31, 2014.

The agreement between the parties specified as follows:

> To comply with the Older Workers Benefit Protection Act of 1990, if applicable, the Agreement advises Blackwell of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Blackwell acknowledge that she: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives her right to pursue any current claims she have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Agreement; and (v) has seven (7) days from the date of the execution of this Agreement to revoke it. Blackwell understands that she may rescind this

> Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or certified mail within the seven-day period.

After submitting her letter of resignation, Blackwell sent a follow-up letter dated July 29, 2014, rescinding her letter of resignation. By letter dated August 8, 2014, counsel for the school district wrote to Blackwell's attorney that "the District is not amenable to permitting Ms. Blackwell to rescind or withdraw her resignation." Via letter dated August 13, 2014, the District acknowledged receipt of the letter of resignation, and noted that the State District Superintendent of Schools "has approved of same."

The petition of appeal alleges that the separation of employment agreement entered into between the parties is "by its own terms not enforceable," because Blackwell exercised the revocation rights expressly agreed upon by the parties. In a second count, the petition avers that the refusal of the District to honor the rescission of her resignation violated Blackwell's rights under the Older Workers' Benefit Protection Act. The petition of appeal raises no other claims.

ANALYSIS AND CONCLUSIONS OF LAW

N.J.A.C. 1:1-12.5 provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c), which provides that "the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in

favor of the non-moving party. Our courts have long held that "if the opposing party offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995) (citing Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, supra, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214. I **CONCLUDE** that this matter is ripe for summary decision. There are no material disputed facts, and the District has correctly asserted that the petition should be dismissed for lack of jurisdiction. The only issues raised by the petition are whether Blackwell should be permitted to rescind her resignation under either her separation of employment agreement or the Older Workers' Benefit Protection Act, P.L. 101-433, 29 U.S.C.A. § 626(f). Neither claim is properly cognizable before the Commissioner.

The Commissioner's jurisdiction is defined by statute, and is limited to "controversies and disputes arising under the school laws." N.J.S.A. 18A:6-9. Our courts have held that where a controversy does not arise under Title 18A, it is outside the jurisdiction of the Commissioner, even if the dispute pertains to school personnel. Bd. of Educ. of E. Brunswick Twp. v. Twp. Council of E. Brunswick, 48 N.J. 94, 102 (1966). As the Appellate Division held in Picogna v. Board of Education of Cherry Hill, 249 N.J. Super. 322, 335 (App. Div. 1991), "[w]hether [a] petitioner's employment was wrongfully terminated under [his] contract . . . is for the court, not the Commissioner, to decide."

The Commissioner has consistently declined to exercise jurisdiction over contractual disputes. In Demikoff v. Harrington Park Board of Education, 97 N.J.A.R.2d (EDU) 16, the claims of a non-tenured school business administrator, whose

employment was terminated pursuant to a contractual sixty-day-notice provision, were dismissed for lack of jurisdiction. The Commissioner, quoting the Initial Decision, held that "'the gist of the petition does not sufficiently implicate education law or statutory entitlement under education law to warrant or permit exercise of the Commissioner's dispute resolution jurisdiction over what are fundamentally contractual matters more properly cognizable in [a] judicial forum.'" Demikoff, supra, 97 N.J.A.R.2d (EDU) at 18; see also Paladino v. Bd. of Educ. of Lacey, 1989 S.L.D. 3063, 3065; Fanego v. State-Operated Sch. Dist. of Jersey City, EDU 10968-97, Initial Decision (April 27, 1999), adopted, Comm'r (June 14, 1999), <http://njlaw.rutgers.edu/collections/oal/>; Larsen v. Piscataway Bd. of Educ., OAL Dkt. No. 1445-81 (State Board, October 6, 1982). Thus, where the only dispute between parties centers on the interpretation of an agreement rather than any specific provision of Title 18A, the Commissioner is without jurisdiction, as "the expertise of the Commissioner would not significantly further the interpretative process as to the intended meaning of the parties' agreement." S. Orange-Maplewood Educ. Ass'n v. S. Orange-Maplewood Bd. of Educ., 146 N.J. Super. 457, 462 (App. Div. 1977).

Blackwell cites no provisions of the school laws in support of her claims. The only statute that she does cite is the Older Workers' Benefit Protection Act, P.L. 101-433, 29 U.S.C.A. § 626(f). But our case law is likewise clear and unequivocal that the Commissioner is without the expertise or authority to interpret the rights of parties under a statute not contained in Title 18A of the New Jersey school laws. See, e.g., Hornstine v Twp. of Moorestown, 263 F. Supp.2d 887, 899-900 (D.N.J. 2003); Galbraith v. Lenape Reg. High Sch. Dist., 964 F. Supp. 889, 895 (D.N.J. 1997); Jenkins v. Newark Bd. of Educ., 166 N.J. Super. 357, 368 (Law Div. 1979).[1]

In her brief in opposition to the motion for summary decision, Blackwell, for the first time, asserts that as a general proposition, a school employee's resignation is not binding unless and until it is accepted by the local board of education. See, e.g.,

[1] The exclusive exception would be where a non-school law claim is pendent to "an equally or more significant related 'school law' issue." Rovello v. Boyle, 93 N.J.A.R.2d (EDU) 313; Sukin v. Northfield Bd. of Educ., 171 N.J. Super. 184, 187 (App. Div. 1979).

Bloomfield Educ. Ass'n v Bloomfield Bd. of Educ., EDU 8308-01, Comm'r (December 29, 2003), http://njlaw.rutgers.edu/collections/oal/>, where the Commissioner noted that

> [I]t is well-established in school law that in the absence of statutory provisions dealing with the effect of resignations and their rescission or modification, principles of contract law are applicable . . . upon acceptance of [a] letter resignation/retirement by the board the teaching staff member does not have a right to unilaterally rescind the resignation.
>
> [Emphasis supplied.]

See also Cutler v. Parsippany-Troy Hills Bd. of Educ., 1990 S.L.D. 725.

Blackwell thus contends that her claims require neither an interpretation of the separation of employment agreement, nor an interpretation of federal law. The District replies that Blackwell has only now, and belatedly, raised an issue that might be within the Commissioner's jurisdiction. I agree. Only the separation of employment agreement and the Older Workers' Benefit Protection Act are cited in Blackwell's petition; the factual allegations of the petition center on the agreement and federal law; and Blackwell makes no factual allegations in the petition related to her newly raised claim that her letter of resignation was not accepted by the District prior to its rescission.

I moreover agree with the District that both it and this forum can be guided only by what the pleading alleges, and not by claims raised in subsequent briefs of counsel. A review of the petition makes it readily apparent that Blackwell's claims exclusively concern the interpretation of both the separation of employment agreement and federal law; neither of which fall under the jurisdiction of the Commissioner. Accordingly, I **CONCLUDE** that the petition of appeal must be dismissed for lack of jurisdiction.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the petition of appeal be **DISMISSED** for lack of jurisdiction.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

April 21, 2015

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: April 21, 2015

Date Mailed to Parties: APR 22 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

184-15

184-15

Mattye M. Gandel

RECEIVED BY
CONTROVERSIES & DISPUTES
2015 JUN -2 A 11:0

520 MELROSE PLACE
SOUTH ORANGE, NEW JERSEY 07079
(973) 763 - 3271
(973) 763 - 4292 (FAX)
email - wsour@aol.com

May 29, 2015

Dennis McKeever, Esq.
Sciarrillo Cornell
Merlino, McKeever & Osborne, LLC
238 St. Paul Street
Westfield, NJ 07090

Ms. Christine Swensen-Hartie
50 East Columbia Avenue
Palisades Park, NJ 07650

Dear Mr. McKeever & Ms. Swensen-Hartie;

Re: Parties – Christine Swensen-Hartie & School District of the Borough of Edgewater, Bergen County
Docket No. 56-3/15
Arbitration – Tenure Hearing

I have read the Settlement Agreement and the General Release and Waiver in the above matter and, pursuant to *N.J.A.C.* 6A:3-5.6, this is to advise the parties that these agreements are hereby approved.

Thank you both for working to arrive at this amicable settlement. Good luck in the future.

Sincerely,

Mattye M. Gandel

Mattye M. Gandel

c: M. Kathleen Duncan, Director, Bureau of Controversies & Disputes ✓

184-15

SEPARATION OF SERVICE AGREEMENT

This Agreement is hereby made this 15 day of May, 2015, by and between Christine Swensen-Hartie (hereinafter "Ms. Swensen-Hartie") and the EDGEWATER BOARD OF EDUCATION (hereinafter the "Board") (collectively the "Parties").

WHEREAS, the Board is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1, and is entrusted with maintaining and conducting the public schools of the Edgewater Public School District;

WHEREAS, Ms. Swensen-Hartie is tenured in the position of Secretary with the Edgewater Board of Education; and

WHEREAS, Ms. Swensen-Hartie is currently employed by the Board as a Secretary; and

WHEREAS, Ms. Swensen-Hartie is currently on administrative leave from the District; and

WHEREAS, Ms. Swensen-Hartie shall resign from employment with the District effective June 30, 2015; and

WHEREAS, the Board and Ms. Swensen-Hartie have engaged in good faith discussions concerning Ms. Swensen-Hartie's future separation from employment with the Board and have reached an agreement, which they wish to memorialize herein; and

WHEREAS, the Board and Ms. Swensen-Hartie wish to fully and finally resolve any and all claims, complaints, charges and actions of any kind whatsoever, whether known or unknown, which either party may have against them as provided herein;

NOW THEREFORE, the Board and Ms. Swensen-Hartie, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the Parties, agree as follows:

1. PAID ADMINISTRATIVE LEAVE: Ms. Swensen-Hartie will continue on paid administrative leave until such time that all accumulated sick, vacation and personal days are exhausted. Currently, Ms. Swensen-Hartie has accumulated 71.5 days, to be paid at a rate of $163.00 per day, for a total of $11,654.50.

Upon expiration of the 71.5 accumulated days, the paid administrative leave will convert to an unpaid administrative leave, until the date of Ms. Swensen-Hartie's resignation.

2. RESIGNATION DATE: Ms. Swensen-Hartie agrees to sign and submit to the Board, simultaneously with this Separation of Service Agreement, an irrevocable letter of resignation from all employment with the Board effective June 30, 2015. The irrevocable letter of resignation shall be in the form attached hereto as Exhibit "B." The letter of resignation and this Agreement shall be subject to Ms. Swensen-Hartie's right to rescind pursuant to the Older Workers Benefit Protection Act, 29 U.S.C. 626(F)(1)(G), within seven (7) calendar days after the signing of this Agreement. The procedure for Ms. Swensen-Hartie to revoke this Agreement is set forth in paragraph 8 herein. If Ms. Swensen-Hartie does not rescind her letter of resignation and this Agreement within seven (7) calendar days of the signing of them, her resignation and this Agreement shall be binding and irrevocable. The Board shall accept Ms. Swensen-Hartie's letter of resignation simultaneously with the acceptance of this Agreement via resolution at a regular meeting of the Board.

3. CONTINGENCY: This Agreement is contingent upon immediate receipt by the Board of an irrevocable letter of resignation effective June 30, 2015. The irrevocable letter of resignation shall be provided contemporaneously with the execution of this Agreement by both parties.

4. CONSIDERATION: In further consideration of this Agreement, and in addition to the compensation Ms. Swensen-Hartie shall receive as required by Paragraph 1 of this Agreement, the Board agrees to withdraw all references to the previously filed tenure charges from Ms. Swensen-Hartie's personnel file.

   Ms. Swensen-Hartie specifically waives any and all other payments she may ordinarily be due under her employment contract with the District or under the Education Association Collective Bargaining Unit with the District. The payments identified in Paragraph 1 of this Agreement represent all payments due and owing Ms. Swensen-Hartie with respect to the Agreement and her employment with the Board.

5. RELEASE: Ms. Swensen-Hartie hereby releases, waives and forever discharges any and all past, present or future claims that relate to any action that predates this

Agreement that she may have against the Board, including but not limited to, any and all claims for back pay or any other claim related to her absence from work and/or her employment with the Board. Ms. Swensen-Hartie acknowledges that she has the opportunity to consult with legal counsel and representatives of her choice regarding this Agreement and the General Release and Waiver that accompanies it prior to executing it; and that she represents that she has read this Agreement and the General Release and Waiver and fully understands them and agrees to be bound by them. Ms. Swensen-Hartie also acknowledges that she has been given a reasonable period of time within which to consider this settlement and the terms of this Agreement and General Release and Waiver prior to executing them.

6. WAIVER: Ms. Swensen-Hartie agrees to waive any and all claims or demands which Ms. Swensen-Hartie now has or may have had against the Board; and in recognition of and in consideration for Ms. Swensen-Hartie's promise to provide the Board with a Release of all claims against it. Ms. Swensen-Hartie agrees that she will not reapply nor be eligible for employment with the Board after signing this Agreement.

7. OLDER WORKER BENEFIT PROTECTION ACT OF 1990: To comply with the Older Workers Benefit Protection Act of 1990, this Agreement advises Ms. Swensen-Hartie of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Agreement as follows:

a. Ms. Swensen-Hartie fully understands the terms and conditions of this Agreement;

b. Ms. Swensen-Hartie has been advised to consult with an attorney to review the Agreement;

c. Ms. Swensen-Hartie specifically waives her right to pursue any claims under the Age Discrimination in Employment Act;

d. Ms. Swensen-Hartie does not waive any rights or claims under the Age Discrimination in Employment Act that may arise after the date the waiver is executed.

e. Ms. Swensen-Hartie is receiving consideration above and beyond anything of value to which she already is entitled;

f. Ms. Swensen-Hartie has been given at least twenty-one (21) calendar days within which to consider this Agreement; and

g. Ms. Swensen-Hartie has seven (7) calendar days from the date of the execution of this waiver to revoke it.

8. CONFIDENTIALITY: This Agreement shall remain confidential to the maximum extent permitted by law and neither party shall disclose the terms of this Agreement to third parties. Ms. Swensen-Hartie may disclose the terms of this Agreement to her immediate family, tax advisor and attorney who shall be subject to the confidential provision of this agreement, and also maintain the confidentiality of this Agreement. A copy of this Agreement shall not be maintained in Ms. Swensen-Hartie's personnel file.

9. ENTIRE AGREEMENT: This Agreement and General Release and Waiver contain the entire Agreement and understanding between the Parties and constitutes a full and final agreement in any and all issues relating to this matter, except that the Parties reserve their right to enforce this Agreement, if necessary.

10. CHOICE OF LAW: This Agreement shall be governed by the laws of the State of New Jersey.

11. SEVERABILITY: If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

12. BINDING EFFECT: The Parties shall be bound by the terms and conditions of this Agreement.

13. APPROVAL: The terms and conditions of this Agreement and Ms. Swensen-Hartie's irrevocable letter of resignation are subject to ratification and approval by the Edgewater Board of Education.

14. VOLUNTARY AGREEMENT: The Parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement.

15. ADMISSION OF LIABILITY: The Parties' entry into this Agreement shall not constitute nor shall it be interpreted as an admission of wrongdoing or guilt, or liability in any manner on either of the Parties' part. Any such obligation or liability on either Party's part is expressly denied. The Parties have entered into this Agreement solely to compromise disputed claims.

16. OPPORTUNITY TO CONSULT WITH COUNSEL: The Parties acknowledge that each has been given the opportunity to consult with an attorney or a representative of their own choosing with respect to this Agreement and reviewed with their attorney or representative all the terms and conditions of this Agreement prior to executing this Agreement. Each Party signs this Agreement freely and voluntarily and without coercion or duress. The Parties further acknowledge that they fully understand the duties and obligations enumerated herein and have been informed of their legal rights and obligations.

17. BREACH: If either party breaches this Agreement, the breaching party shall bear the costs of the non-breaching party of any litigation or efforts to have such breach corrected or compensated for, including but not limited to, reasonable attorneys' fees.

18. RATIFICATION: The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the Board to its terms. Upon ratification of this Agreement, the Board authorizes its Board President to execute same on its behalf.

19. GOOD FAITH AND NONDISPARAGEMENT: The Parties expressly agree that they shall act in good faith to ensure implementation of this Separation of Service Agreement and General Release and Waiver. The Parties mutually agree to refrain from making any derogatory comments, written or oral; retaliation or disparagement, in any manner, against the other party or their families, family members, agents, officials, administrators, representatives and employees.

    The Board agrees that in the event it receives any inquiries or reference requests for Ms. Swensen-Hartie that its comments shall be limited to an acknowledgement of her position, length of employment, salary history, and effective resignation date.

20. COBRA: Nothing contained within this Separation of Service Agreement shall alter Ms. Swensen-Hartie's rights to continuation of health insurance through Federal law, i.e. the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA") upon separation from employment with the Board as of the date which coincides with the date that Ms. Swensen-Hartie no longer receives health insurance as provided by the Board.

21. MODIFICATIONS: This Agreement may not be altered, amended or modified except in writing, signed and duly authorized by all Parties.

22. EXECUTION IN COUNTERPARTS AND FACSIMILE SIGNATURES: This Agreement may be executed in two (or more) counterparts each of which, when executed and delivered shall be deemed to be an original, and of which counterparts, taken together, shall constitute one and the same agreement. An original signature transmitted by facsimile shall be deemed to be an original for purposes of this Agreement and for the accompanying letter of resignation.

IN WITNESS WHEREOF, the Parties hereunder set their hands and seals to this Agreement effective on this _____ day of _____, 2015.

On Behalf of the Board:

Christine Swensen Hartie

CHRISTINE SWENSEN-HARTIE

By: _____

THOMAS QUINTON

Board of Education President

_____

WITNESS

_____

GARY GREMBOWIEC

Business Administrator

Dated: 5/21, 2015

Dated: 5/21, 2015

GENERAL RELEASE AND WAIVER

In consideration for the promises and undertakings described in the Separation of Service Agreement dated _____, 2015, I hereby release, waive and discharge the Edgewater Board of Education, and its present and former board members, officers, employees and representatives, and their estates and/or heirs thereof from any and all claims which I, my estate and/or heirs may have against any of them. This releases and waives all claims, known and unknown, resulting from anything which has happened up to now, including claims for attorney's fees.

Without limiting the scope of the foregoing provision in any way, I specifically release all claims which were or could have been asserted by me. I also release and waive all claims relating to or arising out of any aspect of my employment to date with the Edgewater Board of Education, including but not limited to, all claims under Title VII of The Civil Rights Act, The Civil Rights Act of 1991 and the laws amended thereby; Sections 1981 through 1988 of Title 42 of the United States Code; the Employee Retirement Income Security Act of 1974; the Immigration Reform Control Act; the Fair Labor Standards Act; the Occupational Safety and Health Act; the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act of 1990, the Americans with Disabilities Act; the Family and Medical Leave Act of 1993; the New Jersey Family Leave Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Wage and Hour Act, and any related federal, state or local law claims, and any claims of discrimination based on race,

age, sex, religion, color, creed, handicap or disability, citizenship, national origin and any other factor prohibited by any federal, state or local law, rule, regulation or guideline; any claim for wrongful discharge; any contract of employment, express or implied; any provision of the Constitution of the United States or the State of New Jersey; and any other law, common or statutory, of the United States, the State of New Jersey or any other state; any claims for the negligent and/or intentional infliction of emotional distress or specific intent to harm; any claims for attorneys' fees, costs and/or expenses; any claims for unpaid or withheld wages, severance pay, benefits, bonuses, deferred compensation, and/or other compensation of any kind; and/or any other federal, state or local human rights, civil rights, wage and hour, wage payment, pension or labor laws, rules and/or regulations, and all claims growing out of any legal restrictions on the Edgewater Board of Education's right to hire and/or terminate its employees.

I agree not to seek any employment at any time with the Edgewater Board of Education.

I also promise not to sue and waive all claims against the Edgewater Board of Education covered by the Separation of Service Agreement and this General Release and Waiver. If one party breaches this promise by suing the other for any such claims, the breaching party will pay all costs and expenses the other party incurs defending against the suit, including reasonable attorney's fees and costs. Notwithstanding the foregoing, the Parties reserve their right to enforce the terms of this Separation of Service Agreement and General Release and Waiver.

I acknowledge that I was advised to consult with attorneys regarding this General Release and Waiver; and that I have read and fully understand it and agree to be bound by it. I also

acknowledge that I have been given a reasonable period of time within which to consider this settlement and the terms of this General Release and Waiver prior to executing it.

ACKNOWLEDGMENT

I HAVE CAREFULLY READ AND FULLY UNDERSTAND THE TERMS AND CONDITIONS OF THIS RELEASE AND WAIVER. I ACKNOWLEDGE THAT I HAD THE OPPORTUNITY TO REVIEW THIS RELEASE AND WAIVER WITH ANYONE OF MY CHOOSING, AND TO DISCUSS WITH SUCH PERSONS THE TERMS AND CONDITIONS OF THIS RELEASE AND WAIVER AND MY RIGHTS UPON EXECUTION. I AGREE AND ACKNOWLEDGE THAT NO REPRESENTATIONS CONCERNING THE TERMS OR EFFECT OF THIS RELEASE WERE MADE BY THE EDGEWATER BOARD OF EDUCATION OR ITS ATTORNEYS OTHER THAN AS SET FORTH IN THE DOCUMENT AND THAT I HAVE VOLUNTARILY SIGNED THIS RELEASE AND WAIVER AS MY OWN FREE ACT WITH FULL KNOWLEDGE OF ITS TERMS AND CONDITIONS, WHICH ARE FINAL AND BINDING UPON ME.

I FURTHER UNDERSTAND THAT THIS AGREEMENT SHALL NOT BECOME EFFECTIVE OR ENFORCEABLE FOR A PERIOD OF SEVEN (7) DAYS FOLLOWING THE EXECUTION OF THIS AGREEMENT AND THAT I MAY REVOKE THIS AGREEMENT BY DELIVERING A WRITTEN NOTICE OF ANY SUCH DECISION TO THE EDGEWATER BOARD OF EDUCATION WITHIN THIS SEVEN-DAY PERIOD.

DATED: 5/15, 2015

Christine Swensen Hartie

Christine Swensen-Hartie

Christine Swensen Hartie

Name (Please Print)

186-15

186-15L

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
Commissioner

May 29, 2015

Ben A. Montenegro, Esq.
Montenegro, Thompson, Montenegro & Genz
531 Burnt Tavern Road
Brick, New Jersey 08724

Stephen Willis, Esq.
Willis & Gresek
247 Main Street
Toms River, New Jersey 08008

Re: *In the Matter of the Tenure Hearing of Wayne Wedderman, School District of the Township of Barnegat, Ocean County, Agency Dkt. No. 369-12/14.*

Dear Counsel:

I have reviewed the record in the contested case entitled *In the Matter of the Tenure Hearing of Wayne Wedderman, School District of the Township of Barnegat, Ocean County, Agency Dkt. No. 369-12/14.* The record includes the District's request to withdraw the tenure charges filed in this matter, as well as the respondent's formal resignation filed with the District on April 14, 2015 and accepted by the Board on April 28, 2015. In light of this information, I find that no purpose would be served by further proceedings in this matter.

Accordingly, I approve the dismissal of the tenure charges with prejudice and dismiss the matter as a contested case before me. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library

DCH/MKD/JKH

187-15

187-15

OAL DKT. NO. EDU 16073-14
AGENCY DKT. NO. 316-10/14

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
S.M. and L.M., on behalf of minor children, J.M. and M.M.,	:	DECISION
RESPONDENTS.	:	

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed. According to the Agreement, the first settlement payment was due at the time that the respondents signed the Agreement, with subsequent payments to be made on the first day of every month beginning May 1, 2015. These dates have preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of the settlement payments. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/04/15
Date of Mailing: 6/04/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 16073-14

AGENCY DKT. NO. 316-10/14

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, PASSAIC COUNTY,

Petitioner,

v.

S.M. and L.M. ON BEHALF OF J.M. and M.M.,

Respondents.

Rodney T. Hara, Esq., for petitioners (Fogarty & Hara, attorneys)

John D. Rue, Esq., for respondent (The Law Office of John D. Rue, attorneys)

Record Closed: April 27, 2015 Decided: April 30, 2015

BEFORE **EVELYN J. MAROSE**, ALJ:

On December 8, 2014, the above referenced matter was remanded to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

A telephone prehearing was conducted on January 20, 2015. On April 27, 2015, the parties submitted a copy of the signed Settlement Agreement and Board Resolution, which is attached hereto for reference.

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

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives' signatures on the attached settlement agreement. The Board of Education of borough of Hawthorne, Passaic County has approved the settlement, as evidenced by the attached Board resolution dated April 22, 2015.

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

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

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

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

April 30, 2015
DATE

EVELYN J. MAROSE, ALJ

Date Received at Agency: 5-5-15

Date Mailed to Parties: MAY - 5 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

kep

AGREEMENT

This AGREEMENT is made this __ day of April, 2015 between the Hawthorne Board of Education, which has offices located at 445 Lafayette Avenue, Hawthorne, New Jersey 07506 (the "Board"), and Salvatore and Lucy Mistretta, who reside at One James Court, North Haledon, New Jersey 07508 (the "Parents").

WHEREAS, the Board operates a kindergarten through twelfth grade school district for students who are domiciled in the Borough of Hawthorne;

WHEREAS, Salvatore and Lucy Mistretta are the Parents of M.M. and J.M., who attended school in the Hawthorne School District (the "District") for the 2013-2014 school year;

WHEREAS, the Parents resided in the Borough of North Haledon for the 2013-2014 school year;

WHEREAS, a hearing on whether M.M. and J.M. were entitled to a tuition free education for the 2013-2014 school year was conducted by the Board;

WHEREAS, the Board determined that M.M. and J.M. were not entitled to a tuition free education for the 2013-2014 school year;

WHEREAS, the Board filed a verified petition (the "Petition") with the Commissioner of Education (Agency Ref. No. 316-10/14 and OAL Docket No. EDU 16073-2014N) which seeks a determination that the Parents are liable to the Board for the payment of tuition in the amount of sixty thousand four hundred thirteen and 00/100 dollars ($60,413.00);

WHEREAS, the Parents dispute the calculation of tuition in the Petition;

WHEREAS, the Parents have asserted numerous defenses to any liability whatsoever for the cause of action asserted in the Petition;

WHEREAS, the Board and the Parents (collectively, the "Parties") are entering into this Agreement to fully and finally release and discharge any and all claims that they have, ever had or may have had against each other as of the date of this Agreement and to provide for the dismissal of the Petition with Prejudice.

WHEREAS, the parties have agreed to a payment plan and are desirous of memorializing the terms in a written agreement which shall be submitted to an administrative law judge and the New Jersey Commissioner of Education for approval and incorporation in a decision which can be entered on the docket of the Superior Court of New Jersey in the event of default;

NOW, WHEREFORE, based on the foregoing premises and the mutual promises and covenants contained herein, the parties agree as follows:

1. **No Admissions of Liability:** This Agreement shall not be offered or construed as an admission by any Party of any wrongdoing, liability or damages. The Parties specifically deny that they engaged in any improper or violation of any law, that they have any liability to any other Party, or that they caused any damage to any other Party. The Parties are settling the Action and entering into this Agreement solely to avoid the burden and expense of litigation.

2. **Payment Amount; Incentive Discount; Schedule.** Parents shall pay the Board the amount of twenty thousand and 00/100 dollars ($20,000.00), which shall be reduced to fifteen thousand and 00/100 dollars ($15,000.00) (the "Incentive Discount") if the Parents make timely payments. Payments shall be made in accordance with the following payment schedule:

a. Fifty-nine (59) payments in the minimum amount of one hundred twenty five and 00/100 dollars ($125.00) for each payment shall be paid, with the first payment being made at the time the Parents sign this Agreement and the following payments on the first day of each month beginning May 1, 2015 for fifty-eight (58) months.

b. Said payments may be made in advance, in the Parents' discretion, without prejudice to the Parents.

c. A final payment which reflects the balance due on the fifteen thousand and 00/100 dollars ($15,000.00) shall be paid no later than March 1, 2020.

3. **Payment Instructions.** Parents shall make all payments to the Board by check, payable to the Hawthorne Board of Education, and shall be received at the Board office located at 445 Lafayette Avenue, P.O. Box 2, Hawthorne, New Jersey 07506 no later than the date payment is due, except as expressly provided for herein.

4. **Late Payments.** During the course of repayment, in the event that the Parents make a payment late, but nonetheless by the fifteenth (15th) day of the month in which that payment was due, such payment shall be accepted as timely (and without prejudice to their right to the Incentive Discount) provided that it is accompanied by a late charge of twenty five and 00/100 dollars ($25.00).

5. **Default.** If payment is not made by the fifteenth (15th) day of any month in which it was due, the Board may notify the Parents that they are in default. Such notice shall be provided to them at the address stated on Page 1 of this agreement, or to any other substitute address subsequently provided to the Board by the Parents. Default shall be effective upon actual receipt of said notice.

6. **Redemption.** In the event of default, the Parents shall have thirty (30) days to pay to the Board the full amount of fifteen thousand and 00/100 dollars ($15,000.00), less any amounts actually paid in accordance with Section One (1) of this agreement. Late fees, if any, shall not be credited as amounts paid for these purposes. If the Incentive Discount is paid within thirty (30)

days, the payment described above shall constitute full and complete payment of all obligations by the Parents pursuant to this Agreement.

7. **Demand.** If the Parents have not paid the above amount in full within thirty (30) days from the Parents' receipt of a notice of default, the Board may demand (in writing, to the address stated on Page 1 of this agreement or any subsequent address provided by the Parents) the immediate payment of the full balance due (twenty thousand and 00/100 dollars ($20,000.00), less any amounts actually paid in accordance with Section One of this Agreement, not including late fees), within seven (7) days (the "Demand Notice"). If payment of the balance due is not made within seven (7) days of the Parents' receipt of the Demand Notice, the Board shall be entitled to judgment in the amount of twenty thousand and 00/100 dollars ($20,000.00), less credit for monies previously paid in accordance with Section One (1) of this Agreement (not including late fees). In this event, Parents consent to the entry of a judgment in the Superior Court of New Jersey for the amount due under the terms of this Agreement.

8. **Collection.** Upon obtaining a judgment from the Superior Court ofNew Jersey, the Board may (in its discretion) initiate collection procedures against the Parents for collection of the amount due. Parents shall reimburse the Board for the cost of such collection procedures, including the reimbursement of reasonable attorney's fees, if they default on this agreement.

9. **Release.** Upon receipt of payment by the Parents in accordance with the terms of this Agreement, the Parents shall be released from any and all claims and actions at law that the Board has against the Parents.

10. **Miscellaneous Representations.** The Parties acknowledge that they have had an opportunity to have this Agreement reviewed by an attorney of their own choice. The Parties further acknowledge that this Agreement has been entered into voluntarily, without duress and of

their own free will, with the full understanding of their duties and obligations contained therein, and agree to be bound by the provision contained in this Agreement.

11. **Entire Agreement.** This Agreement constitutes the entire understanding of the parties with respect to any and all claims between the Parties, supersedes any previous oral or written agreement entered into between the parties with respect to this subject matter of this litigation.

12. **Choice of Law; Choice of Venue.** The parties agree that this Agreement is governed by the laws and regulations of the State of New Jersey and that any and all claims arising out of this Agreement shall be litigated under the jurisdiction of the courts of the State of New Jersey.

13. **Authority.** The undersigned represent that they have the requisite authority to sign this Agreement on behalf of the Board.

IN WITNESS WHEREOF, the parties have hereunto set forth hands and seals on the date and year shown below.

Witness: Hawthorne Board of Education

By: _____ By: _____

Gertrude Engle
Board Secretary/Business Administrator

Richard A. Spirito, Jr.
Superintendent of Schools

Dated:

Witness:

_____ _____

Salvatore Mistretta

_____

Lucy Mistretta

Dated: 4/16/2015

Witness:

EXTRACT FROM THE MINUTES OF A MEETING OF THE HAWTHORNE BOARD OF EDUCATION OF HAWTHORNE SCHOOL DISTRICT, PASSAIC COUNTY, NEW JERSEY, AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of Hawthorne School District, in the County of Passaic, New Jersey, Tuesday, April 21, 2015 in a Regular Public Meeting at the Municipal Building, Lafayette Avenue, Hawthorne, New Jersey.

The following members of the Board of Education were present:

Mr. Sciarra, Ms. Hyams, Mr. Doyle, Mr. Turco, Mr. Clavijo, Ms. Goff
Mr. Puluse, Mr. Reicher, Mr. Terraglia

Pursuant to the recommendation of the Superintendent of Schools, the Committee on Finance and Administration recommends the following resolutions:

F-26. WHEREAS, the Hawthorne Board of Education (hereinafter referred to as the "Board of Education") filed a verified petition with the Commissioner of Education (Agency Ref. No. 316-10/14 and OAL Docket No. EDU 16073-2014N) which seeks a determination that the parents of two (2) students are liable to the Board of Education for the payment of tuition for the 2013-2014 school year; and
WHEREAS, the parties have entered into an agreement to resolve the Board of Education's claim for tuition;

BE IT RESOLVED that the Board of Education approves the agreement with the parents for the payment of tuition for an agreed amount in accordance with a payment schedule and authorizes the superintendent of schools and board secretary/business administrator to sign the agreement on behalf of the Board of Education

F-24-29, A-31-35 – moved by Mr. Terraglia, seconded by Ms. Hyams

Ayes	-	**Ms. Goff, Mr. Turco, Mr. Puluse, Mr. Sciarra, Mr. Terraglia Mr. Doyle, Ms. Hyams, Mr. Reicher, Mr. Clavijo**
Nays	-	**None**
Abstain	-	**None**
Absent	-	**None**

I, Gertrude Engle, Business Administrator/Board Secretary of Hawthorne School District, in the County of Passaic, State of New Jersey, hereby certify that the foregoing Extract from the Minutes of the Regular Meeting of the Board of Education of said district, duly called and held on April 21, 2015 has been compared by me with the original Minutes as officially recorded in my office in the Minute Book of said Hawthorne School District Board of Education this 22nd day of April, 2015

Gertrude Engle
Business Administrator/Board Secretary

188-15L

159-15

State of New Jersey

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

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

DAVID C. HESPE
Commissioner

June 4, 2015

Mehezabin & Altaf Ghoghai
26 A Forest Drive
Springfield, New Jersey 07081

Anthony P. Sciarrillo, Esq.
Lindabury, McCormick, Estabrook & Cooper, P.C.
53 Cardinal Drive
P.O. Box 2369
Westfield, New Jersey 07091-2369

Re: *Board of Education of the Township of Millburn, Essex County v. M.G. and A.G., on behalf of minor child, Q.G., Agency Dkt. No. 9-1/15*

Dear Parties:

Upon review of the Petition of Appeal filed in connection with this matter, and based upon the respondents' failure to submit an Answer to the Petition that complies with *N.J.A.C.* 6A:3-1.5, I have determined to grant summary decision in favor of the petitioner.

On January 13, 2015, the Board filed its Petition of Appeal pursuant to *N.J.A.C.* 6A:3-8.1 seeking an order assessing tuition and claiming that minor child Q.G. was not entitled to attend school in the district during the 2013-2014 school year pursuant to *N.J.S.A.* 18A:38-1 *et seq.* A copy of the Petition was served upon respondents M.G. and A.G. on January 13, 2015, via certified and regular mail, as was an acknowledgment of filing and notice dated January 15, 2015 that an Answer to the Petition was due within 20 days. *N.J.A.C.* 6A:3-1.5.

Because respondents failed to respond to the initial notice, a second notice was sent on February 19, 2015, via certified and regular mail, clearly indicating that – absent receipt of an Answer to the Petition within 10 days – each count in the Petition would be deemed admitted and the matter may be decided on a summary basis pursuant to *N.J.A.C.* 6A:3-1.5(e). According to information obtained from the U.S. Postal Service, the copy sent via certified mail was claimed, and the copy sent via regular mail was not returned. M.G. and A.G. failed to respond to the second notice. Two additional notices were sent via certified and regular mail, on March 20, 2015 and April 24, 2015, to which M.G. and A.G. also failed to respond. The notices sent via regular mail were not returned, and although the March 20, 2015 certified mailing was unclaimed, the April 24, 2015 certified mailing was claimed.

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To date, no Answer has been filed on behalf of M.G. and A.G. Accordingly, petitioner's claim that Q.G. was not entitled to attend school in the district pursuant to *N.J.S.A.*18A:38-1 *et seq.* is deemed admitted. It is hereby ordered that respondents reimburse the petitioner for tuition costs in the amount of $14,876 for Q.G.'s ineligible attendance in the district during the 2013-2014 school year.

IT IS SO ORDERED.*

Sincerely,

David C. Hespe
Commissioner of Education

c: County Superintendent
State Law Library

DCH/MKD/DCS

VIA REGULAR MAIL

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

189-15LM

189-15

State of New Jersey

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

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

June 4, 2015

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Lyndhurst, New Jersey 07071-0790

Nancy Oxfeld, Esq.
Oxfeld Cohen, P.C.
60 Park Place, Suite 600
Newark, New Jersey 07102

Re: *In the Matter of the Tenure Hearing of Marie Ebert, State-Operated School District of the City of Newark, Essex County, Agency Dkt. No. 49-3/15*

Dear Counsel:

Upon review of the parties' submissions, relevant sections of Title 18A, and the corresponding regulations, it is apparent that the Commissioner lacks jurisdiction to hear and decide petitioner's Motion for Emergent Relief requesting a stay pending proceedings in the Appellate Division since this matter is presently before an arbitrator for final determination. Under these circumstances, and in accordance with *N.J.A.C.* 6A:3-5.5(b), the parties are free to direct requests to hold the matter in abeyance to the assigned arbitrator.

The Commissioner's jurisdiction to hear and decide tenure matters is limited by statute. At the outset, *N.J.S.A.* 18A:6-9 provides that an arbitrator "shall hear and make a final determination" on controversies and disputes arising under the tenure laws, codified at *N.J.S.A.* 18A:6-10 *et seq.* The Commissioner is required to refer promptly such matters to a panel of arbitrators subject to the criteria set forth in *N.J.S.A.* 18A:6-16 and *N.J.S.A.* 18A:6-17.3. In an effort to further expedite the tenure hearing process, *N.J.S.A.* 18A:6-17.1(d) mandates a 45-day timeframe for issuance of arbitrators' written decisions. Pursuant to *N.J.S.A.* 18A:6-17.1(e), an arbitrator's final determination is not appealable to the Commissioner or the State Board of Education, but is subject to judicial review and enforcement in the Superior Court. *See N.J.S.* 2A:24-7 through *N.J.S.* 2A:24-10.

Notwithstanding an arbitrator's broad jurisdiction to hear and decide tenure matters, *N.J.S.A.* 18A:6-10 *et seq.* grants the Commissioner limited authority to perform certain

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related functions following referral of a tenure matter to an arbitrator for final determination pursuant to *N.J.S.A.* 18A:6-16 or *N.J.S.A.* 18A:6-17.3. For example, the tenure laws require the Commissioner to "approve or disapprove" within five days an arbitrator's request for extension of the mandated 45 day timeframe. *N.J.S.A.* 18A:6-17.1(g). If an arbitrator fails to adhere to the 45-day timeframe absent Commissioner approval of an extension request, *N.J.S.A.* 18A:17-1(h) allows the Commissioner to remove that arbitrator from the case and assign the matter to a new arbitrator within five days. However, the tenure laws do not bestow upon the Commissioner any authority to hear and decide related motions once a given matter is transmitted to an arbitrator for final determination.

Furthermore, *N.J.A.C.* 6A:3-5.5(b) provides specific guidance as to whom the parties should direct requests to hold a tenure matter in abeyance. The ultimate answer to this inquiry hinges upon whether the Commissioner has already referred the matter to an arbitrator:

> Where a party to a tenure matter requests, the Commissioner may agree to hold the matter in abeyance at any time prior to transmittal to an arbitrator. Thereafter, requests to hold the matter in abeyance shall be directed to the arbitrator.

Once a tenure matter is before an arbitrator for final determination, the Commissioner lacks jurisdiction to determine whether a stay should be granted. In this instance, the Commissioner referred the matter to an arbitrator via letter dated March 30, 2015. Subsequently, petitioner's Motion for Emergent Relief requesting a stay was filed with the Bureau of Controversies and Disputes on May 20, 2015.

For the foregoing reasons, the Commissioner lacks jurisdiction to hear and decide petitioner's Motion for Emergent Relief. This determination shall not preclude the parties from seeking the desired relief before the arbitrator pursuant to *N.J.A.C.* 6A:3-5.5(b).

Sincerely,

David C. Hespe
Commissioner of Education

c: Arbitrator Tia Schneider Denenberg
Donna Arons, DAG

DCH/MKD/DCS
Via Facsimile & Regular Mail

190-15IM

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

June 4, 2015

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One Riverfront Plaza, Suite 320
Newark, New Jersey 07102

Re: *In the Matter of the Tenure Hearing of Neil Thomas, State-Operated School District of the City of Newark, Essex County, Agency Dkt. No. 59-3/15*

Dear Counsel:

Upon review of the parties' submissions, relevant sections of Title 18A, and the corresponding regulations, it is apparent that the Commissioner lacks jurisdiction to hear and decide petitioner's Motion for Stay Pending Appeal since this matter is presently before an arbitrator for final determination. Under these circumstances, and in accordance with *N.J.A.C.* 6A:3-5.5(b), the parties are free to direct requests to hold the matter in abeyance to the assigned arbitrator.

The Commissioner's jurisdiction to hear and decide tenure matters is limited by statute. At the outset, *N.J.S.A.* 18A:6-9 provides that an arbitrator "shall hear and make a final determination" on controversies and disputes arising under the tenure laws, codified at *N.J.S.A.* 18A:6-10 *et seq.* The Commissioner is required to refer promptly such matters to a panel of arbitrators subject to the criteria set forth in *N.J.S.A.* 18A:6-16 and *N.J.S.A.* 18A:6-17.3. In an effort to further expedite the tenure hearing process, *N.J.S.A.* 18A:6-17.1(d) mandates a 45-day timeframe for issuance of arbitrators' written decisions. Pursuant to *N.J.S.A.* 18A:6-17.1(e), an arbitrator's final determination is not appealable to the Commissioner or the State Board of Education, but is subject to judicial review and enforcement in the Superior Court. *See N.J.S.* 2A:24-7 through *N.J.S.* 2A:24-10.

Notwithstanding an arbitrator's broad jurisdiction to hear and decide tenure matters, *N.J.S.A.* 18A:6-10 *et seq.* grants the Commissioner limited authority to perform certain

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related functions following referral of a tenure matter to an arbitrator for final determination pursuant to *N.J.S.A.* 18A:6-16 or *N.J.S.A.* 18A:6-17.3. For example, the tenure laws require the Commissioner to "approve or disapprove" within five days an arbitrator's request for extension of the mandated 45-day timeframe. *N.J.S.A.* 18A:6-17.1(g). If an arbitrator fails to adhere to the 45-day timeframe absent Commissioner approval of an extension request, *N.J.S.A.* 18A:17-1(h) allows the Commissioner to remove that arbitrator from the case and assign the matter to a new arbitrator within five days. However, the tenure laws do not bestow upon the Commissioner any authority to hear and decide related motions once a given matter is transmitted to an arbitrator for final determination.

Furthermore, *N.J.A.C.* 6A:3-5.5(b) provides specific guidance as to whom the parties should direct requests to hold a tenure matter in abeyance. The ultimate answer to this inquiry hinges upon whether the Commissioner has already referred the matter to an arbitrator:

> Where a party to a tenure matter requests, the Commissioner may agree to hold the matter in abeyance at any time prior to transmittal to an arbitrator. Thereafter, requests to hold the matter in abeyance shall be directed to the arbitrator.

Once a tenure matter is before an arbitrator for final determination, the Commissioner lacks jurisdiction to determine whether a stay should be granted. In this instance, the Commissioner referred the matter to an arbitrator via letter dated April 13, 2015. Subsequently, petitioner's Motion for Stay Pending Appeal was filed with the Bureau of Controversies and Disputes on May 18, 2015.

For the foregoing reasons, the Commissioner lacks jurisdiction to hear and decide petitioner's Motion for Stay Pending Appeal. This determination shall not preclude the parties from seeking the desired relief before the arbitrator pursuant to *N.J.A.C.* 6A:3-5.5(b).

Sincerely,

David C. Hespe
Commissioner of Education

c: Arbitrator Robert T. Simmelkjaer
Donna Arons, DAG

DCH/MKD/DCS
Via Facsimile & Regular Mail

191-15

191-15LM

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

June 9, 2015

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Colin M. Lynch, Esq.
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Newark, New Jersey 07102

Re: *In the Matter of the Tenure Hearing of Sandra Cheatham-Powell, State-Operated School District of the City of Newark, Essex County, Agency Dkt. No. 68-3/15*

Dear Counsel:

Upon review of the parties' submissions, relevant sections of Title 18A, and the corresponding regulations, it is apparent that the Commissioner lacks jurisdiction to hear and decide petitioner's Motion for Stay Pending Appeal since this matter is presently before an arbitrator for final determination. Under these circumstances, and in accordance with *N.J.A.C.* 6A:3-5.5(b), the parties are free to direct requests to hold the matter in abeyance to the assigned arbitrator.

The Commissioner's jurisdiction to hear and decide tenure matters is limited by statute. At the outset, *N.J.S.A.* 18A:6-9 provides that an arbitrator "shall hear and make a final determination" on controversies and disputes arising under the tenure laws, codified at *N.J.S.A.* 18A:6-10 *et seq.* The Commissioner is required to refer promptly such matters to a panel of arbitrators subject to the criteria set forth in *N.J.S.A.* 18A:6-16 and *N.J.S.A.* 18A:6-17.3. In an effort to further expedite the tenure hearing process, *N.J.S.A.* 18A:6-17.1(d) mandates a 45-day timeframe for issuance of arbitrators' written decisions. Pursuant to *N.J.S.A.* 18A:6-17.1(e), an arbitrator's final determination is not appealable to the Commissioner or the State Board of Education, but is subject to judicial review and enforcement in the Superior Court. *See N.J.S.* 2A:24-7 through *N.J.S.* 2A:24-10.

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Notwithstanding an arbitrator's broad jurisdiction to hear and decide tenure matters, *N.J.S.A.* 18A:6-10 *et seq.* grants the Commissioner limited authority to perform certain related functions following referral of a tenure matter to an arbitrator for final determination pursuant to *N.J.S.A.* 18A:6-16 or *N.J.S.A.* 18A:6-17.3. For example, the tenure laws require the Commissioner to "approve or disapprove" within five days an arbitrator's request for extension of the mandated 45-day timeframe. *N.J.S.A.* 18A:6-17.1(g). If an arbitrator fails to adhere to the 45-day timeframe absent Commissioner approval of an extension request, *N.J.S.A.* 18A:17-1(h) allows the Commissioner to remove that arbitrator from the case and assign the matter to a new arbitrator within five days. However, the tenure laws do not bestow upon the Commissioner any authority to hear and decide related motions once a given matter is transmitted to an arbitrator for final determination.

Furthermore, *N.J.A.C.* 6A:3-5.5(b) provides specific guidance as to whom the parties should direct requests to hold a tenure matter in abeyance. The ultimate answer to this inquiry hinges upon whether the Commissioner has already referred the matter to an arbitrator:

> Where a party to a tenure matter requests, the Commissioner may agree to hold the matter in abeyance at any time prior to transmittal to an arbitrator. Thereafter, requests to hold the matter in abeyance shall be directed to the arbitrator.

Once a tenure matter is before an arbitrator for final determination, the Commissioner lacks jurisdiction to determine whether a stay should be granted. In this instance, the Commissioner referred the matter to an arbitrator via letter dated April 16, 2015. Subsequently, petitioner's Motion for Stay Pending Appeal was filed with the Bureau of Controversies and Disputes on May 20, 2015.

For the foregoing reasons, the Commissioner lacks jurisdiction to hear and decide petitioner's Motion for Stay Pending Appeal. This determination shall not preclude the parties from seeking the desired relief before the arbitrator pursuant to *N.J.A.C.* 6A:3-5.5(b).

Sincerely,

David C. Hespe
Commissioner of Education

c: Arbitrator Stephen M. Bluth
Donna Arons, DAG

DCH/MKD/DCS
Via Facsimile & Regular Mail

192-15LM

192-15

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

June 9, 2015

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Re: *In the Matter of the Tenure Hearing of Lorraine Williams, State-Operated School District of the City of Newark, Essex County, Agency Dkt. No. 58-3/15*

Dear Counsel:

Upon review of the parties' submissions, relevant sections of Title 18A, and the corresponding regulations, it is apparent that the Commissioner lacks jurisdiction to hear and decide petitioner's Motion for Stay Pending Appeal since this matter is presently before an arbitrator for final determination. Under these circumstances, and in accordance with *N.J.A.C.* 6A:3-5.5(b), the parties are free to direct requests to hold the matter in abeyance to the assigned arbitrator.

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For the foregoing reasons, the Commissioner lacks jurisdiction to hear and decide petitioner's Motion for Stay Pending Appeal. This determination shall not preclude the parties from seeking the desired relief before the arbitrator pursuant to *N.J.A.C.* 6A:3-5.5(b).

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Commissioner of Education

c: Arbitrator David L. Gregory
Donna Arons, DAG

DCH/MKD/DCS
Via Facsimile & Regular Mail

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DCH/MKD/DCS
Via Facsimile & Regular Mail

192-15LM+

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
TRENTON, NEW JERSEY

In the Matter of Tenure Charges Against LORRAINE WILLIAMS, Respondent

Filed By

THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

Agency Docket Number 58-3/15

For the State-Operated School District of the City of Newark, Essex County:
Ms. Teresa L. Moore, Esq.

For Ms. Lorraine Williams, Respondent:
Ms. Nancy I. Oxfeld, Esq,

Arbitrator David L. Gregory

The Dorothy Day Professor of Law and
The Executive Director of the Center for Labor and Employment Law
St. John's University School of Law
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By the April 2, 2015 appointment letter from the Department of Education of the State of New Jersey, I was appointed Arbitrator in the Matter of the Tenure Hearing of Lorraine Williams, State Operated School District of the City of Newark, Essex County, Agency Docket No.58-3/15. I had previously served as the Arbitrator in the L. Williams/Newark 501-14 matter (see my Decision of December 20, 2014, dismissing charges) On April 24, 2015, Respondent moved for Summary Judgment and Dismissal of all of the charges in the present case now before me. A flurry of pre-hearing papers had already commenced, and increased in complexity and intensity, further supplemented by concurrent telephonic oral argument in several instances. Commissioner of Education Hespe stated in his letter of June 9, 2015 that the District could bring its May 19, 2015 Motion for a Stay Pending Appeal to me as the Arbitrator. During May 17-25, 2015, I was attending the annual meetings of the American Law Institute as a Life Member and of the National Academy of Arbitrators. Both principal lawyers also took some vacation time, with one of the lawyers traveling abroad. In order to be fully informed upon her return, she reasonably requested some necessary additional time. Meanwhile, over the course of the winter and spring of 2015, several encyclopedic decisions were issued by highly respected arbitrators on the TEACH NJ panel of 25. Most, albeit not all, of these decisions clearly favor Respondent.

The equitable principles of Comity and of resolution of the entire case are critically important in this matter, and the District's request that this Arbitration be placed in Abeyance is very well presented in both the District's papers and in the telephonic oral arguments further elucidating those papers. The dilemma of the decision maker only deepens, for the Motion papers and oral arguments of Respondent's attorney are just as impressive. The Commissioner of Education weighed in with letters bearing on these complexities. The steadily growing body of arbitral authority on the 25 member statewide panel of TEACH NJ arbitrators may indeed be more favorable to Respondent regarding the issues at the heart of the present matter. As I discussed at some length in my December 20, 2014 Decision in Newark, it would, at the very least, be outrageously and unjustifiably expensive to proceed forward with the arbitration hearing while awaiting the response from appeals to the New Jersey Superior Court Appellate Division. More prudent and more gracious than wrestling with legalisms, Comity embodies common sense and civility among and within branches of government. "Sensible case management dictates that arbitration should not go forward on an agency referral to arbitration that has been appealed ..." (District's attorney's June 8 2015 letter at page 1). More immediate, the District asserts that I was selected out of order, and not at random, to serve as arbitrator for this present Williams case.)

What I said in the first Williams/Newark case I decided in December 2014 seems even more apt several months later, making the District's request that I place the present case in abeyance even more jurisprudentially resonant.

To wit:

"By letter dated September 29, 2014, the Department of Education of the State of New Jersey referred this TEACHNJ matter to me as Arbitrator. By letter dated December 4, 2014, Respondent Tenured Teacher Ms. Lorraine Williams filed this Motion to Dismiss the Tenure Charges brought against her for inefficiency. The District replied to the Motion. By Notice letter dated December 16, 2014, the District cross-moved for a ruling that I preclude Respondent from introducing any evidence at the hearing.

I have carefully read and studied all of the parties' submissions. I render my Decision pursuant to law. Felix Frankfurter, Associate Justice of the United States Supreme Court, was the eminent proponent of the pithy axiom that the law is largely the history of procedure. It is indubitable----procedure matters.

New Jersey has dramatically redesigned and rejuvenated its teacher tenure dynamic to be prospective and proactive. TEACHNJ does not operate in a vacuum. Over time, and probably sooner than later, New Jersey should begin to realize impressive cost savings via the TEACHNJ panel of distinguished Arbitrators. The issue in this battery of analogous cases is especially conducive to being determined with precedential effect, guiding at least the institutional parties in any future cases without significant additional costs..

Although the decisions of fellow panel members do not formally have res judicata or collateral estoppel effect, their prior decisions that routinely involve one of the institutional parties, focus on the same particular statutory law, have closely analogous facts and corresponding Arbitral elucidation are, at the very least, appropriately highly influential. "...the precedential value of a prior award between the parties is to be determined by the subsequent arbitrator." Elkouri and Elkouri, How Arbitration Works (6th Edition) at 598.

Respondent has extensively cited a burgeoning litany of very persuasive decisions, finding that "the District erred when it discharged Respondent when it used 2012-13 as one of the two evaluation ...years ." Arbitrator Stephen M. Bluth, Sandra Cheatham and School District of the City of Newark, Agency Dkt Number 226-8/14, at 14, October 16, 2014. Furthermore, having lost in the Section 25 context, the unsuccessful School District cannot then invoke Section 8, as Arbitrator Bluth explains at considerable length in his decision in Cheatham.

It appears that Arbitrator Robert T. Simmelkjaer has written the comprehensive definitive decision governing the identification, determination, and failure of tenure charges prematurely brought. See, Arbitrator Robert T. Simmelkjaer, Neil Thomas and the State-Operated School District of the City of Newark, Agency Dkt Number 244-9/14, November 19, 2014. This 52 page, singled spaced decision is cited extensively in Respondent's Motion. The

most recent pertinent decision applying the Sinnmelkjaer doctrine is the 25 page, single spaced order of Arbitrator Joyce M. Klein, Elena Brady and the State Operated School District for the City of Newark, Agency Dkt Number 270-9/14, December 7, 2014.

The District categorically maintains that the formidable array of arbitral authority contrary to the District's position is simply wrongly decided. The District's rationale is unpersuasive, suggesting that any additional time allowed a presumptive congenitally incorrigible only exacerbates what is already a colossal waste of everyone's time. However, what the District regards as an unwarranted and ungovernable year is often quite the contrary. Rather than cavalierly disregard the gravity of tenure charges, experience instead demonstrates that teachers facing charges usually endeavor to rise to the occasion. Most take full advantage of all ameliorating and rehabilitative professional programs maximizing due process. In any event, Lawmakers periodically provide for transition periods in the implementation of especially important legislation. The federal Civil Rights Act of 1964 did not go into effect for another year and the Americans with Disabilities was gradually and incrementally effectuated."

Abeyance is not in perpetuity, and it certainly is not another means to buy time. Comity equitably reinforces the propriety of timely deference to the state judiciary in this matter. Absent a reasonably timely response decision from the state appellate court, Respondent may bring motions necessary and sufficient to move to hearing dates convening the arbitration in the present matter.

So Ordered,

Dave Gregory

David L. Gregory

I, David L. Gregory, affirm that I have executed this document as my Decision and Order on this 2nd of July, 2015.

196-15

STATE OF NEW JERSEY - DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of Tenure Hearing of Leonard Yarborough:

STATE OPERATED SCHOOL DISTRICT
FOR THE CITY OF NEWARK, ESSEX COUNTY

Case No. 69-3/15

and

OPINION
and AWARD

LEONARD YARBOROUGH

Before:
Edmund Gerber, Arbitrator

Appearances:
For the State Operated School District of the
City of Newark, Essex County:
Ramon E. Rivera, Esq.
Scarinci & Hollenbeck, LLC

For the Respondent:
Charles I. Auffant, Esq.
Stuart Ball, LLC

The State Operated School District of City of Newark ("District") initially filed a Notice of Inefficiency Charge against Leonard Yarborough ("Respondent") on October 9, 2014 pursuant to N.J.S.A. 18A:6-17-3. In an Opinion and Award of December 9, 2014, (#509-14) a Motion to Dismiss the tenure charges was granted. The Award was in reliance on the Opinion and Award of The State Operated School District of the City of Newark and Elena Brady, 270-9/14, wherein it was held that N.J.S.A. 18A:6-17-3 does not provide for consideration of 2012-2013 summative evaluations for the purpose of tenure revocation. As in Brady, the District relied upon the 2012-2013 summative evaluations in bringing tenure charges under N.J.S.A. 18A:6-17-3 against Yarborough. Accordingly, the motion was granted based upon the doctrine of collateral estoppel.

The District filed an Amended Tenure Charge on January 26, 2015 alleging inefficiency pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-16,

N.J.S.A. 18A:6-17.1, N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1 (Section 8) against the Respondent. The amended charges make the same factual allegations as those stated in the original charges. It was specifically alleged that Yarborough demonstrated an inability to completely and responsibly execute his duties as a teacher and enumerated failures to implement curricular goals and objectives, design coherent instruction, access student learning, create an environment of respect and rapport, manage student behavior, etcetera. It was further alleged that the Respondent received an Ineffective rating for the 2012-2013 school year in an Annual Summative Evaluation and received a Partially Effective rating for the 2013-2014 school year in an annual Summative Evaluation.

On April 24, 2015, I was appointed to serve as arbitrator to hear and decide these amended charges. On May 5, 2015, Leonard Yarborough moved for an order dismissing the tenure charges against him with prejudice and filed a brief and answer in support of its motion.

RESPONDENT'S ARGUMENT IN SUPPORT OF MOTION

The Respondent specifically argues in support of its Motion to Dismiss that:

1) Pursuant to the doctrine of Law of the Case, the District is bound by the arbitrator's previous, precedential Opinion and Award barring the District from proceeding with inefficiency charges against Yarborough pursuant to Section 8 of the TEACHNJ Act. The law of the case doctrine requires judges to respect unreversed decisions made during a trial by the same court or a higher court regarding questions of law. Once an issue is litigated and decided in a suit, relitigation of that issue should be avoided, if possible. Sisler v. Gannett Co., 222 N.J. Super 153 App Div. (1987), State v. Hale, 127 N.J. Super 407, 410 App Div. (1974).

   The issue has already been decided in this case; the amended charge is bound by the prior ruling. Specifically, the initial charge of inefficiency filed against Yarborough has been dismissed. Now the District seeks to proceed under Section 8 of the TEACHNJ Act. That same request was rejected by Arbitrator Simmelkjaer In The Matter of Neil Thomas and State Operated School District of the City of Newark, November 20, 2014 (465-15) when he held that "the District cannot rehabilitate charges found to be deficient under Section 25 by proposing that they be reconsidered under Section 8 as a default position." Also, Arbitrator Daniel Brent held In The Matter of Jodi Thompson, Dkt. No. 240-8/14 "the arbitrator is constrained by well established principles of equity and the labor arbitration rules of the American Arbitration Association not to permit a charging

party to plead a new cause of action that was not part of the original charge" (p. 6).

2) Pursuant to the doctrine of *res judicata*, the charge at issue has already been fully resolved, cannot be relitigated and must be dismissed. Even if the charge is treated as a new charge, it is nonetheless barred as a matter of law pursuant to the doctrine of *res judicata*, a "an ancient judicial doctrine which contemplates that when a controversy between the parties is once fairly litigated and determined, it is no longer open to relitigation and rests upon policy considerations which seek to guard the individual against vexatious repetitious litigation and the public against serious burdens which such litigations impose upon the community." Lubliner v. Board of Alcoholic Beverage Control for the City of Paterson, 33 N.J. 428 (1960). Unlike the doctrine of law of the case, *res judicata* is a mandatory doctrine that a tribunal must apply to bar a party from relitigating a case or an issue already fully disposed of.

   For *res judicata* to bar the relitigation of a claim, the following three elements must be met:

   1) The judgment in the prior action must be valid, final and on the merits
   2) The parties in the later action must be identical to or in privity with those in the prior action and
   3) The claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one. Bondi v. Citi Group, 423 N.J. Super 377 App Div. (2011).

   The doctrine of *res judicata* applies to arbitration awards, see Chattin v. Cape May Green, Inc., 216 N.J. Super 618 App Div. (1987).

   In this matter, if the charge is considered a new charge, *res judicata* requires that the new charge be dismissed. The initial charge of inefficiency was brought against Yarborough last year on or about August 30, 2014. The District had ample time to consider the charge upon which it would seek dismissal. The District elected to pursue a charge of inefficiency under Section 25 of the TEACHNJ Act. Once it was determined that its Section 25 charge against Yarborough was substantively deficient, the District expressly sought to pursue an inefficiency charge against him under Section 8. That charge must be rejected. Since the December 29, 2014 Opinion and Award was never appealed, it is a valid, final and on the merits. It is argued that it was specifically determined that the District could not proceed under Section 8. The parties are obviously identical and the instant charge plainly grows out of the transaction or

occurrence as the prior tenure charge since the statements of evidence and exhibits of the charge are identical. Except for the section of TEACHNJ Act cited, the charges are exactly the same and the charge against Yarborough should be dismissed.

4) The District's amended charge against Yarborough is untimely filed and must be dismissed. Assuming *arguendo* that the District has filed a new charge against the Respondent, the District has failed to file that charge in a timely manner under either Section 25 or Section 8 of TEACHNJ. The TEACHNJ Act specifically provides timelines in which tenure charges must be served. Specifically, N.J.A.C. 6A:3-5.1, notice of tenure charges must be served on the teacher within three days of service on the State District Superintendent. If the charges are for inefficiency, pursuant to N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1, the employee has an opportunity within ten days to submit a written statement of position demonstrating how the District failed to follow the applicable evaluation procedures. The Superintendent then must certify the charges and file the same with the Commissioner of Education within thirty (30) days of receipt of same. N.J.S.A. 18A:6-17.3. Once charges are filed with the Commissioner, there are specific mandatory timelines for the filing of answers to tenure charges. Notably absent from either the statutory or regulatory scheme is a procedure for the amendment of certified tenure charges, whether brought for inefficiency pursuant to Section 25 or otherwise. The notice of tenure charge against Yarborough was initially served on him over nine months ago, on August 30, 2014. He duly filed his position to the charge with the State District Superintendent on September 19, 2014. The charge was certified by the District Superintendent and served on Yarborough on September 22, 2014. Yarborough's Motion to Dismiss was granted by this arbitrator on December 29, 2014. The three month period within which the District could have moved to vacate this arbitrator's Opinion and Award expired on March 29, 2015. The District did nothing for more than three months and now, long after the timeframes set forth by applicable statute and regulation governing the filing of tenure charges have expired, and long after its timeframe to move to vacate this arbitrator's decision, the District seeks a "do over" on the case.

The charge is not "new." Rather, it is merely a rehash of the same charge of inefficiency dismissed complete with the same notice of charges, statement of evidence and exhibits. The District is far beyond the time periods contemplated by law for either the certification of tenure charges or the amendment of same. Under Section 25, N.J.S.A. 18A:6-17.3, the District was required to file charges against Yarborough with the Commissioner of Education within thirty (30) days of filing with the State District Superintendent. The District here filed charges with

the State District Superintendent on July 9, 2014. The charge filed was based on the identical series of facts and allegations as the instant charge; thus the District was under an obligation to file the tenure charge within thirty (30) days thereof. The current charge was filed well outside that time period and thus the charge is untimely.

Alternatively, once charges were filed with the State District Superintendent, Yarborough could submit a statement of position and a written statement of evidence under oath within fifteen (15) days of receipt of the charge N.J.A.C. 6A:3-5.1. Upon receipt of the statement or within fifteen days, the State District Superintendent had forty-five (45) days to decide whether to certify the charges to the Commissioner of Education. N.J.S.A. 18A:6-13. The District filed charges with the State District Superintendent on September 22, 2014. The charges were based upon the identical series of facts and allegations and thus the District was under an obligation to vote on whether to file the charge under Section 8 within forty-five (45) days of receiving Yarborough's response to the charge and then was required to file the charge with the Commissioner within fifteen (15) days of making its decision. Clearly, it did not do so and the charge was filed outside the applicable time frame and must be dismissed. The statutory and regulatory time frames set forth exist for a reason; they protect the due process rights of educators subject to tenure charges. The District's conduct in belatedly amending its prior charge violate Yarborough's due process rights and should be dismissed.

5) The District's amended charge is barred by the entire controversy doctrine. The District cannot bring amended or new charges based on the same facts and series of transactions or occurrences at this stage of the proceedings.

The entire controversy doctrine requires that "to the extent possible, courts must determine an entire controversy in a single judicial proceeding and that such a determination necessarily embraces not only joinder of related claims between the parties but also joinder of all persons who have a material interest in the controversy." Cogdell by Cogdell v. Hospital Center at Orange, 116 N.J. 7 (1989). The entire controversy doctrine is equitable in nature and is fundamentally predicated upon judicial fairness and will be invoked in that spirit. Crispin v. Volkswagen Werk, 96 N.J. 336 (1984).

New Jersey Court Rule 4:30A provides, in relevant part, that "non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of omitted claims to the extent required by the entire controversy doctrine." The entire controversy doctrine applies to arbitration proceedings. Shoremount v. APS Corp., 368 N.J. Super 252, 255 App Div. (2004).

The District has already litigated its tenure charge of inefficiency against the Respondent based upon its evaluations for school years 2012-2013 and 2013-2014 and lost that charge. It could have brought other charges simultaneously under Section 8 based upon those same facts or series of transactions or occurrences. It cannot now relitigate the case. If the District is permitted to bring the instant charge, it will be free to continue refilling the same charge against the Respondent under various legal theories over and over again. Clearly this violates the entire controversy doctrine as well as principles of judicial finality and efficiency. And no less importantly, it violates Yarborough's due process rights to not be subject to the same charge repeatedly. The District cannot get a second bite at the apple. The case is concluded.

5) Inefficiency tenure charges can only be brought under Section 25 of the TEACHNJ Act. Therefore, the District's charges must be dismissed. Section 25 of TEACHNJ is the exclusive means through which a District can bring charges of inefficiency. Charges of inefficiency are now defined by and are required to proceed pursuant to Section 25 of the TEACHNJ only. TEACHNJ reforms the prior tenure law by linking tenure decisions directly to effectiveness ratings. N.J.S.A. 18A:28-5. TEACHNJ made a dramatic change to the tenure revocation process, particularly on the grounds of inefficiency pursuant to N.J.S.A. 18A:6-17.3. The new TEACHNJ deleted from Section 8, N.J.S.A. 18A:6-16 the former 90 day improvement period during which teachers were afforded notice of inefficiency and opportunity to cure any professional deficiencies. In its place, Section 25 was added which specifically addresses charges of inefficiency. N.J.S.A. 18A:6-17.3.

   Section 25 has created a new definition of inefficiency. Tenure retention is now based upon continued efficient performance directly tied to evaluation outcomes and student achievement. The evaluation process itself was substantially revamped. Now only two performance evaluations can result in termination. Section 25, create a very limited scope of review of teacher evaluations and the limitations on defenses set forth therein directly flow from a concurrent overhaul of the evaluation process and procedures. Teachers may no longer challenge an evaluator's determination, but only so long as that determination is based upon evaluations which comply with applicable procedures.

   Here, however, what the District is effectively saying is that both N.J.S.A. 18A:6-17.2 and N.J.S.A. 18A:6-17.3 are optional. It may comply with statutory and regulatory procedures or not. The District apparently believes that if it fails to comply with applicable procedures necessary to bring charges under Section 25 as was previously determined in this case, it may simply ignore Section 25 altogether. The limitations on review of evaluations and defenses cannot apply

because those limitations were predicated on compliance with statutory evaluation requirements and procedures. Effectively, the efforts of the legislature to streamline tenure proceedings are rendered a complete nullity. In sum, the terms of the applicable statute, regulatory provisions and guidance issued by the Department of Education all confirm that the exclusive means by which to bring inefficiency charges against a teacher is through Section 25 and only Section 25. The District is seeking to amend the charge against the Respondent so as to pursue the charges under Section 8. Arbitrators have flatly rejected such attempts as held by Arbitrator Simmelkjaer in the matter of Thomas *supra* held that:

> The Respondent logically argues that the District, having brought the charges pursuant to Section 25 is bound by the procedures in that section of the statute. Failure to adhere to these requirements result in the tenure charges being dismissed. On this point, the District cannot rehabilitate charges found to be deficient under Section 25 be reconsidered under Section 8 as a default position. The District cited absolutely no language in Section 25 of the Act or any other authority which would indicate that the legislature intended for deficient inefficiency charges to simply proceed to arbitration via Section 8 of the Act.

Similarly, Arbitrator Simmelkjaer also held in Ursula Whitehurst in the State Operated School District for the City of Newark, Agency Docket No. 282-9/14.

> The arbitrator is not convinced that having dismissed the charge against Miss Whitehurst based on the District's non-compliance with N.J.S.A. 18A:6-17.3 through its utilization of the Respondent's annual Summative Evaluation for the 2012-2013 school year, he can now proceed to a hearing under N.J.S.A. 18A:6-16.

It is undisputed that the District may proceed against the Respondent on statutory grounds other than inefficiency by filing such charges in accordance with Section 8. However, the District cannot file inefficiency charges on alternative grounds or once its filing under Section 25 has been found deficient, rehabilitate the inefficiency charges under Section 8 and then proceed to arbitration on this basis. Had the legislature in enacting TEACHNJ intended this outcome, it would have written the appropriate language. See also, In the Matter of Tenure Charges of Inefficiency of Sandra Cheatham and the School District of the City of Newark, Agency Dkt. No. 226-8/14, Arbitrator Stephen M. Bluth, wherein the request of the District to convert a tenure charge under Section 25 to a Section 8 matter effectively would give the District two bites at the apple and rejected that request. See also, In the Matter of the Tenure Charges against

Reninta Williams and the State Operated School District of the City of Newark, Agency Docket Nos. 211-8/14 and 217-1/15 wherein Arbitrator Tina Schneider Denenberg, citing the decisions in Whitehurst and Thompson, rejected the District's pursuit of charges under Section 8 as well. It is argued that if the legislature had intended for deficient Section 25 inefficiency charges to proceed to arbitration via Section 8, it would have so stated. Instead, it specifically and clearly revamped the entire process of bringing inefficiency charges against a teacher, removing them from the general framework of Section 8 and creating an entirely new and specific process under Section 25. Section 25 separated out inefficiency from all other charges with its own statutorily and regulatory provisions concerning unique timeframes, procedures and requirements, all of which are different from the requirements set forth in Section 8 which involve charges brought on grounds other than inefficiency.

Accordingly, based upon all of the above arguments, the Respondent urges that the instant charge of inefficiency be dismissed and Yarborough be made whole for any lost wages and benefits.

PETIONER'S ARGUMENT IN OPPOSITION TO THE MOTION

On May 15, 2015, the Petitioner filed a brief in opposition to Respondent's Motion to Dismiss. The Petitioner makes the following arguments:

1) The amended tenure charges were timely filed and the State Appointed Superintendent completed a Certification of Determination within the time limits for tenure charges. The arbitration award dismissing the original tenure charges was issued on December 29, 2014. The Petitioner's amended tenure charges were submitted to the State Appointed Superintendent on or about January 6, 2015. On or about January 7, 2015, the State Appointed Superintendent advised the Respondent that the tenure charges had been amended and that pursuant to N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1, the Respondent had fifteen (15) days to submit a response to same. A response was filed by the Respondent with the District on or about February 13, 2015. Thus, the District then had forty-five (45) days from February 13, 2015 as to make a determination as to probable cause on the amended tenure charges. The District certified this determination on the 40th day, on March 25, 2015. On March 27, 2015, the 42nd day, the District filed the amended tenure charges and certification with the Commissioner of Education and notified the Respondent of the determination of probable cause. The Commissioner of Education acknowledged receipt of the amended tenure charges and noted the applicable timeliness for same on or about March 21, 2015. The Commissioner did not find any procedural defects for the filing of the amended charges and on April 24, 2015, this was referred to Arbitrator Gerber

on the Section 8 charges. Therefore, the amended tenure charges were timely filed in accordance with the clear procedures set forth for tenure charges pursuant to N.J.S.A. 18A:6-11. N.J.S.A. 18A:6-13, and N.J.A.C. 6A:3-5.1(B)(4).

2) The evaluations of Respondent for the 2012-2013 school year are valid as Section 25 of the TEACHNJ Act was in effect and in full force in the 2012-2013 school year. TEACHNJ was enacted on August 6, 2012 and was effective prior to the start of the 2012-2013 school year. The effective date of the adoption of TEACHNJ was provided as stated in N.J.S.A. 18A:6-117, "adopted L. 2012, c. 26 ¶1, approved August 6, 2012 in the 2012-2013 school year." The statute provides thereafter (N.J.S.A. 18A:6-118 through 119), that it was adopted "August 6, 2012 in the 2012-2013 school year." In addition, the statutes that established the procedure for adjudicating tenure charges N.J.S.A. 18A:6-16 through 17.5 also cite that same was approved "August 6, 2012 in the 2012-2014 school year."

   The District piloted a new teacher evaluation system in the 2011-2012 school year, not 2012-2013 as asserted by the Respondent. Thus, evaluations conducted in 2011-2012 pilot did not "count" for official purposes, but the experience of that pilot program informed the development of the TEACHNJ process adopted, approved and implemented in the subsequent school year, 2012-2013.

   It is indisputable that the legislature purposefully adopted and approved TEACHNJ August 6, 2012 in the 2012-2013 school year. There is no question that the evaluations in 2012-2013 were to be used towards determining if tenure charges were warranted.

   On October 24, 2014, the Department of Education notified Respondent to the District's request for clarification with respect to its intent in "Guide to TEACHNJ Act" states that "no evaluation outcomes in the 2012-2013 school year will impact tenure decisions. 2013-2014 is the first year where the statewide system will be in place and the first year when the Summative rating "clock" will start."

   Such clarifications did not indicate a prohibition on school districts to use 2012-2013 evaluation data to make personnel decisions such as the decision to renew or non-renew a tenure teacher to the decision to bring a tenure charge of inefficiency charge against a tenured teacher. The Department did not perceive any limitations to the use of evaluation rubrics in the 2012-2013 school year for personnel decisions as no such limitation is mentioned in the TEACH NJ Act.

The Department of Education is the agency tasked with taking all actions necessary for the Act's implementation. It is for that agency or a reviewing court of competent jurisdiction to evaluate the legislative intent of the Act. Nowhere in the limited purview of N.J.S.A. 18A:6-17.2 is "consideration for an arbitrator in rendering a decision."

TEACHNJ required school districts to institute pilot programs to test their new evaluation rubrics by January 31, 2013 at the latest. Neither the legislature nor the Department of Education required school districts to wait a year to implement their evaluation rubrics if the rubrics had been adopted and approved earlier. N.J.S.A. 18:A:6-17.2 provided the latest dates by which districts were required to test and implement their new rubrics. They did not prohibit implementation of approved rubrics earlier than the stated deadline. Nothing in TEACHNJ, or any regulations, provides that evaluations performed in 2012-2013 in accordance with an adopted, approved rubric are to be treated differently from those performed in 2013-2014 for purposes of triggering tenure charges under N.J.S.A. 18A:6-17.3. See IMO Tenure Hearing of Renee Pulliam-Newell and State Operated School District of Newark, Agency Docket No. 276-9/14 where the Commissioner of Education upheld tenure charges for inefficiency under N.J.S.A. 18A:6-17.3 based upon annual summative ratings for consecutive years 2012-2013 and 2013-2014.

In the Mater of IMO LaRhonda Ragland and the State Operated School District for the City of Newark, Docket No. 258-9/14, Arbitrator Timothy Brown, concluded that he had the authority to review the tenure charge to N.J.S.A. 18A:6-17.3 and once the Commissioner transferred the matter, the arbitrator was required to hear the merits of the case. The arbitrator concluded that "the Commissioner's referral of this matter to me was specifically pursuant to TEACHNJ Section 25 and no other Section of the Act and grants me the narrow authority to determine the case under the provisions of Section 25 and no other." The District argues that the teacher evaluations conducted within the District in 2012-2013 were valid, effective and counted for all purposes, including to support tenure charges such as this. The Respondent's contention to the contrary should be rejected.

3) The arbitrator has jurisdiction to decide this matter for inefficiency under Section 8. In Chavez, s*upra*, the arbitrator found that TEACH NJ provides more broad authority for arbitrator review of tenure charges than that narrowly provided in Section 23 [now N.J.S.A. 18A:6-16]. Section 22 of the Act [now N.J.S.A. 18A:6-17.1] provides, among other things, "the Commissioner of education shall maintain a panel of 25 permanent arbitrators to hear matters pursuant to N.J.S.A. 18A:6-16. The plain meaning of such langue supports the conclusion that the

Act grants authority to arbitrators to consider all types of tenure charges, including inefficiency charges beyond merely those covered by Section 23."

Similarly, IMO the Tenure Hearing of Dr. Audrey Cuff, Cumberland Regional School District Board of Education, Docket No. 71-3/14 (June 26, 2014), the arbitrator stated:

> As the parties have acknowledged, this proceeding was initiated before the new procedures of the TEACH NJ Act could be fully implemented. Under TEACHNJ, charges of inefficiency can only be brought where there have been two annual evaluations conducted in accordance with the "rubric adopted by the Board and approved by the Commissioner. C.L. 2012 c. 26, [N.J.S.A. 18A:6-17(3)(d)]. Accordingly, until such time as there have been two annual evaluations, inefficiency must be decided upon the old standard."

Upon review of the evidence set forth at the hearing, the tenure charges alleging inefficiency were sustained and the teacher was dismissed.

The contention that an inefficiency charge cannot proceed on any basis other than N.J.S.A. 18A:6-17.3 and that a charge cannot proceed on that basis either, until all applicable requirements are met, that is, the legislature intended to hand poorly performing teachers a "free pass" for two years after the Act's effective date, has been rejected by TEACH NJ arbitrators. See in the matter of IMO Tenure Hearing of Henchey, Agency Dkt. No. 8-15 January 3, 2015 where the arbitrator stated "to hold otherwise would be to usurp the power of the legislature." (Id. at pg. 8-9). See also the matter of IMO Tenure Hearing Pugliese, Agency Dkt. No. 272-9/12, February 15, 2013, confirmed Superior Court of New Jersey, Chancery Div. Essex County, Dkt. No. C84-13, September 16, 2013, Appeal pending, Dkt No. A-000-57-13.

Arbitrators in several cases in which Section 25 charges have been dismissed have suggested that dismissal might not have been required if the charges had been pled, in the alternative on the basis of Section 8 as well as section 25 Where Section 25 of TEACHNJ is inapplicable because it was held that a teacher cannot be based on two years of ineffective or partially effective ratings, a school district must nevertheless be permitted to proceed with an inefficiency charge in an appropriate case. More importantly, N.J.S.A. 18A:6-16 provides a statutory basis to do so.

Since TEACHNJ's adoption, arbitrators have not hesitated to consider tenure charges of inefficiency in non-mandatory cases pursuant to N.J.S.A. 18A:6-16.

Accordingly, even if the arbitrator here concludes, notwithstanding the facts and argument presented herein, that the requirements for inefficiency tenure charges under Section 25 have not been met, the inefficiency charge must be evaluated under Section 8.

4) The role of the arbitrator is set forth in N.J.S.A. 18A:6-17.1 is limited. Tenure charges are no longer transmitted to the Office of Administrative Law and are instead submitted to an arbitrator to be evaluated under specific criteria. Pursuant to N.J.S.A. 18A:6-17.1, the arbitrator's authority is confined to determine based on the evidence presented at hearing whether or not:

    1) The employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;

    2) There is a mistake of fact in the evaluation

    3) The charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or

    4) The district's actions were arbitrary and capricious.

    N.J.S.A. 18A:6-17.2

    For the charges regarding inefficiency under Section 25, the arbitrator can only make a determination on the four elements set forth above; thus a hearing on the merits on the District's inefficiency charges under Section 8 and Section 25 must be heard pursuant to N.J.S.A. 18A:6-17.1. Therefore, at this juncture, the arbitrator is required to make a determination in effect and conduct a hearing on this matter.

6) The Doctrine of *res judicata* does not apply to preclude the instant charges. *Res judicata* is a term that refers broadly to the common law doctrine barring relitigation of claims or issues that have already been adjudicated. Velasquez v. Franz, 123 N.J. 498, 505 (1991). The doctrine of *res judicata* will only apply to a final and valid adjudication of the merits of a claim. The merits of the amended tenure charge against Yarborough were never adjudicated and thus the defense does not apply. The District previously filed an inefficiency tenure charge against Respondent (Docket No. 268-9/14) under Section 25 of the TEACHNJ Act. The arbitrator dismissed the charge on the basis of the argument concerning the applicability of Section 25. See In the Matter of the Tenure Hearing of Leonard

Yarborough *supra*. The arbitrator did not reach the merits of the charge under Section 8 and never addressed the issue of inefficiency *per se*. Thus, Section 8 was not adjudicated. Even if the District is bound by the arbitrator's decision in the previous matter, it is not precluded by that decision from bringing the instant charge because the arbitrator did not address the charge now presented under Section 8.

While the two charges of inefficiency against the Respondent have been based upon the same facts, they are supported by different statutory authority. Therefore, this is not a "second bite of the apple" as Respondent asserts and this matter must proceed to a hearing for a determination on the merits of the inefficiency charge under Section 8.

Assuming *arguendo* that it is determined that the issue of Respondent's inefficiency has already been litigated The Restatement (Second) of Judgments, *supra* ¶28, sets forth the following with regard to claim preclusion:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, negation of the issue in a subsequent action between the parties is not precluded in the following circumstance[s]: 2) the issue is one of law and (a) the two actions involve claims that are substantially unrelated or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws.

Here the initial determination by the arbitrator essentially set forth that the evaluations of 2012-2013 could not be utilized under Section 25 of TEACHNJ. Unless the District is now permitted to proceed with tenure charges under Section 8, the evaluations during that time period cannot be utilized at all for the purposes of tenure charges. This is clearly an inequitable administration of the TEACHNJ Act and a new determination which takes into account the evaluations and performance of the Respondent is warranted.

7) The entire controversy doctrine is not applicable. Rule 4:30A requires all claims against all potential defendants be brought in one encompassing litigation. The threefold objectives behind the doctrine are 1) to encourage the comprehensive and conclusive determination of a legal controversy; 2) to achieve party fairness, including both parties before the court as well as prospective parties; and 3) to promote judicial economy and efficiency by avoiding fragmented, multiple and duplicative litigation. Cogdell v. Hospital Ctr. at Orange, *supra*.

Respondent asserts that the District is relitigating the tenure charges against him because these charges have already been brought before and arbitrator and the District lost. However, that decision was not based upon Respondent's evaluations or the merits of the District's argument. The previous charges were dismissed against the Respondent based upon the arbitrator's interpretation of TEACHNJ which he determined does not allow for evaluations from the 2012-2013 school year to be considered in tenure matters. This is not a conclusive determination of the legal controversy presented between the parties. Further, a dismissal of these charges would not achieve an equitable result because the District would essentially be unable to bring tenure charges against any teachers based upon their poor evaluations from the 2012-2013 school year. Lastly, this charge does not constitute a duplicative litigation because the merits of the charges have yet to be heard. Accordingly, the District's tenure charges against Respondent should proceed to hearing and a determination on the merits.

8) The doctrine of Law of the Case is not applicable. The doctrine sets forth that unreversed decisions made during the trial by the same court regarding questions of law should not be disturbed. State v. Weldan, 100 N.J. 187, 203 (1985). The policy for such a doctrine is that "once an issue is litigated, relitigation should be avoided if possible." However, the law of the case doctrine is discretionary. State v. Weldan (*supra* at 205). The doctrine does not apply in matters which contain an "ambiguous or uncertain decision" Sisler v. Gannett Co., Inc., 222 N.J. Super 153, 160 (App Div. 1987) Certif. Denied, 110 N.J. 304 (1988). Additionally, the doctrine is usually applicable in situations "where a judge must decide where a ruling made in one trial stage of the action is binding throughout the remainder of the trial." Sisler v. Gannett (Supra at 159).

In the instant matter, the law of the case doctrine is clearly inapplicable. The initial charges against the Respondent were dismissed on a procedural issue regarding Section 25 of TEACHNJ. The arbitrator did not review any evidence in support of the charges in this dismissal, nor did he analyze the legal sufficiency in the District's position. Also, the arbitrator's decision was ambiguous with regard to utilizing the authority of Section 8 to bring the charges. The issue regarding the substance of the District's underlying charges was never litigated and no legal determination was made in this regard. This issue has yet to be argued, let alone re-litigated.

Additionally, the application of this doctrine is discretionary and should be applied flexibly to serve the interests of justice. State v. Weldan *supra* at 205). Here, the

interests of justice would not be served by procedural dismissal. If the evaluations for the 2012-2013 school year do not count for purposes of tenure charges under Section 25, and the District's request to charge Yarborough under Section 8 was denied, Yarborough simply gets a free pass for his poor performance for this time period. This was clearly not the intent of the drafters of TEACHNJ. The interests of justice would be served by permitting this matter to proceed to a hearing on the merits.

DISCUSSION

In granting the Motion to Dismiss of the initial tenure charges against the Respondent, this arbitrator, in applying the doctrine of collateral estoppel relied upon the decision of Arbitrator Joyce Klein in Elena Brady, *supra*. In that Opinion and Award, the arbitrator did not address whether the District could proceed with tenure charges against the Respondent under Section 8, Rather the Award was limited to the finding that N.J.S.A. 18A:6-17.3 does not provide for consideration of a summative evaluation for the year 2012-2013. As the arbitrator stated:

> The notice of "charges based upon inefficiency pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6—17.3 and N.J.S.A. 18A:6-3.5.1" against the Respondent charge her with inefficiency under Section 25 N.J.S.A. 18A:6-17 rather than Section 8N.J.S.A. 18A:6-16, which covers tenure charges other than those of inefficiency under the new provisions of TEACHNJ. The District's efforts to proceed under Section 8 are limited by the charges themselves, which include N.J.S.A. 18A:6-17-3 and not N.J.S.A. 18A:6-16. The District cannot seek to amend its charge to include N.J.S.A. 18A:6-16 at this juncture. As there is no basis for proceeding under N.J.S.A. 18A:6-16, I do not address whether such a proceeding would be warranted based upon the record in this case. *Supra*. Pg 24

Accordingly, since the Award relied upon in granting the original Motion to Dismiss never addressed whether tenure charges may be brought based upon conduct during the 2012-2013 school year, the Respondent's arguments that this matter was subject to *res judicata* or that the matter is bound by the Law of the Case simply do not apply.

Further, I the District's Amendment to the tenure charges in this matter is not untimely. The initial opinion and award dismissing the tenure charges was issued on December 29, 2014 and the District notified the respondent of its intention to file an amendment to its tenure charges on or about January 6, 2015 or approximately 8 days

later. As argued by the District, every subsequent action by the District and Department of Education fell within regulation guidelines. There is no rule directly on point concerning the timing of the filing of amended charges after the granting of a Motion to Dismiss the original charges. However, the timing of the Petitioner's Amendment is certainly timely. The Respondent argues that all filings must be timed from the filing of the initial tenure charges but such an argument has no legal support and is unconvincing.

The issue of this arbitrator's jurisdiction to rule upon the instant motion has been previously determined. See City of Newark and Elena Brady, *supra*. This arbitrator does have authority to rule upon the instant motion.

Further, I find that, pursuant to the Entire Controversy Doctrine, the District had an obligation to present its entire controversy in its initial pleadings.

> The entire controversy doctrine has evolved "to eliminate delay, prevent harassment of a party ..... and promote fundamental fai**rness**." See *Barres v. Holt, Rinehart and Winston, Inc.* 74 N.J. 461, 465 (1977) (Schreiber J., dissenting). See Cogdell v. Hospital Ctr., *supra*

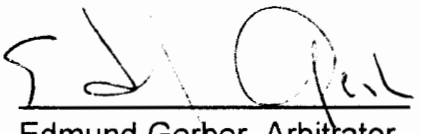
The Entire Controversy Doctrine embodies the principle that the adjudication of a legal controversy should occur in one litigation at which all of the claims and defenses of the parties should be presented. When an action is brought, alternative causes of action should be included in the initial pleadings. There was nothing to prevent the District from alternatively pleading a count of inefficiency under Section 8 in its initial papers. The Respondent here faced tenure charges to remove him from his position as teacher and was successful in having those charges dismissed, only to have a second set of charges re-filed concerning the identical alleged facts. Although the District argues that it would be inequitable to prevent it from allowing to present its case on the merits, the harm done to the Respondent would be far greater. It is a denial of fundamental fairness to force the respondent to defend his face an action regarding the identical facts which would deny him of his position a second time. As Arbitrator Bluth held in Sandra Cheatham, *supra* "the District is not entitled to two bites at the apple."

It is not necessary to make a determination as to whether the evaluations for the 2012-2013 school year may be used in bringing a charge of inefficiency under Section 8. I note however, in a prior matter, this arbitrator did take evaluations of 2012-2013 into consideration in a tenure proceeding where the parties did not challenge the Board had a right to do so. In the Matter of Aubrey Cuff *supra*.

Accordingly, I enter the following:

AWARD

The Respondent's Motion to Dismiss the charges in their entirety is granted and Respondent Leonard Yarborough shall be made whole for all lost wages and benefits.



Edmund Gerber, Arbitrator
June 8, 2015

195-15

LAURIE WARD,	:	
PETITIONER	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent State Board of Examiners (SBE) that she had not met the requirements for issuance of a certificate of eligibility (CE) for the position of Teacher of Preschool through Grade Three. Specifically, the SBE disqualified twelve liberal arts credits out of 125 credit hours which petitioner completed at Baptist Bible College, leaving her short of the 60 liberal arts credits required for the CE she desires. Petitioner holds a Bachelor of Science degree from the college, where she majored in Bible. The parties mutually agreed to proceed without a hearing, and the SBE filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue herein, and the matter is ripe for summary decision; pursuant to *N.J.A.C.* 6A:9B-10.1(a)(3), the issuance of a teaching certificate for preschool through grade three requires completion of "a liberal arts, science dual content or interdisciplinary academic major or a minimum of 60 semester hours in liberal arts and/or science"; the SBE's basis for the denial of the requested CE was that the petitioner's coursework at Baptist Bible College did not constitute the required liberal arts credits because they were "not intended to provide general knowledge," but, rather, were "in depth study of a particular discipline"; the SBE's interpretation, however, created a separate basis for evaluating a Liberal Arts major that contravened the plain language of the regulation that defines same; Theology and Biblical Studies is comparable to other traditional liberal arts majors listed in the regulation; and there was no evidence to establish that the Theology and Bible course of study at Baptist Bible College is vocational in nature. The ALJ concluded that the preponderance of evidence supports a reversal of the SBE's decision. Accordingly, summary decision in favor of the petitioner was granted, and the ALJ ordered reversal of the SBE's decision.

Upon review, the Commissioner found, *inter alia*, that the ALJ made no findings of fact regarding which course credits had been counted or rejected by the SBE in assessing the 60 semester-hour liberal arts requirement. Absent specific factual findings in this regard, the Commissioner was unable to determine whether the SBE's decision was consistent with applicable statutory and regulatory provisions. Accordingly, the Commissioner remanded the matter to the OAL for further action and development of the record consistent with this decision.

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

Issued 6/12/15

198-15

OAL DKT. NO. EDU 13688-14
AGENCY DKT. NO. 234-8/14

LAURIE WARD,	:	
PETITIONER	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law ("OAL") have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by respondent, State Board of Examiners ("Board"), and petitioner's reply thereto. In her petition of appeal to the Commissioner, petitioner challenges the Board's May 22, 2014 decision denying her application for issuance of a Teacher of Preschool through Grade Three Certificate of Eligibility ("CE") on the basis that she lacks 12 of the 60 semester-hour liberal arts credits required under *N.J.A.C.* 6A:9B-10.1(a)(3).[1]

Petitioner was awarded a Bachelor of Science degree in Bible from the Baptist Bible College and Seminary ("BBC"), with a major in "Teacher Education – 4 Year – Elementary Education." (Petitioner's official transcript) Her official transcript further indicates she earned 125 semester-hour credits through coursework in a variety of disciplines. In July 2013, petitioner was informed that her application for a CE was deficient because she lacked

[1] *N.J.A.C.* 6A:9B-10.1(a)(3) provides that candidates seeking a Preschool through Grade Three Certificate of Eligibility shall, among other requirements, "complete a liberal arts, science, dual content or interdisciplinary academic major or a minimum of 60 semester hour credits in liberal arts and/or science." The regulation was cited as *N.J.A.C.* 6A:9-11.1(a)(3) prior to the amendments which took effect on July 7, 2014.

12 of the 60 semester-hour liberal arts credits required under *N.J.A.C.* 6A:9B-10.1(a)(3).[2] Following notification that she failed to satisfy the requirements for certification, petitioner requested a credentials review pursuant to *N.J.A.C.* 6A:9B-4.13(a)[3] and provided the Board with additional information concerning the theology and bible course credits she completed at BBC, including full course descriptions. *N.J.A.C.* 6A:9B-4.13(a); (Board Decision at 1)

After considering petitioner's application, the Board issued a written decision pursuant to *N.J.A.C.* 6A:9B-4.15[4] declining to find that certain credits she earned upon completion of "theology and bible" courses at BBC constituted liberal arts credits. The Board determined that a review of the course descriptions did not "suffice as providing a one-to-one correspondence between the licensure deficiency, *i.e.* 12 liberal arts credits, and what [petitioner] proffered" and denied petitioner's application for certification. (Board Decision at 2-3) Neither the Board's decision nor anything else in the record indicates specifically which course descriptions the Board reviewed during its assessment.[5]

This appeal followed. Subsequently, respondent filed a motion for summary decision and the parties agreed to proceed without a hearing. Upon review, the Administrative Law Judge ("ALJ") denied respondent's motion, reversed the Board's determination, and granted summary decision in favor of petitioner. (Initial Decision at 4) Yet no findings of fact were made by the ALJ as to which course credits the Board had rejected, or which course credits the Board counted toward the 60 semester-hour liberal arts credits requirement under

[2] Because the record does not contain a copy of this decision, presumably made pursuant to *N.J.A.C.* 6A:9B-5.15(b), the Commissioner is unable to determine which of petitioner's 48 course credits were counted toward this requirement, and which course credits did not qualify as liberal arts credits.

[3] This provision was cited as *N.J.A.C.* 6A:9-17.13(a) prior to the amendments which took effect on July 7, 2014.

[4] This provision was cited as *N.J.A.C.* 6A:9-17.15 prior to the amendments which took effect on July 7, 2014.

[5] Petitioner's official transcript contains 12 three-credit courses coded as either theology ("TH") or bible ("BI"), comprising 36 of the 125 total credits she earned at BBC.

N.J.A.C. 6A:9B-10.1(a)(3). Furthermore, the Initial Decision is devoid of citations to the record and lacks the requisite listing of exhibits admitted into evidence. *N.J.A.C.* 1:1-18.3(c)11. Adding to the confusion is a statement in petitioner's reply to respondent's motion, which indicates that the Board accepted "many" of her "religion" courses and rejected others. (Petitioner's April 6, 2015 reply to motion at 4)

When a Board decision denying a request for issuance of a certificate is appealed to the Commissioner, the appropriate standard of review is "whether the decision is consistent with the applicable statutory and regulatory provisions." *Walder v. Board of Examiners*, Commissioner Decision No. 503-14, decided December 24, 2014, at 3. Absent specific factual findings as to which course credits were accepted by the Board in satisfaction of the 60 semester-hour liberal arts credits requirement under *N.J.A.C.* 6A:9B-10.1(a)(3), which course credits were rejected by the Board, and which course descriptions were evaluated by the Board in connection with petitioner's subsequent request for a credentials review, the Commissioner is unable to determine whether the Board's decision was consistent with applicable statutory and regulatory provisions.

Accordingly, the Commissioner is constrained to remand the matter to the OAL, pursuant to *N.J.A.C.* 1:1-18.7, for further action and development of the record consistent with this decision.

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: 6/12/15
Date of Mailing: 6/15/15

[6] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 13688-14
AGENCY DKT. NO. 234-8/14

LAURIE WARD,
Petitioner,
v.
NEW JERSEY STATE BOARD OF EXAMINERS,
Respondent.

Laurie L. Ward, petitioner, pro se

Laura M. Console, Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: April 22, 2015 Decided: April 28, 2015

BEFORE **TIFFANY M. WILLIAMS**, ALJ:

STATEMENT OF THE CASE AND FACTUAL DISCUSSION

The facts in this matter are undisputed and are **FOUND** as **FACT**. The petitioner applied for her Certificate of Eligibility for a Teacher of Preschool through Grade Three. Her application was denied by the Board on May 22, 2014, and the petitioner appealed requesting a credentials review. On April 4, 2014, the Board heard the application for

the credentials review and ultimately determined that the petitioner was short twelve credits of liberal arts classes; therefore, was not eligible for the requested certificate. The Board has specifically disqualified petitioner's twelve liberal arts credits from 125 credit hours completed at Baptist Bible College. Petitioner appealed and the matter was transmitted to the Office of Administrative Law (OAL) for a hearing. During a telephone status conference, the parties mutually agreed to proceed without a hearing, opting to resolve the case by motion instead. By way of motion, the Board requested summary decision in its favor, upholding the denial of the petitioner's application for the Preschool through Grade Three Certificate.

LEGAL ANALYSIS AND CONCLUSION

It is undisputed that the Board has been delegated the authority to oversee the issuance and revocation of teaching certificates in the State of New Jersey. N.J.S.A. 18A:6-38. The Petitioner bears the burden of establishing by a preponderance of the evidence that the Board improperly denied her teaching certificate. The issuance of a teaching certificate for preschool through grade three instructions requires completion of "a liberal arts, science dual content or interdisciplinary academic major or a minimum of 60 semester hours credits in liberal arts and/or science." N.J.A.C. 6A:9B-10.1(a)(3).

Having reviewed the undisputed facts and the briefs of the parties, I **CONCLUDE** that the preponderance of the undisputed evidence compels a reversal of the Board's decision. In support of summary decision, the Board rests on the original articulated basis for the denial—namely that the petitioner's coursework from Baptist Bible College did not constitute liberal arts coursework because the credits were "not intended to provide general knowledge, rather, in depth study of a particular discipline." (See Board's Br. at 3.) I disagree with the Board's analysis on several respects. First, the Board's analysis is concluding that a Theology course of study does not meet the definition of a "Liberal Arts Major," is not supported by the relevant regulatory authority. According to N.J.A.C. 6A:9-2.1, a liberal arts major is defined as follows:

> Any college major, such as philosophy, history, literature, sociology or world language that is intended primarily to

> provide general knowledge and to develop an individual's general intellectual capacities to reason and evaluate, as opposed to professional or vocational skills.

The plain language of the regulatory language makes a distinction between courses of study that "develop general intellectual capacities to reason and evaluate," from courses of study that develop "professional or vocational skill." Ibid. The Board rejected Theology as a Liberal Arts Major because it offered "in depth study of a particular discipline." In so doing, the Board failed to follow the criteria embedded in the regulatory guidance, which did not specifically exclude majors as qualifying for Liberal Arts on grounds that they offered in depth study of a discipline. In fact, the Board's interpretation would obviate the existence of any discipline qualifying as a Liberal Arts Major because every field of study involves in depth study of a discipline. The Board, in using its discretion, created a separate basis of evaluating a Liberal Arts Major in a manner that contravened the plain language and common meaning of the governing regulation.

Accordingly, the plain language of the regulation must be afforded due deference. The petitioner's course of study should be evaluated based on whether it develops general intellectual capacities to reason and evaluate or whether it develops a particular professional or vocational skill. It is axiomatic that a Theology course of study does not develop a particular professional or vocational skill. One cannot graduate with a degree in Theology and secure a position as a theologian, or Bible authority. While there are positions within society and in the ecumenical sector where general knowledge of theology or study of the Bible can be helpful, nonetheless, there is no professional or vocational track for Theology majors. When compared to the Liberal Arts disciplines listed in the regulation, Theology is comparable to Philosophy, Sociology, History, Literature and World Languages, where similarly, a graduate cannot assume a position with a company or organization as a philosopher, sociologist, historian, etc. Rather, one possessed with the knowledge and world view that is developed and perpetuated in those disciplines, adopts those perspectives into whatever professional or vocational role selected as one's life work. The course of

study in Theology and Biblical studies is no different. Students take the world view, critical thinking, and analytical skills into their life's work.

Moreover, based on the review of the course curriculum at Baptist Bible College, I find no evidence that the Theology course of study is intended to develop a professional or vocational track. In the event that the course of study marketed itself as a dedicated to producing clergy or some particular career vocation in the ecumenical realm, then a Liberal Arts Major designation would not be appropriate given the regulatory authority. Here, on the instant facts, there has been no evidence presented to establish that the Theology and Bible course of study at Baptist Bible College are vocational in nature.

Additionally, public policy would not favor assuming that a Theology course of study can only be utilized for a vocational career in ecumenical work or that it does not promote general knowledge in developing intellectual capabilities. The fact that the petitioner also rendered examples of other colleges and universities that offer Theology courses of study as Liberal Arts Majors, underscores the wide acceptance that a Theology course of study is not a specialized vocational or professional tract.

Finally, I note that the petitioner has maintained throughout the proceedings and appeal process that her credits should be counted as liberal arts credits. Accordingly, she has not been offered the opportunity to fully submit evidence that she also may have alternative education and/or experience that also may provide a separate basis for warranting the issuance of the certificate. In the event that the petitioner is unsuccessful ultimately in this appeal, justice would demand that the Board also give her an opportunity to provide such evidence for the Board's consideration.

ORDER

Accordingly, the Board's decision is **REVERSED** and summary decision is **DENIED** as to the Board and **GRANTED** in favor of the petitioner as a matter of law. It is so **ORDERED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

April 28, 2015
DATE

TIFFANY M. WILLIAMS, ALJ

Date Received at Agency: April 28, 2015

Date Mailed to Parties: APR 30 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

rr

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199-15

State of New Jersey

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

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

June 4, 2015

D[redacted] L[redacted], *pro se*
119 [redacted]
Elizabeth, New Jersey 07208

Board Secretary
Elizabeth Public Schools
Mitchell Building
500 North Broad Street
Elizabeth, New Jersey 07207

Re: *D.L., on behalf of minor child, J.F. v. BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY, AGENCY DKT. NO. 78-4/15*

Dear Parties:

Upon review of the Petition of Appeal filed in connection with the above captioned matter and based upon the Board's failure to submit an Answer to the petition, I have determined to grant summary decision in favor of petitioner.

On April 15, 2015, D.L. filed a Petition of Appeal pursuant to *N.J.A.C.* 6A:3-8.1 *et seq.* claiming that J.F. was entitled to attend school in the District in accordance with *N.J.S.A.* 18A:38-1 *et seq.* A copy of the Petition of Appeal was served upon the Board Secretary via facsimile on April 15, 2015, together with an acknowledgment of filing and notice that an Answer to the petition was due within 20 days. *N.J.A.C.* 6A:3-1.5.

Because the Board failed to respond to the initial notice, on May 12, 2015, a second and final notice was sent to the Board Secretary via certified and regular mail, clearly indicating that, absent receipt of an Answer to the Petition of Appeal within 10 days, each count in the petition would be deemed admitted and this matter may be decided on a summary decision basis pursuant to *N.J.A.C.* 6A:3-1.5(e). The certified mail return receipt card indicates that the Board received the second and final notice on May 18, 2015. However, the Board failed to respond to the second and final notice.

To date, no Answer has been filed on behalf of the Board. Accordingly, petitioner's claim that J.F. is entitled to attend school in the District pursuant to *N.J.S.A.* 18A:38-1 *et seq.* is deemed admitted by the Board. The Board is hereby ordered to

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continue to admit J.F. into its public school system, free of charge, so long as there is no change in circumstances that would alter that entitlement.*

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library

DCH/MKD/DCS

VIA REGULAR MAIL

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

200-15L

State of New Jersey

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

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

DAVID C. HESPE
Commissioner

June 11, 2015

E[redacted] B[redacted]
936 [redacted]
Linden, New Jersey 07036

Jody T. Walker, Esq.
Schwartz Simon Edelstein & Celso, LLC
100 South Jefferson Road, Suite 200
Whippany, New Jersey 07981

Re: *Board of Education of the City of Elizabeth, Union County v. E.B., on behalf of minor child, J.B., Agency Dkt. No. 63-3/15*

Dear Parties:

Upon review of the Petition of Appeal filed in connection with this matter and based upon the respondent's failure to submit an Answer to the Petition that complies with *N.J.A.C.* 6A:3-1.5, I have determined to grant summary decision in favor of the petitioner.

On March 25, 2015 the Board filed its Petition of Appeal pursuant to *N.J.A.C.* 6A:3-8.1 seeking an order assessing tuition and claiming that minor child, J.B., was not entitled to attend school in the district during the 2013-2014 school year pursuant to *N.J.S.A.* 18A:38-1 *et seq*. A copy of the Petition was served upon respondent on March 24, 2015 via certified and regular mail, as was an acknowledgment of filing and notice dated March 25, 2015 that an Answer to the Petition was due within 20 days. *N.J.A.C.* 6A:3-1.5.

Because E.B. failed to respond to the initial notice, a second notice was sent on April 17, 2015, via certified and regular mail, clearly indicating that – absent receipt of an Answer to the Petition within 10 days – each count in the Petition would be deemed admitted and the matter may be decided on a summary basis pursuant to *N.J.A.C.* 6A:3-1.5(e). According to information obtained from the U.S. Postal Service, the copy sent via certified mail was not claimed, but the copy sent via regular mail was never returned to this office. E.B. failed to respond to the second notice. A third and final notice, sent to E.B. via regular mail on May 21, 2015 and reiterating the information contained within the prior notice, was never returned to this office.

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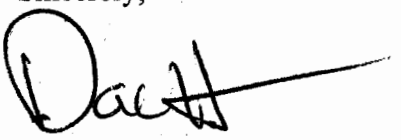
To date, no Answer has been filed on behalf of respondent. Accordingly, petitioner's claim that J.B. was not entitled to attend school in the district pursuant to *N.J.S.A.* 18A:38-1 *et seq.* is deemed admitted. It is hereby ordered that respondent reimburse the petitioner $15,344 in tuition costs for J.B.'s ineligible attendance in the district during the 2013-2014 school year.

IT IS SO ORDERED.*

Sincerely,



David C. Hespe
Commissioner of Education

c: County Superintendent
State Law Library

DCH/MKD/DCS

VIA REGULAR MAIL

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

201-15LM

321-15

State of New Jersey

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

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

DAVID C. HESPE
Commissioner

June 15, 2015

Richard A. Friedman, Esq.
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
150 West State Street
Trenton, NJ 08608

Keith Waldman, Esq.
Selikoff & Cohen
700 East Gate Drive, Suite 502
Mt. Laurel, NJ 08054

Dear Counsel:

Your April 30, 2015 letter to me – wherein you renew your motion for reconsideration of the decision approving the request of the Camden State-Operated School District to close several school facilities – has been reviewed. For the reasons which follow, your motion is denied.

As Director Duncan advised you by letter dated April 23, 2015, the decision you seek to have reviewed was issued by Director Piaia, not by me. Therefore, there could be no opportunity for a motion for reconsideration, since I have not yet considered the issue. Furthermore, as the regulatory provision in *N.J.A.C. 6A:26-17.1(a)* was the result of an administrative/technical error, effective with publication in the June 15, 2015 *New Jersey Register*, the Office of Administrative Law has corrected the error. That section now correctly reads: "All appeals of final determinations made by the Commissioner pursuant to EFCFA and this chapter shall be to the Appellate Division of the Superior Court." Accordingly, the subparagraphs of *N.J.A.C. 6A:26-17.1* which apply are *(b)* and *(c)*.

By letter dated May 1, 2015, as provided in *N.J.A.C. 6A:26-17.1(b)*, you requested an informal hearing before an Assistant Commissioner. Your request was forwarded to Assistant Commissioner Robert Bumpus, who sent you a briefing schedule by letter dated May 29, 2015. If, after the opportunity for written and oral submissions, you are not satisfied with Assistant Commissioner Bumpus's determination, you may appeal his decision to me in accordance with *N.J.A.C. 6A:26-17.1(c)* by filing a petition of appeal with Controversies and Disputes pursuant to *N.J.A.C. 6A:3*.

Sincerely,

David C. Hespe
Commissioner

DCH/MKD/ch/rfriedman5-07
c: Bernard Piaia
Robert Bumpus
Bryant Lawrence Horsley, Esq.

*This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.2008, c. 36 (N.J.S.A. 18A:10-9.1)*.

202-15

CAROL GRAVES, ET. AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY AND CAMI ANDERSON, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioners – who include public school parents and students, taxpayers and teachers employed in Newark schools – asserted, *inter alia*, that the State-Operated School District of the City of Newark's "One Newark" reorganization plan (the Plan) violated the constitutional rights of Newark children to receive a thorough and efficient public education. Respondents filed a motion to dismiss, contending, *inter alia*, that the petition was untimely filed and that petitioners lack standing to assert their claims.

In considering the within case, the ALJ found that the appeal sought to remedy the disparity in achievement between students in poor urban school districts such as Newark and those in wealthier suburban districts – issues of educational inequality which have plagued educators for years. Nevertheless, she found that the current petition is fraught with procedural and substantive deficiencies such that the District's motion to dismiss must be granted. In so determining, the ALJ concluded, *inter alia*, that: petitioners' challenge to the Plan in counts two and three of the petition was untimely; 22 of the 25 petitioners lacked standing to bring the within claims, and the claims of the three remaining petitioners were not ripe for adjudication; no facts were alleged in support of the claim in count three that the District violated the Charter School Act; and the fourth count, pertaining to desegration, failed to name indispensible parties. Accordingly, the ALJ dismissed the petition.

Upon comprehensive review, the Commissioner concurred with the findings and conclusions of the ALJ and adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

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

Issued 6/15/15

OAL DKT. NO. EDU 10677-14
AGENCY DKT. NO. 225-8/14

CAROL GRAVES, ET. AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY AND CAMI ANDERSON, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

This matter involves a challenge by a group of petitioners to the "One Newark Plan" implemented by the State-Operated School District of the City of Newark. The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. [1]

Upon a comprehensive review of the record, the Commissioner concurs with the Administrative Law Judge – for the reasons thoroughly outlined in the Initial Decision - that all of the Counts in the petition of appeal should be dismissed. Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 6/15/15
Date of Mailing: 6/16/15

[1] On June 1, 2015, the petitioners filed a Motion to File Untimely Exceptions. In their motion, the petitioners concede that their exceptions were due on or before May 13, 2015, as required by *N.J.A.C.* 1:1-18.4. Yet it was not until June 1, 2015 that the petitioners filed their motion. Moreover, there was ample opportunity for the petitioners to seek an extension of time to file exceptions prior to the expiration of the time for filing exceptions. The petitioners have not provided any compelling reason as to why the exception filing deadline should be relaxed. Therefore, the petitioners' Motion to File Untimely Exceptions is hereby denied. As a result, the untimely exceptions that were simultaneously filed with the petitioners' motion papers were not considered.

[2] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
MOTION TO DISMISS
OAL DKT. NO. EDU 10677-14
AGENCY DKT. NO. 225-8/14

CAROL GRAVES ET. ALS,
Petitioners,
v.
THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY AND CAMI ANDERSON, STATE SUPERINTENDENT OF SCHOOLS,
Respondents.

Robert Pickett, Esq., for petitioners (Pickett and Craig, attorneys)

Perry Lattiboudere, Esq., for respondents (Adams, Gutierrez and Lattiboudere, attorneys)

Record Closed: January 26, 2015 Decided: April 28, 2015

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

The twenty-five petitioners, who include public school parents and students, taxpayers, and teachers employed in the Newark schools, assert that the State-Operated School District of the City of Newark (the District) has implemented a reorganization of its schools, the "One Newark Plan" (the Plan), that violates the constitutional right of Newark children to receive a thorough and efficient public education. Petitioners moreover contend that the District has violated statutory requirements for converting public schools to charters, as well as enrollment procedure requirements for charter schools. Finally, petitioners assert that the Newark schools are de facto segregated; as a remedy, they seek the creation of a county-wide school district.

Respondents have filed a motion to dismiss, contending that the petition was untimely filed; that petitioners lack standing to assert their claims; that petitioners have failed to proffer facts that, if true, establish that the Plan violates their constitutional rights or the provisions of the Charter School Program Act; and that the fourth count of petition, asserting that the Newark schools are unconstitutionally segregated, must be dismissed for failure to name indispensible parties.

PROCEDURAL HISTORY

Petitioners filed a petition of appeal and application for emergent relief with the Commissioner of Education (the Commissioner) on August 18, 2014. The District replied via letter memorandum on August 22, 2014. Oral argument was scheduled for September 2, 2014. I conferred with counsel via telephone on August 28, 2014, and it was agreed that the oral argument would be converted to an in-person case management conference, per my letter of the same date.

At the case management conference, it was determined that petitioners would file and serve a motion for leave to amend the petition to name the Commissioner and the Department of Education as parties to this action. They filed and served their motion on September 12, 2014. Thereafter, a telephonic status conference was

conducted on October 4, 2014, in which two deputy attorneys general participated on behalf of the Department of Education. During the course of that telephone conference, the deputies urged that the Department of Education was not a necessary party to this proceeding. Notwithstanding his motion to amend, counsel for petitioners appeared to agree. Accordingly, I offered him the opportunity to reflect and determine in consultation with his clients whether he wished to pursue his amended pleading. Via letter dated October 10, 2014, counsel for petitioners advised that after careful review, he had determined that it was unnecessary to name the Commissioner or the Department of Education as respondents. Accordingly, he withdrew his motion to amend, and indicated that his clients would proceed under the originally filed petition.

Respondents filed a motion to dismiss on October 17, 2014. Petitioners filed a brief in opposition to the motion on November 12, 2014. Respondents replied to the opposition on November 24, 2014. Oral argument took place on January 26, 2015.

FINDINGS OF FACT

Respondents' motion is filed in accordance with N.J.A.C. 6A:3-1.5(g), which permits the filing of a motion to dismiss in lieu of an answer. In ruling on a motion to dismiss, this forum's inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the petition. Printing Mart-Morristown v Sharp Electronics, 116 N.J. 739, 746 (1989); see also R. 4:6-2(e). While our case law provides that a reviewing forum must search "the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim . . . ," Printing Mart-Morristown, supra, 116 N.J. at 746 (citing DiCistofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244, 252 (App. Div., 1957)), dismissal of a complaint "is mandated where the factual allegations are palpably insufficient to support a claim . . ." Rieder v State of N.J. Dep't of Transp., 221 N.J. Super. 546, 552 (App. Div. 1987).

For purposes of the pending motion, "all facts alleged in the complaint and legitimate inferences drawn therefrom are deemed admitted." Smith v City of Newark, 136 N.J. Super. 107, 112 (App. Div. 1975). Accordingly, I **FIND** as follows:

The District has operated under State control for about twenty years. Respondent Cami Anderson is the State Superintendent for the District, and was appointed by the Governor of the State of New Jersey. Newark is an urban school district, comprised primarily of Black and Hispanic students; the petition states that African-Americans make up 51% of the school population, and Hispanics make up 40%. According to the petition, less than 1% of the student population is white.[1]

On or about November 21, 2013, Anderson publicly announced her proposal for a reorganization that would alter the manner in which students are assigned to local schools; would close failing schools; and would expand the presence of charter schools in Newark. On December 18, 2013, Anderson again publicly discussed her District-wide restructuring of the Newark schools, "calling it the One Newark Plan." A question and answer sheet describing the Plan in detail is attached to the petition as Exhibit A; the sheet describes monthly stakeholder roundtables and School Advisory Board meetings where the plan was discussed, and notes that "[w]e listened intently to the feedback we were getting and the following things become clear: we need to keep focused on solving the challenges, keep working to attain our goals, and make key adjustments based on the input [received]."

Exhibit A is four pages long, was issued in February 2014, and shares details about the Plan, including guidance for families regarding school enrollment in grades K-12. The document likewise details the expansion of charter schools in Newark, noting that they will occupy existing school district buildings. At oral argument, counsel for petitioners urged that there was no finality to the Plan until June 2014; asserting it was not until then that his clients' cause of action became ripe. But he could not offer any documentary evidence that the Plan was finalized then, or even pinpoint the operative event in June 2014 that crystallized petitioners' claims. Petitioners assert that the Plan was developed without any meaningful community input, notwithstanding the fact that the petition itself describes at least three instances, well before the start of

[1] These figures do not add up to 100%, and the petition offers no explanation of this discrepancy. Suffice it to say however, that most students in the Newark schools are Black or Hispanic. At oral argument counsel described the District as 91% minority.

the 2014-2015 school year, that the public received information about the Plan from school district administration.

The petition challenges the underlying rationale for the Plan; claims that it is based on faulty data and methodology; and baldly asserts that "the One Newark Plan is doomed to both fail and further negatively impact the majority of African American and Hispanic students at the 'closed' and 'converted' schools." When I pressed at oral argument for an example of how the Plan would discriminate against minority students, particularly when the vast majority of students district-wide are members of minority groups, counsel referred me to Exhibit B to his petition.

Exhibit B reports on the results of a study completed in January 2014 by a Rutgers professor and a doctoral student. Its analysis is based on the information shared by Anderson on December 18, 2013, when she "announced a wide-scale restructuring of the Newark Public Schools." In a thirty-four-page document, the authors challenge the assumptions upon which the Plan is based, and opine that the Plan, including but not limited to its expansion of the presence of charter schools in Newark, will not successfully right what is wrong with the school system. But the report is based not upon hard facts, but rather upon supposition and speculation. The following excerpt is representative. In regard to the use of standardized test scores as an indicator of school success, the report states:

> . . . there is no indication here as to whether a school's student population characteristics were used in making One Newark decisions. Yet the influence of these characteristics on test scores is very well established: if a child lives in economic disadvantage, does not speak English as a first language, or has a special education need, that child is far more likely to underperform on standardized tests.
>
> If One Newark decisions were made without considering these student characteristics, schools that might be "beating the odds"—performing over expectations, given their student populations—could still be closed . . . .

Thus, the report opines that "student characteristics" should have been a factor in the One Newark determination to close underperforming schools, but its authors admit they do not know if these characteristics were considered by Newark personnel, or not.

Additionally, petitioners assert that under the Charter School Program Act, an existing public school is eligible to become a charter school only if more than half the teaching staff in the school sign a petition in support of this change, as do more than half the parents of students attending the school. See N.J.S.A. 18A:36A-4(b). No such petitions were signed here. But the closed schools were not converted to charters; rather the district leased closed school buildings to charter schools. The petition does not allege otherwise, stating that "[t]he District attempts to avoid the requirements of N.J.S.A. 18A:36A-4(b) by closing public schools and then leasing the same building that housed those school to private/outside charter school entities." Petitioners term this "a stealth conversion of existing public schools," but proffer no facts that support this contention. Petitioners also assert that the "One Newark Enrolls" process through which the district will make final decisions regarding student enrollment in charter schools on the basis of a "sophisticated mathematic equation/algorithm," likewise violates the Charter School Program Act, which provides that seats in charter school classrooms must be open to all students on a space-available basis. N.J.S.A. 18A:36-7.

Finally, in the fourth count of the petition, it is alleged that the Plan is "a feeble attempt to address and ameliorate the oppressive consequences of the segregation that exists in the Newark School District . . . ." This racial segregation negatively impacts the educational opportunity available to Newark students and isolates them from the rest of the public school population in New Jersey. A dual system of public schools has evolved as a result, which the petition describes as "separate and unequal." Thus, petitioners seek an order regionalizing public education in Essex County, on a county-wide basis.

ANALYSIS AND CONCLUSIONS OF LAW

This petition seeks to remedy the disparity in achievement between students in poor urban school districts such as Newark, and those in wealthier suburban districts. Petitioners urge that the Plan exacerbates those disparities, violates the Charter School Act, and disserves the students of Newark. The issues of educational inequality raised by this petition are serious and very real, and have plagued educators for time immemorial. But the petition in its present form is so fraught with procedural and substantive deficiencies, that I **CONCLUDE** that the motion to dismiss filed by the District must be granted.

The Timeliness of the Challenge to the One Newark Plan
Counts Two and Three of the Petition

Petitioners have filed their petition pursuant to N.J.A.C. 6A:3-1.1 et seq., which establishes the procedures for appeals before the Commissioner of Education. See N.J.S.A. 18A:6-9. The time for filing is clearly set forth at N.J.A.C. 6A:3-1.3(i), which provides that a petition of appeal before the Commissioner must be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education . . . which is the subject of the requested contested case hearing." The "notice of a final order, ruling or other action" of the Board contemplated by the rule has been defined as notice "sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." Kaprow v. Bd. of Educ. of Berkeley, 131 N.J. 572, 587 (1993).

Here, it is uncontroverted that the District announced that it would be implementing the Plan as early as November 2013; the petition characterizes the Plan so announced with a good bit of detail, averring "that [the Plan] calls for, inter alia, the universal enrollment of all District students and reorganization that will impact over 28 of the District's 70 schools, including school consolidations, closings and the conversion of certain closed schools to charter schools." On December 18, 2013, the specifics of the Plan were announced yet again. A February 2014, pamphlet (Exhibit B) again discusses the Plan and the "charter launch" in detail. Accordingly, the petition

arguably should have been filed within ninety days of the November 2013 announcement by Anderson. But giving petitioners every benefit of the doubt, at a minimum, their claims should have been formalized no later than ninety days after the release of the February 2014 pamphlet; or not later than the end of May 2014. The petition was not filed until August 18, 2014. The claims in counts two and three of the petition are thus untimely, and must be dismissed.

This conclusion is buttressed by the report that accompanies the pleading as Exhibit A, and upon which petitioners rely almost exclusively in support of their claims in count two of the petition. The report's findings are based on data reviewed and received from the District itself, and which obviously must have been available to the report's authors in advance of its release in January 2014. Accordingly, query why the petition was not filed within ninety days from the issuance of a report that counsel urges forms the basis of his clients' claims?

The ninety-day rule has been strictly applied by the Commissioner. See Kaprow, supra, 131 N.J. 572; Morris-Union Jointure Comm'n v. Bd. of Educ. of S. River, 92 N.J.A.R.2d (EDU) 453; Markulin v. Bd. of Educ. of Neptune, 92 N.J.A.R.2d (EDU) 406. The rationale for this requirement was articulated by the New Jersey Supreme Court in Kaprow, supra, 131 N.J. at 582, as follows:

> The [ninety-day] limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. . . . The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days.

These considerations have particular applicability here. Petitioners had months to call into question the appropriateness of the enrollment and building changes proposed by the Plan, but instead waited until the eve of the start of the new school year, when their challenge would have created the most disruption and confusion for the school children of Newark. They utilized this strategy at their peril. I **CONCLUDE** that the challenges to the Plan articulated in counts two and three of the petition are untimely and must be dismissed.

The Commissioner has the discretion to relax the timeliness rule, N.J.A.C. 6A:3-1.16, but this extraordinary relief has been reserved only for those situations where a substantial constitutional issue is presented or where a matter of significant public interest is involved, beyond that of concern only to the parties. Portee v. Bd. of Educ. of Newark, 94 N.J.A.R.2d (EDU) 381, 384; Wise v. Trenton Bd. of Educ., EDU 160-00, Initial Decision (July 25, 2000), adopted, Comm'r (September 11, 2000), aff'd, St. Bd. (January 3, 2001), <http://njlaw.rutgers.edu/collections/oal/>. The claims of counts two and three of the petition surely are couched in such terms, asserting that the Plan violates the guarantee that the children of New Jersey receive a thorough and efficient public education. N.J. Constitution, Art. VIII, § IV, par. 1. But to relax the rule, a viable constitutional claim must be articulated by petitioners; I **CONCLUDE** that they have failed to articulate such a claim, as set forth below.

Standing – Counts Two and Three of the Petition

The twenty-five petitioners comprise a diverse group of stakeholders, to include taxpayers, teachers, students, and parents. Standing is a "threshold justiciability determination whether the litigant is entitled to initiate and maintain an action before a court or other tribunal." In re Six-Month Extension of N.J.A.C. 5:91-1, 372 N.J. Super. 61, 85 (App. Div., 2004); Stubus v. Williams, 339 N.J. Super. 38, 47 (App. Div. 2001). To have standing, a party "must present a sufficient stake in the outcome of the litigation, adverseness with respect to the subject matter and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." In re Camden Cty., 170 N.J. 439, 449 (2002). A petitioner must show a direct impairment of his own constitutional rights, and must have suffered a distinct injury or harm that was caused by the adverse party and that can be remedied by the administrative forum. See Trombetta v. Atl. City, 181 N.J. Super. 203, 221 (Law Div. 1981), aff'd o.b., 187 N.J. Super. 351 (App. Div. 1982); New Jersey Turnpike Auth. v. Parsons, 3 N.J. 235, 240 (1949); In re Ass'n of Trial Lawyers of Am., 228 N.J. Super. 180 (App. Div. 1988); Herron v. Montclair Bd. of Educ., Initial Decision (April 16, 2014), Comm'r's Decision (June 2, 2014), <http://njlaw.rutgers.edu/collections/oal/>.

Accordingly, a desire to vindicate the public interest is insufficient to confer standing; there must be a specific connection between the petitioner and the public interest he alleges to represent. D.H. on behalf of J.M.H. v. Montclair Bd. of Educ., EDU 9419-04, Initial Decision (November 22, 2004), Comm'r's Decision (December 29, 2004), <http://njlaw.rutgers.edu/collections/oal/>. For example, in Montclair a parent challenged the imposition of a testing requirement for enrollment in Algebra, but had no children affected by the controverted test. Her claim was dismissed, with the administrative law judge noting that neither the petitioner nor her child "[would] be directly affected by the challenged policy . . . or harmed by an unfavorable decision." Ibid. As the District correctly asserts, here, the taxpayer and teacher petitioners have no right to a thorough and efficient education, and accordingly, lack standing to bring claims that the Plan violates the New Jersey Constitution. Of the twenty-five petitioners, fifteen fall into this category.[2] None of these petitioners claim to have children that attend either the Newark public schools, or the charter schools that now fill once vacant Newark school buildings.

Four of the petitioners are high school students.[3] But as the District again correctly points out, they too make no allegations that the Plan affected their access to a through and efficient public education. Indeed, there was no change to the school placements for these petitioners in the aftermath of the implementation of the Plan, and these petitioners do not allege otherwise. I **CONCLUDE** that accordingly, the student petitioners likewise lack standing to assert that the Plan violated the constitutional rights of Newark students, as they proffer no facts that, if true, would reflect a direct impairment of their own constitutional rights. Trombetta, supra, 181 N.J. Super. at 222. For the same reason, they are without standing to assert that the leasing of District facilities to charter schools violated their rights, as this aspect of the Plan in no way affected their access to a thorough and efficient education.

The six remaining petitioners are parents of school age children. Three of these petitioners, however, likewise, do not allege that the Plan directly affected their

[2] These petitioners include: Graves, Owens, Smith-Gregory, Moncur, Gamble, Gianni, Matee, Cunningham, Jones, Gaines-Sloan, Wade, Ausby, Ikwuegbu, Osuji, and Corley.
[3] These petitioners include: Leonardo, Towkaniuk, Melendez, and Maldonado.

children's education, and indeed their children attend schools that have remained open and unaltered during the 2014-2015 school year.[4] (See Petition Exhibit A.) I **CONCLUDE** that accordingly, these petitioners likewise lack standing to assert that the Plan violated the constitutional rights of Newark students, as they offer no facts that would reflect a direct impairment of their own constitutional rights, or those of their children. Trombetta, supra, 181 N.J. Super. at 222. Again, they are likewise without standing to assert that the leasing of District facilities to charter schools violated their rights, as this aspect of the Plan in no way affected their access to a thorough and efficient education or otherwise directly impacted the delivery of educational services to their children, nor does the petition allege otherwise.

Justiciability – Count Two of the Petition

This leaves three petitioners with children who had attended schools that were closed under the Plan, to include Tillman, Moore, and Branch. But even as to these three remaining petitioners, the petition fails to allege that their children's educational programming has been disrupted by the Plan or by their reassignment to another school. Indeed, the petition does less specify any shortfalls in their education in the aftermath of the Plan's implementation. Rather, the pleading simply speculates that the Plan ultimately will not remedy the poor academic performance of Newark students overall.

Neither the courts nor the Commissioner enter rulings that are advisory or abstract. N.J. Civil Serv. Ass'n v. State of New Jersey, 88 N.J. 605, 611 (1982); Crescent Park Tenants Assoc. v. Realty Eq. Corp. of New York, 58 N.J. 98.107; Milano v. Franklin Bd. of Educ., EDU 08606-08, Initial Decision (February 24, 2009), Comm'r's Decision (December 21, 2009), <http://njlaw.rutgers.edu/collections/oal/>. Our jurisprudence recognizes that a case must "[involve] a real and substantial controversy for which specific relief may be provided through a decree of conclusive character, as distinguished from an opinion advising what the law would be on a hypothetical set of facts." Presbyterian Church v. Florio, 902 F. Supp. 492, 503 (D.N.J. 1995). Claims are

[4] These petitioners include: Molina, Loucious Jones, and Reedus.

ripe for adjudication when the "harm asserted has matured sufficiently to warrant judicial intervention. Issues must be fully developed, clearly defined and not merely speculative, conjectural or premature." Trombetta, supra, 181 N.J. Super. at 223. Petitioners' assertions that the Plan will not remedy educational disparities in Newark are speculative and are not grounded in any facts directly related to the children of these petitioning parents.

Thus, the District correctly urges that these remaining petitioners do not articulate cognizable claims. The expert report upon which petitioners rely readily confirms the correctness of this conclusion. The report ties nothing about the Plan to these specific petitioners and their children's educational programs. It offers a difference of opinion as to how to best reorganize the Newark schools, noting that "if" the reorganization failed to consider "student population characteristics" it "would be" likely to fail. The report appears to contain the conclusions of educational experts, but there must be a factual basis for an expert's opinion. Bahrele v. Exxon Corp., 279 N.J. Super. 5, 30 (App. Div. 1995). When an expert's opinion is merely a bare conclusion unsupported by factual evidence, in other words, a "net opinion," it cannot form the basis of a justiciable claim, and ultimately will be inadmissible at hearing. State v One Marlin Rifle, 319 N.J. Super. 359, 370 (App. Div. 1999).

The petition, which relies almost exclusively on this report as the basis for the claims in its second count, echoes its non-specific and speculative tone. The petition's general message is simply that the Plan won't help make the public schools better, and may make matters worse. By way of example, the pleading avers that "[t]he interventions and school closings by Respondents . . .are doomed to fail." Elsewhere the pleading states that "expanding charters to replace public schools will leave the neediest students to languish in other district schools that are failing or less successful." Nowhere does the petition offer concrete factual allegations that tie the Plan to some sort of disruption in the educational program for the children of petitioners Tillman, Moore, or Branch. I **CONCLUDE** that the claims of these remaining three petitioners are not ripe for adjudication relative to their claims in count two of the

petition that the Plan will not deliver a thorough and efficient education to their children.[5]

The Alleged Violations of the Charter School Act
Count Three of the Petition

It uncontroverted that as a component of the Plan, certain Newark schools were closed, and the buildings that previously housed them were leased to charter schools. Petitioners do not contend otherwise; they nonetheless assert that the District violated the Charter School Program Act, N.J.S.A. 18A:36A-1, et seq. But the petition offers no factual support for its contention that the District's actions constituted a "stealth" conversion of the District schools to charter schools.

Indeed, the District has the clear statutory authority to lease school property that it does not presently intend to use, but that may, at some future time, be required for school purposes. N.J.S.A. 18A:20-8.2. The decision to close a particular school likewise lies within the District's sound discretion. Boult v. Passaic Bd. of Educ., 136 N.J.L. 521 (E. & A. 1947); Glynos v Bd. of Educ. of Union Cty., EDU 9008-93, Comm'r (August 31, 1993), <http://njlaw.rutgers.edu/collections/oal/>. Here, as superintendent of a state-operated school district, Anderson has the power to take the steps needed to properly conduct and maintain the schools of Newark, including the closing of school buildings, when appropriate. See N.J.S.A. 18A:7A-38(b); N.J.S.A. 18A:7A-35.

The statute cited by petitioners addresses a very specific situation; one where teachers and parents make application to the Commissioner for conversion of their public school to a charter. N.J.S.A. 18A:36A-4(b) requires that they show support for that change through signatures on a petition. What occurred here, the closing of public school buildings and the leasing of the vacant space to an outside entity, likewise requires an approval process, just a different one. Indeed, the Commissioner's review

[5] Petitioners urge that there is an inconsistency in the District's position; that is, is the District arguing that the petition is too early, or that it is too late? While these arguments superficially appear inconsistent, they are not. To the extent that the petition alleges that the proposed Plan is flawed, it is too late. To the extent that the petition speculates how the Plan will affect the education for Newark students, it is too early.

and approval process must include evaluation of a comprehensive application; submission of addenda and supporting documents; an "in-depth" interview; and an on-site preparedness visit. N.J.A.C. 6A:11-2.1 et seq. Our courts have recognized that the Commissioner is "exceedingly careful in the approval of charter schools because of the impact that a wrong decision will have on students who attend a charter school that falters, or worse, fails to provide an educational program that satisfies the constitutional standard of a thorough and efficient education." Quest Acad. Charter Sch. of Montclair Founders Grp., supra, 216 N.J. at 388 (citing In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch., 164 N.J. 316, 323 (2000)).

The charters that now occupy vacated District buildings assumedly complied with this rigorous process; in any event, the petition of appeal does not aver otherwise. Accordingly, the petition alleges no facts in support of its claim that District violated the Charter School Act, and I **CONCLUDE** that these claims, as articulated in count three of the petition, must be dismissed.

The Legality of the Universal Enrollment Plan

Petitioners contend that the Universal Enrollment Plan component of One Newark violates the requirements of N.J.S.A. 18A:36A-7 and N.J.S.A. 18A:36A-8. These provisions of the Charter School Act require that charter schools "be open to all students on a space available basis." N.J.S.A. 18A:36A-7. Similarly, N.J.S.A. 18A:36A-8 specifies that preference must be given to local students; charters must give priority to siblings; and must "seek the enrollment of a cross section of the community's school age population including racial and academic factors." Petitioners assert that the Universal Enrollment Plan violates these requirements.

Importantly, however, the statutes relied upon by petitioners establish obligations with which the charter schools must comply. The petition asserts that the relationship the Plan establishes between the charters and the District causes these obligations to remain unmet. But the petition does not identify the offending charter schools or join them as parties. These charter schools are indispensible parties to this action. The regulations governing the filing of controversies and disputes before the

Commissioner require that a "petitioner shall name as a party any person or entity indispensible to the hearing of a contested case." N.J.A.C. 6A:3-1.3(b). Failure to do so may be grounds for dismissal. Ibid. A review of R. 4:28-1(a) is instructive, and it provides:

> A person who is subject to service of process shall be joined as a party to the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest in the subject of the action and is so situated that the disposition of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect that interest . . . .

The New Jersey Supreme Court has described an indispensable party as one having "an interest inevitably involved in the subject matter before the court and a judgment cannot justly be made between litigants without either adjudging or necessarily affecting the absentee's interest." Allen B. DuMont Labs v Marcalus Mfg. Co., 30 N.J. 290, 298 (1959). Under this standard, it is readily apparent that these unnamed charter schools have a clear stake in this litigation, and that the rights that petitioners seek to vindicate, would, in part, require an order directing that the charter schools comply with N.J.S.A. 18A:36A-7 and N.J.S.A. 18A:36A-8. Thus, complete relief cannot be granted without their participation, and for this reason, I **CONCLUDE** that the claims articulated in count three of the petition must be dismissed for failure to name indispensible parties.

Finally, the District suggests that petitioners' claims might be seen as an effort to vindicate the right of these unnamed charters to be unfettered in their enrollment decisions. Viewed this way, the claims in count three nonetheless cannot survive this motion to dismiss. As set forth at length above, these petitioners have standing to assert only rights personal to themselves. They lack standing to assert the rights of the charter schools now housed in vacated District school buildings.

The Claims in Count Four – Desegregation

Count Four of the petition asserts that the District "has or will be attempting to implement its One Newark Plan as a feeble attempt to address and ameliorate the oppressive consequences of the segregation that exists in the Newark School District . . . ." The petition goes on to assert that "[a]s conceived by Respondents Newark School District and Superintendent Cami Anderson, the One Newark Plan falls short of eradicating the corrosive segregated environment that pervades the Newark School District, which is highly segregated by race." It is incontrovertible that while Newark and several other Essex County districts primarily educate minority students, others primarily educate White students. All of these districts, Newark included, reflect the racial and ethnic breakdown of the communities they serve.

The petition asks for the following relief:

> . . . a remedial plan that will eliminate this form of racial segregation in the Newark Public Schools and that will remedy the harms caused by such segregation by the creation of appropriate county-wide or regional-wide school district which would mandate the inclusion of predominately Essex County white suburban school districts into any county-wide or regionalization plan that would effectively desegregate the Newark School District as mandated by the New Jersey Constitution.

The petition names as parties neither the "white suburban school districts" alluded to in the pleading, nor any of the other Essex County districts that are primarily home to minority students. Nor does the petition name either the Commissioner or State Board of Education, all the while averring that it is the Commissioner and State Board of Education who "have failed . . . to fulfill their constitutional responsibility to eliminate racial segregation in the Newark School District . . . ." I **CONCLUDE** that the fourth count of the petition must be dismissed because it fails to name indispensible parties; to include, either the parties who potentially could provide petitioners the relief they seek, or the parties who would be impacted by petitioners' claims.

New Jersey law specifically provides that "[e]ach municipality shall be a separate school district." N.J.S.A. 18A:8-1. Accordingly, the Newark District is a creature of statute that exists to educate the children domiciled within its boundaries. N.J.S.A. 18A:38-1. Thus, as the District correctly asserts, it cannot, by law, send its students to neighboring suburban districts and desegregate itself. Accordingly, petitioners' argument that educational services as currently delivered in Essex County violate the rights of Newark school children to a thorough and efficient education, N.J. Const. Art. VIII, § IV, para. 1, is essentially a contention that N.J.S.A. 18A:8-1 unconstitutionally serves, in practice, to segregate students by race.

A contested case is "a proceeding . . . in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or statute to be determined by an agency . . . ." N.J.S.A. 52:14B-2. Accordingly, essential to a properly brought contested case are party respondents who are legally capable of supplying the relief sought by the petition; the petition asserts that the Commissioner has failed to meet his obligations to desegregate schools, but nonetheless fails to name him as a respondent. See Div. of State Police v. Maguire, 368 N.J. Super. 564, 573 (App. Div. 2004). As I advised counsel when we first conferred on this case, and as I continue to **CONCLUDE**, the Commissioner of Education is an indispensible party to this action. N.J.S.A. 6A:3-1.3(b).

Historical efforts to remedy educational inequality due to disparities in funding are instructive. In Abbott v. Burke, 100 N.J. 269 (1985), Raymond Abbott, and some twenty additional school children brought suit against the Commissioner of Education, State Board of Education, the State Budget Director and State Treasurer, claiming that Public School Education Act of 1975 was unconstitutional as funded. Importantly, the respondents in Abbott v. Burke were the governmental agencies actually responsible for allocating funds to local school districts; they were thus, at least in theory, capable of granting the petitioners the relief they sought.

I thus offer Abbott v. Burke as an example of the procedural course the petitioners should have taken to properly present their claim that the state-wide system of assigning school children to classrooms based on the cities and municipalities in

which they reside unconstitutionally deprives them of a thorough and efficient education. Jenkins v. Morris Twp. Sch. Dist., 58 N.J. 483 (1971) offers another model for properly bringing this desegregation challenge. The deputy attorneys general representing the Department of Education successfully convinced petitioners' counsel that their client did not need to be named as a party respondent. Perhaps they had Jenkins in mind. There, petitioning parents brought suit against three districts, seeking their merger to effectuate racial balance. The court determined both that the Commissioner could serve as the forum to adjudicate that dispute, and had the authority to "cross district lines to avoid 'segregation in fact.'" Id. at 501. But it is noteworthy that in Jenkins, all the districts implicated by the desegregation order sought by the petitioners were joined as party respondents.

Thus, even assuming for argument's sake that it was unnecessary to name the Commissioner or State Board of Education as parties, the claims in count four of the petition cannot survive the District's motion to dismiss because petitioners fail to join the other districts whose educational structure and programming would be impacted by the relief sought. Regionalization county-wide would implicate the delivery of educational services to each and every public school student in Essex County. A failure to join each Essex County school district would plainly impede the ability of these districts to protect their interests. See R. 4-28-1(a). Moreover, any order directing such desegregation would call upon the neighboring districts to take the steps needed to effectuate such a broad ranging and monumental change in the delivery of educational services; to include a potential consolidation of staff, school buildings, equipment, and administrative services. Without the participation of these districts, "complete relief could not be accorded among those already parties." Ibid. Accordingly, I **CONCLUDE** that count four of the petition must be dismissed for failure to name indispensible parties. N.J.A.C. 6A:3-1.3(b).

ORDER

Based on the foregoing, the petition of appeal is **DISMISSED**, as follows:

1. As to all the named petitioners, Counts Two and Three of the petition are dismissed on timeliness grounds.

2. As to all the petitioners with the exception of Tillman, Moore, and Branch, Counts Two and Three are also dismissed for lack of standing. The claim that the Universal Enrollment Plan violates the Charter School Act is also dismissed for failure to name indispensible parties.

3. As to petitioners Tillman, Moore, and Branch, Counts Two and Three of the petition are also dismissed for failure to state a justiciable claim. As to these petitioners, the claim that the Universal Enrollment Plan violates the Charter School Act is also dismissed for failure to name indispensible parties.

4. Count Four of the petition is dismissed for failure to name indispensible parties.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

April 28, 2015

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: April 28, 2015

Date Mailed to Parties: APR 3 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

204-15

A W A R D

In the Matter of the Tenure Hearing of Brian Toal	Department of Education
School District of the Town of Kearny, Hudson County	Docket No. 45-3/15

Before: Joel M. Weisblatt, Arbitrator

At the arbitration of the tenure charges captioned above, the parties reached a settlement of the issues presented by the charges. The parties finalized the terms of that settlement and by June 15, 2015, they executed a written agreement resolving the issues. The Arbitrator finds that the terms of that settlement are clearly in the public interest. Therefore the Arbitrator issues this Award approving the terms of the parties' settlement.

Specifically, the parties response to the health issues directly related to the conduct at issue in the dispute, is appropriate. The teacher has agreed to a professional

medical assessment and to follow appropriate continuing treatment, as determined.

The Arbitrator hereby finds it in the public interest to approve the parties' settlement.

Skillman, New Jersey
June 16, 2015

Joel M. Weisblatt, Arbitrator

SETTLEMENT AGREEMENT

This Settlement Agreement (hereinafter "Agreement") is entered into on this 11th day of June, 2015, by and between Brian Toal (hereinafter "Toal") and the Kearny Board of Education (hereinafter "Board")'

WHEREAS, Toal is employed by the Board as a teacher of music;

WHEREAS, during the 2014-2015 school year, Toal was assigned to Kearny High School;

WHEREAS, the Board certified sworn tenure charges against Toal on February 23, 2015;

WHEREAS, the tenure charges were submitted to the Commissioner of Education and assigned Agency Docket Number 45-3/15;

WHEREAS, Arbitrator Joel Weisblatt has been assigned to hear the aforementioned matter;

WHEREAS, in the interest of cost savings and uncertainty associated with litigation, Toal and the Board desire to resolve the matters with the purpose of the Agreement set out below.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, Toal and the Board agree to the following terms in settlement of the pending matter:

1. Toal agrees to undergo a psychiatric evaluation by a professional of the Board's choosing at the Board's cost, consistent with the relevant provisions of N.J.S.A. 18A and N.J.A.C. 6A.
2. Toal will be reinstated and returned to the classroom as soon as possible upon clearance by the evaluating psychiatrist referenced in paragraph 1. In the event of a non-clearance

the parties will proceed in accordance with statutes, regulations and contractual dictates for such an event.

3. In the event that the evaluating psychiatrist determines that continuing treatment or follow-up is necessary following the evaluation, the evaluating psychiatrist shall consult with Toal's treating doctor in determining an appropriate continuing treatment / follow-up plan. If continuing treatment is recommended, the Board may request periodic updates to confirm Toal's compliance with said plan.
4. Toal's employment record shall be revised to reflect a thirty (30) day suspension without pay between the dates of February 24, 2015 and March 26, 2015.
5. The period between March 27, 2015 and April 26, 2015 shall be designated as a paid approved leave of absence and Toal shall receive back pay for this period.
6. For the period between April 27, 2015 and the date Toal is cleared/non-cleared to return to work by the evaluating psychiatrist, Toal will be paid for one (1) day out of every two (2) days;
7. Toal will lose one (1) increment.
8. Toal may be reassigned to another school as the Superintendent feels is in the school district's best interests. Toal understands that this transfer does not prohibit the Board for making future transfer decisions in accordance with its policies and procedures.
9. Toal will have no priority for any stipend positions he previously held, nor will be barred from applying for any stipend position going forward.
10. The Board agrees to withdraw the tenure charges currently docketed before the Department of Education as Agency Docket Number 45-3/15.

11. This Agreement does not constitute an admission of guilt or wrong-doing on behalf of Toal or the Board. The Board reserves the right to include the allegations contained in the sworn tenure charges in any future discipline action for purposes of determining appropriate sanctions only.
12. Toal acknowledges that no promise, inducement or other agreement not expressly contained in the Agreement has been made conferring any benefit upon him; that this Agreement contains the entire agreement between Toal and the Board with respect to any benefit conferred and that all prior agreements and understandings, whether oral or written are expressly superseded by this agreement and of no other force or effect.
13. This Agreement is subject to approval by vote of the members of the Kearny Board of Education. Toal will be returned to work as soon thereafter as possible.
14. This Agreement is binding on the parties but does not establish practice or precedent and cannot be relied upon for any purpose other than enforcement of the terms contained herein.
15. This Agreement shall be governed by the law of the State of New Jersey and any action to enforce this Agreement shall be brought in the State of New Jersey.
16. The terms of this Agreement may not be modified, except by written agreement signed by the parties. If any provision of this Agreement is deemed unenforceable for any reason, the remainder of the Agreement shall remain binding and in effect.
17. This Agreement may be executed by the parties in one or more counterparts, and each fully-executed counterpart shall be deemed an original. Any facsimile copy of an executed signature page hereto shall be deemed an original signature page for all purposes.

18. By signing this Agreement, Toal states that:

a. He has read the Agreement;

b. That he agrees with the terms of this Agreement;

c. That he has been afforded an opportunity to consult with a union representative and/or attorney prior to executing this Agreement.

IN WITNESS WHEREOF, and intending to be legally bound, Brian Toal and the Kearny Board of Education have executed the foregoing Settlement Agreement.

EMPLOYEE

BRIAN TOAL

DATE: 6/11/15

KEARNY BOARD OF EDUCATION

BY:

DATE: 6/15/15

205-15

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
LESTER RICHENS, STATE-APPOINTED MONITOR	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Board of Education challenged the respondent's appointment of Garnell Bailey to be an Assistant Superintendent in respondent's school district. A hearing in the matter was scheduled for April 23, 2015, but both parties failed to appear. The OAL sent notifications to the parties on April 30, 2015, providing an opportunity to submit an explanation for the nonappearance.

There being no explanation filed by either party, the matter was no longer deemed to be a contested case before the Commissioner. Accordingly, the Commissioner dismissed the petition with prejudice.

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

Issued 6/18/15

OAL DKT. NOS. EDU 10085-13, EDU 10092-13 (CONSOLIDATED)
AGENCY DKT. NOS. 129-6/13, 130-6/13

VINELAND EDUCATION ASSOCIATION, ON BEHALF OF FELICIA GONZALEZ,	:	
PETITIONER,	:	
AND	:	
VINELAND EDUCATION ASSOCIATION, ON BEHALF OF BARBARA DEAN,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release (Settlement Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed. Paragraph 4 of the Settlement Agreement references proposed changes to the Board Policy 5512 and Regulation 5512 that are attached as Exhibit A. There is no Exhibit A attached to the Settlement Agreement and the file does not contain a copy of Exhibit A. Therefore, the Commissioner cannot approve the within Settlement Agreement as it is currently written.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/18/15
Date of Mailing: 6/18/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
CONSOLIDATED
OAL DKT. NO. EDU 10085-13
AGENCY DKT. NO. 129-6/13
OAL DKT. NO. EDU 10092-13
AGENCY DKT. NO. 130/6-13

VINELAND EDUCATION ASSOCIATION, ON BEHALF OF FELICIA GONZALEZ,
and

VINELAND EDUCATION ASSOCIATION ON BEHALF BARBARA DEAN,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,

Respondent.

Matthew B. Wieliczko, Esq., for petitioner Vineland Education Association o/b/o Felicia Gonzalez, (Zeller & Wieliczko, attorneys)

Ned P. Rogovoy, Esq., for petitioner Vineland Education Association o/b/o Barbara Dean

Robert DeSanto, Esq., for respondent Vineland City Board of Education (Gruccio, Pepper, DeSanto & Ruth, P.A., attorneys)

Record Closed: May 5, 2015 Decided: May 6, 2015

BEFORE **W. TODD MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on July 23, 2013, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties prepared and submitted a Settlement Agreement and General Release and Resolution from the Vineland Board of Education indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

May 6, 2015
DATE

W. TODD MILLER, ALJ

Date Received at Agency: 5-11-15

Date Mailed to Parties: 5-11-15

/jb

ACTION

ENGLISH	RIOS	ACOSTA	CODISPOTI	DEWINNE	DIGIORGIO	JENNINGS	MORELLO	PAGANO
			2				1	
			2				1	

RECOMMENDATIONS

It is recommended that:

PERSONNEL (1.1-1.2)

1.1 The Board approve the personnel items in accordance with the lists provided and on file with the Secretary of the Board:

a. Retirements, Resignations, Terminations, Leaves of Absence, Employment, Transfers
b. Students
c. Substitutes
d. Extracurricular Activities Volunteers
e. Volunteers

All Members voted "yes." (7-0-0)

1.2 The Board approve the settlement of an administrative appeal by two teachers whose names are on file with the Board Secretary.

All Members voted "yes" except Ms. Rios who voted "no." (6-1-0)

Board agenda item for 4/15/15

1.2 Felicia Gonzalez

Barbara Dean

Vineland Public Schools

625 PLUM STREET · VINELAND, NJ 08360-3708 · (856) 794-6700 · FAX (856) 794-9464

SECRETARY'S CERTIFICATE

I, **Helen G. Haley**, Board Secretary of the Board of Education of the City of Vineland in the County of Cumberland and State of New Jersey, I hereby certify this to be a true copy of the minutes duly adopted at the Board of Education meeting held on Wednesday, April 15, 2015, which is on file and of record approving the settlement of an administrative appeal by two teachers whose names are on file with the Board Secretary

IN WITNESS THEREOF, I hereby set my hand this 30th day of April 2015.

(SEAL)

Helen G. Haley
Board Secretary

ZELLER & WIELICZKO, LLP
ATTORNEYS AT LAW

RECEIVED
2015 APR 29 A 10:42

ZELLER & WIELICZKO, LLP
Attorneys for Petitioner,
Vineland Education Association
individually and on behalf of
Felicia Gonzalez

120 Haddontowne Court
Cherry Hill, New Jersey 08034
Phone: (856) 428-6600

BEFORE THE COMMISSIONER OF
EDUCATION OF NEW JERSEY/
OFFICE OF ADMINISTRATIVE LAW
OAL Docket Nos: EDU 10085-13
(GONZALEZ) & EDU 10092-13 (DEAN)

VINELAND EDUCATION ASSOCIATION
INDIVIDUALLY AND ON BEHALF OF
FELICIA GONZALEZ AND
BARBARA DEAN,

Petitioners,

vs.

VINELAND BOARD OF
EDUCATION,

Respondent.

STIPULATION OF SETTLEMENT AND RELEASE

The parties in the above-captioned matter hereby agree to settle this controversy upon the following terms and conditions:

1. The respondent Vineland Board of Education has removed all references to the Harassment, Intimidation, and Bullying (hereinafter "HIB") investigation and determination resulting from the February 14, 2013 report of alleged acts of harassment, intimidation and/or bullying as to student T.H., contained in the

120 Haddontowne Court
Cherry Hill, NJ 08034
P 856.428.6600
F 856.428.6314

ZELLER & WIELICZKO, LLP
ATTORNEYS AT LAW

personnel files of Petitioner Felicia Gonzalez and Petitioner Barbara Dean.

2. The letters of reprimand dated March 15, 2013 directed to Petitioner Felicia Gonzalez and Petitioner Barbara Dean have been removed from their respective personnel files.

3. Within ninety (90) days of the full execution of the Stipulation of Settlement and Release, Respondent Vineland Board of Education agrees to amend Board Policy 5512 ("Harassment, Intimidation and Bullying") and Regulation 5512 ("Harassment, Intimidation, or Bullying Investigation Procedure") to afford accused staff offenders of HIB allegations the same rights afforded under the current policies to student offenders and parents of individual student offenders and targets/victims. The proposed revised versions of Vineland Board of Education Board Policy 5512 and Regulation 5512 are attached hereto as Exhibit "A" and are incorporated as part of the within Stipulation of Settlement and Release.

4. Each party hereby releases the other from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial or quasi-judicial proceedings of any kind whatsoever, which have been or could have been brought, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the actions giving rise to the within controversy, except as may be necessary to enforce the terms of this Stipulation.

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ATTORNEYS AT LAW

5. This Stipulation shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose. Each party shall be responsible for her or its own attorney fees.

6. This Stipulation of Settlement and Release contains the entire agreement between the parties, and all terms of this Stipulation are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

7. Petitioners, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of these matters hereby agree to a dismissal, with prejudice, of their Petitions of Appeal in this matter.

8. Petitioners, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of these matters hereby agree to dismiss, with prejudice, their Petitions for Contested Transfer Determination, filed with the Public Employment Relations Commission (PERC), Docket Nos. TI-2013-004 and TI-2013-005.

9. This Agreement shall be incorporated into an Initial Decision by the Honorable William T. Miller, ALJ, which shall be subject to approval and adoption by the Commissioner of Education.

10. The parties to this Settlement Agreement agree not to file Exceptions.

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erry Hill, NJ 08034
P 856.428.6600
F 856.428.6314

ZELLER & WILKOZEK, LLP
ATTORNEYS AT LAW

IN WITNESS WHEREOF, the parties have executed this Stipulation on the dates set forth below.

VINELAND EDUCATION ASSOCIATION

BY: [signature]

WITNESS:

[signature]

DATED: 4/2/15

BOARD OF EDUCATION OF THE VINELAND SCHOOL DISTRICT

BY: _____

ATTEST:

BY: _____

DATED:

PETITIONER

[signature]
FELICIA GONZALEZ

WITNESS:

[signature]

DATED: 4.1.15

PETITIONER

_____
BARBARA DEAN

WITNESS:

_____

DATED:

120 Haddonstowne Court
Cherry Hill, NJ 08034
P 856.428.6600
F 856.428.6514

ZELLER & WIELICZKO, LLP
ATTORNEYS AT LAW

IN WITNESS WHEREOF, the parties have executed this Stipulation on the dates set forth below.

VINELAND EDUCATION ASSOCIATION

BY: _____

WITNESS:

_____

DATED:

BOARD OF EDUCATION OF THE VINELAND SCHOOL DISTRICT

BY: Scott English
Scott English, Pres.

ATTEST:

BY: Rebecca Dec

DATED: 4-15-15

PETITIONER

Felicia Gonzalez
FELICIA GONZALEZ

WITNESS:

DATED: 4-1-15

PETITIONER

Barbara Dean
BARBARA DEAN
4-1-15

WITNESS:

DATED: 4-1-15

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Cherry Hill, NJ 08034
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F 856.428.6314

207-15

OAL DKT. NO. EDU 16077-14
AGENCY DKT. NO. 318-10/14

JEROME D'AGOSTINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/18/15

Date of Mailing: 6/18/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 16077-14

AGENCY DKT. NO. 318-10/14

JEROME D'AGOSTINO,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,

Respondent.

Steven R. Cohen, Esq., for petitioner (Selikoff and Cohen, PA, attorneys)

Louis R. Lessig, Esq., for respondent (Brown and Connery, LLP, attorneys)

Record Closed: May 12, 2015 Decided: May 21, 2015

BEFORE **JOHN S. KENNEDY,** ALJ:

This matter was transmitted to the Office of Administrative Law on December 5, 2014, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

May 21, 2015
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: 5-22-15

Date Mailed to Parties: 5-22-15

cmo

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("this Agreement") is entered into by and between Jerome D'Agostino ("D'Agostino") and the Camden City School District (the "District"). Together, D'Agostino and the District may be referred to herein as "the Parties."

WHEREAS, D'Agostino was a Teacher of Music with the District;

WHEREAS, the District terminated D'Agostino from his position effective August 29, 2014.

WHEREAS, D'Agostino filed a Petition of Appeal in accordance with Title 18A of the New Jersey statutes seeking reinstatement, which is pending before the New Jersey Office of Administrative Law under the caption Jerome D'Agostino v. Board of Education of City of Camden, County of Camden, Agency Dkt. No. 318-10/14 ("the Petition"); and

WHEREAS, the Parties mutually desire to resolve this matter;

NOW, THEREFORE, IT IS HEREBY AGREED by and between the Parties as follows:

1. Effective Date: This Agreement shall take effect on the date it is fully executed by the Parties, and as such, deemed ratified by the State Superintendent as the authorized representative of the District.

2. Separation from Employment:

(a) D'Agostino shall, simultaneously with his execution of this Agreement, provide the District, through its counsel, Brown & Connery, LLP, with an irrevocable letter of resignation on the Effective Date of this Agreement;

(b) The District shall pay D'Agostino the sum of $25,943.50 (the "Back Pay Payment") which represents D'Agostino's back pay from October 1, 2014 until February 27, 2015;

(c) The District shall ensure that D'Agostino receive all applicable pension credit for the period between October 1, 2014 until February 27, 2015;

(d) The District shall provide D'Agostino with a neutral reference of only what is required by law, namely, his employment time period, where he was employed and his final annual salary;

(e) The District shall pay D'Agostino the sum of $10,377.40, which represents additional pay he would have received if still working for the District for two (2) months beyond the end of February 27, 2015, pursuant to the applicable Collective Bargaining Agreement ("CBA").

STATE OFFICE 2015 MAR 2 P

3. Dismissal of the Petition: The Petition shall be dismissed with prejudice, and without attorney's fees or costs to either Party. The Parties shall promptly execute all documents required to effectuate this dismissal of the Petition after the Effective Date of this Agreement, including but not limited to a stipulation of dismissal with prejudice. Effectuation of the dismissal with prejudice shall be a condition precedent to the Back Pay Payment.

4. General Release: D'Agostino releases the District from all known and unknown charges, complaints, claims, grievances, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts, penalties, fees, and expenses (including attorneys' fees and costs actually incurred) of any nature whatsoever that D'Agostino has, ever had, or may have had, against the District, whether or not apparent or yet to be discovered, or which may hereafter develop, for any acts or omissions relating to or arising from anything that has happened up to the Effective Date of this Agreement. This includes, but is not limited to, any claims D'Agostino asserted, or may have asserted, under the following: the National Labor Relations Act; the Civil Rights Act of 1964; Sections 1981 through 1988 of Title 42 of the United States Code; the Employment Retirement Income Security Act; the Immigration Reform Control Act; the Americans with Disabilities Act; the Age Discrimination & Employment Act; the Fair Labor Standards Act; the Occupational Safety & Health Act; the Family & Medical Leave Act; the Equal Pay Act; the New Jersey Law Against Discrimination; the New Jersey Wage Payment Law; The New Jersey Minimum Wage Law; the Equal Pay Law for New Jersey; the New Jersey Worker Health & Safety Act; the New Jersey Family Leave Act; the New Jersey Conscientious Employee Protection Act; any constitution, statute, regulation, ordinance, executive order, public policy or common law; any written, verbal or implied contract; and any other authority or basis for seeking damages or relief of any kind. This release is intended to be broadly construed and applies to any and all claims and potential claims whatsoever, including those of which D'Agostino is not aware, resulting from anything that has happened up to the Effective Date of this Agreement.

5. Covenant Not to Sue: D'Agostino warrants he has not commenced any legal proceedings of any type (including but not limited to charges filed with any governmental agency) against the District. Further, D'Agostino agrees that he will not commence any legal proceedings against the District arising from or relating to anything that has happened up to the Effective Date of this Agreement. Should any such legal proceedings be commenced on D'Agostino's behalf, D'Agostino agrees that he will not seek or accept any relief or recovery therefrom. In the event of a violation of this paragraph, D'Agostino agrees that the District shall be entitled to immediate dismissal of the legal proceedings, and that he shall be responsible for the District's attorneys' fees and costs incurred in connection with those legal proceedings. Should any entity, agency, commission, or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Section 4, D'Agostino agrees not to seek or accept any resulting relief whatsoever, in accordance with this section.

6. Claims Not Released: Notwithstanding Sections 4 and 5 of this Agreement, it is understood and agreed that D'Agostino is not waiving: (a) claims that were filed or could be filed under any state workers' compensation or unemployment law, any claim relating to the Teacher's Pension and Annuity Fund, or any claim arising from a breach of this agreement; or (b) challenges to the validity of this Agreement under the Older Workers Benefits Protection Act. D'Agostino is

not responsible for the District's attorneys' fees and costs incurred in connection with such claims. D'Agostino represents that he is not aware of any present basis for such claims. Further, it is understood and agreed that D'Agostino is not prohibited from filing a charge or communicating with or participating in any administrative proceeding before the Equal Employment Opportunity Commission, United States Department of Labor, or other federal, state or local law agency. Should any entity, agency, commission, or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Section 4, D'Agostino agrees not to seek or accept any resulting relief whatsoever, in accordance with Section 5, above.

7. Older Workers Benefit Protection Act: The releases in section 4 above include a waiver and release of all claims under the Age Discrimination in Employment Act ("ADEA") and the Older Workers Benefit Protection Act ("OWBPA"). Therefore, pursuant to the requirements of the ADEA and OWBPA, D'Agostino specifically acknowledges that:

(a) He has been advised to consult with an attorney of his choosing concerning the legal significance of the Separation Agreement and Release and has done so;

(b) The Separation Agreement and Release are written in a manner that he understands;

(c) The consideration set forth this Separation Agreement consists of benefits to which he is not otherwise entitled and is adequate and sufficient to support his promises, covenants and releases as set forth in this Release;

(d) He has been afforded **twenty-one (21) days** to consider the Separation Agreement and Release before executing it, that any changes thereto subsequently agreed upon by the parties, whether material or immaterial, do not restart this period for consideration, and that by signing and returning the Separation Agreement and Release before the end of the **twenty-one (21) day** period he will have knowingly and voluntarily waived the right to consider the Separation Agreement and Release for the full consideration period; and

(e) He has been advised that during the **seven (7) day** period following his execution of the Separation Agreement and the Release, he may revoke his acceptance of this Agreement by delivering written notice to counsel for Company (as identified below), and that the Separation Agreement and the Release shall not become effective or enforceable until after the revocation period has expired:

Louis R. Lessig, Esquire
Brown & Connery, LLP
360 Haddon Ave.
Westmont, NJ 08108

8. Not Eligible for Re-hire: D'Agostino acknowledges and agrees that his employment with the District is irrevocably severed upon the effective date of this Agreement and that he is ineligible for re-hire as an employee of the District. D'Agostino agrees not to apply for re-employment with the District. If, for some reason, the District receives an application for D'Agostino's employment, the District shall have no obligation to consider or review his application for employment.

9. No Admission of Liability: This Agreement is not, and may not be construed as, an admission of liability by either Party.

10. Entire Agreement: This Agreement encompasses the sole and entire agreement between the Parties and fully supersedes any and all prior agreements or understandings pertaining to the subject matter hereof. No other promises or agreements shall be binding unless in writing, signed by the Parties, and expressly stated to represent an amendment or supersession to this Agreement.

11. Severability: If any portion of this Agreement is deemed unenforceable, the remainder will be fully enforceable.

12. Applicable Law and Construction: This Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey; however, since each party to this Agreement and their counsel have reviewed and negotiated this Agreement, the general rule of construction that any ambiguity or uncertainty in a writing shall be interpreted against the party drafting the writing shall not apply to any action relating to this Agreement. Any action to enforce or interpret this Agreement shall only be brought in a court of competent jurisdiction in Camden County, New Jersey.

13. Counterparts: This Agreement may be exercised in more than one counterpart and each counterpart shall be considered an original, but all of which together shall constitute one and the same.

14. Individuals Bound: This Settlement Agreement and General Release is binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, personal or legal representatives, successors and/or assigns.

15. Breach: D'Agostino understands that if he breaches any provision of this Agreement, the District will file an action to enforce this Agreement.

16. Notices: Any notice given or demand made pursuant to this Agreement shall be made by certified mail, return receipt requested, to the following persons at the following addresses:

If to D'Agostino:

Jerome D'Agostino
1143 South 20th Street
Philadelphia, PA 19146

With a copy to:

Steven R. Cohen, Esquire
Selikoff & Cohen, PA
700 East Gate Drive
Suite 502
Mount Laurel, NJ 08054-3823

If to the District:

Camden City School District
Business Administrator/Board Secretary
201 N. Front Street
Camden, New Jersey 08102

With a copy to:

Louis R. Lessig, Esquire
Brown & Connery, LLP
360 Haddon Avenue
Westmont, New Jersey 0810

17. Facsimile or Electronic Signature Fully Binding: The Parties agree that a facsimile or electronic signature herein shall be deemed to have the same force and effect of an original.

BY SIGNING THIS AGREEMENT, D'AGOSTINO ACKNOWLEDGES:

A. HE HAS READ IT;

B. HE UNDERSTANDS IT AND KNOWS HE IS GIVING UP IMPORTANT RIGHTS;

C. HE AGREES WITH EVERYTHING IN IT;

D. HIS ATTORNEY NEGOTIATED IT WITH HIS KNOWLEDGE AND CONSENT;

E. HE HAS CONSULTED WITH HIS ATTORNEY ABOUT IT; AND

F. HE SIGNS IT KNOWINGLY AND VOLUNTARILY.

IN WITNESS WHEREOF, and intending to be legally bound, the Parties hereby execute this Agreement.

Jerome D'Agostino

Date: 4/15/15

Paymon Rouhanifard
State Superintendent
Camden City School District

Date: 4/20/15

Woodall, Celina

From: Microsoft Outlook
To: Ducan Kathleen (Kathleen.duncan@doe.state.nj.us); Heredia Cris (cris.heredia@doe.state.nj.us)
Sent: Friday, May 22, 2015 3:31 PM
Subject: Relayed: J.D., v. State-Operated School District of The City of Camden, Camden Cnty., EDU 16077-14, Decision Approving Settlement.

Delivery to these recipients or distribution lists is complete, but delivery notification was not sent by the destination:

Ducan Kathleen (Kathleen.duncan@doe.state.nj.us)

Heredia Cris (cris.heredia@doe.state.nj.us)

Subject: J.D., v. State-Operated School District of The City of Camden, Camden Cnty., EDU 16077-14, Decision Approving Settlement.

Sent by Microsoft Exchange Server 2007

Woodall, Celina

From: Microsoft Outlook
To: scohen@selikoffcohen.com; llessig@brownconnery.com
Sent: Friday, May 22, 2015 3:33 PM
Subject: Relayed: J.D., v. State-Operated School District of The City of Camden, Camden Cnty., EDU 16077-14, Decision Approving Settlement.

Delivery to these recipients or distribution lists is complete, but delivery notification was not sent by the destination:

scohen@selikoffcohen.com

llessig@brownconnery.com

Subject: J.D., v. State-Operated School District of The City of Camden, Camden Cnty., EDU 16077-14, Decision Approving Settlement.

Sent by Microsoft Exchange Server 2007

OAL DKT. NO. EDU 2105-14
AGENCY DKT. NO. 40-2/14

L.D., on behalf of minor child, K.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/18/15

Date of Mailing: 6/18/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2105-14

AGENCY DKT. NO. 40-2/14

L.D. ON BEHALF OF MINOR CHILD

K.D.,

Petitioners,

v.

ATLANTIC CITY BOARD OF EDUCATION,

Respondent.

Matthew Sykes, Esq., for petitioners (Lawyers Committee for Civil Rights Under Law, attorneys)

Amy Houck, Esq., for respondent, Atlantic City Board of Education (Cooper Levenson, attorneys)

Record Closed: April 6, 2015 Decided: May 19, 2015

BEFORE **BRUCE M. GORMAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 20, 2014, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties, as well as the Board Resolution approving the settlement.

2. The settlements fully dispose of all issues in controversy and are consistent with the law.

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

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

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

May 19, 2015
DATE

BRUCE M. GORMAN, ALJ

Date Received at Agency: 5-22-15

Date Mailed to Parties: 5-22-15

/jb

ATLANTIC CITY BOARD OF EDUCATION
Office of the Secretary

CitiCenter Building
1300 Atlantic Avenue – 5th Floor
Atlantic City, NJ 08401

Angela Brown
Board Secretary
(609) 343-7200 ext. 5020 - Fax (609) 347-1549

September 17, 2014

At the regular meeting of the Atlantic City Board of Education held on August 19, 2014 the following resolution was approved:

Resolution No. 14 8A 35: On a motion made by Mr. Cooper and seconded by Mr. Dooley, the Atlantic City Board of Education voted unanimously to amend Resolution No. 14 4A 26 from the April 29, 2014 to include the document numbers, at the request of presiding judge.

> On a motion made by Mr. Cooper and seconded by Ms. Bassford, the Atlantic City Board of Education to approve the Settlement Agreement and General Release dated March 27, 2014 between L.D o/b/o student 1438810 and the Atlantic City Board of Education, agency reference number 2014-20874 (EDS 03023-29145) and agency reference number 40-2/14 (EDU 0215-20145).

Respectfully,

Angela Brown

Angela Brown
Board Secretary

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement") is made and entered into as of this 27 day of March, 2014, between L.D. on behalf of K.D./K.G. (referred to herein as "PETITIONERS"), petitioners in that certain due process action (the "Due Process Action") pending in the State of New Jersey, Office of Special Education, Office of Administrative Law, and styled L.D. o/b/o K.D., Petitioners, vs. Atlantic City Board of Education, Respondents, Agency Reference Number 2014-20874, on the one hand, and Atlantic City Board of Education (referred to hereinafter as "RESPONDENTS") or "Atlantic City ", on the other hand.

By means of this Agreement, PETITIONERS intend to fully and unconditionally release any and all claims they, their heirs, administrators, executors, personal representatives, beneficiaries, and assigns may have against RESPONDENTS, and each of RESPONDENTS' affiliates, predecessors, successors, parents, subsidiaries, divisions, assigns, officers, directors, representatives, employees, former employees, insurers, attorneys, consultants and agents, (collectively referred to as "Releasees"), the remaining terms of which Agreement are now fully set forth in Paragraphs I through XVII below.

I. **Agreement**

The Petitioner and Respondent engaging in good faith negotiations have amicably resolved their disputes as asserted by this Agreement, both the Petitioner and Respondent voluntarily agree to the following:

A. Petitioner agrees to immediately withdraw with prejudice the above-captioned Complaint L.D. o/b/o K.D. v. Atlantic City Board of Education (Agency Reference Number 2014-20874) before the Department of Education Office of Special Education and L.D. v. K.D. v. Atlantic City Board of Education (Verified Petition & Emergent Relief Motion Agency Reference Number 40-2/14)before the Commissioner of Education Bureau of Controversies and Disputes. (Collectively the "Complaints")

B. In consideration for withdrawing Petitioner's Complaints the Respondent agrees to reinstate K.D., also known as K.G., at Atlantic City High School immediately upon his release from the Atlantic County Youth Detention Center. If, however, K.D./K.G. remains at a juvenile detention center and receives his education there and enough credits to graduate, the home instruction offer would become null and void. Essentially, the Respondent is unaware of what K.D./K.G. is charged with and how long he will be at the juvenile detention center. Presently, the Respondent agrees to allow K.D/K.G.

return to the Atlantic City High School unless he is forced to remain at a juvenile justice facility.

C. In addition to his immediate reinstatement, Respondent will provide K.D./K.G. a total of 30 hours of compensatory education. This compensatory education will be scheduled upon his reinstatement at the Atlantic City High School. The home instruction will take place either after school hours at Atlantic City High School or at L.D.'s home. The Atlantic City School District will provide home instruction for two hours per week day over the course of three weeks. L.D. will contact K.D./K.G.'s case manager, Tara Lake and inform her of her choice for the location of home instruction. If either the home instructor or K.D./K.G. are unable to participate in home instruction due to illness or a scheduling conflict, they will provide advance notice and reschedule the missed hours. K.D./K.G. agrees that should he miss a session of home instruction without prior notice, those hours will not be made up.

II. Covenant to Not Pursue Further Legal Action

PETITIONERS hereby covenant and agree that the Due Process Action and the Verified Petition and Emergent Relief Motion shall be dismissed with prejudice and without costs as to all parties. PETITIONERS shall take no further action against any individual or entity based upon the matters set forth within PETITIONERS' pleadings and/or based upon any other cause of action that PETITIONERS may have stemming or originating from the provision of education and related services by RESPONDENTS.

III. General Release

Whereas PETITIONERS brought the Actions alleging certain claims as set forth therein, including, but not limited to, claims for compensatory education, reimbursement for education services, counsel fees and other relief as set forth with more particularity within their pleadings, and in consideration for the terms and conditions set forth herein, PETITIONERS, and their heirs, successors and assigns, hereby voluntarily waive, generally release and discharge Releasees from any and all rights or claims that PETITIONERS may have against Releasees, for any and all reasons, including, but not limited to, any claims for equitable relief, and any other economic and/or non-economic damages whatsoever.

PETITIONERS specifically waive any claims which were or could have been set forth in the Actions, as well as any rights that PETITIONERS may have under:

- Title VII of the Civil Rights Act of 1964, as amended;
- The Civil Rights Act of 1991;

V. No Assignment or Transfer of Released Claims

PETITIONERS represent and warrant that as of the Effective Date, PETITIONERS have not assigned, transferred, or hypothecated, or purported to assign, transfer, or hypothecate, to any person, firm, corporation, association, or entity whatsoever any of the Released Claims. PETITIONERS hereby agree to indemnify and hold harmless Releasees against, without limitation, any and all rights, claims warranties, demands, debts, obligations, liabilities, costs, expenses (including attorneys' fees), causes of action, and judgments based on, arising out of, or connected with any such transfer, assignment, or hypothecation, or purported transfer, assignment, or hypothecation.

VI. No Admission of Liability

PETITIONERS understand and agree that this Agreement is a release of disputed claims and does not constitute an admission of liability on the part of RESPONDENTS as to any matters whatsoever and that RESPONDENTS merely intend by this Agreement to avoid further litigation and buy their peace.

VII. Modification

No provision of this Agreement may be changed, altered, modified or waived except in writing signed by PETITIONERS and a duly authorized representative of RESPONDENTS, which writing shall specifically reference this Agreement and the provision which the parties intend to waive or modify.

VIII. Dismissal

Contemporaneously with the execution of this Agreement, PETITIONERS shall dismiss the Petition, and shall cooperate or direct their counsel to cooperate with the execution and filing of any documents reasonably necessary to memorialize the dismissal of the Petition.

IX. Severability

In the event any provision of this Agreement should be held to be unenforceable, each and all of the other provisions of this Agreement shall remain in full force and effect.

X. Attorneys' Fees, Costs and Expenses

PETITIONERS understand and agree that each party is responsible for its own attorneys' fees and no party shall be considered a prevailing party under the law.

XI. Entire Agreement

The parties hereto acknowledge that this Agreement constitutes a full, final, and complete settlement of their differences and supersedes and replaces any and all other written or oral exchanges, agreements, understandings, arrangements, or negotiations between or among them relating to the subject matter hereof, and affirmatively state that there are no other prior or contemporaneous agreements, exchanges, representations, arrangements, or understandings, written or oral, between or among them relating to the subject matter hereof other than that as set forth herein, and that this Agreement contains the sole and entire Agreement between them with respect to the subject matter hereof. The parties hereto further acknowledge and agree that language proposed for, deleted from, or otherwise changed in the various drafts of this Agreement but not included herein shall not be considered in any way in the interpretation and application of this Agreement and shall not in any way affect the rights and obligations of the parties hereto.

XII. Understanding

PETITIONERS acknowledge and represent that they have read this Agreement in full and, with advice of counsel, understand and voluntarily consent and agree to each and every provision contained herein.

XIII. Applicable Law and Mutual Submission to Jurisdiction

This Agreement shall be construed and enforced according to the laws of the State of New Jersey. PETITIONERS agree to submit any and all disputes arising out of or based on this Agreement to the Office of Administrative Law of the State of New Jersey, except as to enforcing the terms of the agreement where petitioners may seek enforcement in any court of competent jurisdiction.

XIV. Counterparts Acceptable

This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the undersigned have executed this Agreement on the date shown below.

PETITIONER:

Lorna Dixon

LORNA DIXON
o/b/o Kaleb Dixon Gray

Date: 3/27/14

MATTHEW SYKES, ESQUIRE

Date: _____

IN WITNESS WHEREOF, the undersigned have executed this Agreement on the date shown below.

Donna L Haye/SS
Donna Haye, Superintendent

4/4/14
Date

- Sections 1981-1988 of Title 42 of the United States Code, as amended;
- The Americans with Disabilities Act of 1990, as amended;
- The New Jersey Law Against Discrimination;
- Individuals with Disabilities Education Act;
- Any other federal, state or local civil or human rights law or any other local, state or federal law, regulation or ordinance;
- Any public policy, contract, tort or common law; or
- Any allegation for costs, fees or other expenses including attorney's fees incurred in the Due Process Action or in any of these matters,

that they, their heirs, administrators, executors, personal representatives, beneficiaries, and assigns may have against Releasees for compensatory or punitive damages or other legal or equitable relief of any type or description. These claims shall be referred to as the "Released Claims".

IV. Release Includes Unknown Claims

A. PETITIONERS understand and agree that the Released Claims are intended to and do include any and all claims of every nature and kind originating from the provision of education and related services prior to the date of this agreement (whether known, unknown, suspected, or unsuspected and whether pursuant to any law or cause of action presently in effect or which may be enacted in the future) which they have or may have against the Releasees, individually or collectively.

B. PETITIONERS acknowledge that they may hereafter discover facts different from or in addition to those which they now know or believe to be true with respect to the Released Claims and agrees that, in such event, this Agreement shall nevertheless be and remain effective in all respects, notwithstanding such different or additional facts, or the discovery thereof.

C. PETITIONERS represent and acknowledge (i) that they and their attorneys have conducted whatever investigation was deemed necessary by them and their attorneys to ascertain all facts and matters related to this Agreement; (ii) that they have consulted with and received advice from legal counsel concerning this Agreement; (iii) that they are fully satisfied with their legal counsel, and (iv) that they are not relying in any way on any statement or representation by RESPONDENTS or its attorneys, except as expressly stated herein, in reaching their decision to enter into this Agreement.

OAL DKT. NO. EDU 7611-14
AGENCY DKT. NO. 122-5/14

P.A., on behalf of minor child, H.D.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PITMAN, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Because Paragraph 6 of the Settlement Agreement references potential claims for the provision of special education services, the parties are reminded that the Commissioner does not have jurisdiction over matters which may arise under the IDEA, the ADA, 42 *U.S.C.* Section 1983, and/or Section 504 of the Rehabilitation Act of 1973. Additionally, to the extent that Paragraph 4 of the Settlement Agreement provides for strict confidentiality, the parties are reminded that the Settlement Agreement may be subject to disclosure pursuant to the Open Public Records Act, *N.J.S.A.* 47:1A-1, *et seq.*

Subject to the foregoing, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/18/15
Date of Mailing: 6/18/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 07611-14
AGENCY DKT. NO. 122-5/14

P.A., ON BEHALF OF CHILD, H.D.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF PITMAN, GLOUCESTER COUNTY,
Respondent.

P.A., petitioner, pro se

Audra Pondish, Esq., for respondent (Wade, Long, Wood and Kennedy, LLC, attorneys)

Record Closed: February 26, 2015 Decided: May 14, 2015

BEFORE **ELIA A. PELIOS**, ALJ:

P.A., parent of H.D., challenges the respondent's determination to change her child's academic placement to the Gloucester County Alternative High School. The matter was transmitted to the Office of Administrative Law (OAL) on June 18, 2014, for a hearing.

On February 26, 2015, an executed settlement agreement and Board Resolution authorizing the settlement was received, which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures, and as confirmed by the representations of both counsel.

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

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

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

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

May 14, 2015
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: 5-15-15

Date Mailed to Parties: 5-15-15

/mel

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 Settlement agreement, received February 26, 2015

Court's Exhibits:

C-1 Certified minutes of Board of Education Addressing Settlement, received April 27, 2015

WADE, LONG & WOOD L.L.C
By: Audra A. Pondish, Esquire
1250 Chews Landing Road, Suite 1
Laurel Springs, NJ 08021
(856) 346-2800
Attorney for Respondent, Borough of Pitman Board of Education

P.A. o/b/o H.D. Petitioner(s) vs. Borough of Pitman Board of Education Respondent(s).	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW AGENCY REFERENCE NO: 122-5/14 OAL Docket No: EDU 07611-2014S SETTLEMENT AGREEMENT

WHEREAS, H.D. is a 16 year old student recently classified as Other Health Impaired and is eligible for special education and related services; and

WHEREAS, the Borough of Pitman Board of Education (hereinafter "Board" or "District") is the Local Educational Authority with responsibility for providing a free appropriate public education for H.D.; and

WHEREAS, a dispute arose over H.D.'s alternative educational program;

WHEREAS, the Petitioner filed a Petition of Appeal; and

WHEREAS, without waiving their respective positions and without any admissions by either party, parent of H.D. and the District wish to fully resolve all outstanding litigations between the parties pursuant to the terms set forth below;

NOW THEREFORE, it is agree by and between the parties hereto as follows:

1. H.D. will attend Salem County Special Services-Alternative High School for the balance of the 2014-2015 school year.
2. Upon attendance to Salem County Special Services, a 30 day review meeting will take place to amend the Individualized Education Plan ("IEP).
3. Parties agree that an annual review meeting will take place in June of 2015 to discuss H.D's program and placement for the 2015-2016 school year.
4. It is mutually agreed that the terms of this Agreement are and will remain confidential to the maximum extent permitted by law.
5. This Agreement is not an admission by either party of any liability, or the violation of any law, statute, or regulation, nor shall it be cited as precedent in any future judicial or administrative proceedings, except as needed for enforcement or interpretation of its specific terms.
6. The Petitioner agrees to all terms of this Agreement as complete, full and final satisfaction of all claims of any nature against the Respondent, Borough of Pitman Board of Education on behalf of herself and her child H.D., for anything that has happened up until the date on which the Petitioner signs this Agreement. This release includes, but is not limited to, further reimbursement for educational services, evaluation services, of any kind, and any and all claims and demands for compensatory education, incidental and punitive damages that may arise under the Individuals with Disabilities Education Improvement Act, 20 U.S.C. Section 1400 *et seq.*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 791 *et seq.*, the Americans with Disabilities Act of 1990, 42 U.S.C. Section 2101 *et seq.*, and any

regulations promulgated under any aforementioned laws, 42 U.S.C. Section 1983, or any other State or Federal law, statue, rule or regulation or common law, contract, policy or directive, for anything that has happened up until the date on which the Plaintiff signed this Agreement.

7. This Agreement represents the entire understanding between the parties and will not be modified, in whole or in part, except by a mutual subsequent written and signed Agreement. It is acknowledged that this Agreement has been entered into freely, willingly and voluntarily, without duress or coercion.

8. This Agreement is subject to formal approval by the Borough of Pitman Board of Education. In the event the District thereafter approves the Agreement, it shall be executed forthwith by the District and shall become effective upon approval by the Court.

9. This Agreement may be executed in counterparts, each of which when so executed and delivered shall be an original and all of which together shall constitute one and the same instrument.

IN WITNESS HEREOF, the parties have executed this Agreement on the dates set forth below:

Date: 2/13/15

Patricia Alexander, parent of H.D.

Date: 2/13/15

Dr. Patrick J. McAleer, Superintendent
Borough of Pitman Board of Education

Date: 2/18/15

Stacy DeClement, Board President
Borough of Pitman Public Schools

Pitman Public Schools

420 Hudson Avenue, Pitman, NJ 08071-1094
Administrative Office: (856) 589-2145 Business Office: (856) 589-0369 Fax: (856) 582-5465

Patrick J. McAleer, Ed.D
Superintendent of Schools
pmcaleer@pitman.k12.nj.us

Deborah J. Roncace, CPA
Business Administrator / Board Secretary
droncace@pitman.k12.nj.us

Motioned by Board Member Downham
Second by Board Member Savage

"That the Pitman Board of Education approves the legal settlement with the parent of SID# 5273083224 dated February 18, 2015."

Motion Approved 7-0-0

I hereby certify that this is a copy of the Original Minutes of The Pitman Board of Education Meeting held Wednesday, April 15, 2015.

April 17, 2015

Deborah J. Roncace

Deborah J. Roncace, Business Administrator/Board Secretary

210-15M

210-15

OAL DKT. NO. EDU 8838-15
AGENCY DKT. NO. 129-6/15

T.J., on behalf of minor child, R.D.	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
v.	:	DECISION ON
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the ALJ's recommended order denying petitioner's application for emergent relief is adopted for the reasons expressed therein. Because the present proceeding fully disposed of all issues in dispute between the parties, no further proceedings are necessary, and this matter is, therefore, dismissed with the request that the Clerk of the OAL return the file to the agency pursuant to *N.J.A.C.* 1:1-3.3.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/18/15

Date of Mailing: 6/19/15

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 8838-15
AGENCY DKT. NO. 129-6/15

T.J. ON BEHALF OF R.D.,
Petitioner,
v.
PENNSAUKEN TOWNSHIP BOARD OF EDUCATION,
Respondent.

T.V.J., and **R.D., Sr.**, petitioners and parents of **R.D.**, a minor child, pro se

Brett E. J. Gorman, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: June 18, 2015 Decided: June 18, 2015

BEFORE **JOSEPH F. MARTONE**, ALJ/t/a:

STATEMENT OF THE CASE

In this matter T.J. (petitioner) filed an application for emergent relief for an order permitting her son, R.D., to participate in the 8th grade commencement ceremony on this date at 6:30 p.m.

PROCEDURAL HISTORY

On June 17, 2015, petitioner filed a request for emergent relief which was transmitted to the Office of Administrative Law (OAL) on the same day. The matter was assigned to the undersigned for hearing on June 18, 2015. After a hearing which included brief testimony from both parties and the submission of evidence, the hearing and record was closed.

FINDINGS OF FACT

Petitioner states in her Petition (P-1) and respondent confirms, and I so **FIND** that R.D. failed to attain a passing math grade on his final eighth grade report card. As a result, T.V.J. was notified on June 15, 2015 that her son, R.D., had been denied the opportunity to participate in the 8th grade commencement scheduled to take place on June 18 at 6:30 p.m.

T.V.J. states that she requested an explanation why R.D. would not be able to participate in the graduation when she contends he has satisfied all educational requirements in accordance with New Jersey State Board of Education to be promoted to the 9th grade and that the school district failed to provide this. T.V.J. testified that she was advised by the someone in the county superintendent's office that R.D. met all requirements to graduate but could not identify that individual or refer me or respondent to the provisions of any law or regulations supporting her contention.

In response to petitioner, respondent relied upon the Certification (R-1) and testimony of Thomas Honeyman, Principal of the Howard Phifer Middle School, which R.D. attends. In his certification and testimony, Mr. Honeyman confirmed that R.D. has failed the 8th grade math class. In accordance with the school district's handbook and promotional ceremony practice (J-1), R.D. has not earned the right to participate in the 8th grade promotion ceremony. This policy states:

> Students who attain failing grades in one and/or two courses are required to attend summer school to receive credit for

the courses they failed. If the student does not attend summer school he/she will be retained in the grade level, and will not be promoted to the next grade.

LEGAL ANALYSIS

The authority to grant emergency relief is governed by the seminal case of Crowe v. DeGioia, 90 N.J. 126 (1982). That case sets forth the standard by which emergency relief can be granted. In order to do so, the petitioner must demonstrate compliance with all of the following:

1. that he will suffer irreparable harm;
2. that his legal right is settled;
3. that material facts are not in dispute;
4. that he has a reasonable probability of success on the merits and;
5. that the hardship to the petitioner out weighs the hardship to the other party.

With regard to the demonstration of irreparable harm by R.D.'s prohibition to attend 8th grade graduation ceremonies, I am mindful of the position taken by the Commissioner of Education in recent cases. See, e.g., M.L. v. Bd. of Educ. of Ewing, EDU 4949-09, Final Decision (June 15, 2009), <http://njlaw.rutgers.edu/collections/oal/>. The Commissioner has observed that harm is "irreparable" when there can be no adequate after-the-fact remedy in law or in equity, and monetary damages cannot adequately redress the intangibles of a lost experience after the event is over. In past cases denying similar applications for emergent relief, the irreparable nature of the harm and the degree or severity of the harm have frequently been addressed as a totality. They are, however, two separate factors and it is on the basis of this severity of the harm – which pertains to the weighing of the interest – and not its irreparable nature, that applications of this kind typically fail. In considering these comments by the Commissioner, I am satisfied that there is no adequate after-the-fact remedy or redress from the loss of the 8th grade graduation experience after the event is over, and that irreparable harm has been demonstrated. It

is noted, however, that success on this one prong of the Crowe case does not absolve the petitioner from demonstrating compliance with the other requirements.

With respect to whether petitioner's legal right to attend the ceremony is settled, I have attempted to review in the short time available to me provisions of State laws and Regulations in order to locate educational requirements of the State Board of Education to allow R.D. to graduate despite his failing of the math class. I have been unable to locate any such provisions. The only provision I have been able to locate is found at N.J.S.A. 18A:35-4.9(a), which authorizes local boards of education to adopt policies and procedures for pupil promotion and remediation related to district goals, objectives and pupil proficiency. Based upon this provision it appears clear to me that the respondent has the authority to adopt the provisions found in its policy (J-1). In the absence of any further proofs with respect to this issue, I **FIND** that petitioner has failed to demonstrate that the legal right of R.D. to graduate is settled.

Although I **FIND** that the material facts in this matter are not in dispute, I **FIND** that based on the evidence before me, petitioner has not established a reasonable probability of success on the merits.

With respect to weighing the hardship upon the parties if the remedy requested is granted or denied, I have previously recognized that preventing R.D. from participating in the 8th grade graduation ceremony amounts to an irreplaceable loss of a happy experience. However, I also recognize that granting the relief requested for R.D. would undermine the authority of the school district to require students to pass all required courses in order to graduate and that this undermining of authority would have a far reaching effect on the school district in its dealings with its students. Therefore, I **FIND** that the hardship to petitioner does not outweigh the hardship to the respondent school district.

Because I have found that petitioner has only established compliance with the irreparable harm requirement and has failed to establish compliance with the other

requirements, I **ORDER** petitioner's request for emergent relief be **DENIED.** This Order resolves all issues raised in the petition.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Department of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

June 18, 2015
DATE

JOSEPH F. MARTONE, ALJ/t/a

JFM/cmo

WITNESSES

For Petitioner:

T.V.J.

For Respondent:

Thomas Honeyman

EXHIBITS

Joint Exhibits:

J-1 School District Policy – Students being Retained or Attending Summer School

For Petitioner:

P-1 Petition for emergent relief

For Respondent:

R-1 Certification of Thomas Honeyman

211-15

BEFORE THE
COMMISSIONER OF EDUCATION
STATE OF NEW JERSEY

IN THE MATTER OF:	)	
	)	
Tenure Charges Against Barbara Jetton	)	
	)	
and	)	Case No. 359-12/14
	)	
West Windsor-Plainsboro Regional School District, Mercer County	)	
	)	

ORDER APPROVING
STIPULATION OF SETTLEMENT, RESIGNATION AND RELEASE

On Wednesday June 17, 2015 the undersigned Arbitrator, duly appointed by the Commissioner of Education received and executed Stipulation of Settlement, Resignation and Release ("Stipulation") and attached copy of the Signed Statement of Charges of Unbecoming Conduct and Just Cause. In addition, the Stipulation was accompanied by a duly executed Resolution of the West Windsor-Plainsboro Regional Board of Education Approving the Settlement Agreement between the West Windsor-Plainsboro Regional Board of Education and Barbara Jetton, ID No. 6370 ("Resolution")

The undersigned Arbitrator has reviewed the Stipulation and Resolution and have determined that the documents satisfy the standards set forth in N.J.A.C. 6a:3-5.6(a) (1) – (4). The Stipulation and Resolution will serve the public interest and eliminate potential additional litigation costs and expenses. It also meets the need for an expeditious and final resolution to the matter and the School Board will be able to resolve the matter expeditiously, at a comparatively low cost, and will avoid the uncertainty of litigation.

Accordingly and pursuant to my authority under N.J.A.C. 6A:3 – 5.6(c) the undersigned Arbitrator hereby APPROVES the Stipulation and attached Resolution.

ORDERED this 18th Day of June, 2017

Alan A. Symonette, Arbitrator

Commonwealth of Pennsylvania)
) ss.:
County of Philadelphia)

I, Alan A. Symonette, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Order.

Dated: June 18, 2015

Alan A. Symonette

Megan McCrea 6/18/2015

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Megan Mc Crea, Notary Public
City of Philadelphia, Philadelphia County
My Commission Expires Aug. 31, 2017
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

BEFORE THE
COMMISSIONER OF EDUCATION
STATE OF NEW JERSEY

IN THE MATTER OF:	)	
	)	
Tenure Charges Against Barbara Jetton	)	
	)	
and	)	Case No. 359-12/14
	)	
West Windsor-Plainsboro Regional School District, Mercer County	)	
	)	

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Megan Mc Crea 6/18/2015

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Megan Mc Crea, Notary Public
City of Philadelphia, Philadelphia County
My Commission Expires Aug. 31, 2017
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

Parker McCay, P.A.
1009 Lenox Drive
Building 4 East, Suite 102A
Lawrenceville, New Jersey 08648-2321
(609) 896-4222
Attorneys for the West Windsor-Plainsboro
Regional School District, Mercer County

IN THE MATTER OF TENURE CHARGES OF AGAINST BARBARA JETTON,	**BEFORE THE COMMISSIONER OF EDUCATION**
	AGENCY REF. NO. 359-12/14
and	
WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT, MERCER COUNTY	**STIPULATION OF SETTLEMENT, RESIGNATION, AND RELEASE**

The West Windsor-Plainsboro Regional School District, whose principal office is located at 505 Village Road West, West Windsor, New Jersey, 08550, as well as its successors, assigns, officers, employees, agents and representatives (collectively hereinafter referred to as the "District"), and Barbara Jetton, residing at 44 York Road, West Windsor, New Jersey, 08550, (hereinafter referred to as "Respondent") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, Resignation, and Release, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

WHEREAS, Respondent is a tenured teaching staff member employed by the District as a teacher; and

WHEREAS, Dr. David Aderhold, Superintendent of Schools, filed sworn tenure charges of conduct unbecoming and other just cause against Respondent, which were certified to the

Commissioner of Education of the State of New Jersey, captioned In the Matter of Tenure Charges Against Barbara Jetton, by the West Windsor-Plainsboro School District, Mercer County ("Tenure Charges"), for allegations related to the breach of standardized test confidentiality, and Respondent filed an answer opposing the charges; and the Commissioner of Education, having reviewed the charges and Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation, and accordingly referred the matter to Arbitrator Alan A. Symonette, Esq. ("Arbitrator") for a hearing; and

WHEREAS, Respondent has denied the allegations set forth in the tenure charges; and

WHEREAS, the Parties are aware of the uncertainty of the outcome of arbitration; and

WHEREAS the proposed Stipulation of Settlement, Resignation, and Release, is in the best interest of the Parties and the public because Respondent resigns from her employment without litigation and it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

NOW, THEREFORE, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. Concurrent with the execution of this Stipulation, Respondent shall submit an irrevocable letter of resignation to the District, which shall provide for her resignation from the District effective December 31, 2015, ("Effective Date"). (See Exhibit A to the Stipulation, a copy of Respondent's signed letter of resignation).

2. Upon final approval of the signed Stipulation by the Arbitrator, the District shall and hereby does withdraw the instant Tenure Charges. The District agrees to not pursue the subject Tenure Charges against Respondent as long as this Stipulation remains in effect and is not voided by any court or administrative agency of competent jurisdiction. In the event the

Stipulation is voided, the District retains the right to file and consider for certification, tenure charges against Respondent, including those tenure charges which have been previously filed against her by the District, and Respondent reserves the right to defend same.

3. Upon final approval of the signed Stipulation by the Arbitrator, Respondent shall remain on the payroll at her current yearly salary of $70,760.00, and she will be immediately placed on paid administrative leave through December 31, 2015. All salary paid for said period shall be subject to all applicable salary withholdings and deductions. Respondent shall not be entitled to any other compensation, including, but not limited to, back-pay.

4. Respondent understands that all compensation, inclusive of monetary and health benefits, under this Stipulation shall immediately cease if her certification is revoked by the State Board of Examiners, or other state appointed agency.

5. This Stipulation is based upon the understanding that Respondent's separation from employment with the District, effective December 31, 2015, will be deemed a voluntary resignation in good standing.

6. The Parties hereby agree and consent that this Settlement Agreement, Release, and Waiver, satisfies the standards set forth in N.J.A.C. 6A:3-5.6(a)(1) – (4). This includes agreement that the within Settlement Agreement, Release, and Waiver will serve the public interest, eliminating potential additional litigation costs and expenses. The parties agree that settlement of this case is justified by the need for an expeditious and final resolution. As a result of Respondent's irrevocable resignation, the Board will achieve a certain result, in an expeditious manner, at a comparatively low cost, and will avoid the uncertainty of litigation before an arbitrator.

7. In accordance with N.J.A.C. 6A:3-5.6 (a) 6, Respondent has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners. Respondent has been advised of the District's duty to notify the State Board of Examiners she has resigned. Further, Respondent has been advised that the District is legally required to participate in any proceedings initiated against Respondent's license by the State Board of Examiners resulting from the Commissioner's referral.

8. As of the Effective Date, all of Respondent's rights of employment with the District, including but not limited to accrued salary, benefits, tenure and seniority, will permanently end.

9. Respondent will not apply for reemployment with the District at any time and will be deemed to have permanently resigned from her tenured position. If Respondent does apply for reemployment with the District and is approved for employment, the terms of this Agreement shall control and shall be grounds for immediate termination of Respondent's employment.

10. In exchange for the consideration set forth in paragraph 3 above, the sufficiency of which is hereby acknowledged, Respondent hereby waives, releases and discharges any and all claims or rights that she has or may have against the District, the District's Superintendent, its Board of Education, and any and all other District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Respondent's employment with the District or separation from employment with the District. It specifically includes, without limitation, all claims that Respondent may have regarding tenure; withholding of increment; discrimination on any basis; any federal or state civil rights law; any alleged

violation of the Age Discrimination in Employment Act; as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law; unemployment compensation laws; disability benefits laws; retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution; the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract; implied contract; collective bargaining agreement; tort law; personal injury; or public policy; having any bearing whatsoever on her employment by and/or termination of her employment with the District, including but not limited to any claim for wrongful discharge; back pay; vacation pay; sick pay; wages; attorneys' fees; costs; and/or future wage loss, except for workers' compensation claims; Except that under no circumstance is Respondent waiving any right she has pursuant to N.J.S.A. 18A:16-6. It is explicitly understood that N.J.S.A. 18A:16-6 applies to

civil actions only and does not apply to administrative matters, including but not limited to, any matters before the State Board of Examiners or appeals from same.

11. Notwithstanding Paragraph 8 of this Settlement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 8, Respondent agrees not to seek or accept any resulting relief whatsoever.

12. To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises Respondent of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Stipulation of Settlement. Accordingly, by executing this Stipulation, Respondent acknowledges that she: (i) fully understands the terms and conditions of this Stipulation of Settlement; (ii) has consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives her right to pursue any current claims she may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Stipulation of Settlement; and (v) has 7 days from the date of the execution of this Stipulation of Settlement to revoke it. Respondent understands that she may rescind this Agreement within 7 calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the 7 day period.

13. This Stipulation, and all of its terms, are and will remain confidential to the extent permitted by law.

14. The Board agrees, through its Administration, to respond to post-employment inquiries regarding Ms. Jetton by providing basic work history type information, such as length of employment, date of resignation, and assignments. This letter, which shall be submitted in response to the post-employment inquiries, is attached as Exhibit B; however, the Board shall also provide fully and truthfully all such information as it may be legally required to provide to various governmental agencies or otherwise, including advising unemployment compensation, if any inquiry is made, that Ms. Jetton's resignation was in lieu of termination.

15. This Agreement shall not constitute a precedent in any matters involving other District employees.

16. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

17. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

18. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Stipulation.

19. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

20. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

21. If any provision of this Stipulation is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

22. The terms and conditions of this Settlement Agreement, Release, and Waiver, and Respondent's irrevocable letter of resignation, are subject to the ratification and approval of the Board.

23. Additionally, this Stipulation is subject to final approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and will become effective only upon approval by the Arbitrator. Counsel for the Parties shall jointly request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

RESPONDENT:

Dated: June 3, 2015

Barbara Jetton
BARBARA JETTON

WITNESS:

Dated: 6-4-15

SANFORD R. OXFELD, ESQ.

FOR THE DISTRICT:

Dated:_____

_____
ANTHONY FLERES, BOARD PRESIDENT

ATTEST:

Dated:_____

_____
LARRY SHANOK, BOARD SECRETARY

CERTIFICATION

I, Barbara Jetton, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: June 3, 2015

Barbara Jetton
BARBARA JETTON

CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):

Dated:_____

_____
JOSHUA S. SKLARIN, ESQ.,

Attorneys for the West Windsor-Plainsboro Regional School District

APPROVED:
Dated: 6/18/2015

_____
ALAN A. SYMONETTE, ARBITRATOR

EXHIBIT A

June 1, 2015
44 York Road
Princeton Junction, NJ 08550

Dr. David Alderhold, Superintendent of Schools
Members of the Board of Education of the West Windsor-Plainsboro Regional School District
505 Village Road, West, P.O. Box 505
West Windsor NJ 08550-0505

Dear Dr. Alderhold and Members of the Board of Education:

Please accept this as my irrevocable letter of resignation. I will be resigning my position as a tenured teaching staff member in the West Windsor-Plainsboro Regional School District, to be effective as of midnight on December 31, 2015. While I have enjoyed working with my colleagues and the exceptional students in this District, it is time to move on and explore alternative professional options.

Thank you both for accepting this letter of resignation and for giving me the opportunity to work in the West Windsor-Plainsboro.

Kind regards,

Barbara Jetton

EXHIBIT B

WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT

505 Village Road West
P.O. Box 505
West Windsor, New Jersey 08550-0505
Phone: (609) 716-5000, Ext. 5040
Fax: (609) 716-5022
E-mail: david.aderhold@ww-p.org

David M. Aderhold, EdD
Superintendent of Schools

May 15, 2015

TO WHOM IT MAY CONCERN

Barbara Jetton has been employed in the West Windsor-Plainsboro Regional School District as a high school English teacher since February 13, 2003. She has submitted her resignation effective December 31, 2015.

During her careeer in the school district, she has taught a wide spectrum of classes to high students in grades nine through twelve. She has taught at both of the district's high schools, West Windsor-Plainsboro High School North and West Windsor-Plainsboro High School South.

Her teaching assignments in the most recent years have included Language Arts II, Art of the Essay, Gender Roles in Literature, and AP Language and Composition. Ms. Jetton has also attended numerous professional development sessions regarding curriculum and instruction. In addition, Ms. Jetton participated on committees that developed curriculum for various courses.

For two years, Ms. Jetton served as the faculty advisor for the High School South literary magazine, ECHOES.

David M. Aderhold, EdD
Superintendent of Schools

Law Offices
PARKER McCAY P.A.
1009 Lenox Drive
Building Four East, Suite 102A
Lawrenceville, NJ 08648
(609) 896-4222
Attorneys for Petitioner West Windsor-Plainsboro Regional Board of Education

IN THE MATTER OF TENURE CHARGES AGAINST BARBARA JETTON, WEST WINDSOR-PLAINSBORO REGIONAL BOARD OF EDUCATION (MERCER COUNTY)	**STATEMENT OF CHARGES OF UNBECOMING CONDUCT AND OTHER JUST CAUSE**

Pursuant to N.J.S.A. 18A:6-10 and 6-11, the undersigned, Superintendent of Schools for the West Windsor-Plainsboro Regional School District in Mercer County ("the District" or "Petitioner"), hereby institutes tenure charges against Barbara Jetton (Respondent), a tenured teacher, for unbecoming conduct and other just cause. These charges are based upon incidents occurring during her employment in the 2013-2014 school year, as evidenced by the sworn statement of evidence and supporting documentation accompanying these charges. These incidents were of such a nature to warrant discharge from employment.

PART A: Unbecoming Conduct

The charge of unbecoming conduct is based on the following facts:

1. Ms. Jetton has been employed by the West Windsor-Plainsboro Regional Board of Education ("the Board") as a tenured high school Language Arts teacher.
2. Ms. Jetton has been employed by the District for approximately twelve (12) years.

3. On March 24, 2014, Ms. Jetton attended a training session for test administrators of the Partnership for Assessment of Readiness for College Careers ("PARCC") field test to be administered to her students on April 1, April 2 and April 3, 2014.
4. At the March 24, 2014, training session all attendees (including Ms. Jetton) were told that the PARCC field test was confidential and its content should be kept secure, just like the High School Proficiency Assessment ("HSPA") which all attendees had previously administered to their students.
5. At the end of the training session, all attendees were told to read and sign a "Spring 2014 PARCC Field Test Security Agreement," hereinafter referred to as the "Security Agreement."
6. The Security Agreement required inter alia, that each test administrator should "not view test content or student responses" nor "reveal or discuss test content or student responses before, during, or after testing."
7. Ms. Jetton signed the Security Agreement on March 24, 2014, indicating an understanding of its contents.
8. On April 6, 2014, Ms. Jetton sent an e-mail with an attached memo to four fellow Language Arts teachers asking them to review the memo before it was sent to Language Arts teachers and administrators in both of the District's high schools.
9. On April 9, 2014, Ms. Jetton sent the same memo to all District Language Arts teachers, as well as the Principal, Assistant Principal and Administrative Intern at West Windsor-Plainsboro High School North.

10. Ms. Jetton's memo stated, in part, as follows:

> "Last week my Art of the Essay Honors class participated in the PARCC test for the ELA version of the graduation exam. As proctor, I spent a great deal of time reading over their shoulders to see what each test involved, then I debriefed them daily to see what they thought of each assessment."

The memo went on to detail much of the contents of the PARCC filed test she proctored. Ms. Jetton's admitted actions were in direct violation of the PARCC security agreement which she signed on March 24, 2014.

PART B: Other Just Cause

The charge of other just cause is based upon the specifics supporting the foregoing charge of unbecoming conduct.

Dr. David Aderhold
Superintendent of Schools
West Windsor-Plainsboro Regional School District

Sworn and subscribed to
before me this 24 day
of November 2014

LILLIAN K. LEA
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES MARCH 16, 2019

213-15

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

SYNOPSIS

The petitioner challenged the determination of the respondent Board that her son, A.S., engaged in behavior that fell under the school district's policy against harassment, intimidation and bullying (HIB). This case stems from an incident that took place on or about May 22, 2014. Petitioner's appeal was not perfected until January 30, 2015. The respondent Board filed a motion to dismiss in lieu of an answer, contending that petitioner's appeal was filed beyond the 90-day period allowed under *N.J.A.C.* 6A:3-1.3(i).

The ALJ found, *inter alia*, that: there are no material facts in dispute here, and the matter is ripe for summary decision; petitioner was properly advised that she could request a hearing before the Board to reconsider the superintendent's decision regarding the HIB finding, and was also advised that the Board's decision could be appealed to the Commissioner no later than 90 days after the issuance of the decision; petitioner requested a hearing via correspondence received by the Board on September 19, 2014; the hearing was held on September 30, 2014, at which time the Board affirmed the superintendent's determination that A.S. had committed acts of HIB; both petitioner and her husband were present at the hearing; the Board's written decision was received by petitioner on October 14, 2014; petitioner submitted an incomplete appeal by mail, which was received by the Department of Education on December 30, 2014; petitioner was informed of the deficiencies in her appeal by letter, which stated that if the incomplete petition was perfected in a timely manner, the filing date of December 30th would be allowed; however, petitioner did not file the perfected petition until January 30, 2015. The ALJ concluded that petitioner failed to file her appeal within the 90 days allowed under *N.J.A.C.* 6A:3-1.3(i), and provided no evidence or law to allow the relaxation of the 90-day time limit. Accordingly, the ALJ granted summary decision to the Board and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ that the petitioner's appeal was time-barred under *N.J.A.C.* 6A:3-1.3(i). Accordingly, the Commissioner adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

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

Issued 6/19/15

OAL DKT. NO. EDU 2571-15
AGENCY DKT. NO. 28-1/15

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

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

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) determination that the petition of appeal was time barred under *N.J.A.C.* 6A:3-1.3(i). Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/19/15
Date of Mailing: 6/19/15

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 02571-15
AGENCY DKT. NO. 28-1/15

M.S. ON BEHALF OF A.S.
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY MIDDLESEX COUNTY,
Respondent.

M.S., pro se, failed to appear

Athena Lekas Cornell, Esq., for respondent, Board of Education of the Township of Cranbury (Sciarillo,Cornell, Merlino, McKeever &Osborne, attorneys)

Record Closed: May 11, 2015 Decided: May 18, 2015

BEFORE **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, M.S. on behalf of A.S. (M.S. or petitioner) filed an appeal of the determination of the Board of Education of the Township of Cranbury (Board) that A.S.

committed acts of harassment, intimidation or bullying (HIB) contact toward another student. On February 20, 2014, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Respondent filed a motion to dismiss in lieu of answer. A conference was held on March 19, 2015. At that time petitioner was given until April 10, 2015 to file a response to the motion. Petitioner requested an adjournment to file her response, which was granted. Apparently petitioner sent her response to the OAL office in Trenton. I received respondent's reply to petitioner's response on May 8, 2015. Respondent sent me a copy of petitioners' response to the motion on May 11, 2015.

FINDINGS OF FACT

Based on the procedural record in the file, I **FIND** the following **FACTS**:

On or about May 22, 2014, there was an incident with A.S and another student. The matter was investigated by the District and on June 17, 2014, the Board was provided with a report regarding the Districts findings. On June 23, 2014, petitioner was advised that the District found evidence that A.S. had committed an act of HIB. She was advised that she could request a hearing before the Board and that the Board's decision could be appealed to the Commissioner no later than ninety days after the issuance of the Board's decision. On September 19, 2014, the District received correspondence from petitioner requesting a hearing before the Board with respect to the HIB determination. A hearing before the Board was held on September 30, 2014. The Board affirmed that A.S. committed acts of HIB. It issued a written decision. Petitioner and her husband were present at the September 30, 2014 Board meeting. Jennifer Osborne (Osborne), an attorney for the Board was also present at this meeting. After the meeting, Osborne spoke to petitioner and her husband, informing them that the Board's decision may be appealed to the Commissioner of Education within ninety days. On October 1, 2014, petitioner was sent written notice from the Board by certified

mail, advising her of its decision and the fact that she could appeal the decision to the Commissioner of Education within ninety days of the issuance of the decision. Petitioner received the notice on October 14, 2014.

Petitioner states that her petition was timely filed because she mailed it out on December 27, 2014. However, the Department of Education received her letter requesting an appeal of the Board's decision on December 30, 2014. The Department of Education sent petitioner a letter stating that her appeal had to meet the requirements of N.J.A.C. 6A:3-1.1 et seq. The letter listed five specific items that must be included in the petition including that the petition must be filed within ninety day of the action which is the subject of the appeal. The letter further stated that The Department of Education will hold the materials that were submitted and if the necessary filings were **timely submitted** December 30, 2014 would be deemed as the filing date. The corrected petition for appeal was mailed by petitioner on January 23, 2015 and received by the Department of Education on January 30, 2015.

CONCLUSIONS OF LAW

Summary decision is the administrative counterpart to summary judgment in the judicial arena. N.J.A.C. 1:1-12.5 provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This language is substantially similar to the guidelines for summary judgment under R. 4:46-2(c), which provides in part that the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

In order to defeat a summary decision motion, the adverse party must respond by affidavits setting forth "specific facts showing that there is a genuine issue which can only be determined in an evidentiary hearing." Use of the summary procedure is aimed

at "the swift uncovering of the merits and either their effective disposition or their advancement toward prompt resolution by trial." Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954).

The New Jersey Supreme Court has encouraged trial-level courts "not to refrain from granting summary judgment when the proper circumstances present themselves." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 541 (1995). While cautioning that a judge should not weigh the truth of the evidence or resolve factual disputes at this early stage of the proceedings, the Court clarified that "when the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Id. at 540 (citations omitted).

Although respondent has filed a Motion to Dismiss rather than a Motion for Summary Decision, the same principles apply. I **CONCLUDE** that this matter is ripe for summary disposition. There are no material disputed facts which require a plenary hearing regarding the issue of whether the appeal was timely filed, and the Board is entitled to summary decision as a matter of law.

N.J.S.A. 18A:37-13.2 et seq., known as the Anti-Bullying Bill of Rights was enacted to strengthen the standards and procedures for "preventing, reporting, investigating and responding to incidents of harassment, intimidation and bullying of students that occur in school and off school premises." N.J.S.A. 18A:37-13.1(f). A parent or guardian may request a hearing before a school board, which must be heard within ten days of the request. N.J.S.A. 18A:37-15b(6)(d). Among the obligations of a board of education to respond to a complaint of HIB, it must issue a written decision affirming, rejecting or modifying a superintendent's decision which the parents/guardians have ninety days to appeal to the Commissioner of Education. N.J.S.A. 18A:37-15b(6)(e).

N.J.S.A. 18A:37-15(b)(6)(e) provides the following: "...The Board's decision may be appealed to the Commissioner of Education, in accordance with the procedures set forth in law and regulation, **no later than 90 days after the issuance of the Board's decision**." In this matter the Board issued its decision on September 30, 2014. Petitioner was present at the board meeting. Petitioner was told directly after the hearing that she had ninety days within which to file an appeal on September 30, 2014 by Osborne, the Board's attorney. The Department of Education received an incomplete request for an appeal from petitioner on December 30, 2014, which is ninety-one days after the Board issued its decision. The ninety-day requirement is to be strictly construed and is mandatory. See eg. Wise v. Bd. of Educ. of the City of Trenton, EDU 160-00, Comm'r (September 11, 2000), aff'd, State Bd. of Educ. (January 3, 2001), http://njlaw.rutgers.edu/collections/oal/. The date that a petition is filed is the date it is received by the Department of Education, not the date that petitioner mailed the petition.

Petitioner was informed by letter that her petition was incomplete and told that if she filed a corrected petition in a timely manner the petition would be considered filed on December 30, 2014. The Department of Education did not receive the petition until January 30, 2015. This is a delay of several weeks. Petitioner did not timely provide the requested information; therefore the petition was filed on January 30, 2015.

Petitioner in her brief cited two cases where the ninety day requirement was relaxed. In P.P, a minor by his Parent and Guardian v. Board of Education of the Pinelands Regional School District, 2011 N.J. Super.Unpub. LEXIS 66, the plaintiff filed an appeal of a suspension with two counts; Count One requesting his suspension be reversed and expunged from his disciplinary record, Count Two the Board's zero tolerance policy violates his procedural due process rights under the New Jersey Constitution. The petition was filed out of time. The Court affirmed the dismissal of Count One because the petition was filed out of time. Count Two was remanded to consider the merits of the constitutional claim. P.P was decided based on R- 69-6(c) regarding when actions in Lieu of Prerogative Writ shall commence. The present case

is not an action in lieu of prerogative writ and there is no constitutional claim in the petition. Petitioner also cites the case of Board of Education of TWP of Waterford vs. Board of Education of Town of Hammonton 2009 N.J. Super. Unpub. 2252. which involved a mediation requirement that would toll the ninety day requirement. There is no mediation requirement in this case.

For the above reasons, I **CONCLUDE** that petitioner failed to file an appeal within ninety days of the issuance of the Board's decision. I further **CONCLUDE** that petitioner has not provided any evidence or law to allow relaxation of the ninety day filing timeline.

ORDER

Based on the foregoing, it is **ORDERED** that the matter be **DISMISSED.** I **DIRECT** the Clerk to return the matter to the Commissioner of the Department of Education for appropriate disposition.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

5-18-15
DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

Date Mailed to Parties: MAY 19 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

'2-14 15

DARCY KOLODZIEJ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTHERN REGIONAL HIGH SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – formerly employed as a teaching staff member in respondent Board's school district – alleged that the failure of the Board to employ her for the 2007-08 school year violated her tenure and seniority rights. The petitioner was employed as a teacher in the school district for the 2002-03 through 2004-05 academic years, before taking a Board-approved maternity leave for the 2005-06 school year; she then returned to work for the 2006-07 school year. The petitioner sought reinstatement to her tenured position, together with back pay and emoluments. The Board contended that the petitioner had not acquired tenure because of a break in service, and that her non-renewal in April 2007 as part of a reduction in force (RIF) was proper. The case was heard at the OAL, and the ALJ issued an Initial Decision which concluded that petitioner: had obtained tenure and had 3.9 years of seniority credit at the time of the RIF; should have been recalled by the District in September 2007; and was entitled to retroactive back pay in the amount of $137,212 for the 2007-08 through 2009-10 school years, as well as seniority credit for the same years. In a decision dated May 16, 2013, the Commissioner rejected the Initial Decision, determining that petitioner had not attained tenure pursuant to *N.J.S.A.* 18A:28-5 at the time of her dismissal in 2007. Petitioner appealed this decision, and on July 24, 2014, the Appellate Division reversed and remanded the matter to the Commissioner for a determination of petitioner's seniority rights and any consequent entitlement to relief.

On remand, the Commissioner noted that the only dispute between the parties regarding the Appellate Division's instructions on remand was whether the petitioner is entitled to seniority credits for 30 days under *N.J.A.C.* 6A:32-5.1(b) for her unpaid maternity leave during the 2005-06 school year. The Commissioner found, *inter alia*, that: the interpretation of *N.J.A.C.* 6A:32-5.1(b) is key to the determination of petitioner's seniority entitlement because the amount of back pay and seniority credit is dictated by whether the petitioner is entitled to 30 days of credit for the 2005-06 school year, when she was out on unpaid maternity leave; and if petitioner receives the 30 day credit for that period, she would have acquired 3.9 years of seniority credit at the time of the 2007 RIF and would have had more seniority than the teacher retained by the District. In light of the Appellate Division's interpretation of *N.J.A.C.* 6A:32-5.1(b) in *Erica A. Cohen v. Emerson Board of Education*, 225 *N.J. Super.* 324 (App. Div. 1988), the Commissioner has no discretion but to find that the petitioner is entitled to receive 30 days of seniority credit for the 2005-06 school year – despite the fact that she was on an unpaid maternity leave for more than 30 days – and therefore, at the time of the RIF, petitioner had 3.9 years of seniority credit and should have been recalled in September 2007. Accordingly, the Commissioner determined that petitioner is entitled to retroactive back pay in the amount of $137,212 and seniority credits for the 2007-08 through 2009-2010 school years.

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

Issued 6/19/15

OAL DKT. NO. EDU 6491-07
AGENCY DKT. NO. 188-7/07

DARCY KOLODZIEJ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTHERN REGIONAL HIGH SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

This matter originated as a petition of appeal filed by the petitioner, Darcy Kolodziej – a health and physical education teacher – challenging the Southern Regional High School District's (District) decision not to renew her employment for the 2007-08 school year due to a reduction in force (RIF). The Administrative Law Judge (ALJ) issued a series of Orders over the course of the litigation that addressed petitioner's tenure and seniority rights and her entitlement to damages, followed by an Initial Decision that confirmed the ALJ's previous findings. The ALJ ultimately determined that the petitioner obtained tenure and seniority rights with the District. The ALJ found that at the time of the RIF in 2007, the petitioner had acquired 3.9 years of seniority credit – which was more seniority than that of Edmond Costa, another physical education teacher in the District who had acquired 3.8 months of seniority credit. As a result, the petitioner should have been recalled by the District in September 2007 instead of Mr. Costa. The ALJ further determined that petitioner was entitled to retroactive back pay, less unemployment benefits received by the petitioner, in the amount of $137,212.00 for the 2007-08,

2008-09 and 2009-10 school years, and seniority credit for those years as if she were properly employed. [1]

In a decision dated May 16, 2013, the Commissioner rejected the Initial Decision and determined that the petitioner had not attained tenure at the time of her dismissal in 2007. The petitioner appealed the Commissioner's May 16, 2013 decision, and on July 24, 2014, the Appellate Division reversed and remanded this matter to the Commissioner for a determination of petitioner's seniority rights and any consequent entitlement to relief. Specifically, the Appellant Division suggested that the Commissioner evaluate whether the petitioner is entitled to 30 days of seniority credit for the 2005-2006 school year under *N.J.A.C.* 6A:32-5.1(b), in light of the fact that the petitioner was out on unpaid maternity leave for the entire school year. [2]

Seniority is part of the regulatory framework adopted under authority of *N.J.S.A.* 18A:28-10 to establish the order of dismissals among a district's tenured staff in the event of a reduction in force. The only dispute between the parties regarding the Appellate Division's instructions on remand is whether the petitioner is entitled to seniority credit for 30 days under *N.J.A.C.* 6A:32-5.1(b) for her unpaid maternity leave during the 2005-2006 school year. Pursuant to *N.J.A.C.* 6A:32-5.1(b):

> Seniority, pursuant to N.J.S.A. 18A:29-9 et seq., shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided. The periods of unpaid absences not exceeding 30 calendar days aggregate in one academic or calendar year, leaves of absence at full or partial pay and unpaid absences granted for study or research shall be credit toward seniority. All other unpaid absences or leaves of absence shall not receive seniority credit.

---

[1] Pursuant to the ALJ's interim Order, the District reinstated the petitioner to her former position in September of 2010.

[2] Following the remand of this matter from the Appellate Division, the parties were afforded an opportunity to submit their respective positions in connection with the petitioner's seniority rights.

The interpretation of *N.J.A.C.* 6A:32-5.1(b) is a key component of the petitioner's seniority entitlement in this case because the amount of back pay and seniority credit is dictated by whether the petitioner is entitled to 30 days of credit for the 2005-2006 school year when she was out on an unpaid maternity leave. Specifically, if the petitioner receives a 30 day credit for the 2005-2006 school year, she would have acquired 3.9 years of seniority credit at the time of the 2007 RIF and would have been entitled to a position as a physical education teacher for the 2007-2008 school year. On the other hand, if the petitioner does not get credit for 30 days of her unpaid maternity leave, she would have acquired 3.8 years of seniority credit at the time of the 2007 RIF and would have been tied for seniority with Mr. Costa. It is undisputed that in the case of a tie, a board of education has the discretion to determine which teacher to recall.

In *Erica A. Cohen v. Emerson Board of Education*, 225 *N.J. Super.* 324 (App. Div. 1988) the Appellate Division considered competing seniority rights of two teachers and analyzed the language contained in *N.J.A.C.* 6A:32-5.1(b).[3] One component of the appeal in that case involved a challenge to the State Board of Education's interpretation of *N.J.A.C.* 6A:32-5.1(b). The State Board of Education interpreted the plain language of *N.J.A.C.* 6A:32-5.1(b) to preclude "credit for any portion of an unpaid leave which, when totaled with all other unpaid leaves during that calendar or academic year, is in excess of 30 days. *Erica A. Cohen v. Emerson Board of Education*, 1985 S.L.D. 2562, 2573-2574. The State Board further noted that its "interpretation is consistent with the purpose of the seniority system to insure equitable determinations on the basis of actual service, and we find that to broaden the exception provided by *N.J.A.C.* 6:3-1.10(b) would undermine that purpose." *Id.* at 2574.

[3] At the time of the *Cohen, supra*, decision the predecessor regulation to *N.J.A.C.* 6A:32-5.1(b) was *N.J.A.C.* 6:3-1.10(b), which includes the identical language contained in *N.J.A.C.* 6A:32-5.1(b).

On appeal the Appellate Division recognized and accepted the State Board of Education's position regarding the purpose of the seniority system and the importance of "equitable determinations on the basis of actual service." *Cohen, supra*, 225 *N.J. Super.* at 10. However, the court rejected the State Board of Education's interpretation of the language found in *N.J.A.C.* 6A:32-5.1(b), and instead found that under *N.J.A.C.* 6A:32-5.1(b), the first 30 days of an unpaid maternity leave is counted toward seniority, and any additional leave time is not credited for seniority purposes. The court expounded, "[i]f the Board has determined that 30 days' aggregate leave within a year is sufficiently inconsequential not to affect an employee's seniority rights, then the rule should be equitably applied to those who take more or less than that period." Applying that interpretation of the regulatory language, the court concluded that the petitioner in *Cohen, supra*, was entitled to seniority credit for the first 9 days of her maternity leave that was paid sick time and the first 30 days of her unpaid maternity leave; and the remainder of her unpaid maternity leave was properly deducted from her seniority credits. *Cohen, supra*, 225 *N.J. Super.* at 10-11.

In light of the Appellate Division's interpretation of *N.J.A.C.* 6A:32-5.1(b) in *Cohen, supra*, the Commissioner has no discretion but to find that the petitioner is entitled to receive 30 days of seniority credit for the 2005-2006 school year despite the fact that she was on an unpaid maternity leave for more than 30 days. Therefore, at the time of the reduction in force in 2007, the petitioner had acquired 3.9 years of seniority credit. As a result, the petitioner had more seniority than Mr. Costa and she should have been recalled by the District in September 2007. Finally, neither the Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654, nor the Collective Bargaining Agreement between the parties dictate a different result as neither can serve to give the petitioner less rights than that afforded by the applicable regulatory provision.

Accordingly, the petitioner is entitled to retroactive back pay, less unemployment benefits received by the petitioner[4], in the amount of $137,212.00 for the 2007-08, 2008-09, and 2009-10 school years.[5] The petitioner is also awarded seniority credits for the 2007-08, 2008-09, and 2009-10 school years as if she had actually been employed.

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: 6/19/15

Date of Mailing: 6/19/15

[4] The District is responsible for reimbursing the unemployment benefits to the Department of Labor and a copy of this decision will be forwarded to that Department.

[5] Following the remand of this matter from the Appellate Division, the petitioner requested that the Commissioner award her damages in the form of lost wages and other benefits stemming from a RIF that occurred in 2013. Any potential damages that were the result of the 2013 RIF were not a part of this case. If the petitioner believed that the Board violated her tenure and seniority rights in 2013, a separate petition of appeal should have been filed.

[6] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

212-15

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF EARL RUSH, SCHOOL DISTRICT OF THE UNION COUNTY VOCATIONAL-TECHNICAL SCHOOLS, UNION COUNTY	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

On March 18, 2015, the petitioning school district served upon respondent an Order to Show Cause why an order should not be entered suspending his teaching certificate for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 for resigning his position on inadequate notice. The respondent failed to answer the order. Respondent was duly advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to respond would cause each allegation raised by the Board to be deemed admitted, and might result in summary decision by the Commissioner.

There being no response to the order to show cause, the Commissioner concluded that the allegations – which respondent has chosen not to deny – may be deemed admitted, and justify suspension of respondent's certification. Accordingly, summary decision was granted to petitioner, and respondent's certificate is suspended for a period of one year from the date of the filing of this decision – a copy of which has been forwarded to the State Board of Examiners for the purpose of effectuating this order.

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

Issued 6/19/15

AGENCY DKT. NO. 44-3/15

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF EARL RUSH, SCHOOL DISTRICT OF THE UNION COUNTY VOCATIONAL-TECHNICAL SCHOOLS, UNION COUNTY	COMMISSIONER OF EDUCATION DECISION

For petitioner, Robert F. Varady, Esq. (LaCorte, Bundy, Varady & Kinsella)

No appearance by or on behalf of respondent

This matter was opened before the Commissioner of Education on March 18, 2015, by way of an Order to Show Cause served by petitioner (Union County Vocational-Technical School District) upon respondent (Earl Rush), requiring respondent to show cause why an order should not be entered suspending his teaching certificate pursuant to *N.J.S.A.* 18A:26-10 for resigning without giving the notice required by his contract with petitioner. By notice dated March 19, 2015, the Bureau of Controversies and Disputes (Bureau) acknowledged receipt of proof that the Order to Show Cause had been served upon respondent and directed respondent to answer within 20 days. A second acknowledgment was sent on April 8, 2015 to correct a potential typographical error.[1]

No answer having yet been received, on April 17, 2015, the Bureau sent respondent a final notice – via regular and certified mail – directing that he file an answer within ten days. The notice advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to answer would cause each allegation in petitioner's papers to be deemed admitted, and might result in summary decision by the Commissioner. The notice sent by certified mail was returned by the postal

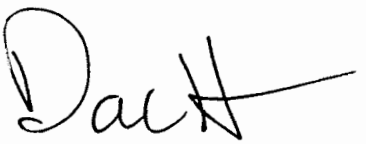
[1] The record reflects some confusion over whether respondent's house number is 576 or 578. Therefore, the Bureau sent the acknowledgment and final notice to both addresses as explained herein.

service as unclaimed; however, the notice sent by regular mail was not returned. Due to some confusion regarding respondent's house number, another final notice was sent to respondent – via regular and certified mail – on May 22, 2015. The certified mailing was claimed on May 23, 2015, as indicated by the return receipt received by the Bureau, and the notice sent by regular mail was not returned. No answer to the Order to Show Cause has been filed as of this date.

Having reviewed petitioner's affidavit in this matter – which states that respondent ceased working as a teacher without giving the 60 days written notice required by his employment contract – and noting that respondent has not denied the allegations therein, the Commissioner deems such allegations admitted pursuant to *N.J.A.C.* 6A:3-1.5(e) and further deems them sufficient to justify suspension of respondent's teaching certification pursuant to *N.J.S.A.* 18A:26-10.

Accordingly, summary decision is hereby granted to petitioner, and respondent's teaching certification is suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.[2]



COMMISSIONER OF EDUCATION

Date of Decision: 6/19/15

Date of Mailing: 6/19/15

[2] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

EDWARD SADLOCH, CHARLES MANZO, BRIAN GOGERTY, MICHAEL WEBER AND DAVID SINISI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CEDAR GROVE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

The petitioners herein are football coaches who, during the 2013-2014 school year, coached students in the respondent Board's athletic program. Petitioners Sadloch and Manzo are the head football coach and assistant football coach, respectively; the remaining petitioners served as volunteer assistant coaches for the team. Petitioners challenged a determination by the Board that they engaged in conduct that constituted harassment, bullying and intimidation (HIB) as that term is defined under *N.J.S.A.* 18A:37-14. This matter arose out of a complaint from a Cedar Grove student athlete that the petitioning coaches engaged in a pattern of conduct that made the high school football program uncomfortable for this particular student. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: the matter is ripe for summary decision, as the evidence is overwhelming that the petitioners must prevail as a matter of law; regarding petitioners Sadloch, Manzo, and Sinisi, it was learned during discovery that there was never any finding by the Board or school district administration that they had engaged in conduct that constituted HIB under *N.J.S.A.* 18A:37-14; regarding volunteer coaches Weber and Gogerty, the documents that accompanied the parties' submissions did not make clear the basis for the HIB charge against these volunteer coaches, and neither of them were afforded the due process guaranteed them under the statute, as the Board – among other things – failed to comply with the investigatory process contained in the statute. The ALJ concluded that there is no other remedy herein but the removal of any mention of HIB from petitioners' files. Accordingly, the ALJ ordered that any references to HIB be expunged from the personnel and/or volunteer files maintained by the Board in regard to the petitioning football coaches.

Upon comprehensive review of this matter, the Commissioner concurred with the ALJ's findings and conclusions. Accordingly, the Initial Decision of the OAL was adopted as the final decision and the Commissioner ordered that any reference to HIB be removed from all of the named petitioners' files.

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

June 23, 2015

OAL DKT. NO. EDU 619-14
AGENCY DKT. NO. 303-12/13

EDWARD SADLOCH, CHARLES MANZO, BRIAN GOGERTY, MICHAEL WEBER AND DAVID SINISI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CEDAR GROVE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the respective exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioners and the Board of Education (Board), and the replies thereto.

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) – for the reasons stated in the Initial Decision – that the Board did not comply with the provisions contained in *N.J.S.A.* 18A:37-15 for Harassment, Intimidation and Bulling (HIB) investigations. Notably the Board never issued a written decision affirming, rejecting or modifying the Superintendent's decision; the coaches were not afforded an opportunity to appear before the Board; and it was not until the parties exchanged discovery in the context of the within matter that three of the coaches ascertained that neither the Board nor the school administration found them to have engaged in HIB.[1] The Commissioner is also in accord with the ALJ's conclusion that in light of the lack of documentation and the state of the record, there

[1] The school administration determined that only coaches Brian Gogerty and Michael Weber committed an act of HIB.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 00619-14
AGENCY DKT. NO. 303-12/13

EDWARD SADLOCH, CHARLES MANZO,
BRIAN GOGERTY, MICHAEL WEBER AND DAVID SINISI,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP
OF CEDAR GROVE, BERGEN COUNTY,
Respondent.

Steven Farsiou, Esq., for petitioners (Kelly, Trinity and Farsiou, attorneys)

Michael Williams, Esq., for respondent (Cruser, Mitchell and Sanchez, attorneys

Record Closed: March 2, 2015 Decided: March 26, 2015

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Petitioners are football coaches. During the 2013-2014 school year they coached students in the Cedar Grove Board of Education's (the Board) athletic program. Petitioners challenge a determination by the Board that they engaged in

conduct that constituted harassment, bullying and intimidation (HIB) as that term is defined by N.J.S.A. 18A: 37-14.

PROCEDURAL HISTORY

Petitioners filed their appeal with the Commissioner of Education (the Commissioner) on December 12, 2013. The Board filed an answer on January 14, 2014, and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case on January 15, 2014. Several hearing dates were adjourned while the parties sought, in the end unsuccessfully, to amicably resolve this dispute. Petitioners filed a motion for summary decision on November 3, 2014. The Board replied via cross-motion on December 4, 2014. Petitioners responded to the cross-motion on January 2, 2015. Oral argument took place on February 9, 2015. Thereafter, via letter dated February 18, 2015, I asked counsel to supplement the record with a copy of the final decision referenced in a checklist annexed to Mr. Farsiou's certification as Exhibit C. Upon receipt of correspondence from counsel, the record closed on March 2, 2015.

FINDINGS OF FACT

The salient background facts are uncontroverted, and I **FIND**:

During the 2013-2014 school year, Edward Sadloch was employed by the Board as head coach of the Cedar Grove football team, having held this position for twenty-four years. Charles Manzo was employed as assistant football coach. The remaining petitioners, Brian Gogerty, Michael Weber, and David Sinisi, served as volunteer assistant coaches for the Cedar Grove team.

This matter arose with a complaint by A.P., a Cedar Grove student athlete, that the petitioning coaches engaged in a pattern of conduct that made the high school football program uncomfortable for him. His complaint was verbally communicated to school administration on August 28, 2013, and was referred the following day to the Anti-Bullying Specialist, Joseph McBride, who had A.P. put his concerns in writing. A.P. alleged that the coaching staff harassed him by requiring that he remain after practice

for extra "conditioning"; unfairly assigned him homework because he misused the word "slightly" in response to a question; and that, because he was inquisitive, placed question marks all over his jersey with tape, advising him that he reminded the coaches of "the Riddler," a character from Batman. A.P. wrote that these were the main instances of abuse directed at him, but indicated that the coaching staff also criticized his hair and suggested that it resembled that of a Black person; generally referred to the student athletes as "idiots, retards, fatties, fatsos"; and made offensive comments to the students, to include, for example, "that kid has an IQ below 40."

McBride investigated A.P.'s concerns, and issued a report on or about September 9, 2013. McBride found that nothing alleged by A.P. rose to HIB, with the exception of Weber's action in covering A.P.'s jersey with question marks. The investigative report noted that coaches Gogerty and Sinisi knew about Weber's conduct "but did not intercede." McBride stated that "[t]heir intention was like Coach Michael Weber's in that they wished to help make [A.] more self aware of his questioning and the need for a quicker on field response to a play." The report determined that the distinguishing characteristic of the targeted student was "frequently and repeatedly asking questions."

Superintendent of Schools Michael Fetherman advised the Board about the HIB investigatory findings at its September 10, 2013, meeting of the Board. Upon reviewing McBride's findings, apparently the Board determined that both Weber and Gogerty violated the Board's HIB policy. It is difficult to know for certain, because the Board failed to put the rationale for its decision in writing. Indeed, accompanying counsel's certification as Exhibit C was a checklist that confirms the steps taken by school district administration and the Board to investigate the allegations of HIB lodged by A.P. It paraphrases legal requirements, stating, "[the] Board must issue decision, in writing, to affirm, reject or modify the superintendent's decision, at next board meeting following receipt of report. Board's decision may be appealed to the Commissioner of Education within 90 calendar days." The checklist then indicates that the Board issued a written decision on October 22, 2013.

The record supplied to me in support of the cross-motions did not include any such written decision by the Board; accordingly, I held the record open and inquired further of counsel. In reply, counsel for the Board could share no such written decision, and I **FIND** that none exists. Rather, he shared a copy of Board minutes from its September 10, 2013, meeting, and advised that the decision to affirm the findings of the administrative HIB investigation was made that night, and remained unmodified following the subsequent meetings with petitioners, A.P., and his parents. But the minutes shared with me reveal no determination relative to HIB, rather they simply note that relative to "an incident involving student number 301430" discipline was imposed on "Employees A-E."

Also according to Fetherman, the Board adopted McBride's conclusion that the targeted distinguishing characteristic was A.P.'s propensity to ask many questions, but likewise determined that the harassment was motivated by the perceived characteristic of having a mental disability. Again, no written Board decision confirms these findings.[1] The confusion created by the lack of a formal Board decision cannot be minimized. Indeed, Fetherman's certification gives the impression that the other ridicule A.P. claimed to have endured, including name-calling such as references to idiots and retards, was a further basis for the Board's HIB finding. But counsel for the Board urged at oral argument that the HIB finding was based exclusively on Weber's and Gogerty's actions in placing question marks on A.P.'s jersey and calling him "the Riddler," and that the remaining allegations were shared by Fetherman exclusively to provide a context for the HIB-related findings. But again, the Board issued no written determination that would clarify its rationale, or more importantly, give Gogerty or Weber clear notice of the charges against them.

In any event, there appears to be no dispute and I **FIND** that the Board determined that Sadloch, Manzo, and Sinisi did not violate the HIB law, but rather exercised poor judgment and failed to meet professional expectations. Via letter dated September 13, 2013, Gogerty and Weber were advised that they were being placed on

[1]Answers to interrogatories are the first a written document that states that the distinguishing characteristic that motivated the coaches' actions is "a mental disability." This was not reflected in the report completed by McBride. It is not reflected in the report supplied to A.P.'s parents. It is not reflected in any other documents generated by the Board that were shared with me.

administrative leave for the duration of the football season. The remaining petitioners received similar letters dated September 13, 2013. Sadloch was placed on leave for the first game of the season. Manzo was placed on leave for the second and third game of the season. Sinisi was placed on leave until October 9, 2013. All the petitioning coaches were directed to complete an online training program entitled "Teaching and Modeling Behavior." Not one of these letters mentions HIB, however.

Fetherman claims to have met privately with Gogerty and Weber, and to have verbally advised them that the Board found that they violated the HIB law. He offers no date upon which that conversation took place, and petitioners disagree that it did. The parties do agree that on September 30, 2013, a meeting took place at which A.P.'s parents, Fetherman, Board counsel, petitioners and their counsel were present, and during which Fetherman confirmed that an HIB investigation had taken place. Again, none of these meetings resulted in written confirmation of what was discussed. The parent report dated September 17, 2013, confirms a finding that Gogerty and Weber committed acts that rose to HIB, but this document was not shared with them until after suit was filed. This document is likewise nonspecific in regard to the rationale for the Superintendent's findings; including neither a description of the precise conduct at issue or the "distinguishing characteristic" that he concluded met the statutory definition of HIB.[2]

A.P.'s parents requested a Board-level hearing, which took place on October 8, 2013. While Fetherman states in his certification that petitioners and their counsel were present at that meeting, counsel for the Board agreed with petitioners' assertion that they were not. This is not the exclusive error in the Fetherman certification. Indeed, in certified answers to interrogatories, Fetherman stated that only Weber engaged in conduct that rose to HIB and that the remaining petitioners engaged in unprofessional conduct. His answer is inconsistent with the certification filed in support of this motion, in which he asserts that both Weber and Gogerty were found to have engaged in HIB.

[2] The document recounts A.P.'s various complaints, but then generally finds an HIB violation without specifying more.

CONCLUSIONS OF LAW

The parties' motions are filed in accordance with N.J.A.C. 6A:3-1.5(g), which permits the filing of a motion to dismiss in lieu of an answer. The rule provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c), which provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214. This matter is ripe for summary decision. Relative to Sadloch, Sinisi, and Manzo, I **CONCLUDE** that they are entitled to the relief they seek as there was never any finding by the Board or school district administration that they

engaged in conduct that constituted bullying or harassment under N.J.S.A. 18A:37-14. Any documents that reflect otherwise should be expunged from their personnel and/or volunteer files.[3] I **CONCLUDE** that Gogerty and Weber are entitled to dismissal of the HIB charges against them in view of the gross violations by this Board of its investigatory and due process obligations under N.J.S.A. 18A:37-15.

This appeal asks that I consider whether the conduct engaged in by Weber and Gogerty rose to bullying as defined by law, and whether these two volunteer athletic coaches were afforded adequate due process during the course of the Board's investigation of the charges filed against them by student athlete, A.P. N.J.S.A. 18A:37-14 defines HIB to include:

> [A]ny gesture, any written, verbal or physical act . . . whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds . . . that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging a student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or be severely or pervasively causing physical or emotional harm to the student.

[3] The rights and obligations established by the Anti-Bullying legislation clearly apply to school volunteers. Indeed, N.J.S.A. 18A:37-13 provides that, " . . . since students learn by example, school administrators, faculty, staff and volunteers should be commended for demonstrating appropriate behavior, treating others with civility and respect, and refusing to tolerate harassment, intimidation or bullying." (Emphasis supplied.)

Districts are required by law to adopt policies that prohibit HIB; that outline expectations for student behavior; that set forth consequences for inappropriate behavior; and create procedures for reporting HIB related concerns. N.J.S.A. 18A:37-15. A school anti-bullying specialist must be assigned to each school, and the results of HIB investigations must be shared with the Superintendent of Schools and the Board of Education. Moreover, the law specifically requires as follows:

> (c) the results of each investigation shall be reported to the board of education no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent;
>
> (d) parents or guardians of the students who are parties to the investigation shall be entitled to receive information about the investigation, in accordance with federal and State law and regulation, including the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, or whether discipline was imposed or services provided to address the incident of harassment, intimidation, or bullying. This information shall be provided in writing within 5 school days after the results of the investigation are reported to the board. A parent or guardian may request a hearing before the board after receiving the information, and the hearing shall be held within 10 days of the request. The board shall meet in executive session for the hearing to protect the confidentiality of the students. At the hearing the board may hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents;
>
> (e) at the next board of education meeting following its receipt of the report, the board shall issue a decision, in writing, to affirm, reject, or modify the superintendent's decision. The board's decision may be appealed to the Commissioner of Education, in accordance with the procedures set forth in law and regulation, no later than 90 days after the issuance of the board's decision . . . .
>
> [N.J.S.A. 18A:37-15 (emphasis supplied).]

Regulations promulgated by the Department of Education further assist local districts in complying with these statutory requirements. N.J.A.C. 6A:16-7.9. The Commissioner has recognized that these requirements have equal applicability when a bullying charge is directed against a staff member. See K.T. on behalf of K.H. and T.D. v. Deerfield Bd. of Educ., EDU 00489-13, Initial Decision (June 19, 2013), rev'd and remanded, Comm'r (July 30, 2013), http://njlaw.rutgers.edu/collections/oal/> (where, in the context of a claim that a teacher bullied a kindergarten student, the Commissioner confirmed that the internal HIB investigation mandated by law is not discretionary).

Neither Weber nor Gogerty were afforded the due process that was guaranteed them by statute. While the law provides that "parents or guardians of the students who are parties to the investigation" must receive written information about that investigation, this requirement must be held to extend to staff members and volunteers whose conduct is implicated by a bullying allegation. The intent of a statute or regulation should be gleaned from a view of the whole and of every part of the statute, with the real intention prevailing over the literal sense of its terms. Schierstead v. City of Brigantine, 29 N.J. 220 (1959). Here, the bullying statute can be subject to no other logical interpretation; indeed, without knowing what has been alleged how can a staff member determine whether and upon what factual basis to file an appeal with the local board or the Commissioner? More importantly, how can that staff member or volunteer know how to redirect his behavior in the future?

Indeed, this appeal exemplifies the harm that can flow from a failure to interpret the statute as I suggest. Five coaches filed this petition; only after formal discovery did they learn that three did so unnecessarily. Neither the Board nor administration had found them to have engaged in HIB. The remaining two could not parse out the basis for the determination that they had engaged in HIB; only during discovery did they learn that their conduct was thought to have been motivated by the perception that A.P. had a low mental ability. I shared their confusion. Indeed, the documents that accompanied the parties' submissions left me perplexed as to the basis of the HIB charge against Weber and Gogerty, and only through the assistance of counsel was I able to ascertain that exclusively their conduct in placing question marks on A.P.'s jersey was at issue. The inconsistencies in the Fetherman submissions buttressed my perception that even

district personnel were not entirely clear which coaches engaged in HIB, or why they thought that they did so.

Moreover, the Board clearly knew what its statutory responsibilities entailed, and even developed a checklist to ensure that it met all of its obligations. Notwithstanding this effort, Weber and Gogerty never were afforded an opportunity to appear before the Board; never were provided a written summary of the investigation of the charges against them; nor ever given a written decision from the Board in which it explained its rationale for upholding the charges against them. The fact that these coaches were volunteers does not diminish my conclusion that their rights were violated. Football is a high-profile sport, and volunteer coaching opportunities can grow into paid positions. Weber and Gogerty had a right to defend the charges against them. I **CONCLUDE** that because the Board failed to comply with the investigatory process contained in statute, any reference to HIB should be expunged from the volunteer files maintained for Weber and Gogerty by the Board.

Petitioners assert that their conduct did not rise to HIB as that term is defined by law. But the record created via the Board's internal investigation does not permit me to properly make a determination relative to this critical issue. While McBride's investigatory report fully explains his rationale for determining what conduct constituted HIB, and appears to state that Weber is responsible, once the matter moved to the Superintendent and the Board apparently a broader view of who was involved in the alleged misconduct resulted. But neither Weber nor Gogerty were given a proper opportunity at the local level to formally respond to clearly articulated charges against them.

For this additional reason, I **CONCLUDE** that the law permits no other remedy but the removal of any reference to HIB from these coaches' files. The Anti-Bullying statute is quite specific in regard to the sort of investigation required, and it includes tight timelines for completing the steps needed to properly investigate a claim that bullying took place. These timelines are in place for several reasons; first and foremost to ensure that victim's concerns are promptly addressed, but also because charges of this nature are best explored promptly, when memories are fresh. Here, the events at

issue took place well over a year ago. In theory a remand to the Board, or allowing a hearing before me to serve as a substitute for the required local investigatory steps, are possible remedies. But I **CONCLUDE** that such remedies would unfairly prejudice these volunteer coaches.

ORDER

Base on the foregoing, it is **ORDERED** that any reference to HIB be deleted from the personnel and/or volunteer files maintained by the Board in regard to the petitioning football coaches.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

March 26, 2015

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: March 26 2015

Date Mailed to Parties: MAR 27 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

217-15

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

In the Matter of the Tenure Charges Against

JODI THOMPSON

and

THE STATE-OPERATED SCHOOL DISTRICT OF THE

CITY OF NEWARK

Agency Docket No.: 240-8/14 and 16-1/15

AWARD OF ARBITRATOR

The undersigned Arbitrator, having been designated as Impartial Arbitrator by authority of the Commissioner of Education of the State of New Jersey in accordance with the TeachNJ statute, N.J.S.A. 18A:6-17, and having been duly sworn, and having duly heard the proofs and allegations of the parties, after applying the criteria set forth in the TeachNJ statute AWARDS as follows:

Based on the evidence submitted, the Tenure Charges filed against Respondent, Jodi Thompson, by the State Operated School District of the City of Newark cannot be sustained. Respondent's Motion to Dismiss these tenure charges is hereby granted.

All claims by Respondent alleging violation of the Family Medical Leave Act by the District or alleging that retribution for Respondent's use of FMLA leave in the 2013-14 school year was a factor in her annual evaluation have been thoroughly considered by the Arbitrator and are hereby rejected as unsubstantiated in the evidentiary record.

Respondent Thompson shall be returned forthwith to employment by the State Operated School District of the City of Newark, with uninterrupted medical benefits. The 120 days pay lost as a consequence of the filing of tenure charges shall be reimbursed to her, less any substitute interim earnings during this interval.

The Arbitrator hereby retains jurisdiction for the purposes of resolving any and all disputes regarding the tenure charges brought against Respondent Jodi Thompson by the State-Operated School District of the City of Newark, including the remedy herein ordered.

June 19, 2015

Daniel F. Brent, Impartial Arbitrator

State of New Jersey
County of Mercer

On this 19th day of June, 2015 before me personally came and appeared Daniel F. Brent, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.

Notary Public
State of New Jersey

BETH PATCHEL
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 4/21/2020

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

In the Matter of the Tenure Charges Against

JODI THOMPSON

and

THE STATE-OPERATED SCHOOL DISTRICT OF THE

CITY OF NEWARK

Agency Docket No.: 240-8/14 and 16-1/15

Hearings were held in the above-entitled matter on October 27, November 14, November 17 and November 24, 2014 at the New Jersey State Board of Mediation in Newark, New Jersey, before Daniel F. Brent, duly designated by the New Jersey Commissioner of Education as Impartial Arbitrator pursuant to N.J.S.A. 18A: 6-17, the Teacher Effectiveness and Accountability for the Children of New Jersey (TeachNJ) statute. Both parties participated in these hearings, were represented by counsel, and were afforded full and equal opportunity to offer testimony under oath, to cross examine witnesses, and to present evidence and arguments.

The evidentiary record was declared closed on November 24, 2014, subject to the receipt of the stenographic transcript and the subsequent submission of post-hearing briefs by both parties. After the record had closed, but before post-hearing briefs were filed, counsel for the School District of Newark requested, by letter dated December 19, 2014, that the instant matter be held in abeyance because the School District had filed a second set of tenure charges for inefficiency against the Respondent arising from the same set of facts and circumstances during the 2012-2013 and 2013-2014 school years, the difference being that the new charges were brought under Section 8 of N.J.S.A. 18A: 6-16, rather than Section 25, of N.J.S.A. 18A: 6-17.

Counsel for Respondent Jodi Thompson opposed the School District's request to hold the instant matter in abeyance, and asserted that there was no statutory or equitable basis for suspending the proceedings addressing the initial tenure charges after the close of the record. The Arbitrator considered the School District's request and Respondent's reply opposing the request, and issued an Interim Award dated January 16, 2015, which denied the District's motion for suspending the first proceeding and held that the District cannot materially increase the exposure of the Respondent to culpability and penalty by adding a cause of action after the hearing phase of a tenure charge proceeding had ended and the evidentiary record has been closed.

The controversy concerning whether issues raised by the second set of charges could be considered in a second proceeding was deferred and consolidated for consideration in the context of addressing the original tenure charges.

The parties submitted post-hearing briefs, followed by a succession of written exchanges commenting on arbitrators' awards issued after the parties' briefs had been submitted in which various interpretations of the TeachNJ statute by other arbitrators were discussed. Both parties reiterated various aspects of their arguments in light of these subsequent decisions. The Arbitrator requested and received extensions of time to address these additional submissions, and now renders his Award and Opinion after considering the initial set of tenure charges, the second set of tenure charges to the extent discussed below, and the subsequent written communications submitted by counsel for both parties.

APPEARANCES

For the State-Operated School District of Newark

Brenda C. Liss, Esq., of Riker, Danzig, Scherer, Hyland and Perretti, Esqs.

Janelle Edwards-Stewart, Esq., Office of General Counsel, SOSD

Yolanda Mendez, Principal of Roberto Clemente Elementary School

Sheila Laurenceau, Vice-Principal, Roberto Clemente Elementary School

For Respondent Jodi Thompson

Charles I. Auffant, Esq., of Stuart Ball, LLC

William Tiersten, Esq., of Stuart Ball, LLC

Jodi Thompson, Respondent

ISSUE SUBMITTED

What shall be the disposition of the tenure charges filed against Respondent, Jodi Thompson, by the State Operated School District of the City of Newark?

NATURE OF THE CASE

Respondent Jodi Thompson was employed as a teacher by the State-Operated School District of the City of Newark (hereafter, the District or the Board) at the Roberto Clemente Elementary School, where she was assigned to teach Pre-kindergarten classes until the 2013-14 school year, when she was initially assigned to teach a Kindergarten class. Respondent Thompson was observed teaching in her classroom by her Building Principal and by two Assistant Principals on multiple occasions during both the 2012-13 and 2013-14 school years. At the conclusion of the 2012-13 school year, Respondent was rated Partially Effective in her annual evaluation. This rating was primarily the result of the deduction of two points when computing a value for Competency 5, regarding "Commitment to Personal and Collective Excellence", one of the categories of the newly implemented rubric for evaluating teachers under the District's Teacher Practice Evaluation Instrument, which was approved by the New Jersey Department of Education in mid-October 2012.

The deduction of points was made because the Respondent had been absent fourteen times and tardy eighty-two times during this school year. In addition, Respondent arrived and punched in between 8:18 and 8:20 a.m. on sixty-five other days. The balance of the annual evaluation, which was conducted using a rubric that the District implemented in or about

October 2012, addressed Respondent's pedagogical techniques, teaching strengths and weaknesses, and classroom management skills in sections designated as Competencies 1 through 4. But for the negative impact of Respondent's attendance record for the year, she would not have received a Partially Effective summative rating for the 2012-13 school year.

As a result of the Partially Effective rating, the Principal prepared a Corrective Action Plan (CAP) designed to assist Respondent in improving her teaching techniques and to alert Respondent to the negative impact of her attendance and tardiness record on her annual evaluations. Respondent Thompson was invited to participate in the refinement of the CAP. The extent to which she was afforded this opportunity, and to which she engaged in collaborative interaction in order to improve the design of the CAP or to modify the expectations established under the CAP, was disputed during the arbitration hearings.

The version of Respondent's CAP to be implemented for the 2013-14 school year was not finalized until on or about October 14, 2013, which Respondent contends invalidated the CAP, as it was implemented after the September 15th deadline established under the TeachNJ statute. Respondent raised this defense, among others, in support of her position that the tenure charges filed against her should be dismissed. The District asserted that the implementation of the CAP was timely because the District had received written

authorization from a designee of the Commissioner of Education explicitly extending until October 15, 2013 the deadline for finalizing Corrective Action Plans for teachers who had been rated Partially Effective in the 2012-13 school year.

Among the other defenses interposed by Respondent were that the 2012-13 school year evaluation was precluded from consideration by operation of the provisions of the TeachNJ statute, which provided that school districts throughout the state had to complete their implementation of new evaluation rubrics no later than January 31, 2014. According to Respondent, this deadline and other factors considered by arbitrators adjudicating TeachNJ efficiency cases involving 2012-13 annual summative ratings supported her assertion that, whatever shortcomings in her teaching performance, including attendance and tardiness issues, occurred during the 2012-13 school year could not be used by the District as a basis for tenure charges seeking termination of Respondent's employment for inefficiency as a teacher under the TeachNJ statute.

Respondent also asserted that the evaluation process conducted during the 2013-14 school year, when both parties agree the rubrics tested by the District during 2011-12 and approved by the Commissioner of Education in October 2012 were fully operative, was procedurally defective, as a major

evaluation had been arbitrarily and capriciously implemented, and thus her annual summative rating could not form a proper basis for a tenure charge, as the defenses to tenure charges alleging inefficiency explicitly provided by the TeachNJ statute include arbitrary and capricious action by the District. Respondent asserted that the primary pre-announced classroom evaluation of her performance was inherently unfair and procedurally flawed because she was observed on her first day of student contact in her new assignment as a writing support specialist, while dealing with unfamiliar children in a blended classroom that included students with special education needs, although she was not licensed as a special education teacher, and at grade levels with which she was not experienced. Respondent characterized the scheduling of this evaluation on her first day of teaching after returning from an extended Family Medical Leave (FMLA) Act leave as an arbitrary and capricious action by the District establishing one of the limited defenses to tenure charges specifically established by the TeachNJ statute.

The District refuted these allegations, contending that annual evaluations of the Respondent as Partially Effective for both the 2012-13 and the 2013-14 school years could properly be considered to support tenure charges for inefficiency because Newark was among a small number of school districts for whom the Commissioner of Education had approved 2011-12 as a pilot year for the development of new evaluation rubrics under the TeachNJ statute. Moreover, according to the District, the Department of Education had

approved the District's evaluation instrument in time for implementation early in the 2012-13 school year, and the District had negotiated contract language with the Newark Teachers Union permitting implementation of an approved rubric for evaluating teacher performance beginning in the 2012-13 school year. The District cited various statutory provisions in support of its position.

The District asserted that Respondent was properly evaluated on multiple occasions, and was offered coaching and other assistance by a master teacher, but that she failed fully to utilize these resources, declined opportunities to observe other successful teachers in her building, and consistently failed to implement the differentiated, individualized teaching techniques that the District reasonably expected its teachers to incorporate into their lessons. The District defended its methods of evaluation and the rating of Respondent Thompson as Partially Efficient for two consecutive school years as proper actions under the TeachNJ statute. The District disputed that any procedural defect existed in the evaluation process, denied that the defect alleged by Respondent had materially affected the outcome of Respondent's evaluations, and moved for the tenure charges to be sustained.

The legal arguments offered by Respondent and by the District have been set forth in detail in their post-hearing submissions, and thus need not be reiterated at length herein.

RELEVANT STATUTORY LANGUAGE

TEACHNJ ACT

8. N.J.S.A. 18a:6-16:

* * *

If, following receipt of the written response to the charges, the commissioner is of the opinion that they are not sufficient to warrant dismissal or reduction in salary of the person charged, he shall dismiss the same and notify said person accordingly. If, however, he shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section [23] 22 of P.L. 2012 Ch. 26 for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for purposes of deciding the motion.

* * *

[23] 22. (New Section)

* * *

b. The following provisions shall apply to a hearing conducted by an arbitrator pursuant to N.J.S. 18A:6-16, except as otherwise provided pursuant to P.L. , c. (C

(1) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case;

* * *

(3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely, including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.

Discovery shall not include depositions, and interrogatories shall be limited to 25 without subparts.

c. The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the

American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

d. Notwithstanding the provisions of N.J.S. 18A:6-25 or any other section of law to the contrary, the arbitrator shall render a written decision within 45 days of the start of the hearing.

e. The arbitrator's determination shall be final and binding and may not be appealable to the commissioner or the State Board of Education. The determination shall be subject to judicial review and enforcement as provided pursuant to N.J.S. 2A:24-7 through N.J.S. 2A:24-10.

f. Timelines set forth herein shall be strictly followed; the arbitrator or any involved party shall inform the commissioner of any timeline that is not adhered to.

g. An arbitrator may not extend the timeline of holding a hearing beyond 45 days of the assignment of the arbitrator to the case without approval from the commissioner. An arbitrator may not extend the timeline for rendering a written decision within 45 days of the start of the hearing without approval of the commissioner. Extension requests shall occur before the 41st day of the respective timelines set forth herein. The commissioner shall approve or disapprove extension requests within five days of receipt.

* * *

(d) The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.

(e) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case. The arbitrator shall render a decision within 45 days of the start of the hearing.

8A:6-123 Review, approval of evaluation rubrics.

17.

b. The State Board of Education shall promulgate regulations pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), to set standards for the approval of evaluation rubrics for teachers, principals, assistant principals, and vice-principals. The standards at a minimum shall include:

(1) four defined annual rating categories for teachers, principals, assistant principals, and vice-principals: ineffective, partially effective, effective, and highly effective;

(2) a provision requiring that the rubric be partially based on multiple objective measures of student learning that use student growth from one year's measure

to the next year's measure;

(3)a provision that allows the district, in grades in which a standardized test is not required, to determine the methods for measuring student growth;

(4) a provision that multiple measures of practice and student learning be used in conjunction with professional standards of practice using a comprehensive evaluation process in rating effectiveness with specific measures and implementation processes. Standardized assessments shall be used as a measure of student progress but shall not be the predominant factor in the overall evaluation of a teacher;

(5) a provision that the rubric be based on the professional standards for that employee;

(6) a provision ensuring that performance measures used in the rubric are linked to student achievement;

(7) a requirement that the employee receive multiple observations during the school year which shall be used in evaluating the employee;

(8) a provision that requires that at each observation of a teacher, either the principal, his designee who shall be an individual employed in the district in a supervisory role and capacity and who possesses a school administrator certificate, principal certificate, or supervisor certificate, the vice-principal, or the assistant principal shall be present;

(9) an opportunity for the employee to improve his effectiveness from evaluation feedback;

(10) guidelines for school districts regarding training and the demonstration of competence on the evaluation system to support its implementation;

(11) a process for ongoing monitoring and calibration of the observations to ensure that the observation protocols are being implemented correctly and consistently;

(12) a performance framework, associated evaluation tools, and observation protocols, including training and observer calibration resources;

(13) a process for a school district to obtain the approval of the commissioner to utilize other evaluation tools; and

(14) a process for ensuring that the results of the evaluation help to inform instructional development.

d. Beginning no later than January 31, 2013, a board of education shall implement a pilot program to test and refine the evaluation rubric.

e. Beginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric for all educators in all elementary, middle, and high schools in the district. Results of evaluations shall be used to identify and provide professional development to teaching staff members. Results of evaluations shall be provided to the commissioner, as requested, on a regular basis.

18A:6-124 Regulations.

24. The State Board of Education shall promulgate regulations pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), in accordance with an expeditious time frame, to set standards for the approval of evaluation rubrics for all teaching staff members, other than those included under the provisions of subsection b. of section 17 of P.L.2012, c.26 (C.18A:6-123). The standards at a minimum shall include: four defined annual rating categories: ineffective, partially effective, effective, and highly effective.

28. This act shall take effect in the 2012-2013 school year, except that section 17 of this act shall take effect immediately. The Department of Education shall take such anticipatory administrative action in advance thereof as shall be necessary for the implementation of this act.

Approved August 6, 2012.

17. a. The Commissioner of Education shall review and approve evaluation rubrics submitted by school districts pursuant to section 16 of P.L.2012, c.26 (C.18A:6-122). The board of education shall adopt a rubric approved by the commissioner.

b. The State Board of Education shall promulgate regulations pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), to set standards for the approval of evaluation rubrics for teachers, principals, assistant principals, and vice-principals. The standards at a minimum shall include:

(1) four defined annual rating categories for teachers, principals, assistant principals, and vice-principals: ineffective, partially effective, effective, and highly effective;

(2) a provision requiring that the rubric be partially based on multiple objective measures of student learning that use student growth from one year's measure to the next year's measure;

(3) a provision that allows the district, in grades in which a standardized test is not required, to determine the methods for measuring student growth;

(4) a provision that multiple measures of practice and student learning be used in conjunction with professional standards of practice using a comprehensive evaluation process in rating effectiveness with specific measures and implementation processes. Standardized assessments shall be used as a measure of student progress but shall not be the predominant factor in the overall evaluation of a teacher;

(5) a provision that the rubric be based on the professional standards for that employee;

(6) a provision ensuring that performance measures used in the rubric are linked to student achievement;

(7) a requirement that the employee receive multiple observations during the school year which shall be used in evaluating the employee;

(8) a provision that requires that at each observation of a teacher, either the principal, his designee who shall be an individual employed in the district in a supervisory role and capacity and who possesses a school administrator certificate, principal certificate, or supervisor certificate, the vice-principal, or the assistant principal shall be present;

(9) an opportunity for the employee to improve his effectiveness from evaluation feedback;

(10) guidelines for school districts regarding training and the demonstration of competence on the evaluation system to support its implementation;

(11) a process for ongoing monitoring and calibration of the observations to ensure that the observation protocols are being implemented correctly and consistently;

(12) a performance framework, associated evaluation tools, and observation protocols, including training and observer calibration resources;

(13) a process for a school district to obtain the approval of the commissioner to utilize other evaluation tools; and

(14) a process for ensuring that the results of the evaluation help to inform instructional development.

c. A board of education shall adopt a rubric approved by the commissioner by December 31, 2012.

d. Beginning no later than January 31, 2013, a board of education shall implement a pilot program to test and refine the evaluation rubric.

e. Beginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric for all educators in all elementary, middle, and high schools in the district. Results of evaluations shall be used to identify and provide professional development to teaching staff members. Results of evaluations shall be provided to the commissioner, as requested, on a regular basis.

f. The commissioner shall establish a model evaluation rubric that may be utilized by a school district to assess the effectiveness of its teaching staff members.

OPINION AND ANALYSIS

Many of the arbitrators who have been designated under the TeachNJ statute to decide tenure charges of teaching inefficiency brought against teachers employed by the State Operated School District of the City of Newark during the 2012-13 school year have rendered opinions stating that evaluations conducted during this year cannot form a valid basis for inefficiency charges under the TeachNJ statute. Tenure charges for misconduct during the 2012-13 school year that were brought under Section 8 of N.J.S.A. 18A:6-16, and thus were not dependent on assessment of the pedagogical techniques and classroom performance, have been properly distinguished as suitable for supporting tenure charges because, unlike teachers facing tenure charges for inefficiency under Section 25 of N.J.S.A. 18A: 6-17, the misconduct charges brought under Section 8 of the TeachNJ statute were not dependent upon application of an approved performance evaluation framework, also known as a rubric. Teach NJ requires that: "Beginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric for all educators in all elementary, middle, and high schools in the district."

According to the Respondents in the tenure cases decided by several of my colleagues, no inefficiency tenure charge could properly be brought before the deadline established under TeachNJ mandating that all New Jersey public

school districts develop rubrics satisfying TeachNJ statutory teacher evaluation criteria had passed. Based on this premise, the Newark School District's use in 2012-13 of rubrics developed by the District in 2011-12 was deemed premature, and thus invalid, notwithstanding the designation of the Newark School District by the Commissioner of Education, among as many as eleven of the 604 public school districts in New Jersey, as a pilot district for TeachNJ during the 2011-12 school year. School districts, other than these specially designated pilot districts, could not implement approved rubrics to determine whether a teacher was performing with high efficiency, efficiency, partial efficiency, or inefficiency until the 2013-14 school year. At issue in the instant case is whether a similar restriction governing the use of 2012-13 teacher evaluations performed under the District's Teacher Practice Evaluation Instrument, approved by the New Jersey Department of Education in mid-October 2012, must be applied to the Newark District in the instant case.

Nothing in the provisions of the TeachNJ statute explicitly created a two-year, much less a four-year, hiatus during which ineffective teachers would be immune from evaluations of their performance resulting in discipline or discharge. Nor has any arbitrator on the Tenure Panel held, to my knowledge, that gross misconduct during 2012-13 must be ignored or condoned because school districts were impotent to react to misconduct or conduct unbecoming under both the old tenure law and the new TeachNJ law when it became effective. This arbitrator, and many others, have resolved tenure cases alleging

conduct unbecoming a teacher, principal, or other school employee that arose before and during the 2012-13 school year. These cases were governed by the procedures and criteria set forth in Section 8 of N.J.S.A. 18A:6-16.

Similarly, nothing in the new TeachNJ statute precludes a school district that had been designated a pilot district in 2011-12 and successfully implemented a rubric approved by the Commissioner in 2012-13 from evaluating its teachers under the approved teaching performance assessment criteria. That the statute imposed a specific deadline by which every district in the state was to have implemented these new rubrics in accordance with the standards of TeachNJ neither precludes valid assessment of teachers for 2012-13 by other districts using the standards previously approved by the Commissioner nor invalidates utilization of the newly approved rubrics by Newark to evaluate its teachers in 2012-13 after the Department of Education had approved the District's Teacher Practice Evaluation Instrument. Therefore, also at issue in the instant case is whether annual evaluations under the newly approved rubric can form a valid basis supporting tenure charges for inefficiency in teaching performance during 2012-13.

The evidentiary record involving Respondent Jodi Thompson established persuasively by a preponderance of the evidence that she was accurately evaluated in 2012-13 regarding her classroom performance and teaching acumen. This evaluation found that her teaching was worthy of being rated as

Efficient. However, after her egregious attendance and tardiness record was included when computing Competency Five, which addresses the factor of "Commitment to Personal and Collective Excellence", a two-point deduction for poor attendance reduced Respondent's annual rating for 2012-13 to Partially Effective. Given her fourteen days of absence, her tardiness on eighty-two days, and her last minute arrival a minute of two before she was scheduled to begin working with her students on sixty-five more school days when she was not actually tardy, Respondent's attendance and tardiness record in 2012-13 was reasonably construed by the District as negatively affecting Respondent's entire job performance as a teacher to the extent that her annual rating was reasonably reduced to Partially Efficient by the deduction of two points.

Whether or not the 2012-13 summative annual rating could be counted for sustaining teacher efficiency tenure charges in the instant case, the District exercised reasonable management discretion and authority by deeming Respondent "Partially Effective" (or the equivalent term for the third of four possible levels of performance under the pre-existing evaluation scheme) for the 2012-13 school year based solely on her attendance, tardiness, and near-tardiness record, the extent of which was undisputed. Regardless of whether two points could be deducted from the TeachNJ rubric under Competency Five, dropping Respondent from the Effective category to the Partially Effective category; whether she was evaluated under the pre-existing rubric; or whether her performance was assessed by applying well-recognized labor relations

principles using neither of these rubrics, Respondent's 2012-13 school year justified an annual performance rating of "Partially Effective" or the equivalent term then in effect, and exposed her to appropriate discipline. Nevertheless, the District elected not to impose discipline immediately under Section 8 for Respondent's poor attendance at the end of the 2012-13 school year.

Nothing in the evidentiary record before me, or in the published opinions of my colleagues, convinced me that the TeachNJ statute established a safe harbor that unequivocally and completely insulated teachers from the adverse consequences of their actions for a minimum of two, to as many as three, years before tenure charges based on inefficiency could be brought. However, the well-reasoned opinion of Arbitrator Robert Simmelkjer in The Matter of Ursula Whitehurst, issued on January 5, 2015, in which he thoroughly and persuasively analyzed the relevant factors that govern the disposition of many of the parties' arguments in the instant case, persuasively mandates a conclusion that neither the approval of the District's Teacher Practice Evaluation Instrument by the New Jersey Department of Education by a memo issued in mid-October 2015, nor the acquiescence of the Newark Teachers Union to a provision in its collective bargaining agreement with the District, justified using an annual evaluation for 2012-13 as the basis for inefficiency tenure charges brought pursuant to Section 25 of N.J.S.A. 18A: 6-17.

Whether or not unreliable and untimely attendance at work to the extent demonstrated by Respondent during the 2012-13 school year constituted misconduct or conduct unbecoming a teacher that was sufficient, per se, to justify termination of tenure, there is no valid basis in the evidentiary record to find that Respondent was insulated from an annual evaluation that incorporated her egregious attendance and tardiness or near-tardy record as a significant factor. Thus. Respondent's attendance and tardiness record could properly be included as a factor in assessing her performance. However, Arbitrator Simmelkjer's detailed analysis and conclusions of law are sufficiently persuasive to support Respondent's assertion in the instant case that her annual summative rating for 2012-13 cannot be used as a valid basis for tenure charges based on insufficiency applying only the standards of Section 25 of N.J.S.A.18A:6-17.

This conclusion necessitates a discussion regarding the second set of tenure charges that the District issued following the publication of arbitration decisions by several of my colleagues that invalidated tenure charges based on annual summative assessments for 2012-13 made by Newark administrators applying the "new" rubric in insufficiency cases. While prudent lawyering may explain the District's decision to file an additional set of tenure charges alleging identical facts and conduct under a different section of the statute, Section 8 of N.JS.A. 18A:16-6, the District's filing of these charges after the record addressing the first set of charges had closed imposed an inherently unfair

burden both on Respondent and on the attorneys who represent her. Permitting duplicative filing of tenure charges alleging identical facts to be submitted in a separate action under a different statutory provision that imposes different standards for establishing conduct sufficient to terminate tenure would unduly encumber the tenure adjudication process established by TeachNJ, which process the Legislature required to proceed expeditiously by creating short time limits within which the arbitration process must be completed.

Moreover, the second tenure charges did not amend the first charges by the introduction of new facts. Nor was the second theory raised in a timely manner. The second set of tenure charges simply alleged a second cause of action under a different statutory standard in order to prove that Respondent's teaching was legally unacceptable to the extent that her tenure should be rescinded. Respondent's alleged misconduct, other than her pedagogical shortcomings, that could have formed a basis for imposing discipline under Section 8 during 2012-13, such as her attendance or an incident involving a verbal altercation with a Vice-Principal in front of her students, was addressed by the District in the calculations of professionalism under Competency Five of the rubric. Thus, the District's decision not to file Section 8 tenure charges at the end of the 2012-13 school year supports Respondent's assertion that neither her 2012-13 attendance record, her interaction with parents, the quality of her driving near the school, nor the incident involving a verbal

altercation with a Vice-Principal in front of her students established a second, independent cause of action justifying terminating her employment that could be raised after the record addressing the first set of charges had been closed.

There is no valid basis in the statute to afford the District two separate, sequential opportunities to litigate identical charges arising from the same set of facts by citing two different sections of the statute in two sets of tenure hearings. Nor is there any compelling basis under the rules of the American Arbitration Association governing TeachNJ cases, or mandated under sound arbitration or legal practice, to permit a duplicate filing of amended tenure charges based on the same set of facts after the record in the first case has been closed. Therefore, the second set of tenure charges filed by the District against Respondent Thompson must be dismissed as procedurally invalid and untimely.

According to the testimony and the documents comprising the evidentiary record of the instant case, Respondent Thompson's attendance record would have justified a rating of "Partially Effective" or its equivalent rating in for 2012-13 school year whether the District had used the prior evaluation standards, the disputed current rubric, or considered Respondent's attendance and tardiness record as an independent factor. Although the District reasonably concluded that Respondent's 2012-13 attendance and tardiness record was a material impediment to an efficient teaching

performance during the 2012-13 school year, the District misapplied a rubric that had not yet unequivocally been approved by the Commissioner for use by the District during the 2012-13 school year as a basis for filing tenure charges based on inefficiency under Section 25 of N.J.S.A. 18A:6-17. In light of such a material defect by erroneously applying the standards of the TeachNJ statute for the 2012-13 school year, the District's rating of Respondent as "Partially Effective" for 2012-13 must be deemed invalid regardless of the methodology used to evaluate her classroom techniques and performance and notwithstanding her egregious tardiness and attendance record.

A similar conclusion must be reached for the 2013-14 school year, but for a different reason because the District's summative evaluation of Respondent's performance, while achieved using an approved rubric the validity of which was undisputed, contained at least one serious material procedural flaw that satisfied an explicit statutory criterion of a valid defense. By electing formally to evaluate Respondent's teaching on the first day of student contact in her new assignment as a writing support specialist, thus observing her work with a class that was unfamiliar with her and that included a substantial cadre of special education students, the District created a procedural defect that satisfied the "arbitrary and capricious" standard of defenses specified in the TeachNJ statute.

No valid excuse for scheduling a major evaluation under such adverse circumstances has been offered in the evidentiary record. Time limits for completing annual evaluations that were alleged as justification for asking a teacher to prove her competence in a different subject area with students who were strangers to her on the first day she entered their classroom was far outweighed by the detriment to Respondent and the material negative impact on her annual summative evaluation for the 2013-14 school year by the arbitrary and capricious timing of this observation.

Much testimony was devoted to the timeliness of the Corrective Action Plan implemented for Respondent during the 2013-14 school year; the degree to which Respondent cooperated in developing the CAP; and the applicability of a Corrective Action Plan developed while Respondent was a Pre-kindergarten teacher for use after she was assigned to teach Kindergarten commencing in September 2013. None of these factors, however, invalidated the District's annual rating for 2013-14. The District has established persuasively by a preponderance of the evidence that:

(1) The District satisfied the requirement that the CAP arising from Respondent's performance rating for the 2012-13 school year be finalized by October 15, 2013, the extended date established by a designee of the Commissioner of Education, with at least apparent authority, upon which the District reasonably relied;

(2) Respondent Thompson was offered ample opportunity to participate in the development and refinement of her CAP;

(3) Respondent Thompson was afforded substantial access to coaching and other assistance by a Master Teacher during 2013-14;

4) The pedagogical deficits identified by the CAP were equally valid, if not more so, in the context of teaching Kindergarten students than Pre-K students, and thus Respondent suffered no material detriment from any failure substantially to review and edit her CAP after Respondent's initial teaching assignment was changed from Pre-kindergarten to Kindergarten for the 2013-14 school year;

(5) There was no adverse consequence to Respondent Thompson because of her valid use of FMLA leave from January through April 2014, and any allegation of retaliation against Respondent for using FMLA was unsubstantiated in the evidentiary record;

(6) The Building Principal's decision not to return Respondent to her original Kindergarten class after Respondent returned from extended FMLA leave in April 2014 was based on valid educational considerations, including the successful performance of the long-term substitute teacher who had replaced Respondent during her protracted FMLA leave and the likely adverse consequences for the students from disrupting their bond with a teacher for a second time during the same school year; and

(7) Respondent Thompson did not significantly improve her performance between September 2013 and January 2014, despite being given a Corrective Action Plan.

Notwithstanding these conclusions, the District's evaluation of Respondent's performance for the year was fatally tainted by an arbitrary and capricious action that materially impaired Respondent's right to be judged and rated on the basis of valid observations and evaluations as required under the TeachNJ statute.

The District has credibly described deficiencies in Respondent's performance observed during that evaluation visit, but the arbitrary and capricious timing and circumstances of this evaluation session was unjustified by sound educational policy, prohibited by applicable statute, and undermined the validity of the District's summative evaluation of Respondent Jodi Thompson for the 2013-14 school year, resulting in the tenure charge for inefficiency.

Respondent Thompson's testimony convincingly articulated that she was well-meaning in her efforts to foster a learning environment in her classroom that incorporated multiple creative pedagogical techniques to reach students in her classes, many of whom were often below grade level in their reading skills and were dealing with other emotional and physical circumstances. These factors posed greater challenges to a teacher, such as Respondent, who was

evaluated during more than one informal observation as needing coaching and assistance and unequivocally advised that she must expend substantial and consistent effort to achieve an efficient level of teaching performance, whether as a Kindergarten teacher or as a writing support specialist.

The Arbitrator does not, and should not, substitute his judgment for the substantive professional evaluations of Respondent's teaching performance, lesson preparation, and classroom management by two Assistant Principals and a Building Principal at Roberto Clemente Elementary School, who competently discerned on several occasions professional weaknesses in Respondent's teaching organization, pedagogical, and classroom management skills that must be addressed immediately if she is to succeed as a teacher in the future. However, the glaring procedural error in evaluating Respondent on her first day teaching a new subject to classes of students with whom she had no prior opportunity to develop a relationship or to set the standards for her classroom cannot be ignored when applying the standards and defenses clearly articulated in the TeachNJ statute. Because the District's annual evaluation of Respondent Jodi Thompson for the 2013-14 school year was improper under the statutory criteria, the District's rating of Respondent Thompson's teaching performance for the 2013-14 school year as Partially Effective cannot be sustained.

The evidentiary record as a whole supported the District's assertion that Respondent was deficient in the areas of professional development described by District administrators. To protect her employment going forward, Respondent must significantly improve her classroom management skills and develop more focused, multi-level lesson plans appropriate for the mix of students in whatever teaching role she may be assigned in the future. Respondent would be well advised to ask for, assiduously pursue, and willingly accept whatever coaching or other assistance District professionals can provide so that she can be successful as a classroom teacher for the Newark School District. If she continues to teach with the same lack of sophistication in her lessons, and the rudimentary level of classroom management and organizational skills described by the District's witnesses, Respondent may find herself vulnerable to tenure charges in the future.

Despite her daunting family situation, Respondent Thompson must also expend whatever energy and organization is necessary to arrive at school in a timely and reliable manner sufficiently before classes begin to be ready to perform her professional duties. Failure to take such steps to improve her out of classroom performance may also jeopardize her continuing employment.

Having considered thoroughly the written evidentiary record, sworn testimony, and legal arguments submitted in the instant case, I am compelled to find by at least a preponderance of the evidence that the Tenure Charges

filed against Respondent Jodi Thompson by the State Operated School District of the City of Newark cannot be sustained. Respondent's Motion to Dismiss these tenure charges is hereby granted.

All claims by Respondent Thompson alleging violation of the Family Medical Leave Act by the District or alleging that retribution for Respondent's use of FMLA leave in the 2013-14 school year was a factor in her annual evaluation have been considered by the Arbitrator and are hereby rejected as unsubstantiated in the evidentiary record.

Respondent Thompson shall be returned forthwith to employment by the State Operated School District of the City of Newark, with uninterrupted medical benefits. The 120 days pay lost as a consequence of the filing of tenure charges shall be reimbursed to her, less any substitute interim earnings during this interval.

The Arbitrator hereby retains jurisdiction for the purposes of resolving any and all disputes regarding the tenure charges brought against Respondent Jodi Thompson by the State-Operated School District of the City of Newark, including the remedy herein ordered.

June 19, 2015

Daniel F. Brent, Impartial Arbitrator

OAL DKY. NO. EDU 9828-14
(EDU 18575-13 ON REMAND)
AGENCY DKT. NO. 292-11/13

BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter, the proposed settlement agreement and general release (Agreement), and the Initial Decision on Remand of the Office of Administrative Law (OAL) have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. According to the Agreement, the settlement payment was due within thirty (30) days of the final execution of the Agreement. This date has preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of the settlement payment. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/26/15

Date of Mailing: 6/26/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9828-14
(On Remand of EDU 18575-13)
AGENCY DKT. NO. 292-11/13

BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF GLOUCESTER, CAMDEN COUNTY,
Respondent.

Christopher A. Barrett, Esq., for petitioner (Cooper Levenson, attorneys)

Cameron Morgan, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: April 24, 2015 Decided: April 30, 2015

BEFORE **W. TODD MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 6, 2014, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties prepared and submitted a Settlement Agreement and General Release indicating the terms thereof; a Resolution by the Hammonton Board of Education, Atlantic County, and Resolution from Gloucester City Board of Education, Camden County which are attached and fully incorporated herein.

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

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

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

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

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

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

April 30, 2015
DATE

W. TODD MILLER, ALJ

Date Received at Agency: April 30, 2015

Date Mailed to Parties: 5-5-15

/jb

COOPER LEVENSON, P.A.
1125 Atlantic Avenue - 3rd Floor
Atlantic City, NJ 08401
Telephone: (609) 344-3161
Facsimile: (609) 344-0939
Attorneys for Petitioner

TOWN OF HAMMONTON BOARD OF EDUCATION, Petitioner, vs. GLOUCESTER CITY BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION Docket No. EDU 18575-13 Agency Ref. No. 292-11/13 **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

This Settlement Agreement and General Release ("Agreement") is entered into by and between the Town of Hammonton Board of Education ("Petitioner" or "Board") and the Gloucester City Board of Education ("Respondent" or "Board"). Respondent and the Petitioner are collectively referred to as the "Parties."

WHEREAS, in the Fall of 2013, a dispute arose as to the financial responsibility for the F. Children's attendance at school in the Gloucester City School District, pursuant to *N.J.S.A.* § 18A:38-1 *et seq.* and *N.J.A.C.* § 6A:22 *et seq.*, for the 2013-2014 school year;

WHEREAS, following good faith negotiations, the Parties wish to amicably resolve their dispute and to settle any and all claims between them relating to the F. Children;

WHEREAS, the Parties enter into this Settlement Agreement to outline the Parties' agreement and to release any and all claims and/or available counterclaims that filed in the above-captioned matter regarding the F. Children's eligibility to attend school in the District during the 2013-2014 academic school year, without alleging or admitting deficiencies in their positions.

NOW THEREFORE, in consideration of the agreements, promises, covenants and conditions contained herein, the adequacy and sufficiency of which are expressly acknowledged by the Parties hereto, the Parties agree as follows:

1. Settlement: In accordance with the agreed-upon terms set forth below, Petitioner and Respondent agree to the full and complete waive and release of any and all claims and/or counterclaims, suits, demands, or legal proceedings, of any kind whatsoever, that either of them has or may have, regarding the F. Children's eligibility to attend school

in the Gloucester City School District or the Hammonton School District during the 2013-2014 and 2014-2015 school years.

1.1.In consideration for the same, Petitioner hereby agrees as follows:

1.1.1 Petitioner agrees to pay Respondent the amount of $10,000, which represents the settlement of any and all claims and counterclaims in reference to the above–captioned matter.

1.1.2 The aforementioned payment pursuant to paragraph 1.1.1 above shall be made payable to the "Gloucester City School District" within thirty (30) days of the final execution of this Agreement, and shall be sent to the Gloucester City School District's Business Office.

2. **Release of Claims**: The Parties agree that this Agreement is dispositive of all issues, claims, and cross-claims in dispute in the above-captioned matter, or which were brought or could have been brought between the parties in any claim or proceeding, of any kind, with respect to the F. children, and it is intended to constitute a final resolution of any and all such disputes.

3. **No Admission of Liability**: This Agreement cannot be construed as an admission of liability as to any party. Respondent acknowledges and understands that Petitioner does not make any admission of liability by agreeing to withdraw his Petition of Appeal filed against the Board. Petitioner acknowledges and understands that Respondent does not make any admission of liability by agreeing to withdraw its applications to the Court.

4. **Attorney's Fees and Court Costs**: Each party shall be responsible for their own fees and costs, including attorneys' fees and costs, and court costs incurred in connection with this dispute, to the extent applicable. Neither party shall be deemed a prevailing party in this matter.

5. **Entire Agreement**: This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof, and supersedes all prior written or oral, as well as all contemporaneous oral agreements, understandings, and negotiation.

6. **Governing Law**: This Agreement shall be construed, interpreted, enforced, and governed under the laws of the State of New Jersey. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the Parties.

7. **Board Approval**: This Agreement is subject to the approval by the boards of education of the Town of Hammonton and of the City of Gloucester City. This Agreement is without prejudice to any party if its terms are not fully ratified by both boards of education in duly constituted meetings thereof.

8. **Amendments**: This Agreement may only be amended by way of a writing signed by all Parties and counsel.

9. **Representation of Comprehension of Document**: In entering into this Agreement, Petitioner and Respondent represent that they each have relied upon the legal advice of their respective counsel, who is the attorney of their choice, and that the terms of this Agreement and Release have been completely read and explained to each party. The Parties acknowledge that they are satisfied with the representation provided. The Parties fully understand and voluntarily accept the terms of this Agreement and Release. The Parties enter into this Agreement knowingly, without coercion or other improper influence, pressure, or duress.

10. **Confidentiality**: The terms of this Agreement shall remain confidential to the extent permitted by law.

11. **Signatures in Multiple Parts**: This Agreement may be executed by that parties separately or in multiple parts. A copy of this Agreement with separate signature pages appended to it, that have been duly executed separately by the parties, shall be deemed a complete original as long as both sets of signature pages are appended thereto.

TOWN OF HAMMONTON
BOARD OF EDUCATION

BY: _____
Barbara Prettyman,
School Business Administrator

_____
Joseph Giralo,
Board President

GLOUCESTER CITY
BOARD OF EDUCATION

BY: _____
Margaret McDonnell,
School Business Administrator

_____
Kathleen McHugh,
Board President 12/9/14

Hammonton Board of Education

566 Old Forks Road
Hammonton, NJ 08037
Phone 609-567-7000 ✦ Fax 609-561-4420
Website: www.hammontonps.org

Dr. C. Dan Blachford
Superintendent of Schools

Barbara S. Prettyman
Business Administrator

April 10, 2015

Resolution No. 14 12 32 R:

Upon a motion made by Mr. Lyons, seconded by Mrs. Berenato, resolved that the Hammonton Board of Education approve Settlement Agreement with Gloucester City Board of Education. Motion carried by all members present voting "aye" in roll call.

I hereby certify the above to be a true and exact copy of the Minutes of the Regular Meeting of the Hammonton Board of Education held on December 11, 2014.

BSP

Board Secretary

GLOUCESTER CITY BOARD OF EDUCATION
GLOUCESTER CITY, NEW JERSEY 08030

DECEMBER 9, 2014

SECRETARY'S REPORT

Upon the Superintendent's recommendation, Motion by Mrs. Borger, seconded by Mr. Hubbs to approve the following Financial Action Items:
RCV#7 6 votes yes, 4 members absent. Motion approved.

Financial Actions:

7. Approve the Settlement Agreement

Recommend the Board approve the final version of the Settlement Agreement and Release to resolve the homeless litigation with Hammonton, with the Hammonton Board of Education paying the Gloucester City Board of Education $10,000.

This is to certify that the above Motion was passed by the Gloucester City Board of Education at the DECEMBER 9, 2014 Board Meeting.

Margaret M. McDonnell, Secretary

CHRISTOPHER KECHULA,	:	
PETITIONER	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	
	:	COMMISSIONER OF EDUCATION
RESPONDENT.	:	
	:	DECISION
AND	:	
ALAN HUDSON,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	
RESPONDENT	:	

SYNOPSIS

In this consolidated case, petitioners – formerly employed as custodians for the respondent Board – alleged that their tenure rights were violated when their employment was terminated. The Board asserted that the petitioners' appeal rests solely on contractual claims – which do not require an interpretation of school law – and filed a motion to dismiss for failure to state a claim and lack of subject matter jurisdiction. In an Initial Decision dated April 7, 2015, the ALJ granted the Board's motion to dismiss. However, the Commissioner rejected the decision and remanded the matter to the OAL for fact finding to determine whether the Board appointed the petitioners for a fixed term and thereby excluded them from statutory tenure.

On remand, the ALJ found that a revised certification from the Board's Director of Human Resources supports the respondent's contention that the petitioners were in fact appointed for fixed one year terms, and therefore not subject to statutory tenure. Accordingly, the ALJ concluded that the matter must be dismissed for lack of jurisdiction.

Upon review, the Commissioner was able to determine that, because the Board's certification is now part of the record, the petitioners do lack tenure rights pursuant to *N.J.S.A.* 18A:17-3. Therefore, the Commissioner lacks jurisdiction to hear and decide the within consolidated petitions. Accordingly, the Commissioner granted the respondent's motion to dismiss.

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

Issued 6/26/15

OAL DKT. NO. EDU 7019-15
(EDU 2417-14 AND 4461-14 [CONSOLIDATED] ON REMAND)
AGENCY DKT. NOS. 31-2/14 AND 46-2/14

CHRISTOPHER KECHULA, PETITIONER V. BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION ON REMAND
ALAN HUDSON, PETITIONER V. BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY, RESPONDENT.	:	

The record in this consolidated matter – along with the Initial Decision of the Office of Administrative Law (OAL), issued April 7, 2015, and the subsequent Initial Decision, issued June 2, 2015 in response to the Commissioner's remand – have been reviewed. The parties did not file exceptions.

By way of background, this controversy concerns whether petitioners, formerly employed as custodians for the Piscataway Board of Education (Board), possessed tenure rights

pursuant to *N.J.S.A.* 18A:17-3[1] that were violated when the Board terminated their employment. The Board filed motions to dismiss the petitions of appeal for failure to state a claim upon which relief can be granted and lack of subject matter jurisdiction.[2] Ultimately, the Administrative Law Judge (ALJ) granted the Board's motions and dismissed both petitions as reflected in the Initial Decision dated April 7, 2015.

In order to determine whether the Commissioner lacks jurisdiction to hear and decide this matter under *N.J.S.A.* 18A:17-3, it is necessary to establish whether the Board appointed petitioners for a fixed term and thereby excluded them from statutory tenure. As a result, on May 12, 2015, the Commissioner rejected the ALJ's Initial Decision – because neither the Initial Decision nor the record contained the requisite factual finding – and remanded the matter to the OAL for further proceedings.

Thereafter, the Board submitted a certification from its Director of Human Resources (R-1) to the ALJ indicating that for each year of their employment with the district, petitioners were, in fact, appointed by the Board for a fixed one-year term. After considering the certification, the ALJ issued an Initial Decision on June 2, 2015 which "serves as a supplement to and incorporates by reference the Initial Decision issued...April 7, 2015" granting the Board's motion and dismissing the petitions for lack of jurisdiction. Because the Board's certification is part of the record, the Commissioner can now conclude that petitioners lacked tenure rights pursuant to *N.J.S.A.* 18A:17-3. Therefore, the Commissioner lacks jurisdiction to hear and decide the consolidated petitions of appeal.

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[1] *N.J.S.A.* 18A:17-3 provides that "Every public school janitor of a school district shall, *unless he is appointed for a fixed term*, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed" except for a reduction in force or "neglect, misbehavior or other offense." (Emphasis added)

[2] Custodians excluded from statutory tenure by virtue of fixed term appointment may negotiate contractual tenure rights – over which the Commissioner lacks jurisdiction. *See Wright v. Bd. of Educ.*, 99 *N.J.* 112, 116 (1985) (holding contractual provision granting tenure to custodians after three years of employment is not barred by *N.J.S.A.* 18A:17-3 and falls within the scope of collective negotiations).

Accordingly, respondent's motion is granted and the consolidated petitions are dismissed for lack of jurisdiction.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 6/26/15

Date of Mailing: 6/26/15

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7019-15
AGENCY DKT. NO. 31-2/14, 46-2/14

CHRISTOPHER KECHULA
AND ALAN HUDSON,
Petitioners,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF PISCATAWAY,
MIDDLESEX COUNTY ET AL,
Respondent.

ON REMAND
OAL DKT NO. EDU 2417-14
AGENCY DKT. NO. 31-2/14
(CONSOLIDATED)
OAL DKT NO. EDU 4461-14
AGENCY DKT NO. 46-2/14

Nancy I. Oxfeld, Esq., for petitioners (Oxfeld Cohen, attorneys)

David B. Rubin, Esq., for respondent

Record Closed: June 2, 2015 Decided: June 2, 2015

BEFORE **TIFFANY M. WILLIAMS**, ALJ:

This decision serves as a supplement to and incorporates by reference the Initial Decision issued at docket number EDU 02417-2014, dated April 7, 2015. The matter was remanded and transmitted to the Office of Administrative Law (OAL) on May 13, 2015, and received by the undersigned on May 27, 2015. The matter was remanded

for a determination as to whether the petitioners were appointed by the Board for a fixed term of employment and thereby excluded from statutory tenure.

Upon notice of the remand, the respondent provided a revised certification from Ms. Catherine Sousa, the Board's Director of Human Resources. Ms. Sousa certified that for each year of the petitioners' employment, they were appointed by the Board for a fixed one-year term. (R-1). As noted, in the Initial Decision of April 7, 2015, the petitioners failed to respond to the respondent's motion to dismiss, which was granted in the Initial Decision. To date, the petitioners failed to respond to refute the revised certification of Ms. Sousa or communicate any response after being afforded an opportunity to do so.

Accordingly, for the reasons stated in the Initial Decision dated April 7, 2015, and including the additional facts from the revised accompanying certification, I **CONCLUDE** that these matters are **DISMISSED** for lack of jurisdiction, and the respondent's motion is **GRANTED**.

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

June 2, 2015
DATE

TIFFANY M. WILLIAMS, ALJ

Date Received at Agency: June 2, 2015

Date Mailed to Parties: JUN - 4 2015

rr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

220-15IM

220-15

State of New Jersey

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

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

June 30, 2015

Samuel Wenocur, Esq.
Oxfeld Cohen, P.C.
60 Park Place, Suite 600
Newark, New Jersey 07102

Raymond L. Hamlin, Esq.
Hunt, Hamlin & Ridley
Military Park Building
60 Park Place, 16th Floor
Newark, New Jersey 07102

Re: *In the Matter of the Tenure Hearing of Stephen Donovan, School District of the Township of Irvington, Essex County. Agency Dkt. No. 113-5/15.*

Dear Counsel:

I have reviewed the materials filed in connection with respondent Stephen Donovan's Motion to Dismiss the tenure charges filed by the Irvington Township Board of Education. The respondent maintains that the charges should be dismissed because they are duplicative of previous charges that were filed by the Board in May 2014. Following the filing of those original charges in May 2014, the parties entered into a Consent Order that was approved by an Arbitrator on August 1, 2014. Under the Consent Order, the respondent was required to file an application for disability retirement with the New Jersey Division of Pensions and Benefits (Division). In response to the current charges, the respondent submitted proof that he has filed an application with the Division for a disability pension, and to date the Division has not yet issued a decision approving or denying the application. As such, the respondent argues that the current charges are premature because the Board is only permitted to re-file the tenure charges if he is denied disability.

On the other hand, the Board maintains that it is authorized to file the current charges because the Consent Order states that if the respondent is not approved for disability the Board may re-file the tenure charges. The Board contends that it does not have the requisite information from the respondent regarding when he filed for disability, and the status of his application. Without that information, and based on its need to plan for the upcoming school year, the Board asserts that it should be permitted to proceed with the current tenure charges.

Upon review and consideration of the submissions, I find that under the Consent Order the Board may only re-file the tenure charges if the respondent is not approved for a disability retirement. Despite the Board's concerns, it is clear from the documents submitted by the respondent that he has in fact applied for a disability retirement with the Division. Moreover, the respondent's independent medical examination was scheduled for June 25, 2015. Therefore, the Board may not re-file tenure charges until a decision is issued by the Division as to whether the respondent is eligible for a disability retirement.

Accordingly, the Motion to Dismiss is hereby GRANTED, and the tenure charges are dismissed.*

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library

DCH/MKD/JKH

Via Regular Mail

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

221-15

In the Matter of Tenure Charge of Inefficiency of

Sandra Cheatham — Docket No. 68-3/15

-and-

School District of the City of Newark

APPEARANCES

For the District
Brenda C. Liss, Esq.

For the Respondent
Colin M. Lynch, Esq.

BEFORE: ARBITRATOR STEPHEN M. BLUTH

BACKGROUND

The facts of this matter are unusual and stem from a previous charge against Respondent in 2014. At that time the Newark School District (District) preferred charges of inefficiency against Sandra Cheatham (Cheatham or Respondent) under Section 25 of the TEACHNJ Legislation (Law). As a result it sought the termination of her employment on the grounds of inefficiency. Subsequently, Respondent answered the charges against her. Consequently, I was selected to hear and decide this matter. However, after hearing this matter I determined the District had not followed the appropriate procedures and dismissed the charges against her. On or about October 16, 2014, I issued my decision whereby I determined Respondent should be reinstated with full back pay.

Also, at this hearing the District claimed even if a teacher is exonerated under Section 25, it did not preclude it from instituting charges under against Respondent Section 8 of the Law. In my decision I firmly rejected the District's contention if I found Respondent not culpable of the charges against her

under Section 25, I should treat the matter as if the charges had been filed under section 8.

Thereafter, on or about January 30, 2015 the District brought forth a second tenure charge seeking Respondent's dismissal. In the District's view, this second set of charges they claimed were "new" or "amended." Consequently, Respondent again challenged the District's claim. I met with parties on April 28, 2015 to discuss this matter and hear oral argument in support of their positions. This Opinion and Award follows.

POSITIONS OF THE PARTIES

The District contends Respondent's reliance on the "Law of the Case" doctrine is misplaced. It points out this doctrine is a non-binding rule to prevent re-litigation of a previously resolved issue in the same case. Further, the District maintains, the Respondent's claim this instant matter is the same as the previous one is not accurate. To buttress that contention, it explains, the first case was docketed as 226-814, while the instant matter was assigned Docket Number 68-3/15. In its view this proves these

are two different cases and renders the "Law of the Case" doctrine inapplicable.

Further, the District argues, the Res Judicata Doctrine does not apply to the instant matter because the present matter is not the same as the previous proceeding. It points out, for this doctrine to apply, the judgment in the prior action must be valid, final, and on the merits. Also, the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one. The District also insists the issue of whether a school district may proceed on inefficiency charges under section 8 and whether Respondent should be removed from her position are matters of public importance which should not be barred from consideration.

Also, according to the District, there is no merit to Respondent's claim inefficiency charges must be brought only under Section 25, as using Section 8 is contrary to the law. It points out the Legislature created a new form of charge, that of Section 25 in TEACHNJ, which dealt with the discipline of inefficient teachers. It was under this Section the District proceeded with this form of charge against

Respondent in 2014. However, the District emphasizes, absent from TEACHNJ is any statement Section 25 is the only type of inefficiency that may be brought against a poorly performing teacher. It explains Section 25(a) of the ACT N.J.S.A.18:6-17.2(a) states "In the event that the matter before the arbitrator. . . is employee inefficiency pursuant to Section 25 of this act. . . ." indicates inefficiency may be brought before an arbitrator other than pursuant to Section 25.

Moreover, it argues, interpreting Section 18A:6-17.3 as the exclusive authority for insufficiency charges leads to the illogical, untenable result in that it created a three-year hiatus from 2012 to at least 2015 during which time the State's boards of education would be prohibited from bringing any charges of inefficiency against poorly performing teachers.

Also, the District refers to numerous arbitration awards that have recognized charges brought under Section 8 N.J.S.A.18:6-16 would have been available to the School District if that basis for the charge had been pled. The contention that an inefficiency charge cannot proceed on any basis other than N18:6-173 would

lead to the absurd conclusion the Legislature intended to hand poorly performing teachers a "free pass" for three years after the Act's effective date is contrary to legislative intent.

Additionally, the District rejects Respondent's claim the new evaluation rubrics were developed in exchange for speedy tenure charges with limited defenses. While it acknowledges that claim may be accurate, it avers Respondent reaches too far in suggesting the "quid pro quo" also entailed the complete elimination of inefficiency charges under Section 8, and a three-year moratorium on all charges without warranting a single statement from the Legislature to that effect. The District emphasizes TEACHNJ is not a wholesale replacement of New Jersey's Tenure Act; rather it is a package of amendments to some, but not all, of the sections of the Tenure Act. It argues, as well, under Respondent's interpretation no teacher within the State of New Jersey could be removed based on inefficiency during that three-year time period. Therefore, based on reasons delineated herein the School District of Newark submits Respondent's motion to dismiss and/or for summary

judgment should be denied and this matter should proceed to hearing.

Respondent alleges the charges against her are baseless. In her view the instant amended charges filed against her are simply a legal ploy to avoid the consequences from the District's premature filing of charges against her pursuant to Section 25 of the TEACHNJ Act. Respondent stresses the District initially failed and the charges were dismissed. As a result, she relates, it now seeks to file so-called "new" tenure charges. However, Respondent avers, these charges are not new. Rather, they are simply a rehash of the same charges filed against her with the Commissioner in August 2014. Also, Respondent reports, these new charges are ostensibly brought pursuant to Section 8 rather than Section 25 of TEACHNJ. However, she emphasizes, even a cursory inspection of these "new" charges reveals they constitute little more than an amendment of the prior charges I dismissed in my decision of October 14, 2014. Moreover, she reports, both the Statement of Evidence and the accompanying documentary exhibits appended to the "new" charge are effectively identical to those accompanying the

dismissed charge. Thus, in Respondent's view, these amendments are not "new." At best, they are an amendment of the previously dismissed charges, she declares.

In addition to that factor, Respondent relates these amendments have been filed long after I previously dismissed the charges against her, Respondent reports. Further, she avers, they are predicated on a legal theory I expressly rejected when I determined the District could not proceed under Section 8 of TEACHNJ, given its failure under Section 25. Importantly, Respondent reminds, I barred the District from getting a "second bite at the apple" and a "do-over." She further avers if the District disagreed with my findings, it had ample opportunity to attempt to vacate my Award, something it failed to do.

Also, according to Respondent, the amended complaint is substantively deficient, as the charge seeks to pursue a claim of inefficiency against her under Section 8 of TEACHNJ in light of the revamping of the tenure laws, which hold the only section of that statute in which a school district may bring a

charge of inefficiency against a teacher is Section 25; Section 8 is available for other charges such as misconduct or "conduct unbecoming." Therefore, Respondent posits, the District's amended charge of inefficiency must be dismissed with prejudice.

Respondent explains as well, she taught in the District from 1974 to approximately 1992, at which time she moved to Georgia. However, she returned to Newark in 2003-2004 and has taught there ever since that time, she explains. Respondent emphasizes, for the entirety of her career including 2011-2012, she has been rated as a "proficient" and "effective" educator. It was only after Cheatham filed a workers' compensation claim and filed complaints regarding the health and safety of her Kindergarten classroom she received a "partially effective" rating for 2012-2013, while at the conclusion of the 2013-2014 her rating was "ineffective." In her view these ratings were solely in retaliation for her workers' compensation claim and complaints about the health conditions of her classroom.

As a result of these two ratings, Respondent was served with a Notice of Tenure charge seeking her

removal for "inefficiency" pursuant solely to Section 25 of the TEACHNJ Act. Then, on or about August 16, 2014, Respondent relates, the State District Superintendent, Cami Anderson, certified the tenure charges and filed them with the New Jersey Department of Education, Respondent reports. As a result, the matter proceeded to arbitration in which I was appointed arbitrator. After hearing all the evidence, I concluded the District's evaluation program was not in compliance with applicable regulations in the form of ACHIEVENJ because those regulations did not go into effect until the 2013-2014 school year.

Additionally, Respondent explains, I rejected the District's claim it could proceed under Section 8 of the Act N.J.S.A. 18A:6-16 if a teacher is exonerated under Section 25. She emphasizes, too, I rejected the District's claim exoneration under Section 25 that does not preclude it from instituting a similar procedure under Section 8, thus giving the District the proverbial "second bite." Notwithstanding my ruling, the District served a second Notice of Tenure Charges on Respondent pursuant to Section 8 of TEACHNJ, and filed them with the Commissioner of Education on

or about March 30, 2015. In Cheatham's view, the improperly certified and filed amended charges by the District should be dismissed because they were not in compliance with the law.

Moreover, Respondent contends the dismissal of tenure charges against her is now the "law of the case," and the District's amendment of those charges is constrained by that doctrine. This is so because the amended inefficiency charges rely on the same facts and evidence presented in the initial charges. The District's attempt to amend tenure charges that have already been dismissed is fundamentally unfair and in clear violation of her rights, Respondent argues, and should not be permitted to proceed. This "law of the case" doctrine, she relates, requires judges to respect un-reversed decisions made during a trial by the same or higher court regarding questions of law. This is based on the simple principle once an issue is litigated and decided in a suit, re-litigation of that issue should be avoided if possible, Respondent explains. Since, in the instant matter, the issue has already been decided, the amended charges are bound by the "law of the case," Respondent

contends. She reminds, the District attempted to proceed under Section 8 after I dismissed the charges filed under Section 25 and that I specifically rejected the notion that, having failed under Section 25, the District could proceed with charges under a different section of the law. She also reminds the District had three months in which to attempt to vacate my Award. It did not do so, Respondent avers, but rather adopted the questionable tactic of refiling the same charges with the apparent hope of getting a different result.

Further, Respondent cites the Res Judicata Doctrine, which holds when a controversy between parties is once fairly litigated and determined it is no longer open to re-litigation. Thus, while "Law of the Case" is a discretionary doctrine applied by a tribunal regarding legal determinations made in the same case, Res Judicata is a mandatory doctrine that a tribunal must apply to bar a party from re-litigating in a new case an issue already disposed of, Respondent declares. She maintains the criteria for Res Judicata to bar re-litigation of a claim have been met in this matter. She reminds, the first criterion is the

judgment in the prior action must be valid, final, and on the merits. Second, the parties in the later action must be identical to or in privity with those in the prior action. Finally, the claim in the later action must grow out of the same transaction or occurrence. As a result this issue cannot be re-litigated as it is the same claim as the District made in the earlier case. Therefore, Respondent argues, since all three criteria in this matter have been met, the Res Judicata Doctrine prohibits the District from re-litigating this matter.

Additionally, when the District realized the charges against her were deficient, it sought to pursue inefficiency charges against her under Article 8, Respondent informs. However, she points out, I expressly rejected that claim in my first Award. In fact, because my decision was final, the parties were identical, and the instant charges grew out of the same transaction or occurrence as the prior tenure charge, and since the Statements of Evidence and the exhibits attached thereto for both charges are effectively identical, Respondent claims, this

Doctrine precludes the District from proceeding with the new charges.

Moreover, according to Respondent, the District's amended charges against her were untimely filed and must, therefore, be dismissed. For example, she explains, under Section 25 the District was required to file charges against her with the Commissioner of Education within 30 days of filing with the State District Superintendent. In this case, the District certified the charges in August 2014. Said charges were based on the identical series of facts and allegations as the instant charges. Thus, the District was under an obligation to file the tenure charges against Respondent within 30 days thereof, she maintains. It is clear the current charges were filed well outside that time period and are untimely under TEACHNJ. Accordingly, Respondent argues, they must be dismissed.

Also, even if the instant charges were deemed to have been filed pursuant to Section 8, they are still untimely, Respondent avers. She stresses, once charges were filed with the State District Superintendent, she could submit a position statement and statement of

evidence within 15 days of receipt of charges. Upon receipt of this statement, or at the end of the 15-day period, the District Superintendent had 45 days to decide on whether to certify the charges to the Commissioner of Education, Respondent relates. Then, it had 15 days to file written charges with Commissioner after making a decision. In the instant matter, Respondent explains, the District filed charges with the State District Superintendent in August 2014. These charges were based on the identical series of facts and allegations as the instant charges. Therefore, according to Respondent, the District was obligated to vote on whether to file charges under Section 8 within 45 days of receiving her response to the charges; it was then required to file charges with the Commissioner within 15 days of making its decision. Respondent argues the District did not do so and the charges were filed outside the applicable time frame. Consequently, the charges were untimely filed under TEACHNJ and should be dismissed, Respondent insists.

Finally, Respondent cites the "entire controversy doctrine" that bars the District from bringing "amended" or "new" charges based on the same facts and

series of transactions or occurrence at this stage of the proceeding. In this case the District has already fully litigated its tenure charges against Respondent based on her 2012-2013 and 2013-2014 evaluations. It lost on those charges, Respondent reminds. She also emphasizes the District could have attempted to bring other charges simultaneously under Section 8 based on those same facts of transaction or occurrence and attempted to do so. However, Respondent stresses, I rejected its attempt to do so. She maintains the District cannot now re-litigate the case. If it is to be allowed to do so, it will be free to continue re-filing the same charges against her under various legal theories. This would allow it to get second, third or more bites at the apple, and would violate Respondent's due process rights to not be subjected to the same charges repeatedly and indefinitely by the District, she maintains. Therefore, Respondent asks the instant charges not be permitted to be brought anew under Section 8. Accordingly, she asks the charges be dismissed and she be made whole for any lost wages or benefits.

DISCUSSION AND FINDINGS

I have reviewed the arguments, submissions and briefs submitted by the parties. Based on my examination, I determine the District may not proceed with charges against Respondent. I so find for several reasons.

First, at the arbitration I held in 2014, the District charged Respondent with inefficiency and sought her dismissal. At that time I dismissed the charges against her brought under Section 25 of TEACHNJ. The District then argued it could bring these charges against Respondent under Section 8. At that time I indicated it could not do so because it filed under Section 25. My reasoning in that matter was the District was attempting to get a "second bite of the apple" and a "do-over," and should not be permitted to do so.

I observe, as well, after my Award was issued, the District made no attempt to have it vacated. That failure indicates to me the Department accepted my findings and that should have ended the controversy.

Moreover, I find the Doctrine of Res Judicata is relevant in this matter. This so because I have examined both the first and second set of charges and

observe the charges filed in January 2015 were virtually identical to the charges I had previously dismissed. Further, I reject the District's claim the matters raised in the second set of charges are not the same matter and thus, do not fall under Res Judicata. In my opinion, this is pure nonsense. Just because the charges were filed under a different section of the law does not render the matter different. I am also unsympathetic to the District's claim this is a matter of public importance and should not be barred from being heard. While I certainly agree the matter is one of public importance, this does not override the age old Res Judicata.

Additionally, I find, the District's claim it could file "new" or "amended" charges does not conform to TEACHNJ. My review of that Section reveals it is part and parcel of other Sections specifically Section 5. Section 8 simply contains the procedures the parties must follow if charging a tenured teacher. While Section 8 makes no mention of inefficiency, it must be read in conjunction with Section 5 (N.J.S.18A:6-11). That Section reads, "Any charge made against an employee of a board of education under

tenure **during good behavior and efficiency** (emphasis added) shall be filed with the secretary. . . ." Therefore, Section 8 refers to teachers who, among other criteria, are deemed to be "efficient." Therefore, Section 8, in conjunction with Section 5, limits charges to teachers who are efficient. Thus, under this principle excluded are teachers who are deemed inefficient, This squares with the long-established concept of "*expression unius est exclusive alterius*" (to include one thing is to exclude others). Since teachers with good behavior and efficiency are covered by Section 8, the only way to proceed against an inefficient teacher is under Section 25. The District's claim this would lead to an unacceptable three-year hiatus due to the need for three less than efficient ratings over a three-year period, the fact remains that is the way the legislation was written.

As for the District's argument the "Law of the Case" is not binding, while true, it certainly provides guidance as to what criteria must be met to establish it. In this, I find Respondent clearly met the criteria.

Finally, with regard to the timeliness issue, since I have determined the District improperly charged Respondent and that those charges should be dismissed, I find no reason to address that matter. Consequently, I make no comment on it.

Based on the evidence presented, I determine the District improperly charged Respondent under Section 8 of TEACHNJ. The appropriate remedy is reinstatement with full back pay and benefits. It is so ordered.

AWARD

The District improperly charged Respondent under Section 8 of TEACHNJ. The appropriate remedy is reinstatement with full back pay and benefits.

_____

STEPHEN M. BLUTH, ARBITRATOR

State of New York)
)ss:
County of Nassau)

On this, the _____ day of _____, 20_____, before me a notary public, the undersigned officer, personally appeared _____, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same for the purposes therein contained.
In witness hereof, I hereunto set my hand and official seal.

_____

Notary Public

222-15

222-15

DOCKET # 360-12/14

X----------X

In the Matter of the Tenure Charges Preferred by

EDISON TOWNSHIP BOARD OF EDUCATION **ARBITRATOR'S**

"District **OPINION**

-against- **and**

MARYELLEN LECHELT **AWARD**

"Respondent"

X----------X

BEFORE:
ARTHUR A. RIEGEL, ESQ., ARBITRATOR

APPEARANCES:
FOR THE DISTRICT:
BUSCH LAW GROUP, LLC by ARI D. SCHNEIDER, ESQ.
MARGARET DELUCA, DISTRICT AFFIRMATIVE ACTION OFFICER

FOR THE RESPONDENT:
SELIKOFF & COHEN, PA by KEITH WALDMAN, ESQ. & STEPHEN B. WALTON, ESQ.
JEFFREY BOWDEN, PRESIDENT, EDISON TOWNSHIP EDUCATION ASSOCIATION
MARYELLEN LECHELT, RESPONDENT

BACKGROUND

On November 24, 2014, Dr. Richard O'Malley ("Dr. O'Malley") filed tenure charges with the Board. On December 10, 2014, Ms. Lechelt timely served and filed a statement of position, which is optional under *N.J.S.A.* 18A:6-11. On December 16, 2014, the Board certified the tenure charges and forwarded them to the Commissioner of Education, who received the charges on

223-15

DOCKET # 361-12/14
X----------X
In the Matter of the Tenure Charges Preferred by

EDISON TOWNSHIP BOARD OF EDUCATION
"District"

-against-

MARIA WEBER
"Respondent"

ARBITRATOR'S

OPINION

and

AWARD

X----------X
BEFORE:
ARTHUR A. RIEGEL, ESQ., ARBITRATOR

APPEARANCES:
FOR THE DISTRICT:
BUSCH LAW GROUP, LLC by ARI D. SCHNEIDER, ESQ.
MARGARET DELUCA, DISTRICT AFFIRMATIVE ACTION OFFICER

FOR THE RESPONDENT:
DERETSKY HUNTER & DeFILLIPO, LLC by STEPHEN B. HUNTER, ESQ
JEFFREY BOWDEN, PRESIDENT, EDISON TOWNSHIP EDUCATION ASSOCIATION
MARIA WEBER, RESPONDENT

BACKGROUND

On November 24, 2014, Dr. Richard O'Malley (hereinafter "Dr. O'Malley") filed tenure charges with the Board of Education. On December 12, 2014, Ms. Weber filed a Statement of Position with the Board of Education, which is optional pursuant to **N.J.S.A.** 18A:6-11. Ms. Weber's Statement of Position was incorporated as part of the Answer filed in this proceeding. (Board Exhibit 6, as revised).

On December 16, 2014, the Board certified the tenure charges and forwarded the charges to

the Commissioner of Education. On January 7, 2015, Ms .Weber filed her Answer, consistent with an agreed upon extension of time approved by the Commissioner of Education's designee.

On February 6, 2015, a pre-hearing conference was conduced at which time a discovery schedule was established, as were tentative hearing dates.

The parties thereafter exchanged initial disclosures and discovery materials. This matter was consolidated for a hearing with **In the Matter of Tenure Charges Against Maryellen Lechelt**, Docket No. 365-12/14 and **In the Matter of Tenure Charges Against Tyler Van Pelt**, Docket No. 362-12/14. Hearings were conducted on March 10, 2015, March 19, 2015, March 25, 2015, April 2, 2015, April 12, 2015 and telephonically on April 21,2015. Subsequently, May 8, 2015 was established as the due date for the submission of the Post Arbitration Hearing Brief on behalf of Ms. Weber.

The parties were represented by counsel and were afforded a full and fair opportunity to conduct direct and cross examination of witnesses and to present relevant documentary evidence. The record was closed upon the Arbitrator's timely receipt of the parties' post-hearing briefs.

THE CHARGES

BACKGROUND COMMON TO ALL CHARGES

Ms. Weber has been employed by the Board as a Special Education teacher since the 2000-2001school year. Ms. Weber was obliged, among other things, to ensure the implementation and enforcement of all Board policies, follow administrative directives and procedures, as well as New Jersey law, and accord herself appropriately towards and amongst the other Board employees she works with on a day to day basis – *i.e.*, not to conduct herself inappropriately in their presence and cause them embarrassment, discomfort, offense and concern. Ms. Weber, however, has ignored the

foregoing duties and responsibilities, and knowingly accorded herself in both a highly inappropriate and highly offensive manner – exposing others to a hostile and uncomfortable working environment.

Board Policy 3362, *Sexual Harassment*, states that "[s]exual harassment includes all unwelcome . . . verbal contacts of a sexual nature that would not have happened but for the employees gender." Policy 3362 further states that "when such conduct is severe and pervasive and has the purpose or effect of unreasonably altering or interfering with work performance or creating an intimidating, hostile, or offensive working environment, the employee shall have cause for complaint."

Board Policy 3281, *Inappropriate Staff Conduct*, states in relevant part that "[I]nappropriate conduct by a school staff member outside their professional responsibilities may be considered conduct unbecoming a staff member. Therefore, school staff members are advised to be concerned with such conduct which may include, but is not limited to, communications and/or publications using emails, text-messaging, social networking sites, or any other medium that is directed and/or available to pupils or for public display."

Board Policy 3211, *Code of Ethics*, indicates that "the educator shall exert every effort to raise professional standards to promote a climate that encourages the exercise of professional judgment, to achieve conditions which attract persons worthy of the trust to careers in education."

Board Policy 1140, *Affirmative Action Program*, establishes that the program shall "promote the acceptance of persons of diverse backgrounds regardless of race, creed, color, national origin, ancestry, age, martial status, affectional or sexual orientation, gender, religion, disability, or socioeconomic status." Further, this Policy provides that the Board's affirmative action program will "foster a learning environment that is free from all forms of prejudice, discrimination, and

harassment based upon race, creed, color, national origin, ancestry, age, martial status, affectional or sexual orientation, gender, religion, disability, or socioeconomic status in policies, programs, and practices of the Board of Education."

Board Policy 3321, *Acceptable Use of Computer Network(s)/Computers and Resources by Teaching Staff Members*, advises employees that the Board retains the right to have the Superintendent or designee monitor network activity, in any form necessary, to maintain the integrity of the network(s) and ensure its proper use." Policy 3321 further states that "the Board provides access to computer network(s)/computers for administrative and educational purposes only." Moreover, the foregoing policy, in relevant part, states that "any individual engaging in the following actions declared unethical, unacceptable or illegal when using computer network(s)/computers shall be subject to discipline or legal action: (1) using the computer network(s)computers for . . . inappropriate or obscene purposes."

Finally, Board Policy 3351, *Healthy Workplace Environment*, requires that "employees interact with each other with dignity and respect" and further states that "repeated malicious conduct of an employee or group of employees directed toward another employee or group of employees in the workplace that a reasonable person would find hostile and offensive is unacceptable and is not conducive to establishing or maintaining a healthy workplace environment."

On October 23, 2014, during a voluntary Engrade Chromebook Training, Ms. Weber actively participated in a group chat on the Today's Meet website (https://todaysmeet.com/engraderocks) through the District's computer network. Today's Meet is a public web forum, accessible by all Board employees and students. The group chat spanned for a period of roughly two and a half hours and served no instructional purpose. Rather, the chat was graphically sexual in nature;

discriminatory to women, homosexuals, elderly persons and special education/handicap students; highly offensive to anyone not involved with same; and created a hostile work environment to other Board employees who were able to view, at any point in time, the content of the discussion.

The nature of the foregoing conversation is egregious beyond the bounds of decency. No persons and/or classifications of persons were spared. Ms. Weber's behavior, as set forth more specifically below, illustrates a complete and shameful disregard of her responsibilities as an employee of the Edison Township Board of Education and a member of the teaching profession, including, but not necessarily limited to, violations of the above mentioned policies. Ms. Weber's conduct has caused both members of the Board's Administration and members of the staff grave concerns over her intentions and capabilities, to the point of no longer feeling comfortable to be in her presence and/or permitting her to interact with other Board employees or students.

I hereby charge Maria Weber with *conduct unbecoming a teaching staff member, misbehavior and/or other just cause, including but not necessarily limited to* insubordination; all of which warrant her dismissal, pursuant to N.J.S.A.18A:28-5, and 18A:6-10.1, et seq. As more specifically set forth below, it is clear that she has exhibited a callous disregard for the expectations of her employer, as well as the rights of other employees of the Board, to conduct their daily activities in an environment that is free from harassment, discrimination, bullying and inappropriate conduct and communications, as well as an egregious breach of the professional standards imposed upon her as a member of the teaching profession.

SPECIFICATION OF CHARGES

CHARGE I

Unbecoming Conduct and/or Other Just Cause
Inappropriate Staff Conduct With Other Staff Members

On October 23, 2014, while attending a voluntary Engrade Chromebook Training at the Board's Offices, Maria Weber engaged in a course of misconduct that violated New Jersey Law, as well as Board policies, regulations and procedures regarding staff interaction with and/or concerning other staff members. More specifically, Ms. Weber actively participated in a conversation through the District's network, in a public chat room ("Today's Meet"), that was visible to those present in the room and obtainable by any District employee and student through the Today's Meet website, which was discriminatory, offensive, rife with sexual innuendo and ultimately created a hostile work environment (the content of which is set forth more fully in Exhibit B of the Sworn Statement of Evidence). This misconduct by Ms. Weber is unconscionable and constitutes unbecoming conduct, misbehavior, neglect, insubordination, and/or other just cause for dismissal.

Count 1 - Inappropriate comments about Sara Bleekinger – Engrade Trainer

On October 23, 2014, Ms. Weber engaged in a course of misconduct directed towards Ms. Bleekinger, which was inappropriate, foul, discriminatory, offensive, harassing and sexual in nature (the content of which is set forth more fully in Exhibit B of the Sworn Statement of Evidence). Such conduct resulted from a group chat through "Today's Meet" that was visible to Alysia Battista and others who were present in the Training, as well as to the entire Edison Township School District community, as "Today's Meet" is a public chat room which maintains a transcript of each conversation and is accessible to all Board employees and students.

More specifically, Ms. Weber made the following comments about Ms. Bleekinger:

(1) "maybe she was caught in the rain";

(2) "I think you make her nervous";

(3) "your (sic) cuter... your mamalechelt"

(4) "was that your alarm or did I hear church bells";

(5) "are you winking at her';

(6) "maybe we would have learned something if stevie was giving the workshop";

(7) "does anyone have tips for her? Is that her way of saying I don't know what the hell im (sic) talking about";

(8) "I would hate to be her";

(9) "she keeps looking at you ...especially when she says repository";

(10) "teach like a robot ty";

(11) "dare you to ask her if she would go out with our friend ty";

(12) Adding her insight into potential pick-up lines for Mr. Van Pelt to use on Ms. Bleekinger, Ms. Weber stated, " how bout (sic) my eyes are the only thing I don't wanna (sic) take off of your (sic)" ;

(13) "she keeps staring at ty";

(14) "she keeps looking for your approval...can you give her a little something";

(15) "don't say good bye...just say see ya (sic) later babe";

(16) tell her to meet u (sic) in Dartmouth at 4(sic)";

(17) "im sure his roomie would love to join too",

(18) "do you want the pad ty? You can give her your number".

Ms. Weber's conduct resulted in a disruption of the October 23, 2014 Engrade Training, created a hostile school environment for anyone who has had occasion to review her comments and made it unpleasant for Ms. Battista and other staff members to be in her presence for fear that they will either be harassed, discriminated against and embarrassed; made to feel uncomfortable; and/or forced to hear and or view Ms. Lechelt make further inappropriate and offensive comments to them, about them and/or about others.

Count 2 - Inappropriate and offensive comments between each other

On October 23, 2014, Ms. Weber engaged in a course of misconduct which was inappropriate, foul, discriminatory, offensive and harassing and sexual in nature (the content of which is set forth more fully in Exhibit B of the Sworn Statement of Evidence). Such conduct resulted from a group chat through "Today's Meet" that was visible to Alysia Battista and others who were present in the Training, as well as to the entire Edison Township School District community, as "Today's Meet" is a public chat room which maintains a transcript of each conversation and is accessible to all Board employees and students.

More specifically, Ms. weber made the following comments:

(1) "hes a virgin still...leave him pure";

(2) " I like control fu (sic).

(3) In response to Mr. Van Pelt stating that he is a "backchannel guy", Ms. Weber stated. "cant you tell b the way she walks";

(4) In response to Ms. Lechelt stating that the conversation is "so beautifully filthy, Ms. Weber stated, "always is when tvp is chatting".

(5) "whats a repository? Is it something u (sic) stick up your ass";

(6) In response to Ms. Lechelt's comment regarding "the 01 (sic) powder your balls shower, " Ms. Weber stated "or soap in the wash cloth".

Ms. Weber's conduct resulted in a disruption of the October 23, 2014 Engrade Training, created a hostile school environment for anyone who has had occasion to review her comments and made it unpleasant for Ms. Battista and other staff members to be in her presence for fear that they will either be harassed, discriminated against and embarrassed; made to feel uncomfortable; and/or forced to hear and or view Ms. Weber make further inappropriate and offensive comments to them, about them and/or about others.

CHARGE II

Insubordination and Unbecoming Conduct and/or Other Just Cause
Disruption of Professional Development Training

All of the allegations contained in the Background Information and preceding Charges are incorporated by reference as if fully set forth herein. On October 23, 2014, during an Engrade Training, Maria Weber engaged in a course of misconduct that was inappropriate, foul, discriminatory, harassing, offensive and sexual in nature. More specifically, by actively participating in a group chat through "Today's Meet", which was – in part – about Alysia Battista, visible to Ms. Battista and highly offensive to her, Ms. Battista was unable to focus and effectively forced to leave the training to forego further angst, ultimately preventing her from reaping any instructional benefits. This misconduct by Ms. Weber is unconscionable and constitutes unbecoming conduct, misbehavior, neglect, insubordination, and/or other just cause for dismissal.

CHARGE III

Insubordination and Unbecoming Conduct and/or Other Just Cause
Misuse of the District's Computer Network

All of the allegations contained in the Background Information and preceding Charges are incorporated by reference as if fully set forth herein. On October 23, 2014, Maria Weber actively participated in a group chat through the District's computer network that was inappropriate, foul, discriminatory, harassing, offensive and sexual in nature (the content of which is set forth more fully in Exhibit B of the Sworn Statement of Evidence), by way of the "Today's Meet" website, which

constituted a flagrant misuse of Board resources and showed a concerning lack of judgment and failure to comply with the heavy duty of self-restraint and controlled behavior expected from any member of the teaching profession. This misconduct by Ms. Weber is unconscionable and constitutes unbecoming conduct, misbehavior, neglect, insubordination, and/or other just cause for dismissal.

CHARGE IV

Insubordination and Unbecoming Conduct and/or Other Just Cause Violations of District Policies

All of the allegations contained in the Background Information and preceding Charges are incorporated by reference as if fully set forth herein. On October 23, 2014, Maria Weber actively participated in a group chat through the District's computer network that was inappropriate, foul, discriminatory, harassing, offensive and sexual in nature (the content of which is set forth more fully in Exhibit B of the Sworn Statement of Evidence), by way of the "Today's Meet" website, which was both viewable to other attendees of the Engrade Training and obtainable by any District employee and student through the "Today's Meet" website, in violation of numerous Board Policies, as more specifically set forth immediately below within this Charge. This misconduct by Ms. Weber is unconscionable and constitutes unbecoming conduct, misbehavior, neglect, insubordination, and/or other just cause for dismissal.

Count 1 – Violation of Sexual Harassment Policies/Regulations

Ms. Weber's conduct violated Board Policy 3362, *Sexual Harassment*, in that it subjected Alysia Batista, as well as other Board employees, "to sexually offensive speech and conduct . . . wholly inappropriate to the harmonious employment relationships necessary to the operation of the school district." Further, Ms. Weber's conduct was severe and pervasive and had the purpose or effect of unreasonably altering or interfering with work performance or creating an intimidating, hostile or offensive working environment for others. More specifically, Ms. Weber made statements, including but not limited to, her sexual abilities and those of co-workers; obscene teasing, jokes and remarks of a sexual nature; comments of a sexual nature on, or staring at, an individual's physical attributes; and questions about sexual conduct. Regardless of whether such comments were directed at a particular individual, or even if such targets were aware that comments were made about them, Ms. Weber's graphic declarations constitute sexual harassment.

Count 2 – Violation of Affirmative Action Policy

Ms. Weber's conduct violated Board Policy 1140, *Affirmative Action Program*, in that it subjected Alysia Battista, as well as other Board employees, to a "learning environment [rife] with all forms of prejudice, discrimination and harassment . . ."

Count 3 – Violation of Sexual Harassment and Affirmative Action Policies pertaining to Affirmative Action Investigation

Following an Affirmative Action/Sexual Harassment Investigation conducted by the District's Affirmative Action Office, Margaret Deluca, Ms. Weber's conduct during the October 23, 2104 Today's Meet group chat was determined to be in violation of the District's Sexual Harassment and Affirmative Action Policies, as well as various other Board Policies. In relevant part, Ms. Deluca found that the "comments in the chat were directed against females and were so outrageous that the teacher filing the complaint was unable to concentrate on the needed instruction, thus interfering with her work performance." Further, Ms. Deluca expressed her concern that Ms. Weber did not understand the gravity of her conduct. As a result of same, Ms. Deluca recommended that Dr. O'Malley "consider the most severe [disciplinary] consequences for Ms. Weber." Ultimately, Ms. Weber's behavior triggered an Affirmative Action/Sexual Harassment investigation that resulted in a determination of misconduct by her.

Count 4 – Violation of Code of Ethics Policy

Ms. Weber violated Board Policy 3211, *Code of Ethics*, in that she failed to "exert every effort to raise professional standards to promote a climate that encourages the exercise of professional judgment, to achieve conditions which attract persons worthy of the trust to careers in education, and to assist in preventing the practice of the profession by unqualified persons."

Count 5 – Violation of Inappropriate Staff Conduct Policy

Ms. Weber violated Board Policy 3281, *Inappropriate Staff Conduct*, by engaging in inappropriate conduct, outside of her professional responsibilities, including communications through the internet, which were available to pupils and for public display.

Count 6 – Violation of Healthy Workplace Environment Policy

Ms. Weber violated Board Policy 3351, *Healthy Workplace Environment*, by engaging in "repeated malicious conduct . . . directed toward another employee or group of employees in the workplace that [Ms. Battista, and others, found] hostile [and] offensive."

Count 7 – Violation of Acceptable Use of Computer Network(s)/Computers and Resources by Teaching Staff Members

Ms. Weber violated Board Policy 3321, *Acceptable Use of Computer Network(s)/Computers and Resources by Teaching Staff Members*, by engaging in a group chat on the District's computer network that had no administrative and/or educational purposes. More specifically, Ms. Weber violated this Policy by actively participating in a conversation through the District's computer network that was highly inappropriate (contrary to the intended use of the network) and outright obscene (contrary to the generally accepted social standards for use of publicly owned and operated communication vehicles).

CHARGE V

Insubordination and Unbecoming Conduct and/or Other Just Cause
Failure to Pay Attention During Professional Development Training

All of the allegations contained in the Background Information and preceding Charges are incorporated by reference as if fully set forth herein. On October 23, 2014, during an Engrade Training, as a result of a roughly two and a half hour inappropriate and extraneous conversation, unrelated to the Training in any way, Maria Weber failed to pay attention and/or make any effort to benefit from the instruction provided. This misconduct by Ms. Weber constitutes unbecoming conduct, misbehavior, neglect, insubordination, and/or other just cause for dismissal.

POSITIONS OF THE PARTIES

CONTENTIONS OF THE BOARD

The Board argued as follows:

These facts pertain to Maria Weber.

- Ms. Weber has been employed by the Board since the 2000-2001 school year. She is currently a tenured employee.
- Ms. Weber was a special education teacher, assigned to James Monroe School for the 2014-2015 school year.

On September 4, 2014, Ms. Weber executed the *Important Board Policies, Regulations, and Mandated Communications* Form, acknowledging that all Board policies and regulations can be found on the Board's website at http://www.edison.k12.nj.us/Page/514 and agreeing to review and conform to the requirements of same. B-19.

The following facts apply to all of the Respondents

- Article III(B)(1 and 2) of the Agreement for Professional Employees between Board of Education Edison Township New Jersey and Edison Township Education Association, July 1, 2011 through June 30, 2014 ("CBA") state, in relevant part, that "all Board of Education policies will be upheld and enforced by all Board employees who are party to this

Agreement, as well as by all Administrators, Principals, and Supervisors" and "all Board of Education policies will be available for review in the office of the principal, school library, and the Association office." B-27.

- Board Policy 3321, *Acceptable Use of Computer Network(s)/Computers and Resources by Teaching Staff Members*, advises employees that the Board retains the right to have the Superintendent or designee monitor network activity, in any form necessary, to maintain the integrity of the network(s) and ensure its proper use." Policy 3321 further states that "the Board provides access to computer network(s)/computers for administrative and educational purposes only." Moreover, the foregoing policy, in relevant part, states that "any individual engaging in the following actions declared unethical, unacceptable or illegal when using computer network(s)/computers shall be subject to discipline or legal action: (1) using the computer network(s)computers for . . . inappropriate or obscene purposes." B-24.
- Moreover, Policy 3321 subject employees who violate same to discipline, which includes but is not limited to, suspension, revocation of computer privileges and/or dismissal. B-24.
- Unequivocally, there is no expectation of privacy for any Board employee when using the district's computer network. In fact, there is no program and/or policy that would trump the foregoing fact. 3T-14:16-15:12; 2T 26:13-19.
- Board Policy 3362, *Sexual Harassment*, states that "[s]exual harassment includes all unwelcome . . . verbal contacts of a sexual nature that would not have happened but for the employee's gender." Policy 3362 further states that "when such conduct is severe and pervasive and has the purpose or effect of unreasonably altering or interfering with work

performance or creating an intimidating, hostile, or offensive working environment, the employee shall have cause for complaint." B-21.

- Board Policy 3362 also states that "any employee . . . who is found to have sexually harassed an employee of this district will be subject to discipline which may include termination of employment." B-21.
- Board Policy 1140, *Affirmative Action Program*, establishes that the Board's affirmative action program will "foster a learning environment that is free from all forms of prejudice, discrimination, and harassment based upon race, creed, color, national origin, ancestry, age, martial status, affectional or sexual orientation, gender, religion, disability, or socioeconomic status in policies, programs, and practices of the Board of Education." B-20.
- Board Policy 3281, *Inappropriate Staff Conduct*, states in relevant part that "[I]nappropriate conduct by a school staff member outside their professional responsibilities may be considered conduct unbecoming a staff member. Policy 3281 further states that "School staff's conduct in completing their professional responsibilities shall be appropriate at all time . . . [and] school staff shall not make inappropriate comments about pupils." B-23.
- Board Policy 3211, *Code of Ethics*, indicates that "the educator shall exert every effort to raise professional standards to promote a climate that encourages the exercise of professional judgment, to achieve conditions which attract persons worthy of the trust to careers in education." B-22.
- Board Policy 3351, *Healthy Workplace Environment*, requires that "employees interact with each other with dignity and respect" and further states that "repeated malicious conduct of an employee or group of employees directed toward another employee or group of

employees in the workplace that a reasonable person would find hostile and offensive is unacceptable and is not conducive to establishing or maintaining a healthy workplace environment." Policy 3351 further defines the foregoing unacceptable conduct to include the use of derogatory remarks; insults; verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating. Finally, a single act of such conduct can constitute the unacceptable conduct prohibited by this policy if it is especially severe and egregious. B-25.

- Board Policy 3351 states that "appropriate disciplinary action may be taken depending on the severity of conduct." B-25
- On October 23, 2014, Respondents attended a mandatory Engrade Training (the "Training") at the Board's offices. Engrade was a new initiative (learning management system) for the District's elementary school teachers. 2T 24:3-23.
- The Training lasted for two-and-one-half hours (roughly 9:00-11:30AM) and was conducted by Sara Bleekinger, who is not a Board employee. 2T 28:24-29:2.
- Respondents were required to use their District issued Chromebooks to participate in the Training. All Respondents admit to using same during the Training and connecting to the Internet through the District's network. Further, Respondent's computers were open, with their screens exposed, throughout the duration of the Training. 1T 74:12-18; 2T 25:6-20. At 8:53AM, Mr. Van Pelt forwarded an email to Ms. Lechelt, Ms. Weber and Jonathan

Bauza, requesting that they "join [him] on [his] personal wiseass backchannel discussion."[1] B-12.

- Mr. Van Pelt attached a link to bring the invitees to a web site called "Today's Meet." B-12. Today's Meet is an interactive program that hosts various educationally based conversations (i.e., teacher to teacher / teacher to student). However, Today's Meet is not a program that the District requires it teachers to use and/or be familiar with. In fact, it has no affiliation to this District. Importantly, the District does not maintain Today's Meet chat and/or content, nor does it request and/or require Today's Meet to do so. 3T 20:5-11; 5T 236:24-237:15.
- Respondents were not required to use Today's Meet as part of the Engrade Training. In fact, there was absolutely no compatibility and/or correlation between the Engrade Training and the Today's Meet website. B-41.
- Respondents denied reading Lechelt-3 in its entirety prior to using the Today's Meet Program on October 23, 2014. More specifically, Respondent's did not review Today's Meet's Privacy Policy and Terms of Service. In fact, said portions of Lechelt-3 became effective December 13, 2014 – after the chat at issue occurred! See, Lechelt-3.
- Moreover, the document date stamped Lechelt-032 within Lechelt-3 illustrates that Today's Meet chat rooms can be public and/or have limited access. Without question, the chat at issue here was not totally private as Ms. DeLuca – who was not invited to take part in same – was able to access the chat room. See, Lechelt-3.

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[1] Note that while the invitation was actually sent at 8:53AM, the email illustrates that it was sent at 5:53AM. The district's network is set not set to Pacific Standard time and is therefore displayed at a time three hours earlier than it actually is. 2T 45:13-46:3.

- The Respondents, along with Jonathan Bauza, proceeded to engage in a 2.5 hour chat (beginning at 8:54AM and ending at 11:24AM) (hereinafter referred to as the "Group Chat"). B-13.
- James Madison Intermediate School Teacher, Alysia Battista, also attended the October 23, 2014 Engrade Training. 1T 60:10-16.
- Throughout the Training, Alysia Battista was seated in the last row, roughly 3 feet directly behind Ms. Lechelt. To the left of Ms. Lechelt were Jonathan Bauza and then Mr. Van Pelt. Ms. Weber was seated directly in front of Mr. Van Pelt. See, Lechelt-1; 1T 181:13; B-44 and Lechelt-1.
- Ms. Battista did not have any personal animosity towards Respondents prior to the Training. In fact she had no relationship (personal/professional) with any of them prior to same. 1T 83:4-9.
- A few moments after the Training began, Ms. Battista was distracted by noise emanating from Mr. Van Pelt, Ms. Lechelt and Mr. Bauza. Mr. Battista proceeded to "shush" Ms. Lechelt. 1T 67:5-22.
- Ms. Lechelt turned around and gave Ms. Battista a look that Ms. Battista interpreted as "really did you just shush me?" Ms. Lechelt and Messrs. Van Pelt and Bauza continued to converse loudly and lean in towards each other's computer screens. 1T 68:14-20.
- Ms. Battista was able to clearly see Ms. Lechelt's computer screen and, therefore, observe the content of the conversation between Ms. Lechelt, Mr. Van Pelt, Mr. Bauza and Ms. Weber. In fact, Ms. Battista indicated that Respondents made no effort to hide what was going on and, in fact, at one point during the training, Ms. Lechelt actually got up from her

seat, leaving the computer screen open and the chat on the screen – exposed to the general public and visible to anyone looking. More specifically, Ms. Battista observed the following comments: "short bus" and sexual innuendos – i.e., references to male genitalia, "blow me" and "how do you think I got my job"; comments about lesbians. Ms. Battista also observed comments about someone wearing red. Ms. Battista was wearing red and believed some of the commentary was directed towards her. 1T 69:18-71:22; 74:12-18; 1T 70:5-9, 74:12-19; B-8, B-10.

- Ms. Battista was heavily distracted and highly uncomfortable with the nature of the chat. She described same as "unbelievable". The content of the conversation was upsetting to Ms. Battista because: (1) she has a niece who is classified as special education; (2) she has an "uncle who's epileptic and his whole life he was called retarded and that affected him, so to see that from people who work with children"; and (3) she has a cousin who is discriminated against for being a lesbian. Ms. Battista indicated that "seeing those things especially with people who work with kids, whether it's a joke or not, that's not crossing the line, that's jumping over the line and turning around and spitting on it." 1T 73:5-24.
- Ms. Battista found the Group Chat to be "sexually offensive." 1T 151:16-20.
- Similarly, Ms. Battista clearly observed the web address that hosted the Group Chat. She documented same in both her note to Mr. Figurelli and her written statement. 1T 84:4-16; B-8 and B-10.
- Ms. Battista, based on the portions of the transcript she saw, believed that the Respondents were talking about her – *i.e.*, she observed a comment about something red somebody was wearing, and assumed it was a reference to her because she was wearing a red sweater; and

she saw a reference about someone "scratching their lips", which Ms. Battista tends to do when she gets upset, as was the case during the Group Chat. 1T 71:8-22; 176:11-21.

- Ms. Battista made a determination to inform central administration about this chat. She believed that since she preaches to her students to "say something if they see something", she would be disingenuous if she did not do same. Moreover, she expressed concern – *i.e.,* "if that's what's going on in public when other people can see it and I don't think they made any effort to hide what was going on, what could possibly be going on when the kids were not being supervised by other adults." 1T 74:7-11.
- Ms. Battista proceeded to take photographs of Ms. Lechelt's computer screen so she would be able to prove the egregiousness of Respondent's chat. Ms. Battista did not take the time to focus her phone when she snapped the pictures and that is why same came out blurry. 1T 75:21-25; B-7.
- Ms. Weber made all of the comments in the chat attributed to "trish." B-6. Specifically, Ms. Weber made the following comments about the Engrade Trainer – Sarah Bleekinger:
    - "maybe she was caught in the rain";
    - "I think you make her nervous";
    - "your cuter . . . your mamalechelt"
    - "was that your alarm tvp or did I hear church bells";
    - "are you winking at her";
    - "maybe we should have learned something if stevie was giving the workshop";
    - "does anyone have tips for her? is that her way of saying I don't know what the hell im talking about [sic]";

- "I would hate to be her";
- "she keeps looking at you . . . especially when she says repository";
- "teach like a robot ty";
- "dare you to ask her if she would go out with our friend ty";
- Adding her insight into potential pick-up lines for Mr. Van Pelt to use on [the trainer], Ms. Weber stated, "how bout my eyes are the only thing I don't wanna take off of your [sic]";
- "she keeps staring at tvp";
- "shes looking for your approval . . . can you give her a little something";
- "don't say good bye . . . just say see ya later babe [sic]";
- "tell her to meet u on Dartmouth at 4 [sic]";
- "im sure his roomie would love to join too [sic]";
- "do you want the pad ty? you can give her your number." B-13.

- Ms. Weber made the following comments to Mr. Van Pelt, Ms. Lechelt and Mr. Bauza:
  - "hes a virgin still . . . leave him pure [sic]";
  - "I like control fu";
  - In response to Mr. Van Pelt stating that he is a "backchannel guy", Ms. Weber stated, "cant you tell by the way he walks";
  - In response to Ms. Lechelt stating the conversation is "so beautifully filthy", Ms. Weber responded "always is when tvp is chatting";
  - "whats a repository? is it something u stick up your ass [sic]";

- In response to Ms. Lechelt's comment regarding "the ol powder your balls shower," Ms. Weber stated "or soap on the wash cloth." B-13.

- The foregoing chat had no educational purpose, nor did it enhance the instruction of the Training in any manner. 3T 250:24-251:6; B-42.
- Ms. Battista left the Training to speak with Steve Figurelli about her observations. Mr. Figurelli was unavailable so Ms. Battista wrote him a quick note and placed same in a sealed envelope for his attention. B-8.
- Ms. Battista returned to the Training because she knew the Training was important and because she felt she had a professional obligation to sit through same. She did not believe she could simply leave for the day. 1T 79:19-80:1; 149:19-21.
- As a result of Respondents' conduct, Ms. Battista was unable to concentrate and was prevented from learning the content of the Training. Thus, Ms. Battista was unprepared to use Engrade with her students and/or to teach Engrade to her less computer savvy team members and/or student teachers. 1T 71:23-25; 81:8-11; 1T 60:17-61:5.
- Within an hour after the Training, Ms. Battista met with her building Principal, Mr. Duggan, to inform him of Respondents' conduct. 1T 82:2-8.
- Pursuant to the request of Mr. Duggan, Ms. Battista prepared a handwritten statement, documenting her observations during the Training. 1T 83:15-19; B-10.
- Thereafter, later in the day on October 23, 2014, Ms. DeLuca interviewed Ms. Battista as part of an affirmative action investigation concerning Respondents' conduct. Ms. Battista provided Ms. DeLuca with a handwritten statement. Ms. Battista was very upset and visibly shaken during this meeting. See, B-11, B-10 and 2T 31:2-33:18; 1T 88:3-18; B-10.

- Ms. DeLuca accessed and reviewed a written copy of the Today's Meet Group Chat ("Transcript"). More specifically, Ms. DeLuca was initially provided with a copy of same by Tara Beams, but also was able to access a copy of the Transcript by simply opening Today's Meet.com and entering the Chat Room created by Mr. Van Pelt. 2T 41:4-20; B-13.
- Ms. DeLuca found the Transcript to be disgusting and offensive. 2T 48:20-23.
- The chat between Mr. Van Pelt, Ms. Lechelt and Ms. Weber was open to the public and anyone with the chat name was able to access same. 2T 44:6-10; 6T 8:19-22.
- In fact, Don Platvoet, during his brief training of Respondent's on the potential uses of Today's Meet, did not inform Respondent's that it was a private program. 6T 8:8-15.
- Next, Ms. DeLuca met with and interviewed the other teachers in attendance during the October 23, 2014 Engrade Training. 2T 50:12-25; See, teacher interview notes.
- Only one other teacher present during the Training (Angie McKenna) observed the content of the chat between Respondents. 2T 52:22-53:16.
- Ms. DeLuca then proceeded to separately interview each of the Respondents. B-14 through B-16; 2T 56:10-12.
- Mr. Van Pelt and Ms. Lechelt indicated that they made derogatory references to special education and/or handicap students as a result of the Instructor's "offensive" use of the designation "low" for students. 2T 63:15-64:8.
- Per the District's Assistant Superintendent for Special Services, the Instructors use of the designation "low" should not have been offensive. In fact, all of the tests used by the District to classify special education students use the term "low" when classifying students. 2T 65:13-66:5; 3T 237:12-239:16.

- Respondents all appeared to be sorry they were caught, not sorry they had engaged in the conduct at issue. 2T 93:19-24; 104:14-105:4; 114:18-21.
- Specifically, Mr. Van Pelt did not take Ms. DeLuca's interview seriously. On two separate occasions during the interview, Mr. Van Pelt blurted out offensive, disgusting and unacceptable comments – *i.e.*, (1) when explaining that the phrase "eating chicken" means oral sex, Mr. Van Pelt stated under his breath, audible to Ms. DeLuca, that he likes oral sex; and (2) after explaining that the phrase "get the baby batter off the brain" was a reference to masturbation, Mr. Van Pelt stated, that he did not masturbate, "at least not that time." 2T 75:2-8; 76:6-20; 88:6-89:6.
- Throughout the course of her investigation, Ms. DeLuca determined the following meanings for the following phrases used by Respondents:
    - That many, if not all, references to "backchannel" were references to anal sex. B-15; 2T 68:7-16; 3T 266:4-7.
    - Mr. Van Pelt consistently used the phrase "eating chicken", which means both smoking marijuana and oral sex. 2T 71:1-2, 73:22-23.
    - After Ms. DeLuca stated that Ms. Battista "keeps scratching her lips and they are getting bigger." Mr. Van Pelt stated, "DSL." "DSL" is an acronym for the phrase *Dick Sucking Lips*. B-13; 2T 77:5-24.
    - "Tricky d" and "Little Richard" were derogatory references to Dr. O'Malley, made by Ms. Lechelt and Mr. Van Pelt, respectively. B-13; 3T 227 20-24; 5T 244:12-20.
    - Mr. Van Pelt's use of the phrase "get[ting] the baby batter off the brain" was a reference to male ejaculation/masturbation. 2T 87:10-88:5; B-14.

- Following her interviews of Respondents, Ms. DeLuca reviewed and analyzed all relevant Board Policies to determine whether violations had occurred. 2T 114:22-115:1; 2T 55:3-20.
- Finally, Ms. DeLuca analyzed and evaluated all of the information/evidence gathered throughout her investigation and prepared a memorandum summarizing her findings and providing recommendations for Dr. O'Malley's review. B-26; 2T 126:10-22.
- Ms. DeLuca recommended that Dr. O'Malley consider the most severe consequences possible for all three Respondents because "they didn't seem, for lack of a better term, to get it. They didn't seem to realize the seriousness of the situation." 2T 127:25-128:13.
- Dr. O'Malley recommended that Tenure Charges be filed against Respondents because he "felt their comments and their actions were so egregious, that it would not make them suit [sic] to fit in a position of entrusting them with children . . . I just felt that in the context of their – what they wrote and what they were talking about was just – just disgusting and unbearable . . . And how could I ever look a parent in the eye and say that their children are safe knowing that they are in front of their classroom." 3T 57:17-58:3.
- The Tenure Charges were posted to the public through the news media. Parents and teachers alike have approached Dr. O'Malley on a daily basis to express their trepidations to the possible return of Respondents to the classroom. 3T 62:22-63:19.
- Dr. O'Malley indicated that "every parent and Edison resident and teacher feel that this was absolutely disgusting, and how can anyone not only talk about this, but talk about someone's child like this." 3T 63:4-8.

The record is closed and the evidence speaks for itself – the Board has proven by a preponderance of the credible evidence that Respondents have engaged in unbecoming conduct,

misbehavior and/or other just cause warranting their dismissal from their tenured positions with the Board.

Respondents conduct in engaging in a discriminatory, offensive and highly inappropriate group chat constitutes unbecoming conduct and/or just cause warranting their dismissal. On October 23, 2014, during a mandatory Engrade Training, Respondents engaged in a two and one-half hour "Group Chat" through the "Today's Meet Website, visible to those present in the room, observed in detail by Alysia Battista and ultimately printed through the news media and therefore, viewable by the general public. Respondents conceded that they were responsible for posting the various comments attributed to them (*i.e.*, "tvp" = Mr. Van Pelt; "trish" – Ms. Weber; and "mamalechelt" = Ms. Lechelt).. The chat was full of sexual innuendo, discriminatory, offensive content and ultimately created a hostile and uncomfortable work environment for Ms. Battista. In fact, Ms. Battista believed portions of the chat were directed at her and was made to feel so uncomfortable by the general content of same that she was unable to remain focused during the Training and was ultimately brought to tears after having been exposed to same.

The inappropriateness of Respondents' chat is born from an objective review of the Today's Meet Transcript (B-13). Respondents' subjective descriptions and/or interpretations of the chat as a *joke* or a *misunderstanding* are entirely irrelevant to this Tribunal's consideration. Conversely, the Board's conclusion that the Respondents displayed such poor judgment through their participation in the Group Chat that they are not fit to be entrusted with the care of this District's students, coupled with the common sense determination that their conduct crossed all behavioral boundaries for public school teachers, should not be disturbed.

As to Charge I Count 1, Respondents, as a group, consistently directed commentary towards and/or about Ms. Bleekinger that was sexually explicit and offense, demeaning, derogatory and wholly inappropriate. More specifically, Respondents consciously decided to turn a serious and important instructional course into a fantasy game of sorts, within which they vividly described and/or actively suggested ways for Mr. Van Pelt to initiate and achieve sexual interactions with Ms. Bleekinger, along with the sexual fantasies Mr. Van Pelt had towards Ms. Bleekinger. Mr. Van Pelt admitted to making the following comments: "I'd like to tag her"; "you know what would look good on you? ME"; "do you like to have your hair pulled"; "I'd like to invite her to a private backchannel discussion . . . all night long".

Ms. Lechelt admitted to making the following comments: "I have a feeling she would rather go out with me";[2] "im [sic] worried you'll catch something from her backchannel"; "theres [sic] not enough room in her repository for two"; "do you want to blow me". Ms. Weber admitted to making the following comments: "dare you to ask if she would go out with our friend ty"; "tell her to meet u [sic] at Dartmouth at 4"; "im [sic] sure his roomie would love to join too") our friend ty"; "tell her to meet u [sic] at Dartmouth at 4"; "im [sic] sure his roomie would love to join too").

Despite denying engaging in such behavior within their Answers to the Sworn Tenure Charges and Answers to Interrogatories, Mr. Van Pelt and Ms. Weber conceded, through their testimony, that their comments towards Ms. Bleekinger were inappropriate. Specifically, Mr. Van Pelt stated, "[d]id I make inappropriate comments about [Ms. Bleekinger]? Yes, I would agree they were inappropriate, yes."

With regard to the comments made by Ms. Weber, Ms. Weber conceded, "it wasn't right and

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[2] An implication that Ms. Bleekinger is a lesbian.

I've apologized a million times." Conversely, the record is devoid of any concession of remorse by Ms. Lechelt with regard to the specific comments she directed towards Ms. Bleekinger during the Group Chat.

Regardless of Respondent's testimony, even a cursory review of the portions of the Transcript directed towards Ms. Bleekinger illustrate that same is inappropriate for teachers to partake in during school hours and through the District's computer network. Further, whether or not Ms. Bleekinger observed the comments directed towards her is immaterial. The record is clear – the Board's administration, Ms. Battista (the only Board employee to view the chat) and the general public found the comments directed towards Ms. Bleekinger to be inappropriate, foul, discriminatory, offensive, harassing and sexual in nature. Thus, the Board has provided sufficient evidence to sustain this Charge.

Count 6 of Charge I alleges that the Respondents made disgusting, offensive and inappropriate sexual comments among themselves and about each other. Respondents, throughout the Group Chat, made consistent comments between each other about Mr. Van Pelt enjoying, preferring and/or engaging in anal sex – *i.e.*, use of word "backchannel." Mr. Van Pelt and Ms. Lechelt discussed masturbating, particularly in school and during the training session. In fact, the clear implication from their conversation was that Mr. Van Pelt had excused himself from the Training to masturbate in the restroom. Mr. Van Pelt made multiple references to the act of oral sex – *i.e.*, eating chicken, as well as a flippant comment about him being a "lesbian". Ms. Lechelt stated emphatically that she "loves" when Respondents ask her to "blow" them. Finally, the inappropriateness of Respondents' exchange is encapsulated by Ms. Weber's admission that the conversation is "so beautifully filthy" and "it always is when tvp is chatting."

Without question, such comments were graphically sexual, offensive, discriminatory, harassing and inappropriate to Ms. Battisa, Ms. DeLuca, Dr. O'Malley and the general public. Such commentary simply has no place inside of a school building. Thus, the Board has established that Respondents, with respect to this Charge, have engaged in unbecoming conduct.

Charge II alleges that Respondents engaged in unbecoming conduct during the training session when they caused a disruption by preventing Ms. Batista from participating in the training.

The record evidence demonstrates that Ms. Battista, upon viewing portions of the Group Chat, became offended, was unable to focus and was effectively forced to leave the training to report the misconduct she observed Respondents partake in. In fact, Respondents' conduct prevented Ms. Battista from learning the content of the training. Thus, Ms. Battista was unprepared to use Engrade with her students and/or to teach the Engrade program to her team members and/or student teachers.

Respondents' defense to this Charge is entirely misplaced.[3] More specifically, Respondents, through their testimony, failed to address the actual disruption to Ms. Battista (which was alleged in Charge II of the each of the Sworn Tenure Charges), while attempting to divert this Tribunal's attention to the lack of general disruption. Importantly, however, the Board did not charge Respondents with causing a general disruption to the Training as the Group Chat was only observed by one person and thus, logically, only could have disrupted one person – Alysia Battista.

Merrian's Webster Dictionary defines disruption as follows: to cause (something) to be unable to continue in the normal way; to interrupt the normal progress or activity of (something).

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[3]Mr. Waldman asserts that "the charges themselves . . . point to a much more general disruption and, in fact, they say that the harassment was public." 3T 131:20-24. However, such a statement is not accurate, as this Charge states, in relevant part, that "by taking part in a group chat through Today's Meet, which was –in part – about Alysia Battista, visible to Alysia Battista and highly offensive to her, Ms. Battista was unable to focus and was effectively forced to leave the training . . ." B-3. The Board did not charge "general disruption."

Here, without question, Respondents' Group Chat resulted in a situation where Ms. Battista was unable to continue with the Training in the normal way. Thus, the Board has sustained its burden in establishing that Respondents disrupted the Engrade Training.

As a consequence of Respondents' partaking in a 2 ½ hour group chat, they failed to pay attention to the training . The Board has established by a preponderance of the credible evidence that Respondents, as a result of their participation in a 2.5-hour conversation during the Training, failed to sufficiently pay attention to the content and/or presentation of the Engrade materials.

The Board had an expectation that all teachers present at the Training, or any professional development training for that matter, would pay attention to the entirety of the instructional presentation and refrain from engaging in ancillary and unrelated conduct. Respondents' conduct fell far short of the foregoing expectation.

The transcript of the Chat proves that it lasted for 2.5 hours. Mr. Van Pelt made his first comment at 8:54AM and his last comment at 11:23AM. Similarly, Ms. Lechelt made her first comment at 8:54AM and her last at 11:24AM. B-13. Finally, Ms. Weber made her first comment at 8:58AM and her last comment at 11:24AM. B-13. Between 8:54AM and 10:49AM, the longest period of time in between comments was only 4 minutes, on two separate occasions. Both Mr. Van Pelt and Ms. Weber testified that they spent as much as 15-20 minutes participating in the chat. Ms. Lechelt did not attempt to quantify her participation in the chat.

Regardless of the self-serving estimates set forth by Mr. Van Pelt and Ms. Weber, even if each Respondent only spent 15-20 minutes participating in the chat (or the length of time it took them to type the comments they admitted to making into the chat), they failed to pay attention, or at the least, refrain from engaging in unrelated activity – by their own admission – throughout the

entirety of the Training. Thus, the Board has sustained this Charge against all Respondents.

As to Charge III, on October 23, 2014, during the Training, Respondents participated in an inappropriate, foul, discriminatory, harassing and offensive chat through the District's computer Network and District's computers. The chat was not the result of any educational and/or instructional requirements or necessities. Thus, it constituted a misuse of the District's computer network.

Board Policy 3321, *Acceptable Use of Computer Network(s)/Computers and Resources by Teaching Staff Members*, states – in relevant part – that "any individual engaging in the following actions declared unethical, unacceptable or illegal when using computer network(s)/computers shall be subject to discipline or legal action: (1) using the computer network(s)/computers for illegal, inappropriate or obscene purposes, or in support of such activities . . . Inappropriate activities are defined as those that violate the intended use of the network(s) . . . ; and (3) using the computer network(s) in a manner that: engages in other activities that do not advance the education purposes for which computer network(s)/computers are provided."

Here Ms. Weber agreed that her conduct constituted a misuse of the District's network. Similarly, Ms. Lechelt grudgingly conceded that her participation in the Group Chat did not enhance any educational purposes. Only Mr. Van Pelt refused to acknowledge same by steadfastly arguing that the Group Chat, which provided an infusion of humor to the Training, enhanced the Respondents' learning capacity.

While Mr. Van Pelt's lack of credibility will be addressed in greater detail below, suffice it to say that Mr. Van Pelt's claim surely does not overcome the Board's proofs coupled with the other Respondents' concessions. Initially, Mr. Van Pelt set up the Group Chat and invited the other Respondents and Mr. Bauza to his "personal wiseass backchannel discussion." Clearly, the name

he chose for the Group Chat depicts his true intentions for the chats direction and content – *i.e.*, inappropriate.

Next, an objective review of the content of the chat illustrates that same was wholly inappropriate in relation to Board Policy 3321 and entirely unrelated to the educational purposes of the Training. Finally, and perhaps most importantly, the admissions of Ms. Lechelt and Ms. Weber that they misused the district network must be similarly attributed to Mr. Van Pelt, as his conduct during same was at least as egregious as the other two Respondents.

Thus, the Board has sustained its burden in proving that Respondents misused the District's computer network, constituting unbecoming conduct.

Charge IV indicates that Respondents' conduct during the training session violated several district policies. In September 2014, Respondents executed "Important Board Policies, Regulations, and Mandated Communications Forms." B-17, 18 and 19. These forms indicate, "employees are expected to review and become familiar with all Board policies and regulations" and further, directs employees to the web address where same can be found. In fact, Respondents all acknowledged that the policies and regulations are on the Board's website and agreed to "conform to the requirements of the policies and regulations of the Edison Township Board of Education."

Additionally, Article III(B), *Board Policies*, of the controlling CBA states, in relevant part, that: (1) all Board of Education policies will be upheld and enforced by all Board employees who are party to this Agreement, as well as by all Administrators, Principals, and Supervisors; and (2) all Board of Education policies will be available for review in the office of the principal, school library, and the Association office.

Thus, regardless of whether or not Respondent's actually adhered to their obligations to

familiarize themselves with and abide by all Board policies and regulations, their affirmative obligation to do same undercuts any efforts by Respondents to argue that they were unaware of certain policy requirements that they disregarded. More simply put, in considering whether or not Respondents violated Board Policies as alleged in the Sworn Tenure Charges against them, this Tribunal must find that they were familiar with all Board Policies and aware of their obligations pursuant to same.

Pursuant to Counts 1, 2 and 3 of Charge IV, Respondents are charged with violating the Board's Affirmative Action and Sexual Harassment Policies. More specifically, Board Policy 1140, *Affirmative Action Program*, requires the Board to implement and "foster a learning environment that is free from all forms of prejudice, discrimination, and harassment based upon race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, gender, religion, disability, or socioeconomic status in the policies, programs, and practices of the Board of Education."

Board Policy 3362, *Sexual Harassment*, states that "[t]he Board of Education recognizes that an employee's right to freedom from employment discrimination includes the opportunity to work in an environment untainted by sexual harassment." Said Policy further provides that "[s]exually offensive speech and conduct are wholly inappropriate to the harmonious employment relationships necessary to the operation of the school district and intolerable in a workplace which the children of this district are exposed." Sexual harassment includes all "verbal or physical contacts of a sexual nature that would not have happened but for the employee's gender. When such inappropriate conduct is "severe and pervasive" and has the effect of unreasonably altering or interfering with work performance or creating an intimidating, hostile, or offensive working environment, the

employee shall have cause for complaint. Finally, employees are put on notice through Policy 3362 that should they be found guilty of sexual harassment, they will be subject to discipline which may include termination.

Though Respondents were not charged with violating New Jersey's sexual harassment laws, Respondents sought to interject the more stringent standards of same into this matter in an effort to defend the Board's allegations. Respectfully, any comparison of the Respondents' conduct to New Jersey Law is not relevant and/or appropriate, as Respondents were not charged with violating state law.

However, to the extent this Tribunal disagrees with the Board's interpretation of the Sworn Charges, the Board contends Respondents have, in fact, violated New Jersey Law, as established by the New Jersey Supreme Court. Lehman v. Toys R Us, Inc., 132 N.J. 587, 603-604 (1993)(a four part test must be considered in determining whether or not sexual harassment has occurred: (1) the complained of conduct would not have occurred but for the employee's gender; and (2) was severe or pervasive enough; (3) to make a reasonable woman believe that (4) the conditions of employment are altered and the working environment is hostile or abusive).

Here, the credible record evidence is clear and convincing – Respondents violated the Board's Affirmative Action and Sexual Harassment Policies. Ms. Battista, based on the portions of the transcript she saw, believed that Respondents – at least in part - were talking about her (*i.e.*, she observed a comment about somebody in red, and assumed it was a reference to her because she was wearing a red sweater; and she saw a reference about someone "scratching their lips", which Ms. Battista tends to do when she gets upset and was doing during the Group Chat). More specifically, but without limitation, Ms. Battista observed and recalled the following commentary between

Respondents: reference to a "short bus" - a demeaning reference to the mode of transportation for special education students; the size of male genitalia; use of the word "dick"; comments about being a "virgin"; describing the trainer as a lesbian, with a reference to a rainbow; "blow me" – "how do you think I got my job"; "men who are like 'turtles'". As a result of Respondents' conduct, Ms. Battista was unable to concentrate and was prevented from learning the content of the training – *i.e.*, Respondents altered and interfered with Ms. Battista's work performance and created an intimidating, hostile, and offensive working environment.

Further, the severity and pervasiveness of Respondent's 2.5 hour chat is borne from Ms. Battista's reaction at the time she observed same, Ms. Battista's demeanor during her testimony when she broke down in tears because she remains upset with the content of Respondent's chat and the testimony and conclusions of Ms. DeLuca and Dr. O'Malley.

Ms. DeLuca, an experienced affirmative action coordinator/investigator, determined that Respondents' comments during the Today's Meet Group Chat included: (1) explicit and graphic references to sexual acts and sexual sayings; (2) references and imaginations regarding a sexual relationship between Mr. Van Pelt and Ms. Bleekinger; (3) comments concerning Ms. Bleekinger's sexual preferences – *i.e.*, the suggestion that she is a lesbian; (4) inexcusable and insulting comments about special education/handicap students; (5) demeaning comments about other persons present in the training, including their sexual orientation and/or age; and (6) inappropriate, insulting and unfounded comments concerning Dr. O'Malley's physical appearance and hiring/promotion practices.

Ultimately, Ms. DeLuca concluded that the related Board Policies were violated because Respondents' verbal attack on females, elderly persons, lesbians and students with disabilities

created a hostile and offensive working environment for Alysia Battista.[1] Respectfully, the record would not support any alternative finding by this Tribunal.

Importantly, Respondents' efforts to attack the credibility of Ms. Battista by categorizing her as both unreasonable and atypical are unavailing. Initially, common sense must prevail.

Regardless of Respondents' self-serving and rehearsed definitions/meanings for the various phrases used throughout the transcript, this Tribunal must evaluate same based on the meaning the general public would have, and since has, attributed to such relevant statements – that they are disgusting, sexually offensive, insulting, demeaning, and discriminating on their face. Further, to the extent this Tribunal is convinced that Respondents' efforts to apply the "reasonable person standard" to Ms. Battista are appropriate, which the Board remains steadfastly opposed to, the Board argues that said standard has been satisfied – both Ms. DeLuca and Dr. O'Malley corroborated the reasonableness of her reaction to Respondents' Group Chat.

Thus, to categorize Ms. Battista's reaction to Respondents' commentary as "unreasonable" would be to implicitly identify such comments as acceptable. Moreover, the Board would be remiss to fail to point out the hypocrisy of Respondents' argument – *i.e.*, Respondents, in one breath, ask this tribunal to find that Ms. Battista's reaction to Respondents' comments was atypical or unreasonable, while in the other breath, argue that their "reaction" to Ms. Bleekinger's well accepted categorizations/classifications of special education students (*i.e.*, "low") was normal and a legitimate excuse to their behavior. Respondents' attempt to deflect this Tribunal's attention from their conduct, by yet again attacking Ms. Battista's person, should not be overlooked. The overwhelming

[1] Respondents' argument that the chat was not severe and pervasive because it only affected Ms. Battista is unavailing and disingenuous. Ms. Battista was the only employee to have viewed the chat during the chat. Thus, same should not serve as a mitigating factor in support of Respondents' case.

record evidence illustrates that Respondents' conduct violated the Board's Affirmative Action and Sexual Harassment Policies.

Count 4 and 5 of Charge IV asserts that Respondents violated Board Policy 3211 and Board Policy 3281. The *Code of Ethics* policy states in relevant part that the educator "shall not intentionally expose the pupil to embarrassment or disparagement." Further, Policy 3211 requires that the "educator shall exert every effort to raise professional standards to promote a climate that encourages the exercise of professional judgment, to achieve conditions which attract persons worthy of the trust to careers in education, and to assist in preventing the practice of the profession by unqualified persons."

Board Policy 3281, *Inappropriate Staff Conduct*, indicates, in relevant part, "staff members have the public's trust and confidence to protect the well-being of all pupils attending the school district." Policy 3281 further requires that "school staff's conduct in completing their professional responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments . . . about pupils." B-23.

The foregoing policies hold Board employees to the highest degree of morality and professional standards. Similarly, they confer expectations on Board employees to safeguard the trust and confidence conferred upon them by the public. However, Respondent's voluntary and willful conduct during the October 23, 2014 Group Chat, along with the content of said chat, constituted a grave lack of professional judgment and a breach in the trust attributed to these teachers by both the Board and the general public. More specifically, the 2.5-hour conversation between the Respondents, with no instructional/educational purpose, during an important Professional Development Training (a professional responsibility) was highly inappropriate and a drastic

deviation from the administration's expectations for its employees to embrace the Engrade program and/or act with a certain level of respect and commitment during any professional development training.

Further, the content of same, specifically the derogatory references by Mr. Van Pelt and Ms. Lechelt about their special education / handicap students leapt across all bounds of decency. Perhaps most importantly, as a result of the words documented by Respondents, the young impressionable students (and their parents) previously assigned to Mr. Van Pelt and or Ms. Lechelt, at any time during the employment of Mr. Van Pelt and Ms. Lechelt, are forced to wonder which hurtful and derogatory grouping they were assigned to by their respective teacher. Thus, the Board has sustained its burden in establishing that Respondents' conduct violated Board Policies 3211 and 3281.

Count 6 refers to Board Policy 3351, *Healthy Workplace Environment*, which states, in relevant part, "employees [must] interact with each other with dignity and respect . . . Repeated malicious conduct of any employee or group of employees directed toward another employee or group of employees in the workplace that a reasonable person would find hostile or offensive is unacceptable and is not conducive to establishing or maintaining a healthy workplace environment." Policy 3351 defines unacceptable conduct as conduct that constitutes the "use of derogatory remarks; insults; verbal . . . conduct that a reasonable person would find threatening, intimidating or humiliating. A single act of such conduct shall not constitute the unacceptable conduct prohibited by this policy unless it is especially severe and egregious."

Here, once again, the Board has sustained its burden in proving that Respondents have violated this Policy. By their own admission, the overall content of the Group Chat contained interactions devoid of both dignity and respect – *e.g.*, graphic and vulgar sexual comments

concerning Mr. Van Pelt's desires with respect to Ms. Bleekinger; derogatory and insulting comments about Mr. Van Pelt and Ms. Lechelt's student groupings and special education students in general; baseless insulting and defamatory remarks about Dr. O'Malley's appearance and hiring/firing/promotional practices; derogatory and insulting remarks about woman, lesbians, elderly persons. B-13. Further, the Group Chat by Respondent's lasted 2.5 hours, encompassed 16 pages of a transcript and contained 318 separate comments, making the foregoing malicious conduct repeated conduct. B-13.

Finally, notwithstanding Respondents' unjustified and desperate claims that Ms. Battista is not a reasonable person and/or did not have a reasonable reaction to the content of the Group Chat, Ms. DeLuca and Dr. O'Malley certainly found Respondents' conduct hostile, offensive and humiliating as well. In reality, even a cursory review of the public comments associated with any of the printed news articles related to Respondents' conduct illustrates that the general public also finds the content of Respondents' Group Chat hostile, offensive and humiliating. Thus, without question, the Board has also satisfied the *reasonable person* element of this Policy.

Credibility is the value that the fact finder gives to the testimony of a witness. It contemplates an overall assessment of the witness's story in light of its rationality, internal consistency, and the manner in which it "hangs together" with the other evidence. Credible testimony must proceed from the mouth of the credible witness and must be such as common experience, knowledge and common observation can accept as probable under the circumstances. The Board cites judicial case law in this regard.

In deciding the facts of a case, the fact finder must decide which witnesses to believe and which witnesses not to believe based on the following factors: (1) interest in the outcome of this

case; (2) witness' recollection; (3) ability to know what he/she was talking about; (4) contradictions or changes in testimony; (5) demeanor; (6) whether or not testimony makes sense; (7) reasonableness of testimony when considered in the light of other evidence. See, NJ Model Civil Jury Charge. Additionally, New Jersey law permits a fact finder to reject the entirety of a witness's testimony if a determination is made that the witness deliberately lied on any fact significant to the decision in the case.

Initially, all Respondents' display of remorse during the Hearing was incredible as the Board exposed the same glaring contradictions made by each Respondent. Respondents attempted to illustrate, through their testimony, remorse for their behavior during the Training. However, the authenticity of such remorse, only displayed to the person responsible for deciding their fate, after undergoing hours of preparation with their counsels, must certainly be undermined by the Respondents conduct (*i.e.*, lack of remorse) during their suspension meetings with Dr. O'Malley, November 11, 2014 interviews with Ms. DeLuca, Sworn Answers to the Tenure Charges and Answers to Interrogatories.

Notwithstanding the lone admissions of making the comments in the Transcript, as well as other various innocuous admissions, Respondents uniformly and consistently denied the remaining substantive allegations made by the Board in the Sworn Tenure Charges. Id. Therefore, the weight given to Respondents' staged showing of remorse during the Hearing, must certainly be weighed in light of their failure to exhibit the same remorse when meeting with Dr. O'Malley and Ms. DeLuca, filing their Answers to the Charges and serving their Answers to the Board's Interrogatories. Such behavior by the Respondents bolsters the Board's assertion that Respondent's were only sorry they got caught, but not sorry for what they had done.

Next, Respondents' efforts to assert an expectation of privacy in defense of their actions during the Group Chat is unreasonable based on the record and the law – *i.e.*, Board Policy 3321 expressly denies Board employees of any expectation of privacy when using the district's network; pursuant to state and federal law, when something is exposed to the public view, such as this Group Chat, same is not protected by an reasonable expectation of privacy. Thus, Respondents' efforts to push such an illogical argument/defense on this Tribunal illustrate Respondents' lack of credibility.

Mr. Van Pelt and Ms. Lechelt's lack of credibility is further borne from the unreasonableness of their defense to the Charge alleging that they made inappropriate comments directed towards special education / handicap students – *i.e.*, that their perceived anger towards Ms. Bleekinger's direction to label a group of students "low" triggered their barrage of insulting and demeaning commentary.[2] This argument is irrational because: (1) the district's Assistant Superintendent / Director of Special Services informed Ms. DeLuca that the use of the designation "low" is an acceptable norm; (2) all Respondent's acknowledged and accepted the District's practice, as well as the nationwide practice, of using various tests that ultimately label the students as "low", "very low" and "average"; and (3) not one of the Respondents confronted Ms. Bleekinger during the Training about her student *designations* or raised a concern with the administration with regard to their accepted use of such *offensive* tests/terms.

When engaging in credibility determinations related to each Respondent, it should not be lost on this Tribunal that all of the Respondents, rather than simply take ownership for their conduct, blamed and attacked others (*i.e.*, Ms. Bleekinger and Ms. Battista), for causing these grown teachers to act in the manner they chose to act. More specifically, the notions that Ms. Bleekinger's use of

[2]Notably, this ludicrous defense also illustrates their lack of remorse – *i.e.*, their willingness to blame their voluntary actions on someone else, as opposed to simply stating they were wrong without qualification and excuse.

a uniformly accepted student classification; or that Ms. Bleekinger was inadequately prepared for the presentation; or that Ms. Battista was a "peeping tom" with the intention of bringing trouble upon the Respondents are so ostensibly absurd that the credibility of the persons making such statements must be gauged against the lunacy of same. In other words, a credible witness/person would not make such arguments.

Thus, the Board submits that this record is replete with reasons that should cause this Tribunal pause when considering whether Respondents provided credible testimony.

As a point of legal argument, the Board asserts that Respondents had no right to privacy when engaging in the Group Chat during the October 23, 2014 training session. Throughout this process, have asserted that they had a good faith belief that the Group Chat was private. More specifically, in concert, Respondents argued that if the chat rooms were open to the public, student privacy concerns under FERPA and state law would be triggered. However, Respondents' efforts to assert an expectation of privacy in defense of their actions during the Training are unavailing, as both the record and the law are fatal to such a defense. In fact, said argument is so suspect that it does nothing more than bolster the Board's assertion that Respondents are not remorseful for their conduct – *i.e.*, despite the baselessness of the claim, Respondents have conspired to stick with the defense through the resolution of this matter.

Board Policy 3321, *Acceptable Use of Computer Network(s)/Computers And Resources by Teaching Staff Members*, states – in relevant part – that "[t]he Board retains the right to have the Superintendent or designee monitor network activity, in any form necessary, to maintain the integrity of the network(s) and ensure its proper use." Further, every District employee is aware that there is no expectation of privacy when using the District's computer network, and there is no program

and/or policy that trumps same. More specifically, Respondents were actually informed during Today's Meet training that the program was not private.

Here, Respondents all executed "Important Board Policies, Regulations, and Mandated Communications" Form, within which Respondents agreed to review and conform to all Board Policies. More importantly, Mr. Van Pelt and Ms. Weber acknowledged reviewing and being familiar with the Board's *Acceptable Use* Policy, along with the Board's right to monitor their network activity. Simply put, there is no way the Board could have been more explicit with the reality that employees do not enjoy any expectation of privacy when using the District's network.

FERPA is a Federal Law that controls the disclosure of personally identifiable information from an eligible student's *education records* to a third party unless the eligible student has provided written consent. The applicable statute defines education records as those records, files, documents and other materials which: (1) contain information directly related to a student; and (2) are maintained by an educational agency or institution or by a person acting for such agency or institution. Importantly, without dispute, the Group Chat did not contain and/or reference specific students or information directly related to specific students. Further, the Board does not maintain the Group Chats and/or transcripts of the Chats, and there is simply no reason for Respondents to have thought otherwise. Thus, Respondents' efforts to grasp on to the protections of FERPA, despite the record evidencing that FERPA's application is unjustified, is merely an act of desperation.

A person cannot assert an expectation of privacy with regard to something exposed to the public view. There is no liability under the tort of invasion of privacy for observing a plaintiff or even taking his photograph while he or she is walking on a public highway, since he or she is not

then in seclusion, and his or her appearance is public and open to the public eye. These premises are supported by judicial case law.

Here the record evidence is clear. Ms. Battista observed the conversation and identified the web address by viewing Ms. Lechelt's computer screen during a Training session. In fact, all Respondents engaged in the Group Chat on their computers in a room filled with thirty to forty other persons, with the screens open and on their desks for a two and a half hour period, during which they all, at one point or another, stood up and walked around, while not closing their computer screens. Had Respondents desired to avail themselves to an expectation of privacy, they surely would have found a way to be more discreet during the Group Chat. Thus, Respondent's expectation of privacy defense is contrary to well-established law. In fact, in the event this Tribunal feels compelled to give any deference to Respondents' FERPA based privacy argument – to which the Board contends none is warranted – Respondents' cavalier participation in the Group Chat during a training, visible to other members of the public, must trump any FERPA privacy considerations.

As to the charges serves on Respondents, the record confirms that the Board has proven by a preponderance of the credible evidence that Respondents are guilty of conduct unbecoming, insubordination and/or other just cause warranting dismissal. The infractions established in the record evidence cut to the core of Respondents' fitness to continue to teach. Unlike labor arbitration, this Tribunal's decision regarding any potential penalty must be first and foremost concerned with the welfare of students, not the employment rights of Respondent. There is ample, longstanding precedent for this proposition in the body of School Law in New Jersey that has developed over the last several decades, as well in the growing number of Tenure Hearing arbitral decisions under the

recently revised Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TeachNJ Act").

With respect to just cause, in evaluating whether an employer has just cause to discipline an employee, Arbitrators follow guidelines similar to those utilized in Enterprise Wire Co., 46 LA 359, 363-64 (1966); Grief Brothers Cooperage Corp., 42 LA 555, 558 (1964). Consequently, it has been held that the employer should satisfy the conditions set forth in the above cases in order to prove "just cause" for the disciplining the employee.

The "inherent duties of a public employee include compliance with all reasonable rules and regulations, and duties arising from a fiduciary relationship to the public and from such duties as arise by the nature of the office held." Unless the penalty is unreasonable, arbitrary or offensively excessive under all of the circumstances, it should be permitted to stand. These statements have been well established by New Jersey courts.

Moreover, recent case law suggests that progressive discipline is ***not*** a fixed and immutable rule to be followed without question because some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. For example, in American Arbitration Association Decision, 2010 AAA LEXIS 439, Arbitrator Renovitch acknowledged that extremely serious offenses usually justify the enforcement of a discharge.

The holding that dismissal was warranted in the cited case resulted from a Grievant failing to perform an end-of-run check, which resulted in a sleeping student being left on her school bus. In that case, the arbitrator enforced a summary dismissal. Arbitrators Tener, Dichter and Simon enforced summary dismissals in other cases that reflected other fact patterns.

Moreover, since the implementation of the TeachNJ Act, Arbitrators have dismissed teachers for engaging in inappropriate conduct that has reflected poorly on both the teacher and the school district. The cited decisions were all issued since 2012.

In anticipation of the cases Respondents will likely seek to rely upon to argue that their dismissal is not warranted in this matter, the Board asserts same are readily and easily distinguishable from the matter at bar based on discrepancies in fact and proofs.

Here, the just cause conditions have been satisfied: namely, Respondents were forewarned prior to the Group Chat that dismissal could result from misusing the District's computer network and violating various Board Polices and standards of expected behavior. Respondents conduct on October 23, 2014 violated established Board Policy and any reasonable expectations of employee conduct; Respondents' conduct was investigated fully; substantial evidence, including Respondents' acknowledgments of wrongdoing, admissions and a copy of the actual transcript, were obtained; and termination was reasonably related to the seriousness of Respondents' offenses (*i.e.*, the duration and wholly inappropriate nature of the conversation, coupled with the grave lack of judgment displayed by Respondents) and the Respondents' past record. Specifically, Respondents' conduct with respect to the group chat, without the consideration of progressive discipline, rose above and beyond the level of egregiousness necessary for dismissal.

Accordingly, satisfaction of the just cause standard, along with the arbitral precedents, must result in the termination of Respondents. Their acts are egregious on their face. In fact, the totality of their conduct, and each specific charge considered alone, are more egregious than that deemed sufficient for dismissal in the above-cited precedents. Respondents violated board policies and the common decency expected of public school teachers, as illustrated in the record evidence, by

misusing the District's network to mock, insult, harass and offend others (including special education students, the superintendent of schools, the Engrade Training presenter, females, older persons and each other), while creating a hostile and unhealthy work environment for the one person who openly observed same; continuing such conduct for a period of 2.5 hours during scheduled instructional time; failing to comprehend the seriousness of their conduct by constantly making excuses, placing the blame elsewhere and disingenuously declaring remorse only when face-to-face with the assigned arbitrator after being prepped by their counsel as to what this tribunal wants to hear; and, in the case of Mr. Van pelt, admitting to masturbating on school property.

Respondents showed a complete lack of concern for the parents and students of the Edison Township School District, and a callous sense of desperation by attempting to attack and demonize the VICTIM – Ms. Battista (*e.g.*, referring to her as a "*peeping Tom*", claiming that she went out of her way to discover their chat and ultimately blaming her for the trouble and embarrassment now endured).

The record, as discussed and documented above, clearly illustrates that Respondents recognize a large portion of their conduct was inappropriate.[1] Specifically, Respondents concede, for the most part, that they misused the District's network and made regrettable comments about other persons and classifications of persons

It is well established in case law that the term "unbecoming conduct" is a broadly defined, elastic term, encompassing any conduct that has a tendency to destroy public respect for government employees and competence in the operation of public services. In hearings similar to this one,

[1] Importantly, it should not be lost on this tribunal that Respondents testified to same, despite their prior submissions denying any misconduct.

arbitrators have determined that conduct unbecoming a teacher has been found to include a broad range of behavior that impacts a teacher's ability to perform his duties or otherwise renders him unfit to have the responsibility to care for children. In this matter, Respondents have unmistakably breached the public trust placed in their position as teachers.

Based on the foregoing, Maria Weber has failed to satisfy the standards of a profession predicated on public trust and respect. Her misconduct goes to the heart of her character and fitness.

CONTENTIONS OF RESPONDENT

Respondent argued as follows;

Maria Weber (hereinafter "Ms. Weber" or "Respondent") has been recognized as an outstanding Special Education Teacher within the Edison Township School District receiving consistent "accomplished" and "distinguished" evaluative ratings. Ms. Weber's Principal Lynda Zapoticzny (hereinafter "Zapoticzny") in writing a letter on behalf of Ms. Weber, that was part of Respondent's Answer in this proceeding referred, in part, to Ms. Weber being "...the kind of professional who constantly seeks out best practices and new interventions that may lead to success for her students, even if it is just one who will benefit. Maria is willing to take on whatever comes her way for the greater good of the children of the school community".

It is uncontroverted that Ms. Weber was involved in the chat activity that took place on October 23, 2014 at which time Ms. Weber attended a voluntary Engrade training session at the Board's administrative offices. Ms. Weber, who was a novice regarding the use of social media sites, agreed to be a participant in a chat within the Today's Meet website that she viewed, based on information that had been previously provided to her, to be a private chat that was not accessible to anyone who was not specifically invited to be a participant and who did not know the applicable

"room number" to be a participant in the chat room activity.

The Today's Meet website emphasized the privacy rights of the participants. Moreover, the recommendation of Edison Township School District personnel that the Today's Meet website be used in a supplemental curriculum capacity indicated, in part, that the Board recognized that there were FERPA implications involving student notes and comments that could be a part of any Today's Meet chat activity, substantiating the chat participants' understanding that they were involved in a private chat room.

It is undisputed that Ms. Weber did not make any negative comments about classified students or any students in general. Moreover, it was stipulated that Ms. Weber did not make any critical comments about any supervisors or administrators employed within the Edison Township School District. There were no inappropriate comments addressed to any School District teachers by the Respondent aside from jocular jibes directed primarily at one of the other participants in the chat.

It was equally uncontroverted that, despite the Board of Education's tenure charge allegations to the contrary, there was absolutely no disruption of the training session. Out of the approximately 25 teachers who were interviewed as part of the Board of Education's investigation prior to the proffering of the tenure charges at issue only one teacher, Alysia Battista (hereinafter "Ms. Battista"), alleged that there was any disruption regarding the training session.

Ms. Weber testified concerning her full participation in numerous interactive activities as part of the Engrade training program, both independently and collaboratively with her fellow 4th grade teachers. The Respondent, in part, asked "Presenter" Sara Bleekinger, during the course of the training program, specific questions that were responded to.

Throughout the entire investigatory process and throughout the arbitration hearing itself, Ms. Weber was consistently apologetic and remorseful.

One of the foundational principles in evaluating what punishment should be assessed, assuming that it is determined that Ms. Weber engaged in conduct unbecoming a teacher, is to consider the applicable administrative and judicial decisions in this State applying the principle of progressive discipline.

Applying that progressive disciplinary policy mandates the conclusion that Ms. Weber should be the beneficiary of the application of progressive discipline principles. For over fifteen years in the Edison Township School District, Ms. Weber's record was unblemished, wherein she consistently received excellent evaluations.

Ms. Weber's participation in the chat does require a penalty, however, it is averred that the penalty should be a minimal one for a teacher who has provided consistently exemplary service for such a lengthy period of time and who was apologetic since "day one" concerning her involvement in a chat that she viewed related exclusively to private activity wherein her remarks, that Ms. Weber acknowledged were inappropriate, were almost exclusively limited to mocking remarks addressed to a former co-teacher, Tyler Van Pelt.

The **Fulcomer** and just cause standards are the relevant standards to be applied in teacher tenure cases. The lead case in New Jersey regarding tenure charges that have been initiated by local Boards of Education concerning allegations of unbecoming conduct is **In re Fulcomer**, 93 **N.J. Super**. 404 (App. Div. 1967)

Under **Fulcomer,** the Arbitrator is asked to consider the following factors:

1. The potential impact of your decision on Respondent Maria Weber's teaching career;

2. The longevity of Ms. Weber's career;

3. Ms. Weber's overall teaching record;

4. Ms. Weber's teaching ability;

5. Whether there was an absence of prior discipline;

6. Whether there was an absence of past increment discipline affecting Ms. Weber during her employment;

7. The nature and gravity of the offenses under all of the circumstances involved;

8. Evidence as to provocation, extenuation or aggravation; and

9. Any harm or injurious effect which Ms. Weber's conduct may have had on the maintenance of discipline and the proper administration of the school system.

The **Fulcomer** standards have been periodically "tweaked" in other Commissioner of Education decisions and by the courts. Factors which have previously been taken into account in making penalty determinations include (1) the nature and gravity of the offenses under all of the circumstances involved; (2) the teacher's attitude - i.e., whether the acts were premeditated, cruel or done with intent to punish; (3) any evidence as to provocation, extenuation or aggravation; (4) any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system; and (5) the likelihood of such behavior recurring. Under the TEACHNJ Act, arbitrators have consistently applied the **Fulcomer** tests and several arbitrators have also considered the often cited seven tests of "just cause" that have historically been applied

Encompassed within the **Fulcomer** standards, and as part of the just cause tests summarized above, is the need to consider principles of progressive discipline in fashioning remedies in cases

in which an arbitrator has determined that at least one act of "conduct unbecoming" has been proven by the Board of Education. The New Jersey courts have observed that progressive discipline is to be used to justify severe penalties or to mitigate penalties based on the absence of prior disciplines.

The **Fulcomer** tests, as well as the application of progressive discipline standards, as referenced above, will be applied in the following legal points in evaluating Respondent Maria Weber's conduct in this case.

When applying the **Fulcomer** principles it becomes clear that Ms. Weber's employment should not be terminated but that she receive a fair and proportionate punishment reflective of how similar offenses of other public employees have been treated in tenure charge proceedings. The Board of Education has argued that Ms. Weber and the other two Respondents in this consolidated proceeding, violated District affirmative action policies and that her conduct somehow amounted to sexual harassment.

Under New Jersey case law for "hostile environment" sexual harassment, and in consideration of the Board's own policies, the Board cannot successfully argue that, under all of the circumstances, Ms. Weber's conduct amounted to any form of sexual harassment. It is significant that the Board of Education did not even accuse Ms. Weber of directing any of her limited chat remarks towards Ms. Battista and failed to present a scintilla of evidence that there was any disruption in the Engrade training program and that there were any teachers, aside from Ms. Battista, who were fearful "of being harassed".

It is submitted that the only "offense" committed by Maria Weber related to her violation of the District's computer use policy when she logged onto a chat when, after the initial chat remarks, Ms. Weber agreed that this "backroom chat" did not address any educational related issues. For this

violation Ms. Weber apologized profusely to District administrators and exhibited substantial remorse for her actions.

Assuming **arguendo** that the Board of Education's tenure charges could be construed as even alleging that Maria Weber engaged in a violation of the Board's Sexual Harassment, and/or Healthy Workplace Environment policies, when the Board of Education did not even include any allegations that any of Ms. Weber's limited comments were directed at Ms. Battista or, in fact, at any one other than the participants in the chat, the facts in this matter establish that the conduct at issue was "neither severe nor pervasive".

Regarding the issue of "pervasiveness" the record established that only Alysia Battista and one other teaching staff member Angie McKenna were even aware of the existence of the chat. Regarding the issue of "unreasonable interference" with work, the record clearly established how atypical Ms. Battista's reaction was.

The record established, consistent with the statements of Ms. McKenna, that Ms. Battista appeared to be "consumed" by the chat and took out her I-Phone, moved to her left, leaned forward towards Ms. Lechelt and Ms. Lechelt's computer, aimed her I-Phone at Ms. Lechelt's computer screen, zoomed in on the screen and took a series of pictures because of Ms. Battista's unsubstantiated belief that the chat participants were talking about her. No other teaching staff member advised Margaret DeLuca, the District's Affirmative Action Officer, that there was any disruption in the training program.

In consideration of the above, it is clear, as determined by the Board itself in the drafting the tenure charges that Maria Weber did not sexually harass Ms. Battista or anyone else.

There was no evidence presented by the Board of Education to indicate that Ms. Weber's

continued employment within the Edison School District had or will have any negative effect on the maintenance of discipline and the proper administration of the school system.

While Board witnesses Margaret DeLuca and Dr. O'Malley testified that they did not feel comfortable returning Ms. Weber to her position because the Board had supposedly received certain complaints about the participants in the chat room, the Board did not present any written evidence that could establish that there would be any problem raised by parents, or members of the Edison Township community, if Ms. Weber continued to be employed, in consideration of her outstanding reputation within the District.

A review of several recent TEACHNJ arbitration awards that related to the use of Board computers and social media sites, wherein teachers were charged with "conduct unbecoming" that was substantially more egregious and serious than the conduct attributed to Maria Weber, **that did not result in the termination of the teachers at issue**, substantially supports Ms. Weber's argument that her limited involvement in the chat room activity, with none of her remarks addressed to any District students, administrators or supervisors or teaching staff members, aside from those participants in what she viewed to be a private chat room, does not justify termination or a long term suspension.

A review of many tenure charge cases **decided by the Commissioner of Education** prior to the TEACHNJ Legislation involving the criminal acts of teaching staff members, as well as numerous acts of unbecoming conduct, in many instances as part of a pattern of disciplinary actions taken against the affected teachers, further supports the Respondent's contentions regarding the extent of any penalty that is imposed on her.

A review of all of the cases reviewed mandates the conclusion that not only is termination

not warranted in this matter, no long term suspension is required as well.

Ms. Weber's decision not to exit the chat room when she realized that the backchannel discussion only briefly referred to the Engrade instruction should not warrant the 120 day suspensions assessed against teachers Ciripompa, Buglovsky, Boyle and Dzownar imposed by other arbitrators!

If there had not been inappropriate remarks made by the other chat participants about special education students (taken out of context but still made) and the Superintendent of Schools would tenure charges have been filed against the Respondents at all? **Very unlikely!!** The Board of Education would probably have only withheld the increments of the "chat participants" for one year, **with no suspension sought**, if the chat only referred to jocular comments addressed at a colleague's imaginary flirtation with the training presenter.

Since Maria Weber did not make any negative remarks at all about District students, administrators or teachers not involved in the chat one can argue that, in consideration of the **Fulcomer** standards and the seven tests of "just cause", the imposition of a sixty day suspension without pay; i.e. a **$20,000** loss in salary, although excessive, still represents a measured, reasonable penalty.

Relevant case law as well as a review of the **Fulcomer** standards, establish that a teacher's expressions of remorse are often positively referred to whether the "trier of fact" was an Administrative Law Judge or an Arbitrator. A teacher's arrogant dismissal of the tenure charges, along with a refusal to acknowledge culpability would tend to support a local board of education's assertion that the behavior at issue was not aberrant and that the conduct that was the subject of the tenure charges could be repeated in the future. However, not every arbitrator has considered the

"lack of remorse" to be a dispositive consideration in the assessment of a penalty.

Maria Weber consistently expressed remorse for her actions in being a participant in the October 23, 2014 chat activity. She apologized from the time that she first met with her building Principal, prior to her meeting with the Superintendent of Schools on October 27, 2014.

As the Arbitrator you were able to observe Ms. Weber's demeanor during the course of her testimony and saw how passionate she has always been about teaching. Her remorse was genuine -- she had let her students, co-workers and supervisors down and had compromised her own values, by participating at all in the chat room.

There is no dispute that Maria Weber engaged in a single act of unbecoming conduct when she participated in the chat on October 23, 2014, regardless of her limited involvement in that chat and the absence of any negative remarks addressed to special education students within the District or to any students at all, or to any District supervisor or administrator, or to any teacher in attendance during the training session aside from the teachers who were also active participants in the chat. Her conduct did violate the District's Acceptable Use of Computer Network Policy.

However, the focus of the Board of Education's investigation was on the Battista sexual harassment claims. For the reasons set forth earlier in this Brief, it is averred that there was not a scintilla of evidence presented to establish that Ms. Weber engaged in any conduct that was prohibited by the District's Sexual Harassment or Affirmative Action policies.

The cited portion of Board Policy 3281, Inappropriate Staff Conduct, that was cited in the tenure charges filed against Ms. Weber refers to conduct, including the use of e-mails or social networking sites "...that is directed and/or available to pupils or for public display". Ms. Weber's participation in what she viewed to be a private chat room did not result in any communications that

were readily available to pupils or for members of the public. The chat was not accessible to anyone who was not specifically invited to be a participant and who did not know the applicable "room number" to be a participant in the chat room activity. Had it not been for Alysia Battista's all consuming decision, during the course of the 2-1/2 hour training program, to limit herself to what became a surveillance operation designed to produce evidence of improper computer use, because of her incorrect perception that she was being singled out for criticism, no one who was not an active chat participant would have known anything about the statements that were made during the course of that chat!

The Board of Education even referred to a violation of Board Policy 3351, Healthy Workplace Environment, that requires that "employees interact with each other with dignity and respect" and further states that "repeated malicious conduct of an employee or group of employees directed toward another employee or group of employees in the workplace that a reasonable person would find hostile and offensive is unacceptable and is not conducive to establishing or maintaining a health workplace environment". It is averred that there again was no evidence produced that any "reasonable person" would have found the actions of Respondent to be hostile and offensive and certainly there was no evidence of "repeated malicious conduct".

The only "conduct unbecoming" charge that was proven in this matter was Respondent's one time violation of the District's computer use policy. The penalty for this violation should be fair and reasonable and again reflective of the **Fulcomer** standards.

As summarized in the earlier Points of this Post Hearing Brief, New Jersey case law has provided many examples of teachers who were charged with "conduct unbecoming" for engaging in conduct that was substantially more egregious and serious than Maria Weber's conduct yet, not

only were they not terminated from their tenured positions but they generally received no more than 120 day suspensions without pay even in cases, such as the **Ciripompa** matter, wherein the arbitrator determined that there was no remorse shown by that respondent.

Maria Weber testified that for every 30 calendar days that she was suspended this would represent a **$10,000** penalty, adversely affecting not only her but her entire family. The relevant cases certainly establish that a 120 calendar day suspension is not a "default remedy" to be imposed in every instance when termination is not warranted, regardless of the application of the **Fulcomer** standards and the seven tests of just cause.

It is respectfully submitted that the application of the **Fulcomer** tests to Maria Weber's conduct provides substantial reasons why a 60 day suspension without pay would be a fair and measured penalty amounting to a **$20,000** loss in salary for gently chiding a former colleague of hers for his self deprecating remarks and his imaginary flirtation with the training Presenter that he knew he would never see again. Not only would a 60 day suspension without pay represent a very significant penalty for a teacher with a previous long term spotless record it should also be considered along with the significant devastating effect of Ms. Weber's removal from the classroom.

It is submitted that any greater penalty would be unnecessarily punitive and disproportionate to her conduct on the date in question.

OPINION

After considering the documentary and testimonial evidence, the undersigned concludes that Maria Weber is guilty of Charges I- Counts 1,2 IV- Counts 1,2, 4, 5, 6, 7 and V. Charges II, III, and IV-Count 3 and V are dismissed.

ANALYSIS OF THE CHARGES

The charges are arranged such that the numbered charges and specifications are preceded by a section entitled *Background Common to All Charges.* It would be appropriate to address that section before considering the numbered charges and specifications.

The bulk of this section deals with established Board policies. The cited policies concern sexual harassment (BX21), inappropriate staff conduct (BX23), the code of ethics (BX22), affirmative action (BX20), acceptable use of computer networks and computers (BX24) and a healthy workplace environment (BX25). The relevant Board Policy Numbers are 3362, 3281, 3211, 1140, 3321 and 3351 respectively.

On the theory that employees cannot be held accountable for the implementation of policies of which they were not put *on notice,* it is first essential to determine if and how the teachers employed by the Board knew of the existence of these policies and how they knew or should have known the substantive content of the policies.

The Board met its burden of demonstrating that the teachers acknowledged their knowledge of the existence of said policies, the manner in which they could secure copies of the policies and their agreement to review the policies and to abide by them. It did so by producing a document entitled *Important Board Policies, Regulations and Mandated Communications Form.* The record indicates that Respondent Weber executed this form on September 4, 2014 (BX19). Thus, she acknowledged that she was aware of the policies, that she would review them and conform to them.

In sum, Respondent Weber was *on notice* both procedurally and substantively of the Board's policies central to these charges. More important, she agreed to review the policies, to be conversant with the policies and to conduct herself in accordance with them.

It is well settled that employers are entitled to establish policies and work rules and to require employees to conform to them. This statement is true provided the employees are notified of the policies and rules. In this case, Respondent Weber acknowledged her responsibility to comply with them.

What is highly relevant here is that, under the circumstances, the failure to abide by the rules and policies is chargeable conduct. Since the failure to comply is chargeable, the Board is well within its rights to impose discipline on employees who are guilty of such breaches.

The second major component of *Background Common to All Charges* is a reference to a group chat on the *Today's Meet* website that was conducted through the District's computer network. The 2 ½ hour group chat was alleged to have taken place on October 23, 2014 during a professional development program that was called an *Engrade Chromebook Training.*

The District provides the teachers with laptop computers, Chromebooks. Thus, those participating in the group chat did so on District owned computers.

The record suggests that *Engrade* is a educational program employed by the District. The October 23, 2014 meeting was devoted to the program.

It is unchallenged that the *Engrade* meeting took place on October 23, 2014, that the group chat lasted (from beginning to end) 2 ½ hours and that Respondent Weber and approximately 25 other teachers were in attendance.

This section of *Background Common to All Charges* goes on to elaborate on the group chat and sets forth the allegedly unacceptable content of it. To the extent that these matters are included in the Charges and Specifications, they will be addressed below.

Charge I

This charge asserts that Respondent Weber's participation in the group chat rises to the level of unbecoming conduct and/or just cause. It alleges that Weber violated New Jersey law and Board policies, regulations and procedures concerning staff interactions. It charged that the chat room was public, was visible, accessible to other employees and students. It added that the chat room was offensive, discriminatory, rife with sexual innuendo and constituted a hostile work environment. This charge was the subject of two *counts* or specifications.

Count 1 concerned inappropriate comments about the Endgrade trainer, Sara Bleekinger. Weber was charged with a course of misconduct toward Ms. Bleekinger. It stated that the group chat was foul, discriminatory, offensive, harassing and sexual in nature. It cited the specific comments made by Weber during the group chat.

It should be stated that the group chat lasted for 2 ½ hours. It was downloaded from the computers and it was 16 pages in length (BX13). The text of Weber's comments were included in the charges served on her.

Eighteen of Weber's comments were listed in the charges. They were demeaning of Bleekinger and many had sexual overtones.

It must be noted that Weber's comments must be read in the context of comments made by other participants in the group chat. There were three main participants, Maria Weber, Maryellen Lechelt and Tyler Van Pelt. All of them were served with charges. While the matter was consolidated relative to the hearings, separate decisions are being written for each of the three named participants.

There was a small number of additional participants in the chat. They were either not

identified or no longer employed by the Board. In any event, their participation was limited and minor as compared to the three charged teachers.

As to Weber's culpability or lack thereof of Count 1, her comments about Sara Bleekinger were inappropriate. The comments related to Bleekinger's looks, her mannerisms and her ability. Many of her comments had sexual innuendos.

When these comments are put in the context of the entire chat, their inappropriateness is magnified. Thus, an objective review of the comments concerning Sara Bleekinger suggests that Weber's comments in and out of context with the total chat were inappropriate.

Despite the obvious, Weber argued that she is not guilty of this Count. She insisted that the she had an expectation of privacy relative to the chat. She posited that the chat would have gone unknown but for Alysia Batista, another attendee at the meeting, seeing it.

As will be discussed in greater depth below, Weber and her cohorts had no expectation of privacy. They were engaged in a chat in a public setting while using a District computer and a District network. Under the circumstances, there could be no expectation of privacy.

The fact that they thought that the chat was private is of no moment. Thinking something does not make it so.

The reasoning was that one needed an access code in order to see that chat's comments. That reasoning is fallacious. Anyone passing by could see what was on the screens of the computers. The fact that only one person complained about the chat is irrelevant. The chat was undertaken in a public setting and, irrespective of all of the issues concerning the ownership of the computer and the network, fell into the public realm. Once that is recognized, it is readily apparent that Weber had no expectation of privacy.

Much was said about Weber's remorse for her conduct. While she, in fact, made certain comments about her remorse for having participated, the defense suggests that she has not fully taken responsibility for her participation in the chat.

Weber always had the option of logging out of the chat. If she thought the comments being made were truly offensive, why would she continue to participate? She did not, suggesting that the comments were not, in her view, inappropriate until she was called to task for it.

Once the content of the chat became known, Weber became the subject of charges of unbecoming conduct for making inappropriate comments about Sara Bleekinger. The fact that the comments were not known to Bleekinger is irrelevant. The comments were public and were treated that way.

In short, the Board met its burden relative to Count 1.

Count 2 addresses comments made by Weber to individuals other than Sara Bleekinger. The comments were primarily made to Lechelt and Van Pelt.

As were the comments made about Ms. Bleekinger, the comments attributed to Weber that were made to Lechelt and Van Pelt were offensive, crude and sexual in nature. Weber again claimed that she was not guilty of this Count on the grounds that she legitimately had an expectation of privacy.

As noted above, she had no valid basis for believing that a chat conducted in a public setting on a computer and on a network that belonged to the District simply does not carry with it an expectation of privacy.

Thus, the comments must be judged on the own merits. These comments were made while Weber was engaged in a District training program in a District facility, using District equipment and

networks while being paid by the District. Under the conditions described immediately above, the comments were unacceptable.

The fact is that the comments were upsetting to one of the other attendees, Alysia Batista. Weber and her collaborators in the chat chose to *blame the victim.* The comments on their face were crude, discriminatory and upsetting and it is clearly understandable and reasonable that Ms. Batista would have reacted as she did, given the setting and the purpose for her being there.

The comments about Weber's remorse in Count 1 are applicable here. They need not be repeated.

Count 2 was proven. The Board met its burden of proof in this regard.

Charge II

This charge is limited to a single count. It alleges that Weber was insubordinate and guilty of unbecoming conduct in that she was involved in the disruption of Engrade training. An analysis of the allegation must be done before a determination is made about the charged misconduct.

The key word in this charge is *disruption.* An accepted definition of this word suggests that the action(s) of an individual or group interfered with the ability of others to continue an ongoing activity. Put another way, the actions of one or more people had to have prevented the organizers of a specific activity from continuing the activity to its planned conclusion.

With this definition in mind, one needs to examine the facts surrounding the instant matter. It is uncontested that the training started and ended on time. It is also clear that from the perspective the trainer, Sara Bleekinger, made her presentation in an uninterrupted manner. Thus, it is difficult to conclude that Weber and others disrupted the training.

That is not to suggest that Alysia Batista was not upset by the contents of the chat. It is

apparent that seeing the text of the chat interfered with her ability to benefit from the training.

It must be said that Batista was the subject of negative comments by the three main participants in the chat. There was a good deal of blaming the victim here. Such a response was inappropriate.

By any reasonable standard, there were many grossly offensive comments that were made during the chat. Any reasonable person would have found them offensive and large numbers of reasonable people would have been disturbed to read the comments, particularly in a professional setting.

The undersigned hastens to add that an absence of disruption of the training session does not obviate the contention that Weber was guilty of misconduct. As noted in the findings to Charge I, she was guilty of misconduct. Specifically in Charge I Count 2, Weber was found to be culpable of unbecoming conduct in connection with Alysia Batista and others. Furthermore, as will be seen in charges not yet addressed, she is guilty of additional misconduct.

However, it cannot be said that Weber disrupted the training session. If the actions of Weber and her two cohorts had not transpired, it is likely that the session would have been no different than it was in the presence of the group chat. Thus, Charge II is dismissed.

Charge III

This charge alleges the misuse of the District's computer network through a group chat that was *inappropriate, foul, discriminatory, harassing, offensive and sexual in nature.* The District alleged that the foregoing was a flagrant misuse of the Board's resources. The Board concluded that this conduct constitutes unbecoming conduct, insubordination and just cause for dismissal.

Without commenting on the merits of Charge III, the Arbitrator points out that Charge IV

Count 7 alleges, although worded in a slightly different way, the same misconduct in the context of Board Policy 3321.

Therefore, the issue of the alleged misuse of the District's computers and network will be addressed in the discussion of Charge IV Count 7. As such, Charge III is dismissed.

Charge IV

This charge asserts that Maria Weber violated various District policies. The District posited that such misconduct constituted unbecoming conduct and/or just cause for dismissal.

Charge IV is comprised of seven counts. Each of the counts will addressed individually. It should be noted that, of the seven counts, only Count 3 does not allege that Weber violated a specific District policy.

With that in mind, there are certain comments that apply to Counts 1, 2, 4, 5, 6, 7. Since it is more efficient to make certain observations about all six counts at the outset rather than repeat them in connection with each policy, the following observations apply to all of the cited Board policies.

As noted above, Weber was *on notice* about each policy (BX19). This document listed 34 policies and procedures in effect in the District. The policies cited in the six counts identified above are all listed on the document.

Weber signed this document to acknowledge receipt of it as well as an acknowledgment of her awareness that the policies can be found on the Board's website. Finally, Weber's signature reflects her agreement to conform to the listed policies and procedures.

What must be concluded is that Weber was bound to comply with the policies. If she failed to review the policies in order to be able to comply with them, she did so at her own risk. In short, she was required to comply with the policies.

A second observation to be made is that Weber and her two colleagues participated in the group chat. Their continued participation in the chat makes each of them responsible for its contents.

It is true that Weber made some, not most or all, of the inappropriate comments. However, had she been concerned about her commitment to honor District policies, she would have logged off of the chat and, in so doing, disassociated herself from it. She did not do so and must be held accountable for her actions.

What remains is an application of the facts of this case to the terms of the cited policies. Such an analysis will result in a determination of whether Weber is guilty of one or more of the counts.

Count 1 alleges a violation of the Board's sexual harassment policy (Policy number 3362) (BX21). In relevant part, the policy states:

> The Board of Education recognizes that an employee's right to freedom from employment discrimination include the opportunity to work in an environment untainted by sexual harassment. Sexually offensive speech and conduct are wholly inappropriate to the harmonious relationships necessary to the operation of the school district and intolerable in a workplace to which the children of this district are exposed.
> Sexual harassment includes all unwelcome sexual; advances, requests for sexual favors, and verbal or physical contacts of a sexual nature that would not have happened but for the employee's gender. Whenever submission to such conduct is made a condition of employment or the basis for an employment decision, or when such conduct is severe and pervasive and has the purpose or effect if unreasonably altering or interfering with work performance or creating an intimidating, hostile, or offensive working environment, the employee shall have cause for complaint.
> The sexual harassment of any employee of this district is strictly forbidden. Any employee or agent of the

> Board who is found to have sexually harassed an employee of this district will be subject to discipline which may include termination of employment.
> The Affirmative Action Officer shall instruct all employees and agents of the Board to recognize and correct speech and behavior patterns that may be sexually offensive with or without the intent to offend.

Before considering the facts, there needs to be analysis of the policy. The policy addresses two forms of sexual harassment, sexually offensive speech and sexually offensive advances, both physically and verbally. There is no evidence of sexual advances in any way, shape or form. Thus, the relevant language in this policy concerns the first paragraph above.

The sexual harassment in this case concerns sexually offensive speech. The purported sexually offensive speech was contained in the comments made during the group chat.

The facts suggest that Alysia Battista, a participant at the Engrade training was sitting behind and to the left of Maryellen Lechelt. She was able to see Lechelt's computer monitor and was able to read the ongoing comments of the group chat and became offended by the comments that were overtly sexual as well as those that had sexual innuendos

Battista became upset by what she saw and left the meeting room. She filed a complaint about the chat and the instant proceeding resulted.

To be clear, counsel for Weber, Lechelt and Van Pelt all cited *Lehman v. Toys 'R' Us,* 132 N.J. 587 (1993) as the seminal case in New Jersey for matters involving sexual harassment. The cited case is applicable to the portion of the instant policy that deals physical and verbal sexual advances. This aspect of the policy is found in its second paragraph, not the first one.

Moreover, the language in the second paragraph of the Board policy tracks *Toys 'R' Us.* The

same cannot be said for the first paragraph. It is evident that, if the Board intended for the *Toys 'R' Us* standards to apply to both paragraphs, it would have made such an indication in the policy. Thus, the plain language of the policy indicates that the Board intended to distinguish sexually offensive language from sexual advances of either a physical or a verbal nature.

Thus *Lehman v. Toys 'R' Us* is inapposite here. The judicial decision must read to indicate that the standards set forth in *Toys 'R' Us* do not apply in matters involving sexually offensive comments that are distinguishable from cases in which there was sexual advances of a physical or verbal nature.

This case deals with sexually offensive speech. The Board is well within its rights to issue policies that are relevant to the governance of the school district.

With the above analysis having been completed, the undersigned must now consider whether Weber was guilty of the violation of the Board's sexual harassment policy in terms of participating in sexually offensive speech.

The Arbitrator is persuaded that she did so through direct comments, by responses to the comments of others and by participating in the group chat from beginning to end. She directly commented on Van Pelt as being a *backchannel guy* by commenting about the way Van Pelt walks. The record suggests that *backchannel* refers to anal sex. Thus, Weber's comment was sexual in nature. Another bit of evidence of a sexual comment by Weber is found in her comment about *repositories* being *stuck up your ass*.

There are numerous examples of responses by Weber to comments made by Lechelt and Van Pelt. She added to a comment of Van Pelt about *pick-up lines* by saying *how about my eyes are the only thing I don't wanna take off of your* (sic). She also said to Van Pelt *don't say goodbye just say*

see you later babe and *tell her to meet u on Dartmouth at 4* (Van Pelt's address). These comments were made in the midst of a series of comments about Sara Bleekinger that were sexual in nature.

Finally, it is obvious that Weber stayed on the chat for its full length. She did not object to its content. She did not log off. It is disingenuous to argue that she did not violate the sexual harassment policy.

It may be true that Weber made fewer sexually offensive comments than did the other respondents in this case. That fact will be considered when a penalty determination is made.

In sum, Maria Weber is guilty of Charge IV Count 1.

Count 2 alleges a violation of the Board's affirmative action policy (Policy Number 1140) (BX20). This policy is designed to promote the acceptance of people of diverse backgrounds regardless of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, gender, religion, disability, or socioeconomic status. The intent of the policy is spelled out in the first full paragraph of the policy statement.

While Weber made no comments that were directly violative of this policy, she participated in a chat that was disparaging of special needs students, lesbians and older people (BX13). She cannot credibly assert that she did not violate this policy while sitting through a chat that was replete with comments about people protected by the policy. She neither objected to the offensive statements nor withdrew from the chat entirely. Thus, she is guilty of Charge IV Count 2.

Count 3 concerns a purported violation of the policies alluded to in Counts 1 and 2 pertaining to the Affirmative Action Investigation. This count is dismissed.

Weber has already been found guilty of Counts 1 and 2. She is essentially being charged with the same misconduct a second time. In this regard, Count 3 is duplicative.

As to Weber's comments at the investigative interview, Weber is being charged with a lack of understanding of the seriousness of the matter. Even if true, that does not suggest misconduct. It introduces a factor to be considered when the penalty is determined.

With respect to the interview per se, there are circumstances under which a interviewee's conduct at an interview could rise to the level of misconduct. However, under the facts of this case, Weber was not guilty of misconduct when she was held to be lacking in her understanding of the seriousness of this matter. Thus, as indicated above, Charge IV Count 3 is dismissed.

Count 4 suggests a violation of the Code of Ethics policy (Policy Number 3211) (BX22). The key language in this policy is found in Principle II. It states as follows:

> The education profession is vested by the public with a trust and responsibility requiring the highest ideals of professional service.
> In the belief that the quality of the services of the education profession influences the nation and its citizens, the educator shall exert every effort to raise professional standards, to promote a climate that encourages the exercise of professional judgment, to achieve conditions which attract persons worthy of the trust to careers in education, and to assist in preventing the practice of the profession by unqualified persons.

Among other issues, this Code of Ethics requires teachers to endeavor to raise professional standards and to encourage the exercise of professional judgment. Weber's participation in the group chat was inconsistent with both of these principles.

Weber attended a professional development training session. It was offered in order to provide participants with the opportunity to improve their abilities with the Endgrade program. It is inconceivable that experienced educators would engage in group chat for 2 ½ hours while a trainer

was engaged in a professional presentation. What makes the misconduct especially egregious is the content of the chat. It was demeaning, denigrating, offensive and discriminatory. There was nothing about the chat that reflected *an endeavor to raise professional standards*. It was crude by any standard and was a clear violation of the District's Code of Ethics.

The Arbitrator is compelled to comment on the argument that the amount of time that the participants were involved the chat was limited to the time spent in inputting the comments. This argument is invalid and inappropriate. It suggests that they may have spent 15-20 minutes actually inputting their entries in the chat.

It is highly disingenuous to assert that the chat lasted 150 minutes but that the participants were involved in the chat for 15 or 20 minutes. That implies that they were focused on the training material for 130-135 of the 150 minutes. That suggests that the three respondents spent no time reading each other's *contributions* to the chat and that they spent no time watching their computer monitors while waiting for responses to previous inappropriate comments.

The chat lasted 2½ hours from beginning to end. There was a maximum of four minutes between chat comments. Weber's argument trivializes the misconduct and does nothing to reinforce the premise that she is sincerely remorseful for her actions.

The second aspect of the Code of Ethics that is pertinent here is the creation of a climate that encourages the exercise of professional judgment. The participation in the group chat is the antithesis of the exercise of professional judgment.

The Arbitrator is convinced that Weber violated this policy. Thus, Weber is guilty of Charge IV Count 4.

Count 5 addresses the Inappropriate Staff Conduct policy (Policy Number 3281) (BX 23).

The relevant provision in this policy is found in the fourth full paragraph. It states as follows:

> School staff in completing their professional responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments to pupils or about pupils and shall not engage in inappropriate conduct towards the pupils.

There was an extensive string of comments concerning special needs students in the transcript of the chat. The comments were, to say the least, inappropriate and discriminatory.

It is true that Weber did not make any of the comments. However, she participated in the full chat and had to have known about the comments about these children. She did nothing to stop the comments or to register outrage to the manner in which these students were described.

What makes Weber even more culpable is the fact that she is a Special Education teacher. If such a teacher is not reactive to offensive comments about the students she teaches, who will be?

Suffice it to say that Maria Weber violated the Inappropriate Staff Conduct policy. She is culpable of Charge IV Count 5.

Count 6 concerns the Healthy Workplace Environment Policy (Policy Number 3351) (BX25). The relevant language in this policy is found in the second full paragraph of the text. It states as follows:

> A significant characteristic of a healthy workplace environment is that employees interact with each other with dignity and respect regardless of an employee's work assignment or position in the district. Repeated malicious conduct of an employee or group of employees toward another employee or group of employees in the workplace that a reasonable person would find hostile and offensive is unacceptable and not conducive to establishing or maintaining a healthy workplace environment.

The record indicates that Supt. O'Malley was the subject of numerous comments about his

appearance, hiring practices and his sexual practices. The comments were graphic and crude. The treatment that he received in the group chat was prototypical of what was proscribed in the policy.

The Arbitrator is compelled to note that the comments were made by Lechelt and Van Pelt. Weber made none of them. However, as noted above, there were three identified people in the chat and she was one of them. The fact that she remained part of the chat for its entire duration subjected her to at least part of the responsibility for it.

Therefore, she violated this policy. As such, Weber is culpable of Charge IV Count 6.

Count 7 addresses the final policy allegedly violated. It is the policy concerning the acceptable use of district computers and computer networks (Policy Number 3321)(BX24).

The key language in this policy is as follows:

> The Board recognizes that telecommunications will allow teaching staff members access to information sources that have not been pre-screened using Board approved standards. The Board therefore adopts the following standards of conduct for the use of computer network(s) and declares unethical, unacceptable, inappropriate or illegal behavior as just cause for taking disciplinary action limiting or revoking access privileges, instituting legal action or taking any other appropriate action as needed necessary.
> The Board provides access to computer network(s)/computers for administrative and educational purposes only. The Board retains the right to have the Superintendent or designee monitor network activity, in any form necessary, to maintain the integrity of the network(s) and ensure its proper use.
> Standards for Use of Computer Network(s)
> Any individual engaging in the following actions declared unethical, unacceptable or illegal when using computer network(s)/computer shall be subject to discipline or legal action:

> 3. Using the computer network(s) in a manner that:
> k. Engages in other activities that do not advance the educational purposes for which the computer network(s)/computers are provided.

Irrespective of the defenses offered by the three charged teachers, there can be no question that they used the District's computers in a manner that was violative of this policy. The defenses will be discussed below. However, the use of the computers for the group chat was clearly in violation of the Board's policy.

Weber, as one of participants in the chat, violated the policy concerning the use of District computers and computer networks. Thus, she is guilty of Charge IV Count 7.

Charge V:

This charge is one of a single count of misconduct. Weber is charged with a failure to pay attention during the Endgrade training and with making no effort to benefit from the instruction provided.

As has been previously documented, Maria Weber has been found guilty of various kinds of misconduct, ranging from inappropriate conduct with other staff members and with other participants in the group chat and individuals not in the employ of the District to significant violations of Board policy. In each of those charges and counts, the misconduct could be documented through a review of the transcript of the chat and through a review of the conduct of Weber in the context of the terms of several Board policies.

In this charge, Weber is said to have not paid attention to the training and having made no effort to benefit from the instruction. The transcript of the chat shows the timing of the comments.

At most, there was a time gap of four minutes between comments. It makes no sense to limit

the time spent on the chat to the amount of time writing comments. Weber was paying attention to the chat for virtually the full 2 ½ hour duration of the session. The total time she was involved in the chat precluded her paying attention to the content of the training.

Finally, Weber was on duty during the training. The session took place at a time when she would have been teaching. She had a professional obligation to make every effort to improve her teaching services by paying attention to the trainer. Instead, she opted to engage in an offensive, crude and grossly immature exercise of exchanging highly inappropriate comments on a chat.

Based on the record created, the Arbitrator concludes that, for practically the full length of the training session, Weber did not pay attention and did not make appropriate efforts to benefit from instruction that was designed to improve his teaching. She was expected to gain further expertise in a pedagogical program so that her students would benefit. She made little or no effort to actualize that goal. As such, Charge IV must be sustained.

ANALYSIS OF THE DEFENSES

Weber offered a number of defenses in an effort to mitigate the findings of misconduct. They are deserving of mention and discussion.

She observed that she made no vulgar comments during the chat. That statement is, for the most part, true. On the other hand, there were inappropriate innuendos in many of her comments.

That being said, comments can be inappropriate without being vulgar. Moreover, a portion of Weber's liability relates to her participation in a chat that was rife with inappropriate, both vulgar and not vulgar comments. She knew or should have known that some of her comments were inappropriate and that the group chat, in essentially its totality, was inappropriate. She also should have known that she should not have been part of an activity that was improper and potentially

hurtful and defamatory.

In short, despite the accuracy of her claim that many of her comments were not vulgar, this assertion does little to mitigate her wrongdoing.

Weber claims that she spent only 15 minutes in the chat. This defense was previously discussed and dismissed.

This claim trivializes the misconduct. One would have to accept the premise that the wrongdoing was limited to the time actually spent on inputting inappropriate comments. That proposition must be dismissed out of hand.

While it may be that Weber was not focused on the chat every second of its 2 ½ hour duration, her involvement had to have been very much longer than the time she actually spent writing her comments.

Weber asserted that her misconduct did not occur in the classroom and that such is a mitigating factor. The reality is that, had the misconduct been perpetrated in the classroom, the penalty in this case would certainly be dismissal.

This defense also presupposes that findings of misconduct can only be made when the events transpire in the classroom. Weber is a tenured employee every minute of her work day. Misconduct can take place in the presence or absence of children. Misconduct can also be found when the perpetrator is alone. The actions define the misconduct and not the people present when the actions are taken.

Weber argued that she had not violated the standards of sexual harassment, as set forth in *Toys 'R' Us.* This argument has been partially addressed above. However, it is sufficiently significant that it requires further discussion.

Weber's reliance on this argument is misplaced for several reasons. She is charged with violating a Board policy, not a New Jersey statute. School boards are expected to adopt policies that set forth guidelines to be followed by various members of the school community. Certainly, the professional staff is part of that community and teachers are required to abide by them.

If the Board adopts a policy that is inconsistent with the law, the remedy is found in a legal challenge. There is nothing in the record that indicates that any legal action has been taken to challenge the legality of the policy.

In addition, one must look at the consequences of violating a law as compared the breach of a policy. The violation of a law can result in either civil or criminal consequences imposed by the Court.

By contrast, the breach of a school board policy can result in the imposition of discipline in an administrative proceeding. While the imposition of discipline may be severe, it is not a civil or criminal penalty.

Weber's argument in this case suggests that the statutory standard for sexual harassment should be used in an administrative, non-judicial proceeding. As such, the argument must fail.

Finally, the Board's policy addresses two areas of possible misconduct. The first one involves the use of sexually offensive speech while the second one addresses unwelcome sexual advances that are either verbal or physical.

The section of the policy relating to unwelcome sexual advances appears to track the *Toy 'R' Us* language. It requires that the action be *severe and pervasive* as required by the Court's decision.

This case is not about unwelcome sexual advances. *Toys 'R' Us* specifically deals with verbal and physical sexual advances.

This is about sexually offensive speech. *Toys 'R" Us* is not. Thus, it is inapposite here. Weber is alleged to have engaged in sexually offensive speech. The undersigned has concluded that she did indeed engage in such speech. Weber was not charged with unwelcome sexual advances and the relevant defenses to such a charge are not applicable here.

Weber averred that none of her comments were addressed to District students or administrators. That may be true but she had an obligation, to say the least, to disassociate herself from the chat by either logging off or by expressing her condemnation over crude and discriminatory comments about students and Dr. O'Malley. She did neither. She *went along to get along* and now wants credit for not making the offensive comments while tolerating them.

Weber's culpability may not be as great as that of the makers of the wholly inappropriate comments about special needs children and Dr. O'Malley. However, she is not devoid of guilt on this regard. On the contrary, her culpability is significant.

Her final defense is that her actions did not have an injurious effect on the maintenance of discipline and the proper administration of the District. This matter will be addressed fully in an analysis of the *Fulcomer* standards.

THE *FULCOMER* STANDARDS

The Board is seeking the termination of Weber's services as a teacher. She argued that the leading New Jersey case concerning the termination of tenured teachers as a consequence of unbecoming conduct is *In re Fulcomer,* 93 N.J. Super. 403 (App. Div. 1967). This was a case in which the Commissioner of Education concluded that Fulcomer engaged in unbecoming conduct and that dismissal was required.. The Appellate Division disagreed and held that the trier of fact must first determine if the respondent teacher engaged in unbecoming conduct and, if so, whether the

misconduct warranted discharge or a lesser penalty.

In this regard, the Court determined that the following factors should be considered:

1. The potential impact on the charged teacher's career.

It is evident that, should Weber be terminated, the District would be required to report the dismissal to the State Board of Examiners for the possible revocation of her teaching certificates. It is reasonable to conclude that a termination in this case would dramatically increase the likelihood of Weber's teaching career in New Jersey being ended.

2. The longevity of Weber's career.

Maria Weber has been a teacher in New Jersey for 20 years, 15 of them in Edison Township. She is a senior teacher and should be given consideration for her years of service in the context of the other *Fulcomer* standards.

3. Weber's overall teaching record.

Weber's teaching record is devoid of negative comments. This comment will be expanded upon in Items 5 and 6 below.

4. Weber's teaching ability

A review of Weber's evaluations reveals that she has been consistently rated either *Accomplished or Distinguished* on the sub-parts to the evaluations, as well as on her overall ratings.

In addition, the record suggests her willingness to immerse herself in co-curricular and community activities. These activities reflect a desire to contribute to the school's standing through her contributions to out-of-classroom ventures.

Finally, her principal wrote a long and thoughtful letter about Weber's dedication and professionalism.

5. Whether there was an absence of prior discipline affecting Weber during her employment.

Weber has never been disciplined in any manner. Given the length of her service, a *clean* disciplinary record must be afforded serious attention.

6. Whether there was an absence of past increment withholdings.

There is no evidence of a salary increment being withheld.

7. The nature and the gravity of the offenses under all of the circumstances involved.

The misconduct described herein is very serious. She was part of a group of teachers who violated several important Board policies. She argued that her misconduct was mitigated by the fact that the majority of her comments were neither offensive nor discriminatory.

That is largely true. However, her continued involvement in the chat suggested that she saw nothing wrong with the comments of others and was devoid of condemnation of crude and unacceptable comments.

Her misconduct may have differed from that of the others but was only marginally less serious. Her lack of crudeness does not obviate her culpability.

8. Evidence as to provocation, extenuation or aggravation.

Weber was not provoked. There were no extenuating circumstances. There were no aggravating conditions.

9. Any harm or injurious effect which Weber's conduct had on the maintenance of discipline and the proper administration of the school system.

This matter ultimately became public. It had an impact on the manner in which the community views the school. Further, the comments made about Dr. O'Malley had to be personally embarrassing and offensive and could have had the effect of weakening his image as the

Superintendent of Schools.

JUST CAUSE

Just Cause standards emanate from *Enterprise Wire,* 46 LA 555 (1956). There are seven tests that need to be applied to a determination of the appropriateness of discipline.

In this case, there was Just Cause to discipline Weber. The Board policies forewarned her that she could be disciplined for violations of the policies. The cited policies were more than reasonably related to the *business efficiency of the District and the performance the employer might expect from an employee.* There was an investigation conducted to determine if Weber was culpable of misconduct. The investigation was fair and objective. It was related solely to the purported misconduct and there was an effort made to interview anyone who had knowledge of the underlying conduct Based upon the investigation and a review of the transcript, the District determined that there was substantial evidence of Weber's guilt. The rules/policies were applied fairly. Finally, the degree of discipline applied herein is related to Weber's misconduct and her past record.

CONCLUSIONS

A review of the *Fulcomer* and *Just Cause* standards persuades the Arbitrator that the Board had cause to serve disciplinary charges on Maria Weber. She is guilty of serious misconduct.

It may be that she is not guilty of making comments that are obscene and inappropriate. It is disappointing to note that she believes that her sole culpability concerns the misuse of District computers and its computer network. She does not recognize that her participation in the group chat, in and of itself, represents unbecoming conduct. Nor does she seem to understand that her involvement in the chat led directly to violations of several District policies.

Weber asserted that she was extremely remorseful for her involvement in the group chat. Her

expressions may have been sincere but, as noted relative to the Affirmative Action interview, she does not fully *get it.*

At the end of the case, she still believes that she only violated one Board policy and was properly remorseful. To paraphrase her remorse, she suggested that *I am sorry but.....* There should have been no *buts.*

However, when the record is viewed as a whole, Weber's misconduct does not rise to the level of justifying termination of services. When this finding is combined with the analysis of the *Fulcomer* and *Just Cause* standards , it becomes clear that dismissal is excessive.

Finally, counsel for the parties did an outstanding job of researching the relevant issues and presented numerous cases for the consideration of the Arbitrator. The cases were reviewed and considered. However, given the number of cases cited by both parties and their non-precedential nature, the cases are not cited in the Opinion. Furthermore, counsel for the parties are to be commended for their overall preparation, the quality of the examinations and cross-examinations and professionalism throughout a long and complicated case.

Thus, the Arbitrator finds that appropriate penalty to be imposed on Maria Weber is a 90 day suspension without pay. Therefore, based on the above, the undersigned makes the following

AWARD

1. Maria Weber is guilty of Charge I -Counts 1, 2, Charge IV- Counts 1, 2, 4, 5, 6, 7 and Charge V
2. The following charges are dismissed: Charge II, Charge III and Charge IV- Count 3.
3. The penalty imposed on Maria Weber is a 90 day suspension without pay.

Dated: June 30 2015
Hewlett Harbor, NY

ARTHUR A. RIEGEL, ESQ.
ARBITRATOR

AFFIRMATION

STATE OF NEW YORK)
COUNTY OF NASSAU)

I, Arthur A. Riegel, am the individual described in and who executed the foregoing instrument, which is my Opinion and Award.

ARTHUR A. RIEGEL

224-15

224-15

DOCKET # 362-12/14
X----------X
In the Matter of the Tenure Charges Preferred by

EDISON TOWNSHIP BOARD OF EDUCATION "District

-against-

TYLER VAN PELT "Respondent"

ARBITRATOR'S OPINION and AWARD

X----------X
BEFORE:
ARTHUR A. RIEGEL, ESQ., ARBITRATOR

APPEARANCES:
FOR THE DISTRICT:
BUSCH LAW GROUP, LLC by ARI D. SCHNEIDER, ESQ.
MARGARET DELUCA, DISTRICT AFFIRMATIVE ACTION OFFICER

FOR THE RESPONDENT:
LAW OFFICE OF WILLIAM F. KOY by WILLIAM F. KOY, ESQ.
JEFFREY BOWDEN, PRESIDENT, EDISON TOWNSHIP EDUCATION ASSOCIATION
TYLER VAN PELT, RESPONDENT

PROCEDURAL HISTORY

On November 24, 2014, Dr. Richard O'Malley ("Dr. O'Malley") filed tenure charges with the Board. Van Pelt timely served and filed a statement of position, which is optional under *N.J.S.A.* 18A:6-11. On December 16, 2014, the Board certified the tenure charges and forwarded them to the Commissioner of Education, who received the charges on December 17, 2014. Van Pelt timely filed his answer. On Friday, February 6, 2015, a pre-hearing conference was held between the parties. A discovery deadline was established, as were tentative hearing dates.

Subsequently, the parties exchanged initial disclosures and discovery. This matter was consolidated for hearing. Hearing was conducted on March 10, March 19, March 25, April 2, April 13, and telephonically on April 21, 2015.

On April 2, 2015, following conferral with counsel, May 26, 2015 was established as the due date for Mr. Van Pelt's and the Board's post-hearing brief.

THE CHARGES

BACKGROUND COMMON TO ALL CHARGES

Mr. Van Pelt has been a Teacher employed by the Board since the 2000-2001 school year. He is currently a union representative for his building. As an employee of the Board, Mr. Van Pelt was obliged, among other things, to ensure the implementation and enforcement of all Board policies, follow administrative directives and procedures, as well as New Jersey law, and accord himself appropriately towards and amongst the other Board employees he works with on a day to day basis – *i.e.*, not to conduct himself inappropriately in their presence and cause them embarrassment, offense, discomfort and concern. Mr. Van Pelt, however, has continuously ignored the foregoing duties and responsibilities, and worse, has demonstrated an unwillingness and/or inability to improve, correct and modify his performance.

Board Policy 3362, *Sexual Harassment,* states that "[s]exual harassment includes all unwelcome . . . verbal contacts of a sexual nature that would not have happened but for the employee's gender." Policy 3362 further states that "when such conduct is severe and pervasive and has the purpose or effect of unreasonably altering or interfering with work performance or creating an intimidating, hostile, or offensive working environment, the employee shall have cause for complaint."

Board Policy 3281, *Inappropriate Staff Conduct*, states in relevant part that "[I]nappropriate conduct by a school staff member outside their professional responsibilities may be considered conduct unbecoming a staff member. Therefore, school staff members are advised to be concerned with such conduct which may include, but is not limited to, communications and/or publications using emails, text-messaging, social networking sites, or any other medium that is directed and/or available to pupils or for public display."

Board Policy 3211, *Code of Ethics*, indicates that "the educator shall exert every effort to raise professional standards to promote a climate that encourages the exercise of professional judgment, to achieve conditions which attract persons worthy of the trust to careers in education."

Board Policy 1140, *Affirmative Action Program*, establishes that the program shall "promote the acceptance of persons of diverse backgrounds regardless of race, creed, color, national origin,

ancestry, age, martial status, affectional or sexual orientation, gender, religion, disability, or socioeconomic status." Further, this Policy provides that the Board's affirmative action program must "foster a learning environment that is free from all forms of prejudice, discrimination, and harassment based upon race, creed, color, national origin, ancestry, age, martial status, affectional or sexual orientation, gender, religion, disability, or socioeconomic status in policies, programs, and practices of the Board of Education."

Board Policy 3321, *Acceptable Use of Computer Network(s)/Computers and Resources by Teaching Staff Members*, advises employees that the Board retains the right to have the Superintendent or designee monitor network activity, in any form necessary, to maintain the integrity of the network(s) and ensure its proper use." Policy 3321 further states that "the Board provides access to computer network(s)/computers for administrative and educational purposes only." Moreover, the foregoing Policy, in relevant part, states that "any individual engaging in the following actions declared unethical, unacceptable or illegal when using computer network(s)/computers shall be subject to discipline or legal action: (1) using the computer network(s)computers for ... inappropriate or obscene purposes."

Finally, Board Policy 3351, *Healthy Workplace Environment*, requires that "employees interact with each other with dignity and respect" and further states that "repeated malicious conduct of an employee or group of employees directed toward another employee or group of employees in the workplace that a reasonable person would find hostile and offensive is unacceptable and is not conducive to establishing or maintaining a healthy workplace environment."

Additionally, Article VI Section C , *School Visitations by Association Representatives*, of the Agreement for Professional Employees between the Board of Education Edison Township New Jersey and Edison Township Education Association, states in relevant part that "Representatives of the Association . . . shall be permitted to transact official Association business on school property at all reasonable times with the approval of the principal and/or Superintendent, provided that doing so shall not interfere with or interrupt normal school operations."

Mr. Van Pelt has an imperfect record of employment with the Board. Importantly, Mr. Van Pelt was first reprimanded during the 2005-2006 school year for using "the e-mail system of the [Board] on December 23, 2005 to transmit an email, which was not related to the educational mission of the Board, to every user in the District." Thereafter, on September 28, 2007, Mr. Van Pelt received a written reprimand for failing to submit a signed Technology Agreement and an executed Appendix A of the Alcohol and Drug Free Workplace Form. Additionally, Mr. Van Pelt was issued a written reprimand, resulting in his pay being docked for one day, after he failed to provide the Board with a sufficient physician's statement of illness following the use of a sick day. Perhaps most troubling is that the foregoing disciplinary action taken against Mr. Van Pelt has not served to modify and/or improve his conduct moving forward. Rather, it appears to have emboldened him, particularly in light of his initiation of and participation in the egregious conversation that lies at the heart of the herein Charges.

Specifically, on October 23, 2014, during a voluntary Engrade Chromebook Training, Mr. Van Pelt invited three (3) other Board employees (Maryellen Lechelt, Maria Weber and Jonathan Bauza), via email, to join a group chat on the Today's Meet website (https://todaysmeet.com/engraderocks) through the District's computer network. Today's Meet is a public web forum, accessible by all Board employees and students. The group chat spanned for a period of roughly two and a half hours and served no instructional purpose. Rather, the chat was graphically sexual in nature; discriminatory to women, lesbians, elderly persons and special education/handicap students; highly offensive to anyone not involved with same; and created a hostile work environment to other Board employees who were able to view, at any point in time, the content of the discussion.

The nature of the foregoing conversation is egregious beyond the bounds of decency. No persons and/or classifications of persons were spared. Mr. Van Pelt's behavior, as set forth more specifically below, illustrates a complete and shameful disregard of his responsibilities as an employee of the Edison Township School District and a member of the teaching profession, including, but not necessarily limited to, violations of the above mentioned policies, New Jersey Law and the controlling collective bargaining agreement. Even worse, Mr. Van Pelt's conduct has caused both the Board's Administration and members of the Board's staff grave concerns over his intentions and capabilities, to the point of no longer feeling comfortable to be in his presence or permitting him to be in the presence of other Board employees and students.

I hereby charge Tyler Van Pelt with *conduct unbecoming a teaching staff member, misbehavior, neglect and/or other just cause, including but not necessarily limited to* insubordination; all of which warrant his dismissal, pursuant to N.J.S.A.18A:28-5, and 18A:6-10.1, et seq. As more specifically set forth below, it is clear that he has exhibited a callous disregard for the expectations of the Board, and the rights of other employees of the Board, to conduct their daily activities in an environment that is free from harassment, discrimination, bullying and inappropriate conduct and communications, as well as an egregious breach of the professional standards imposed upon him as a member of the teaching profession.

SPECIFICATION OF CHARGES

CHARGE I

Unbecoming Conduct and/or Other Just Cause
Inappropriate Staff Conduct With Other Staff Members

On October 23, 2014, while attending a voluntary Engrade Chromebook Training at the Board's offices, Tyler Van Pelt engaged in a course of misconduct that violated New Jersey Law, as well as Board policies, regulations and procedures regarding staff interaction with and/or concerning other staff members. More specifically, Mr. Van Pelt initiated and participated in a conversation through the District's network, in a public chat room ("Today's Meet"), visible to those present in the room and obtainable by any District employee and student through the Today's Meet website, which was full of sexual innuendo, discriminatory, offensive and ultimately created a hostile

work environment (the content of which is set forth more fully in Exhibit H of the Sworn Statement of Evidence). This misconduct by Mr. Van Pelt is unconscionable and constitutes unbecoming conduct, misbehavior, neglect, insubordination, and/or other just cause for dismissal.

Count 1 - Inappropriate comments about Sara Bleekinger – Engrade Trainer

On October 23, 2014, Tyler Van Pelt engaged in a course of misconduct directed towards Ms. Bleekinger, which was inappropriate, foul, discriminatory, offensive, harassing and sexual in nature (the content of which is set forth more fully in Exhibit H of the Sworn Statement of Evidence). Such conduct resulted from a group chat through Today's Meet that was visible to Alysia Battista and others who were present in the Training, as well as to the entire Edison School District community, as Today's Meet is a public chat room which maintains a transcript of each conversation and is accessible to all Board employees and students.

More specifically, Mr. Van Pelt made the following comments about Ms. Bleekinger:

A. "she looks like a poor man's denise richards";

B. "I dare one of you to delete her whole shit";

C. "oh she is aware of my presence . . . she is getting flush around the drop collar";

D. "I made a video of her presenting and that shit gets 5 stars";

E. "i'd like to invite her to a private backchannel discussion . . . all night long";

F. "i'd like to give her some bad options";

G. "it's nervousness cuz [sic] I fear she may reject me ... it may be over betwee [sic] us before it got started";

H. "my next pick up line was going to be 'how about I cook you breakfast'";

I. "I would treat her like a queen ... do you hear me a queen";

J. "i'd like to tag her";

K. "no, see, you guys don't get it ... when they are with me they love it all";

L. "had to get the baby batter off the brain ... well that is the test, if you still care after that occurs ... and that's how I have always known I'm in true love ... and I love her";

M. "can you help me with my pickup line at the end ... I was gonna [sic] go with 'you know what would look good on you? ME'";

N."I am thinking of a super-smart question to ask that will maker her melt ... maybe 'do you like to have your hair pulled?' ... have you ever seen a crisp one hundred dollar bill?";

O."how do you like to do it? Do you like to shower first? Personally I like to give my undercarriage a good how's your father beforehand."

Mr. Van Pelt's conduct resulted in a disruption of the October 23, 2014 Engrade Training, created a hostile school environment for all persons who have had occasion to review his commentary and made it unpleasant for Ms. Battista and other staff members to be in his presence for fear that they will either be harassed, discriminated against and embarrassed; made to feel uncomfortable; and/or forced to hear and or view Mr. Van Pelt make further inappropriate and offensive comments to them, about them and/or about others.

Count 2 - Inappropriate comments about special education/handicap students

On October 23, 2014, Tyler Van Pelt engaged in a course of misconduct directed towards special education/handicap students, which was inappropriate, foul, discriminatory, offensive and harassing in nature (the content of which is set forth more fully in Exhibit H of the Sworn Statement of Evidence). Such conduct resulted from a group chat through Today's Meet that was visible to Alysia Battista and others who were present in the Training, as well as to the entire Edison Township School District community, as Today's Meet is a public chat room which maintains a transcript of each conversation and is accessible to all Board employees and students.

More specifically, Mr. Van Pelt made the following comments about special education/handicap students:

·"bobo";

·"short bus kids";

·"I name my smart kids group 'mr vp's favority students'";

·"and my low group is called 'I hate you don't waste my time'";

·"my middle group is 'whatever'";

Mr. Van Pelt's conduct resulted in a disruption of the October 23, 2014 Engrade Training, created a hostile school environment for all persons who have had occasion to review his commentary and made it unpleasant for Ms. Battista and other staff members to be in his presence for fear that they will either be harassed, discriminated against and embarrassed; made to feel uncomfortable; and/or forced to hear and or view Mr. Van Pelt make further inappropriate and offensive comments to them, about them and/or about others.

Count 3 - Inappropriate comments about Superintendent of Schools, Dr. O'Malley

On October 23, 2014, Tyler Van Pelt engaged in a course of misconduct directed towards Superintendent of Schools, Dr. O'Malley, which was inappropriate, foul, discriminatory, offensive, harassing and sexual in nature (the content of which is set forth more fully in Exhibit H of the Sworn Statement of Evidence). Such conduct resulted from a group chat through Today's Meet that was visible to Alysia Battista and others who were present in the Training, as well as to the entire Edison Township School District community, as Today's Meet is a public chat room which maintains a transcript of each conversation and is accessible to all Board employees and students.

More specifically, Mr. Van Pelt made inappropriate and unsubstantiated comments about Dr. O'Malley's appearance, sexual proclivity, professionalism and hiring/promotion practices, as more fully set forth in Exhibit H of the Sworn Statement of Evidence. Mr. Van Pelt's conduct resulted in a disruption of the October 23, 2014 Engrade Training, created a hostile school environment for all persons who have had occasion to review his commentary and made it unpleasant for Ms. Battista and other staff members to be in his presence for fear that they will either be harassed, discriminated against and embarrassed; made to feel uncomfortable; and/or forced to hear and or view Mr. Van Pelt make further inappropriate and offensive comments to them, about them and/or about others.

Count 4 - Inappropriate comments about Alysia Battista

On October 23, 2014, Tyler Van Pelt engaged in a course of misconduct directed towards Alysia Battista, which was inappropriate, foul, discriminatory, offensive, harassing and sexual in nature (the content of which is set forth more fully in Exhibit H of the Sworn Statement of Evidence). Such conduct resulted from a group chat through Today's Meet that was visible to Alysia Battista and others who were present in the Training, as well as to the entire Edison Township School District community, as Today's Meet is a public chat room which maintains a transcript of each conversation and is accessible to all Board employees and students.

More specifically, Mr. Van Pelt made the following comments about Alysia Battista:

1. Following a comment by Ms. Lechelt directed towards Ms. Battista, concerning Ms. Battista "scratching her lips," Mr. Van Pelt responded, "dsl"[1] and then "we totally just made eye contact and totally had a moment";

Mr. Van Pelt's conduct resulted in a disruption of the October 23, 2014 Engrade Training, created a hostile school environment for all persons who have had occasion to review his commentary and made it unpleasant for Ms. Battista and other staff members to be in his presence for fear that they will either be harassed, discriminated against and embarrassed; made to feel uncomfortable; and/or forced to hear and or view Mr. Van Pelt make further inappropriate and offensive comments to them, about them and/or about others.

Count 5 - Inappropriate comments directed at unidentified employees in the Training

[1] "DSL" is slang for the phrase "dick sucking lips."

On October 23, 2014, Tyler Van Pelt engaged in a course of misconduct directed towards other unidentified employees in attendance at the Engrade Training, which was inappropriate, foul, discriminatory, offensive, harassing and sexual in nature (the content of which is set forth more fully in Exhibit H of the Sworn Statement of Evidence). Such conduct resulted from a group chat through Today's Meet that was visible to Alysia Battista and others who were present in the Training, as well as to the entire Edison Township School District community, as Today's Meet is a public chat room which maintains a transcript of each conversation and is accessible to all Board employees and students.

More specifically, Mr. Van Pelt made the following comments about various unidentified employees:

i. Following a reference by Ms. Lechelt to "this lady in the red tshirt in the second row," Mr. Van Pelt stated "been there done that";

ii. "had her when she was in her f-ing [sic] prime";

iii. "how's that for an image ... try getting that out of your head";

iv. "yea ... she got the mustache too yo [sic]."

Mr. Van Pelt's conduct resulted in a disruption of the October 23, 2014 Engrade Training, created a hostile school environment for all persons who have had occasion to review his commentary and made it unpleasant for Ms. Battista and other staff members to be in his presence for fear that they will either be harassed, discriminated against and embarrassed; made to feel uncomfortable; and/or forced to hear and or view Mr. Van Pelt make further inappropriate and offensive comments to them, about them and/or about others.

Count 6 - Inappropriate and offensive comments between each other

On October 23, 2014, Tyler Van Pelt engaged in a course of misconduct, which was inappropriate, foul, discriminatory, offensive, harassing and sexual in nature (the content of which is set forth more fully in Exhibit H of the Sworn Statement of Evidence). Such conduct resulted from a group chat through Today's Meet that was visible to Alysia Battista and others who were present in the Training, as well as to the entire Edison Township School District community, as Today's Meet is a public chat room which maintains a transcript of each conversation and is accessible to all Board employees and students.

More specifically, Mr. Van Pelt made the following comments to Ms. Lechelt, Ms. Weber and Mr. Bauza:

I. After Ms. Lechelt stated to Mr. Van Pelt that "I didn't realize you were a backchannel guy,"[2] Mr. Van Pelt stated: "now you know ... thought everybody knew" and "you can tell by the way the ladies walk ..."

II. "on the contrary, I am both a feminist and devout lesbian";

[2] "Backchannel guy" is a reference to anal sex.

III."I eat more chicken any man ever seen [sic]";[3]

IV."like being in the backseat of a vw bug?";

V."I eat it all ... cookies and milk, cookies and milk ... and chicken";

Mr. Van Pelt's conduct resulted in a disruption of the October 23, 2014 Engrade Training, created a hostile school environment for all persons who have had occasion to review his commentary and made it unpleasant for Ms. Battista and other staff members to be in his presence for fear that they will either be harassed, discriminated against and embarrassed; made to feel uncomfortable; and/or forced to hear and or view Mr. Van Pelt make further inappropriate and offensive comments to them, about them and/or about others.

CHARGE II

Insubordination and Unbecoming Conduct and/or Other Just Cause
Disruption of Professional Development Training

All of the allegations contained in the Background Information and preceding Charges are incorporated by reference as if fully set forth herein. On October 23, 2014, during an Engrade Training, Tyler Van Pelt engaged in a course of misconduct that was inappropriate, foul, discriminatory, harassing, offensive and sexual in nature. More specifically, by taking part in a group chat through Today's Meet, which was – in part – about Alysia Battista, visible to Ms. Battista and highly offensive to her, Ms. Battista was unable to focus and was effectively forced to leave the training to forego further angst, ultimately preventing her from reaping the benefits of the instruction. This misconduct by Mr. Van Pelt is unconscionable and constitutes unbecoming conduct, misbehavior, neglect, insubordination, and/or other just cause for dismissal.

CHARGE III

Insubordination and Unbecoming Conduct and/or Other Just Cause
Failure to Pay Attention During Professional Development Training

All of the allegations contained in the Background Information and preceding Charges are incorporated by reference as if fully set forth herein. On October 23, 2014, during an Engrade Training, as a result of his participation in a roughly two and a half hour inappropriate and extraneous conversation, Tyler Van Pelt failed to pay attention and/or make any effort to benefit from the instruction provided, destroying the trust placed in Mr. Van Pelt by the Board. This misconduct by Mr. Van Pelt constitutes unbecoming conduct, misbehavior, neglect, insubordination, and/or other just cause for dismissal.

[3] "Eating chicken" refers to oral sex.

CHARGE IV

Insubordination and Unbecoming Conduct and/or Other Just Cause
Misuse of the District's Computer Network

All of the allegations contained in the Background Information and preceding Charges are incorporated by reference as if fully set forth herein. On October 23, 2014, Tyler Van Pelt initiated and participated in a group chat through the District's computer network that was inappropriate, foul, discriminatory, harassing, offensive and sexual in nature (the content of which is set forth more fully in Exhibit H of the Sworn Statement of Evidence), by way of the Today's Meet website, which constituted a flagrant misuse of Board resources and showed a concerning lack of judgment and failure to comply with the heavy duty of self-restraint and controlled behavior expected from any member of the teaching profession. This misconduct by Mr. Van Pelt is unconscionable and constitutes unbecoming conduct, misbehavior, neglect, insubordination, and/or other just cause for dismissal.

CHARGE V

Insubordination and Unbecoming Conduct and/or Other Just Cause
Masturbating In or Around Board Property

All of the allegations contained in the Background Information and preceding Charges are incorporated by reference as if fully set forth herein. On October 23, 2014, Tyler Van Pelt excused himself from the Engrade Training, at around 10:39 AM, presumably to masturbate within the confines of Board property. In fact, Mr. Van Pelt was not shy in informing Ms. Lechelt, Ms. Weber and Mr. Bauza of same when he informed the group that he was gone for a while because he "had to get the baby batter off the brain" – a reference to masturbation. Moreover, Mr. Van Pelt admitted to masturbating in or around school property on at least one other prior occasion and advised Ms. DeLuca of same while being interviewed during Ms. DeLuca's Affirmative Action investigation. This misconduct by Mr. Van Pelt is unconscionable and constitutes unbecoming conduct, misbehavior, neglect, insubordination, and/or other just cause for dismissal.

CHARGE VI

Insubordination and Unbecoming Conduct and/or Other Just Cause
Violations of District Policies

All of the allegations contained in the Background Information and preceding Charges are incorporated by reference as if fully set forth herein. On October 23, 2014, Tyler Van Pelt initiated and participated in a group chat through the District's computer network that was inappropriate, foul, discriminatory, harassing, offensive and sexual in nature (the content of which is set forth more fully in Exhibit H of the Sworn Statement of Evidence), by way of the Today's Meet website, which was both viewable to other attendees of the Engrade Training and obtainable by any District employee and student through the Today's Meet website, in violation of numerous Board Policies, as more

specifically set forth immediately below within this Charge. This misconduct by Mr. Van Pelt is unconscionable and constitutes unbecoming conduct, misbehavior, neglect, insubordination, and/or other just cause for dismissal.

Count 1 – Violation of Sexual Harassment Policy

Mr. Van Pelt's conduct violated Board Policy 3362, *Sexual Harassment*, in that it subjected Alysia Battista, as well as other Board employees "to sexually offensive speech and conduct ... wholly inappropriate to the harmonious employment relationships necessary to the operation of the school district." Further, Mr. Van Pelt's conduct was severe and pervasive and had the purpose or effect of unreasonably altering or interfering with work performance or creating an intimidating, hostile or offensive working environment for others. More specifically, Mr. Van Pelt made statements, including but not limited to, his sexual abilities and those of co-workers; obscene teasing, jokes and remarks of a sexual nature; comments of a sexual nature on, or staring at, an individual's physical attributes; and questions about sexual conduct. Regardless of whether such comments were directed at a particular individual, or even if such targets were aware that comments were made about them, Mr. Van Pelt's graphic declarations constitute sexual harassment.

Count 2 – Violation of Affirmative Action Policy

Mr. Van Pelt's conduct violated Board Policy 1140, *Affirmative Action Program*, in that it subjected Alysia Battista, as well as other Board employees, to a "learning environment [rife] with all forms of prejudice, discrimination and harassment ..."

Count 3 – Violation of Sexual Harassment and Affirmative Action Policies pertaining to Affirmative Action Investigation

Following an Affirmative Action/Sexual Harassment Investigation conducted by the District's Affirmative Action Office, Margaret DeLuca, Mr. Van Pelt's conduct during the October 23, 2104 Today's Meet group chat was determined to be in violation of the District's Sexual Harassment and Affirmative Action Policies, as well as various other Board Policies. In relevant part, Ms. DeLuca found that the "comments in the chat were directed against females and were so outrageous that the teacher filing the complaint was unable to concentrate on the needed instruction, thus interfering with her work performance." Further, Ms. DeLuca expressed her concern that Mr. Van Pelt did not understand the gravity of his conduct, particularly in light of Mr. Van Pelt's unrestrained commentary regarding his attraction to the presenter and his off color comments regarding his proclivity for oral sex and his suggestion that he has previously masturbated on Board premises. As a result of same, Ms. DeLuca recommended that Dr. O'Malley "consider the most severe [disciplinary] consequences for Mr. Van Pelt." Ultimately, Mr. Van Pelt's behavior triggered an Affirmative Action/Sexual Harassment investigation that resulted in a determination that he engaged in misconduct.

Count 4 – Violation of Code of Ethics Policy

Mr. Van Pelt violated Board Policy 3211, *Code of Ethics*, in that he failed to "exert every effort to raise professional standards to promote a climate that encourages the exercise of professional judgment, to achieve conditions which attract persons worthy of the trust to careers in education, and to assist in preventing the practice of the profession by unqualified persons."

Count 5 – Violation of Inappropriate Staff Conduct Policy

Mr. Van Pelt violated Board Policy 3281, *Inappropriate Staff Conduct*, by engaging in inappropriate conduct, outside of his professional responsibilities, including communications through the internet, which were available to pupils and for public display.

Count 6 – Violation of Healthy Workplace Environment Policy

Mr. Van Pelt violated Board Policy 3351, *Healthy Workplace Environment*, by engaging in "repeated malicious conduct ... directed toward another employee or group of employees in the workplace that [Ms. Battista and others found] hostile [and] offensive."

Count 7 – Violation of Acceptable Use of Computer Network(s)/Computers and Resources by Teaching Staff Members

Mr. Van Pelt violated Board Policy 3321, *Acceptable Use of Computer Network(s)/Computers and Resources by Teaching Staff Members*, by engaging in a group chat on the District's computer network that had no administrative and/or educational purposes. More specifically, Mr. Van Pelt violated this Policy by initiating and participating in a conversation through the District's computer network that was highly inappropriate (contrary to the intended use of the network) and outright obscene (contrary to the generally accepted social standards for use of publicly owned and operated communication vehicles).

CHARGE VII

Insubordination and Unbecoming Conduct and/or Other Just Cause Violations of the Collective Bargaining Agreement

All of the allegations contained in the Background Information and preceding Charges are incorporated by reference as if fully set forth herein. Contrary to the requirement of Article VI© of the Agreement for Professional Employees between Board of Education Edison Township New Jersey and Edison Township Education Association, Tyler Van Pelt has consistently conducted union activity during instructional time (*i.e.*, engaging in conduct involving and/or concerning union activities, events and/or obligations while he should have been teaching and/or monitoring his students), without the approval of the principal and/or Superintendent. This conduct, as more

specifically set forth below, constitutes unbecoming conduct, misbehavior, neglect, insubordination, and/or other just cause for dismissal.

Count 1

On September 11, 2014, at 2:00PM and 3:01PM, during Math class and Science/Social Studies respectively, Mr. Van Pelt drafted and sent out emails concerning and/or relating to union activity/events.

Count 2

On September 17, 2014, at 2:14PM, during Math class, Mr. Van Pelt drafted and sent out an email concerning and/or relating to union activity/events.

Count 3

On September 18, 2014, at 2:10PM, during Math class, Mr. Van Pelt drafted and sent out an email concerning and/or relating to union activity/events.

Count 4

On October 23, 2014, at 12:13PM and 3:22PM, during Literacy class and immediately following Science/Social Studies, Mr. Van Pelt drafted and sent out emails concerning and/or relating to union activity/events.

Count 5

On October 23, 2014, at or around 9:38AM and 10:05AM, during Engrade Training – Professional Development, Mr. Van Pelt reviewed an email from ETEA President Jeff Bowden and then prepared and sent an email to Vanessa Barros, both concerning and/or relating to union activity/events.

CHARGE VIII

Pattern of Unbecoming Conduct, Insubordination and/or Other Just Cause over Protracted Period of Time

All of the allegations and facts set forth in the above Background Information, Charges and Counts are incorporated by reference as if fully set forth herein. By virtue thereof, it is evident that Mr. Van Pelt has been engaged in a course of misconduct extending over a protracted period of time, such that, his pattern of misconduct, jointly and severally, constitutes unbecoming conduct and manifestly demonstrates his unfitness to serve in a position of educational leadership, warranting his dismissal.

POSITIONS OF THE PARTIES

CONTENTIONS OF THE BOARD

The Board argued as follows:

These facts pertain to Tyler Van Pelt.

- Mr. Van Pelt has been employed by the Board since the 2000-2001 school year. He is currently a tenured employee.

- Mr. Van Pelt, during the 2014-2015 school year, was an elementary teacher assigned to Lincoln Elementary School.

- Mr. Van Pelt was a union representative for his building during the 2014-2015 school year. 5T 159:10-13.

- In or about January 2006 Mr. Van Pelt received a written reprimanded from former Superintendent of Schools Carol A. Toth for misusing the district's email system in December 2005 (*i.e.*, transmitting an email "which was not related to the educational mission of the Board, to every user in the school district"). B-33.

- Mr. Van Pelt, in response to the foregoing reprimand, indicated that he understood Superintendent Toth's concerns and promised that he "would not utilize the Board's e-mail system in this manner in the future." B-33.

- Importantly, Mr. Van Pelt refused to meet with Superintendent Toth on three (3) separate occasions, prior to actually meeting with her, to address this email issue. See B-33.

- On or about October 13, 2006, former Assistant Principal Rutan forwarded a memorandum to Principal Kovacs, documenting inappropriate comments made by Mr Van Pelt to a superior of Mr. Van Pelts. Specifically, Mr. Van Pelt stated to Assistant Principal Rutan "if I had a dog that shit over and over on my carpet, I would get rid of it." Assistant Principal Rutan characterized Mr. Van Pelt's comments as "intimidating" and an "affront to [his] person [and] character." B-34.

- In or about July 2007 Mr. Van Pelt again demonstrated his unwillingness to cooperate with central administration by effectively refusing to be interviewed as a fact-witness in connection with an affirmative action investigation. B-35.

- In or about June 2007, Mr. Van Pelt was reprimanded for the following conduct: (1) possessing beer at the Rutgers Athletic Center during and/or shortly after the Edison High School Graduation Ceremony; and (2) arriving at the main office, the morning after graduation, and acting in a "belligerent, demanding, and loud manner," making the secretaries feel uncomfortable – resulting in a Detective being forced to escort Mr. Van Pelt

from the premises. As a result of the foregoing conduct, Mr. Van Pelt was notified that former Superintendent Toth intended to recommend that the Board withhold his increments for the 2007-2008 school year. B-36.

- On or about August 20, 2007, Mr. Van Pelt's increments were, in fact, withheld for the 2007-2008 school year. B-39.

- In or about September 28, 2007 Mr. Van Pelt received a written reprimanded for failing to "provide a signed Technology Agreement and Appendix A of the Alcohol and Drug Free Workplace." In other words, Mr. Van Pelt effectively refused to acknowledge his obligation to properly use the Board's technology and his obligation to ensure the work place remains free from drug and alcohol use. B-37.

- In or about June 2008, Mr. Van Pelt was arrested an issued a Temporary Restraining Order for physical assaulting his then wife and co-employee. B-46.

- As a result of the foregoing incident, Mr. Van Pelt entered into a consent order prohibiting him from contacting his wife and resulting in his transfer from Edison High School so he would not be in the same building as his wife. B-46.

- In or about June 2012, Mr. Van Pelt was again reprimanded, this time by current Superintendent of School – Richard O'Malley, Ed.D. – for failing to provide a sufficient certification that an absence was due to a medical illness. Moreover, Dr. O'Malley expressed his concern with Mr. Van Pelt's attempt to supply a deficient and misleading doctor's note that was prepared by a family member. B-38

- On September 11, 2014, Mr. Van Pelt executed the *Important Board Policies, Regulations, and Mandated Communications* Form, acknowledging that all Board policies and regulations can be found on the Board's website at http://www.edison.k12.nj.us/Page/514 and agreeing to review and conform to the requirements of same. B-17.

- Mr. Van Pelt's schedule for the 2014-2015 school year was established prior to the start of the 2014-2015 school year. Mr. Van Pelt was expected to provide instruction during scheduled instructional time. B-32; 6T 28:13-17.

- On Thursday September 11, 2014, Mr. Van Pelt engaged in union activity during instructional time. More specifically, he forwarded union related emails to ETEA president Bowden at 2:00PM and 3:01PM, while he was conducting Math and Science/Social Studies Classes, respectively.[4] B-28 and 32; 2T 136:1-138:9.

- On Wednesday and Thursday September 17 and 18, 2014, Mr. Van Pelt engaged in union activity during instructional time. More specifically, he forwarded union related emails to

[4] Note that the time times reflected on the emails are 3 hours behind the actual time due to a time zone issue with the District's network. See, 2T 136:6-12.

ETEA president Bowden at 2:14PM on the 17th and 2:10PM on the 18th, during his scheduled Math instructional time. B-29 and 32; 2T 138:10-139:20.

- On Thursday October 23, 2014, Mr. Van Pelt engaged in union activity during instructional time. More specifically, he forwarded union related emails to ETEA president Bowden at 12:13PM and 3:22PM, during his Literacy Class and immediately following his Science/Social Studies Class (meaning same, logically, must have been prepared as class was ending and sent right after class ended). B-30/32; 2T 140:1-141:25.

- On Thursday October 23, 2014, Mr. Van Pelt engaged in union activity during instructional time – Engrade Training. More specifically, he reviewed and responded to union related emails at 9:38Am and 10:05AM, while he was supposed to be focused on Engrade Training. B-30 and 32; 2T 142:3-143:11.

- There were no changes to Mr. Van Pelt's schedule, nor were there any assemblies, on September 11, 17, 18th or October 23rd. 6T 27:3-6, 29:11-14.

The following facts apply to all of the Respondents

- Article III(B)(1 and 2) of the Agreement for Professional Employees between Board of Education Edison Township New Jersey and Edison Township Education Association, July 1, 2011 through June 30, 2014 ("CBA") state, in relevant part, that "all Board of Education policies will be upheld and enforced by all Board employees who are party to this Agreement, as well as by all Administrators, Principals, and Supervisors" and "all Board of Education policies will be available for review in the office of the principal, school library, and the Association office." B-27.

- Board Policy 3321, *Acceptable Use of Computer Network(s)/Computers and Resources by Teaching Staff Members*, advises employees that the Board retains the right to have the Superintendent or designee monitor network activity, in any form necessary, to maintain the integrity of the network(s) and ensure its proper use." Policy 3321 further states that "the Board provides access to computer network(s)/computers for administrative and educational purposes only." Moreover, the foregoing policy, in relevant part, states that "any individual engaging in the following actions declared unethical, unacceptable or illegal when using computer network(s)/computers shall be subject to discipline or legal action: (1) using the computer network(s)computers for . . . inappropriate or obscene purposes." B-24.

- Moreover, Policy 3321 subject employees who violate same to discipline, which includes but is not limited to, suspension, revocation of computer privileges and/or dismissal. B-24.

- Unequivocally, there is no expectation of privacy for any Board employee when using the district's computer network. In fact, there is no program and/or policy that would trump the foregoing fact. 3T-14:16-15:12; 2T 26:13-19.

- Board Policy 3362, *Sexual Harassment*, states that "[s]exual harassment includes all unwelcome . . . verbal contacts of a sexual nature that would not have happened but for the employee's gender." Policy 3362 further states that "when such conduct is severe and pervasive and has the purpose or effect of unreasonably altering or interfering with work performance or creating an intimidating, hostile, or offensive working environment, the employee shall have cause for complaint." B-21.

- Board Policy 3362 also states that "any employee . . . who is found to have sexually harassed an employee of this district will be subject to discipline which may include termination of employment." B-21.

- Board Policy 1140, *Affirmative Action Program*, establishes that the Board's affirmative action program will "foster a learning environment that is free from all forms of prejudice, discrimination, and harassment based upon race, creed, color, national origin, ancestry, age, martial status, affectional or sexual orientation, gender, religion, disability, or socioeconomic status in policies, programs, and practices of the Board of Education." B-20.

- Board Policy 3281, *Inappropriate Staff Conduct*, states in relevant part that "[I]nappropriate conduct by a school staff member outside their professional responsibilities may be considered conduct unbecoming a staff member. Policy 3281 further states that "School staff's conduct in completing their professional responsibilities shall be appropriate at all time . . . [and] school staff shall not make inappropriate comments about pupils." B-23.

- Board Policy 3211, *Code of Ethics*, indicates that "the educator shall exert every effort to raise professional standards to promote a climate that encourages the exercise of professional judgment, to achieve conditions which attract persons worthy of the trust to careers in education." B-22.

- Board Policy 3351, *Healthy Workplace Environment*, requires that "employees interact with each other with dignity and respect" and further states that "repeated malicious conduct of an employee or group of employees directed toward another employee or group of employees in the workplace that a reasonable person would find hostile and offensive is unacceptable and is not conducive to establishing or maintaining a healthy workplace environment." Policy 3351 further defines the foregoing unacceptable conduct to include the use of derogatory remarks; insults; verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating. Finally, a single act of such conduct can constitute the unacceptable conduct prohibited by this policy if it is especially severe and egregious. B-25.

- Board Policy 3351 states that "appropriate disciplinary action may be taken depending on the severity of conduct." B-25

- On October 23, 2014, Respondents attended a mandatory Engrade Training (the "Training") at the Board's offices. Engrade was a new initiative (learning management system) for the District's elementary school teachers. 2T 24:3-23.

- The Training lasted for two-and-one-half hours (roughly 9:00-11:30AM) and was conducted by Sara Bleekinger, who is not a Board employee. 2T 28:24-29:2.

- Respondents were required to use their District issued Chromebooks to participate in the Training. All Respondents admit to using same during the Training and connecting to the Internet through the District's network. Further, Respondent's computers were open, with their screens exposed, throughout the duration of the Training. 1T 74:12-18; 2T 25:6-20.

- At 8:53AM, Mr. Van Pelt forwarded an email to Ms. Lechelt, Ms. Weber and Jonathan Bauza, requesting that they "join [him] on [his] personal wiseass backchannel discussion."[5] B-12.

- Mr. Van Pelt attached a link to bring the invitees to a web site called "Todays Meet." B-12. Today's Meet is an interactive program that hosts various educationally based conversations (i.e., teacher to teacher / teacher to student). However, Today's Meet is not a program that the District requires it teachers to use and/or be familiar with. In fact, it has no affiliation to this District. Importantly, the District does not maintain Today's Meet chat and/or content, nor does it request and/or require Today's Meet to do so. 3T 20:5-11; 5T 236:24-237:15.

- Respondents were not required to use Today's Meet as part of the Engrade Training. In fact, there was absolutely no compatibility and/or correlation between the Engrade Training the Today's Meet website. B-41.

- Respondents denied reading Lechelt-3 in its entirety prior to using the Today's Meet Program on October 23, 2014. More specifically, Respondent's did not review Today's Meet's Privacy Policy and Terms of Service. In fact, said portions of Lechelt-3 became effective December 13, 2014 – after the chat at issue occurred! See, Lechelt-3.

- Moreover, the document Bates dare stamped Lechelt-032 within Lechelt-3 illustrates that Today's Meet chat rooms can be public and/or have limited access. Without question, the chat at issue here was not totally private as Ms. DeLuca – who was not invited to take part in same – was able to access the chat room.[6] See, Lechelt-3.

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[5] Note that while the invitation was actually sent at 8:53AM, the email illustrates that it was sent at 5:53AM. The district's network is set not set to Pacific Standard time and is therefore displayed at a time three hours earlier than it actually is. 2T 45:13-46:3.

[6] Moreover, this chat was not private as the Respondents, notwithstanding their lack of privacy expectation on the district's network, have no expectation of privacy to the content of a chat displayed on their computer to a third party while in a public room.

- The Respondents, along with Jonathan Bauza, proceeded to engage in a 2.5 hour chat (beginning at 8:54AM and ending at 11:24AM) (hereinafter referred to as the "Group Chat"). B-13.

- James Madison Intermediate School Teacher, Alysia Battista, also attended the October 23, 2014 Engrade Training. 1T 60:10-16.

- Throughout the Training, Alysia Battista was seated in the last row, roughly 3 feet directly behind Ms. Lechelt. To the left of Ms. Lechelt were Jonathan Bauza and then Mr. Van Pelt. Ms. Weber was seated directly in front of Mr. Van Pelt. See, Lechelt-1; 1T 181:13; B-44 and Lechelt-1.

- Ms. Battista did not have any personal animosity towards Respondents prior to the Training. In fact she had no relationship (personal/professional) with any of them prior to same. 1T 83:4-9.

- A few moments after the Training began, Ms. Battista was distracted by noise emanating from Mr. Van Pelt, Ms. Lechelt and Mr. Bauza. Mr. Battista proceeded to "shush" Ms. Lechelt. 1T 67:5-22.

- Ms. Lechelt turned around and gave Ms. Battista a look that Ms. Battista interpreted as "really did you just shush me?" Ms. Lechelt and Messrs. Van Pelt and Bauza continued to converse loudly and lean in towards each other's computer screens. 1T 68:14-20.

- Ms. Battista was able to clearly see Ms. Lechelt's computer screen and, therefore, observe the content of the conversation between Ms. Lechelt, Mr. Van Pelt, Mr. Bauza and Ms. Weber. In fact, Ms. Battista indicated that Respondents made no effort to hide what was going on and, in fact, at one point during the training, Ms. Lechelt actually got up from her seat, leaving the computer screen open and the chat on the screen – exposed to the general public and visible to anyone looking. More specifically, Ms. Battista observed the following comments: "short bus" and sexual innuendos – i.e., references to male genitalia, "blow me" and "how do you think I got my job"; comments about lesbians. Ms. Battista also observed comments about someone wearing red. Ms. Battista was wearing red and believed some of the commentary was directed towards her. 1T 69:18-71:22; 74:12-18; 1T 70:5-9, 74:12-19; B-8, B-10.

- Ms. Battista was heavily distracted and highly uncomfortable with the nature of the chat. She described same as "unbelievable". The content of the conversation was upsetting to Ms. Battista because: (1) she has a niece who is classified as special education; (2) she has an "uncle who's epileptic and his whole life he was called retarded and that affected him, so to see that from people who work with children"; and (3) she has a cousin who is discriminated against for being a lesbian. Ms. Battista indicated that "seeing those things especially with people who work with kids, whether it's a joke or not, that's not crossing the line, that's jumping over the line and turning around and spitting on it." 1T 73:5-24.

- Ms. Battista found the Group Chat to be "sexually offensive." 1T 151:16-20.

- Similarly, Ms. Battista clearly observed the web address that hosted the Group Chat. She documented same in both her note to Mr. Figurelli and her written statement. 1T 84:4-16; B-8 and B-10.

- Ms. Battista, based on the portions of the transcript she saw, believed that the Respondents were talking about her – *i.e.*, she observed a comment about something red somebody was wearing, and assumed it was a reference to her because she was wearing a red sweater; and she saw a reference about someone "scratching their lips", which Ms. Battista tends to do when she gets upset, as was the case during the Group Chat. 1T 71:8-22; 176:11-21.

- Ms. Battista made a determination to inform central administration about this chat. She believed that since she preaches to her students to "say something if they see something", she would be disingenuous if she did not do same. Moreover, she expressed concern – *i.e.*, "if that's what's going on in public when other people can see it and I don't think they made any effort to hide what was going on, what could possibly be going on when the kids were not being supervised by other adults." 1T 74:7-11.

- Ms. Battista proceeded to take photographs of Ms. Lechelt's computer screen so she would be able to prove the egregiousness of Respondent's chat. Ms. Battista did not take the time to focus her phone when she snapped the pictures and that is why same came out blurry. 1T 75:21-25; B-7.

- Mr. Van Pelt made all of the comments in the chat attributed to "tvp." See, B-2. Specifically, Mr. Van Pelt made the following comments about the Engrade Trainer – Sarah Bleekinger:

    - "she looks like a poor man's denise richards";
    - "I dare one of you to delete her whole shit";
    - "oh she is aware of my presence . . . she is getting flush around the drop collar";
    - "I made a video of her presenting and that shit gets 5 stars";
    - "i'd like to invite her to a private backchannel discussion . . . all night long";
    - "i'd like to give her some bad options";
    - "it's nervousness cuz [sic] I fear she may reject me ... it may be over betwee [sic] us before it got started";
    - "my next pick up line was going to be 'how about I cook you breakfast'";

- "I would treat her like a queen ... do you hear me a queen";
- "i'd like to tag her";
- "no, see, you guys don't get it ... when they are with me they love it all";
- "had to get the baby batter off the brain ... well that is the test, if you still care after that occurs ... and that's how I have always known I'm in true love ... and I love her";
- "can you help me with my pickup line at the end ... I was gonna [sic] go with 'you know what would look good on you? ME'";
- "I am thinking of a super-smart question to ask that will maker her melt ... maybe 'do you like to have your hair pulled?' ... have you ever seen a crisp one hundred dollar bill?";
- "how do you like to do it? Do you like to shower first? Personally I like to give my undercarriage a good how's your father beforehand." B-13.

- Mr. Van Pelt made the following inappropriate comments about special education/handicap students:
  - "bobo";
  - "short bus kids";
  - "I name my smart kids group 'mr vp's favority students'";
  - "and my low group is called 'I hate you don't waste my time'";
  - "my middle group is 'whatever'". B-13.
- Mr. Van Pelt made the following comments about Superintendent of Schools, Dr. O'Malley:
  - "well, I don't want that dudes sloppy seconds";
  - "I am not prepared to accept the premise that little Richard[7] has ever been proficient at pulling chicks". B-13.
- Mr. Van Pelt, in response to a comment by Ms. Lechelt directed towards Ms. Battista, concerning Ms. Battista "scratching her lips," stated, "dsl"[8] and then "we totally just made eye contact and totally had a moment". B-13.

[7] "Little Richard" is a derogatory reference towards Dr. Richard O'Malley. 5T 244:3-4.
[8] "DSL" is slang for the phrase "dick sucking lips." 2T 77:5-24.

- Mr. Van Pelt made the following comments about various unidentified employees:
    - Following a reference by Ms. Lechelt to "this lady in the red tshirt in the second row," Mr. Van Pelt stated "been there done that";
    - "had her when she was in her f-ing [sic] prime";
    - "how's that for an image ... try getting that out of your head";
    - "yea ... she got the mustache too yo [sic]." B-13.
- Mr. Van Pelt made the following comments to Ms. Lechelt, Ms. Weber and Mr. Bauza:
    - After Ms. Lechelt stated to Mr. Van Pelt that "I didn't realize you were a backchannel guy," Mr. Van Pelt stated: "now you know ... thought everybody knew" and "you can tell by the way the ladies walk ..."
    - "on the contrary, I am both a feminist and devout lesbian";
    - "I eat more chicken any man ever seen [sic]";[9]
    - "like being in the backseat of a vw bug?";
    - "I eat it all ... cookies and milk, cookies and milk ... and chicken". B-13.
- The foregoing chat had no educational purpose, nor did it enhance the instruction of the Training in any manner. 3T 250:24-251:6; B-42.

- Ms. Battista left the Training to speak with Steve Figurelli about her observations. Mr. Figurelli was unavailable so Ms. Battista wrote him a quick note and placed same in a sealed envelope for his attention. B-8.

- Ms. Battista returned to the Training because she knew the Training was important and because she felt she had a professional obligation to sit through same. She did not believe she could simply leave for the day. 1T 79:19-80:1; 149:19-21.

- As a result of Respondents' conduct, Ms. Battista was unable to concentrate and was prevented from learning the content of the Training. Thus, Ms. Battista was unprepared to use Engrade with her students and/or to teach Engrade to her less computer savvy team members and/or student teachers. 1T 71:23-25; 81:8-11; 1T 60:17-61:5.

- Within an hour after the Training, Ms. Battista met with her building Principal, Mr. Duggan, to inform him of Respondents' conduct. 1T 82:2-8.

[9] "Eating chicken" refers to oral sex. B-14; 2T 73:22-23.

- Pursuant to the request of Mr. Duggan, Ms. Battista prepared a handwritten statement, documenting her observations during the Training. 1T 83:15-19; B-10.

- Thereafter, later in the day on October 23, 2014, Ms. DeLuca interviewed Ms. Battista as part of an affirmative action investigation concerning Respondents' conduct. Ms. Battista provided Ms. DeLuca with a handwritten statement. Ms. Battista was very upset and visibly shaken during this meeting. See, B-11, B-10 and 2T 31:2-33:18; 1T 88:3-18; B-10.

- Ms. DeLuca accessed and reviewed a written copy of the Today's Meet Group Chat ("Transcript"). More specifically, Ms. DeLuca was initially provided with a copy of same by Tara Beams, but also was able to access a copy of the Transcript by simply opening Today's Meet.com and entering the Chat Room created by Mr. Van Pelt. 2T 41:4-20; B-13.

- Ms. DeLuca found the Transcript to be disgusting and offensive. 2T 48:20-23.

- The chat between Mr. Van Pelt, Ms. Lechelt and Ms. Weber was open to the public and anyone with the chat name was able to access same. 2T 44:6-10; 6T 8:19-22.

- In fact, Don Platvoet, during his brief training of Respondent's on the potential uses of Today's Meet, did not inform Respondent's that it was a private program. 6T 8:8-15.

- Next, Ms. DeLuca met with and interviewed the other teachers in attendance during the October 23, 2014 Engrade Training, with the expectation of interviewing three or four teachers that Mr. Duggan had already spoken with. 2T 50:12-25; See, teacher interview notes.

- Only one other teacher present during the Training (Angie McKenna) observed the content of the chat between Respondents. 2T 52:22-53:16.

- Ms. DeLuca then proceeded to separately interview each of the Respondents. B-14 through B-16; 2T 56:10-12.

- Mr. Van Pelt and Ms. Lechelt indicated that they made derogatory references to special education and/or handicap students as a result of the Instructor's "offensive" use of the designation "low" for students. 2T 63:15-64:8.

- Per the District's Assistant Superintendent for Special Services, the Instructors use of the designation "low" should not have been offensive. In fact, all of the tests used by the District to classify special education students use the term "low" when classifying students. 2T 65:13-66:5; 3T 237:12-239:16.

- Respondents all appeared to be sorry they were caught, not sorry they had engaged in the conduct at issue. 2T 93:19-24; 104:14-105:4; 114:18-21.

- Specifically, Mr. Van Pelt did not take Ms. DeLuca's interview seriously. On two separate occasions during the interview, Mr. Van Pelt blurted out offensive, disgusting and unacceptable comments – *i.e.*, (1) when explaining that the phrase "eating chicken" means oral sex, Mr. Van Pelt stated under his breath, audible to Ms. DeLuca, that he likes oral sex; and (2) after explaining that the phrase "get the baby batter off the brain" was a reference to masturbation, Mr. Van Pelt stated, that he did not masturbate, "at least not that time." 2T 75:2-8; 76:6-20; 88:6-89:6.

- Throughout the course of her investigation, Ms. DeLuca determined the following meanings for the following phrases used by Respondents:

    - That many, if not all, references to "backchannel" were references to anal sex. B-15; 2T 68:7-16; 3T 266:4-7.

    - Mr. Van Pelt consistently used the phrase "eating chicken", which means both smoking marijuana and oral sex. 2T 71:1-2, 73:22-23.

    - After Ms. DeLuca stated that Ms. Battista "keeps scratching her lips and they are getting bigger." Mr. Van Pelt stated, "DSL." "DSL" is an acronym for the phrase *Dick Sucking Lips*. B-13; 2T 77:5-24.

    - "Tricky d" and "Little Richard" were derogatory references to Dr. O'Malley, made by Ms. Lechelt and Mr. Van Pelt, respectively. B-13; 3T 227 20-24; 5T 244:12-20.

    - Mr. Van Pelt's use of the phrase "get[ting] the baby batter off the brain" was a reference to male ejaculation/masturbation. 2T 87:10-88:5; B-14.

- Following her interviews of Respondents, Ms. DeLuca reviewed and analyzed all relevant Board Policies to determine whether violations had occurred. 2T 114:22-115:1; 2T 55:3-20.

- Finally, Ms. DeLuca analyzed and evaluated all of the information/evidence gathered throughout her investigation and prepared a memorandum summarizing her findings and providing recommendations for Dr. O'Malley's review. B-26; 2T 126:10-22.

- Ms. DeLuca recommended that Dr. O'Malley consider the most severe consequences possible for all three Respondents because "they didn't seem, for lack of a better term, to get it. They didn't seem to realize the seriousness of the situation." 2T 127:25-128:13.

- Dr. O'Malley recommended that Tenure Charges be filed against Respondents because he "felt their comments and their actions were so egregious, that it would not make them suit [sic] to fit in a position of entrusting them with children . . . I just felt that in the context of their – what they wrote and what they were talking about was just – just disgusting and unbearable . . . And how could I ever look a parent in the eye and say that their children are safe knowing that they are in front of their classroom." 3T 57:17-58:3.

- The Tenure Charges were posted to the public through the news media. Parents and teachers alike have approached Dr. O'Malley on a daily basis to express their trepidations to the possible return of Respondents to the classroom. 3T 62:22-63:19.

- Dr. O'Malley indicated that "every parent and Edison resident and teacher in the district aren't – now that the transcript was posted, that they feel that this was absolutely disgusting, and how can anyone not only talk about this, but talk about someone's child like this." 3T 63:4-8.

The record is closed and the evidence speaks for itself – the Board has proven by a preponderance of the credible evidence that Respondents have engaged in unbecoming conduct, misbehavior and/or other just cause warranting their dismissal from their tenured positions with the Board.

Respondents conduct in engaging in a discriminatory, offensive and highly inappropriate group chat constitutes unbecoming conduct and/or just cause warranting their dismissal. On October 23, 2014, during a mandatory Engrade Training, Respondents engaged in a two and one-half hour "Group Chat" through the "Today's Meet Website, visible to those present in the room, observed in detail by Alysia Battista and ultimately printed through the news media and therefore, viewable by the general public. Respondents conceded that they were responsible for posting the various comments attributed to them (*i.e.*, "tvp" = Mr. Van Pelt; "trish" – Ms. Weber; and "mamalechelt" = Ms. Lechelt).. The chat was full of sexual innuendo, discriminatory, offensive and ultimately created a hostile and uncomfortable work environment for Ms. Battista. In fact, Ms. Battista believed portions of the chat were directed at her and was made to feel so uncomfortable by the general content of same that she was unable to remain focused during the Training and was ultimately brought to tears after having been exposed to same.

The inappropriateness of Respondents' chat is born from an objective review of the Today's Meet Transcript (B-13). Respondents' subjective descriptions and/or interpretations of the chat as a *joke* or a *misunderstanding* are entirely irrelevant to this Tribunal's consideration. Conversely, the Board's conclusion that the Respondents displayed such poor judgment through their participation in the Group Chat that they are not fit to be entrusted with the care of this District's students, coupled with the common sense determination that their conduct crossed all behavioral boundaries for public school teachers, should not be disturbed.

As to Charge I Count 1, Respondents, as a group, consistently directed commentary towards and/or about Ms. Bleekinger that was sexually explicit and offense, demeaning, derogatory and wholly inappropriate. More specifically, Respondents consciously decided to turn a serious and important instructional course into a fantasy game of sorts, within which they vividly described and/or actively suggested ways for Mr. Van Pelt to initiate and achieve sexual interactions with Ms. Bleekinger, along with the sexual fantasies Mr. Van Pelt had towards Ms. Bleekinger. Mr. Van Pelt admitted to making the following comments: "I'd like to tag her"; "you know what would look good on you? ME"; "do you like to have your hair pulled"; "I'd like to invite her to a private backchannel discussion . . . all night long".

Despite denying engaging in such behavior within their Answers to the Sworn Tenure Charges and Answers to Interrogatories, Mr. Van Pelt and Ms. Weber conceded, through their testimony, that their comments towards Ms. Bleekinger were inappropriate. Specifically, Mr. Van Pelt stated, "[d]id I make inappropriate comments about [Ms. Bleekinger]? Yes, I would agree they were inappropriate, yes."

Regardless of Respondent's testimony, even a cursory review of the portions of the Transcript directed towards Ms. Bleekinger illustrate that same is inappropriate for teachers to partake in during school hours and through the District's computer network. Further, whether or not Ms. Bleekinger observed the comments directed towards her is immaterial. The record is clear – the Board's administration, Ms. Battista (the only Board employee to view the chat) and the general public found the comments directed towards Ms. Bleekinger to be inappropriate, foul, discriminatory, offensive, harassing and sexual in nature. Thus, the Board has provided sufficient evidence to sustain this Charge.

With respect to Count 2 of Charge I, Ms. Van Pelt and Ms. Lechelt engaged in the following exchange:

> Performance indicators are very positive with this fella – tvp
>
> I like the group name "morons" – mamalechelt
>
> The mo moes – lol
>
> Bobo – tvp
>
> They take the tart cart home – mamalechelt
>
> Short bus kids – tvp
>
> I name my smart kids group "mr vp's favority students – tvp
>
> Lol – mamalechelt
>
> And my low group is called "I hate you don't waste my time" – tvp

> My middles group is "whatever" – tvp
>
> I also prefer for my lows "jesus christ, why the fuck did they place you with me?" – mamalechelt
>
> Middle group = "just shut your mouth and do your work" – mamalechelt

The foregoing comments were, without question, made by Mr. Van Pelt and Ms. Lechelt and directed towards the special education/handicap students in their respective classes (*e.g.*, "tart cart" and "short bus" are references to vehicles used to transport special education students).

Mr. Van Pelt and Ms. Lechelt, after having occasion to discuss, with each other, their conduct during the Group Chat, conspired and formulated an excuse that is illogical, unpersuasive and perhaps, most importantly, devoid entirely of any remorse. Specifically, Mr. Van Pelt indicated that he made the foregoing comments because Ms. Bleekinger "advised teachers they could feel comfortable labeling the students low because these labels wouldn't be seen" and such comments "struck a nerve." Similarly, Ms. Lechelt indicated that she made the foregoing statements following Ms. Bleekinger's categorization of students as "lows" and "your lows", coupled with Ms. Bleekinger informing the group that groups can be given any name the teacher desires. As a result of same, Ms. Lechelt explained that she countered such ridiculousness with more ridiculousness.

Notwithstanding the fact that Mr. Van Pelt and Ms. Lechelt are essentially attempting to argue that *two wrongs make a right*, their argument is fatally flawed and incredible for two reasons: (1) they acknowledged and accepted the district's use of various tests (*i.e.*, Woodcock-Johnson, Wechsler, etc.) that classify students as "low", "very low", "low-average"; and (2) they did not raise any complaints during the Training regarding Ms. Bleekinger's classifications of students as "low,"

but, rather, devised such an argument only after realizing others viewed what they written. Most importantly, however, even if Mr. Van Pelt and Ms. Lechelt were subjectively offended by something the instructor had said, their responsive commentary – made of their free will and volition – exhibited a disturbing lack of judgment and that, when viewed objectively, illustrates their true feelings towards this district's students. Thus, the Board has sustained its burden in establishing that Mr. Van Pelt engaged in unbecoming conduct by making wildly inappropriate comments about special education/handicap students.

Finally, as argued by the Board in its opening remarks, and as elicited through the testimony of Ms. DeLuca and Dr. O'Malley, Mr. Van Pelt efforts to blame their voluntary conduct on something said by Ms. Bleekinger illustrates his childishness, lack of remorse, poor judgment and inability to comprehend right and wrong. Respectfully, any effort by Respondent to mitigate the gravity of this particular Charge should be disregarded.

Charge I Count 3 concerns offensive and inappropriate comments made by Mr. Van Pelt and Ms. Lechelt about Dr. O'Malley, the Superintendent of Schools. In relevant part, they engaged in the following exchange:

> I heard these engrade broads are easy – mamalechelt
>
> Tricky d told me that – mamalechelt
>
> Well, I don't want that dudes sloppy seconds – tvp
>
> Well that eliminates the whole district then – mamalechelt
>
> I hear its part of the criteria – holla
>
> It is – mamalechelt

How do you think I got the job – mamalechelt

I'm not saying I disagree with all of the man's philosophies – tvp

I can appreciate any man that looks like a turtle having the ability to get any woman – mamalechelt

I find him incredibly sexy – mamalechelt

In a "I need a job" kinda way – mamalechelt

I am not prepared to accept the premise that little Richard has ever been proficient at pulling chicks – tvp

Oh he's proficient at pulling chicks – mamalechelt

The catch is . . . theyre ugly – mamlechelt

Mr. Van Pelt and Ms. Lechelt conceded making the foregoing statements and admitted that said exchange was about their boss – the superintendent of schools, Dr. O'Malley. On their face, the comments reference Dr. O'Malley's appearance, sexual proclivities and sexually-based hiring, firing and promotional practices. However, such defamatory comments are entirely without basis in fact or reality and ultimately caused Dr. O'Malley undue embarrassment once the Today's Meet transcript was posted by the news media.

Suffice it say that the inappropriateness of this exchange between Mr. Van Pelt and Ms. Lechelt is borne from Ms. Weber's recognition and acknowledgment of same in the middle of the exchange – *i.e.*, "inappropriate in so many ways." Further, however, this count must be sustained against Mr. Van Pelt and Ms. Lechelt as they both acknowledged the inappropriateness and untruthfulness of their respective comments. 5T 139:19-140:6; B-15.

Charge I Count 4 deals with the unbecoming conduct of Mr. Van Pelt and Ms. Lechelt with respect to their harassing and offensive conduct about Alysia Battista. They engaged in the following exchange:

She keeps scratching her lips and they are getting bigger – mamalechelt

Actually ignore than [sic] – mamalechelt

That – mamalechelt

That was a complete threes company statement – mamalechelt

Dsl – tvp

We totally just made eye contact and totally had a moment – tvp

The foregoing comments were all made within a couple seconds of each other, as they are each time stamped 9:55AM. B-13.

Ms. DeLuca, through her investigation, deciphered the meaning and context of this portion of the chat between Ms. Lechelt and Mr. Van Pelt. Specifically, Ms. Lechelt's reference to "scratching lips" was a direct reference to Ms. Battista, who testified that when she gets nervous/anxious she has a habit of scratching her lips, and was doing same during the Respondents' group chat. In response to Ms. Lechelt's comment about Ms. Battista's lips, Mr. Van Pelt stated "dsl." B-13. "Dsl" is a text acronym for "dick sucking lips." Clearly, Mr. Van Pelt's comment was directed toward Ms. Battista. In fact, Mr. Van Pelt's incredible and wavering testimony on this issue should add credence to the foregoing conclusion – *i.e.*, during his November 11, 2014 interview with Ms. DeLuca, Mr. Van Pelt could not remember what he meant by the phrase "dsl" and further denied knowing the meaning of same; thereafter, in response to the Board's discovery responses, Mr. Van Pelt – for the first time - stated that he used the phrase "dsl" in reference to an internet connectivity problem encountered by the present. Clearly, as was *par for the course*, Mr. Van Pelt was untruthful, and exhibited a callous willingness to provide deceitful testimony in an attempt to diminish the gravity of his conduct. In fact, the gravity of Mr. Van Pelt's conduct with respect to

this particular Charge is borne from Ms. Van Pelt's efforts to deny his knowledge of the phrase "dick sucking lips" – had this allegation been less serious, it is likely Mr. Van Pelt would have taken ownership of the statement. Therefore, through the testimony of Ms. DeLuca and Ms. Battista, as well as the logical objective inferences to be drawn from the exchange on its face, the Board has sustained these allegations against Ms. Lechelt and Mr. Van Pelt.

Charge I Count 5 indicates that Mr. Van Pelt and Ms. Lechelt made offensive, discriminatory and inappropriate comments about unidentified employees in the training session. They made the following comments throughout his participating in the Today's Meet Group Chat:

> Following a reference by Ms. Lechelt to a lady in the red tshirt, Mr. Van Pelt stated, "been there done that"
>
> Had her when she was in her f-ing prime
>
> How's that for an image . . . try getting that out of your head
>
> Yea . . . she got the mustache too yo

Ms. Lechelt added the following comments:

> Maybe you should start slowly . . . like with this lady in the red tshirt in the second row
>
> Following Mr. Van Pelt's statement that he "has been there done that," Ms. Lechelt stated, "so did JB"
>
> She is a fan of the backchannel . . . and jean overalls

Clearly, as was par for the course throughout the Training and the Group Chat, Mr. Van Pelt and Ms. Lechelt picked a target (*i.e.*, lady in red tshirt) and attacked said employee through comments that were insulting, discriminatory, derogatory, offensive and sexual in nature. More simply, Mr. Van Pelt and Ms. Lechelt, through the foregoing comments, degraded a colleague by mocking her age, appearance and alleged sexual behavior. Thus, such comments were highly

inappropriate and deemed offensive to Alysia Battista, the Board's Administration and the general public - which likely includes the lady referenced by Mr. Van Pelt and Ms. Lechelt.

Count 6 of Charge I alleges that the Respondents made disgusting, offensive and inappropriate sexual comments among themselves and about each other.

Respondents, throughout the Group Chat, made consistent comments between each other about Mr. Van Pelt enjoying, preferring and/or engaging in anal sex – *i.e.*, use of word "backchannel." Mr. Van Pelt and Ms. Lechelt discussed masturbating, particularly in school and during the training session. In fact, the clear implication from their conversation was that Mr. Van Pelt had excused himself from the Training to masturbate in the restroom. Mr. Van Pelt made multiple references to the act of oral sex – *i.e.*, eating chicken, as well as a flippant comment about him being a "lesbian". Ms. Lechelt stated emphatically that she "loves" when Respondents ask her to "blow" them. Finally, the inappropriateness of Respondents' exchange is encapsulated by Ms. Weber's admission that the conversation is "so beautifully filthy" and "it always is when tvp is chatting."

Without question, such comments were graphically sexual, offensive, discriminatory, harassing and inappropriate to Ms. Battisa, Ms. DeLuca, Dr. O'Malley and the general public. Such commentary simply has no place inside of a school building. Thus, the Board has established that Van Pelt, with respect to this Charge, has engaged in unbecoming conduct.

Charge II alleges that Respondents engaged in unbecoming conduct during the training session when the caused a disruption by preventing Ms. Battista from participating in the training.

The record evidence demonstrates that Ms. Battista, upon viewing portions of the Group Chat, became offended, was unable to focus and was effectively forced to leave the training to report

the misconduct she observed Respondents partake in. In fact, Respondents' conduct prevented Ms. Battista from learning the content of the training. Thus, Ms. Battista was unprepared to use Engrade with her students and/or to teach the Engrade program to her team members and/or student teachers.

Respondents' defense to this Charge is entirely misplaced. More specifically, Respondents, through their testimony, failed to address the actual disruption to Ms. Battista (which was alleged in Charge II of the each of the Sworn Tenure Charges), while attempting to divert this Tribunal's attention to the lack of general disruption. Importantly, however, the Board did not charge Respondents with causing a general disruption to the Training as the Group Chat was only observed by one person and thus, logically, only could have disrupted one person – Alysia Battista.

Merrian's Webster Dictionary defines disruption as follows: to cause (something) to be unable to continue in the normal way; to interrupt the normal progress or activity of (something). Here, without question, Respondents' Group Chat resulted in a situation where Ms. Battista was unable to continue with the Training in the normal way. Thus, the Board has sustained its burden in establishing that Respondents disrupted the Engrade Training.

As a consequence of Respondents' partaking in a 2 ½ hour group chat, they failed to pay attention to the training. The Board has established by a preponderance of the credible evidence that Respondents, as a result of their participation in a 2.5-hour conversation during the Training, failed to sufficiently pay attention to the content and/or presentation of the Engrade materials.

The Board had an expectation that all teachers present at the Training, or any professional development training for that matter, would pay attention to the entirety of the instructional presentation and refrain from engaging in ancillary and unrelated conduct. Respondents' conduct fell far short of the foregoing expectation.

The transcript of the Chat proves that it lasted for 2.5 hours. Mr. Van Pelt made his first comment at 8:54AM and his last comment at 11:23AM. Similarly, Ms. Lechelt made her first comment at 8:54AM and her last at 11:24AM. B-13. Finally, Ms. Weber made her first comment at 8:58AM and her last comment at 11:24AM. B-13. Between 8:54AM and 10:49AM, the longest period of time in between comments was only 4 minutes, on two separate occasions. Both Mr. Van Pelt and Ms. Weber testified that they spent as much as 15-20 minutes participating in the chat. See, Ms. Lechelt did not attempt to quantify her participation in the chat.

Regardless of the self-serving estimates set forth by Mr. Van Pelt and Ms. Weber, even if each Respondent only spent 15-20 minutes participating in the chat (or the length of time it took them to type the comments they admitted to making into the chat), they failed to pay attention, or at the least, refrain from engaging in unrelated activity – by their own admission – throughout the entirety of the Training. Thus, the Board has sustained this Charge against all Respondents.

As to Charge III, on October 23, 2014, during the Training, Respondents participated in an inappropriate, foul, discriminatory, harassing and offensive chat through the District's computer Network and District's computers. The chat was not the result of any educational and/or instructional requirements or necessities. Thus, it constituted a misuse of the District's computer network.

Board Policy 3321, *Acceptable Use of Computer Network(s)/Computers and Resources by Teaching Staff Members*, states – in relevant part – that "any individual engaging in the following actions declared unethical, unacceptable or illegal when using computer network(s)/computers shall be subject to discipline or legal action: (1) using the computer network(s)/computers for illegal, inappropriate or obscene purposes, or in support of such activities . . . Inappropriate activities are defined as those that violate the intended use of the network(s) . . . ; and (3) using the computer

network(s) in a manner that: engages in other activities that do not advance the education purposes for which computer network(s)/computers are provided."

Here Ms. Weber agreed that her conduct constituted a misuse of the District's network. Similarly, Ms. Lechelt grudgingly conceded that her participation in the Group Chat did not enhance any educational purposes. Only Mr. Van Pelt refused to acknowledge same by steadfastly arguing that the Group Chat, which provided an infusion of humor to the Training, enhanced the Respondents' learning capacity.

While Mr. Van Pelt's lack of credibility will be addressed in greater detail below, suffice it to say that Mr. Van Pelt's claim surely does not overcome the Board's proofs coupled with the other Respondents' concessions. Initially, Mr. Van Pelt set up the Group Chat and invited the other Respondents and Mr. Bauza to his "personal wiseass backchannel discussion." Clearly, the name he chose for the Group Chat depicts his true intentions for the chats direction and content – *i.e.*, inappropriate.

Next, an objective review of the content of the chat illustrates that same was wholly inappropriate in relation to Board Policy 3321 and entirely unrelated to the educational purposes of the Training. Finally, and perhaps most importantly, the admissions of Ms. Lechelt and Ms. Weber that they misused the district network must be similarly attributed to Mr. Van Pelt, as his conduct during same was at least as egregious as the other two Respondents.

Thus, the Board has sustained its burden in proving that Respondents misused the District's computer network, constituting unbecoming conduct.

Charge IV indicates that Respondents' conduct during the training session violated several district policies. In September 2014, Respondents executed "Important Board Policies, Regulations,

and Mandated Communications Forms." B-17, 18 and 19. These forms indicate, "employees are expected to review and become familiar with all Board policies and regulations" and further, directs employees to the web address where same can be found. In fact, Respondents all acknowledged that the policies and regulations are on the Board's website and agreed to "conform to the requirements of the policies and regulations of the Edison Township Board of Education."

Additionally, Article III(B), *Board Policies*, of the controlling CBA states, in relevant part, that: (1) all Board of Education policies will be upheld and enforced by all Board employees who are party to this Agreement, as well as by all Administrators, Principals, and Supervisors; and (2) all Board of Education policies will be available for review in the office of the principal, school library, and the Association office.

Thus, regardless of whether or not Respondent's actually adhered to their obligations to familiarize themselves with and abide by all Board policies and regulations, their affirmative obligation to do same undercuts any efforts by Respondents to argue that they were unaware of certain policy requirements that they disregarded. More simply put, in considering whether or not Respondents violated Board Policies as alleged in the Sworn Tenure Charges against them, this Tribunal must find that they were familiar with all Board Policies and aware of their obligations pursuant to same.

Pursuant to Counts 1, 2 and 3 of Charge IV, Respondents are charged with violating the Board's Affirmative Action and Sexual Harassment Policies. More specifically, Board Policy 1140, *Affirmative Action Program*, requires the Board to implement and "foster a learning environment that is free from all forms of prejudice, discrimination, and harassment based upon race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, gender, religion,

disability, or socioeconomic status in the policies, programs, and practices of the Board of Education."

Board Policy 3362, *Sexual Harassment*, states that "[the Board of Education recognizes that an employee's right to freedom from employment discrimination includes the opportunity to work in an environment untainted by sexual harassment." Said Policy further provides that "[sexually offensive speech and conduct are wholly inappropriate to the harmonious employment relationships necessary to the operation of the school district and intolerable in a workplace which the children of this district are exposed." Sexual harassment includes all "verbal or physical contacts of a sexual nature that would not have happened but for the employee's gender. When such inappropriate conduct is "severe and pervasive" and has the effect of unreasonably altering or interfering with work performance or creating an intimidating, hostile, or offensive working environment, the employee shall have cause for complaint. Finally, employees are put on notice through Policy 3362 that should they be found guilty of sexual harassment, they will be subject to discipline which may include termination.

Though Respondents were not charged with violating New Jersey's sexual harassment laws, Respondents sought to interject the more stringent standards of same into this matter in an effort to defend the Board's allegations. Respectfully, any comparison of the Respondents' conduct to New Jersey Law is not relevant and/or appropriate, as Respondents were not charged with violating state law.

However, to the extent this Tribunal disagrees with the Board's interpretation of the Sworn Charges, the Board contends Respondents have, in fact, violated New Jersey Law, as established by the New Jersey Supreme Court. Lehman v. Toys R Us, Inc., 132 N.J. 587, 603-604 (1993)(a four

part test must be considered in determining whether or not sexual harassment has occurred: (1) the complained of conduct would not have occurred but for the employee's gender; and (2) was severe or pervasive enough; (3) to make a reasonable woman believe that (4) the conditions of employment are altered and the working environment is hostile or abusive).

Here, the credible record evidence is clear and convincing – Respondents violated the Board's Affirmative Action and Sexual Harassment Policies. Ms. Battista, based on the portions of the transcript she saw, believed that Respondents – at least in part - were talking about her (*i.e.*, she observed a comment about somebody in red, and assumed it was a reference to her because she was wearing a red sweater; and she saw a reference about someone "scratching their lips", which Ms. Battista tends to do when she gets upset and was doing during the Group Chat). More specifically, but without limitation, Ms. Battista observed and recalled the following commentary between Respondents: reference to a "short bus" - a demeaning reference to the mode of transportation for special education students; the size of male genitalia; use of the word "dick"; comments about being a "virgin"; describing the trainer as a lesbian, with a reference to a rainbow; "blow me" – "how do you think I got my job"; "men who are like 'turtles'". As a result of Respondents' conduct, Ms. Battista was unable to concentrate and was prevented from learning the content of the training – *i.e.*, Respondents altered and interfered with Ms. Battista's work performance and created an intimidating, hostile, and offensive working environment.

Further, the severity and pervasiveness of Respondent's 2.5 hour chat is borne from Ms. Battista's reaction at the time she observed same, Ms. Battista's demeanor during her testimony when she broke down in tears because she remains upset with the content of Respondent's chat and the testimony and conclusions of Ms. DeLuca and Dr. O'Malley.

Ms. DeLuca, an experienced affirmative action coordinator/investigator, determined that Respondents' comments during the Today's Meet Group Chat included: (1) explicit and graphic references to sexual acts and sexual sayings; (2) references and imaginations regarding a sexual relationship between Mr. Van Pelt and Ms. Bleekinger; (3) comments concerning Ms. Bleekinger's sexual preferences – *i.e.*, the suggestion that she is a lesbian; (4) inexcusable and insulting comments about special education/handicap students; (5) demeaning comments about other persons present in the training, including their sexual orientation and/or age; and (6) inappropriate, insulting and unfounded comments concerning Dr. O'Malley's physical appearance and hiring/promotion practices.

Ultimately, Ms. DeLuca concluded that the related Board Policies were violated because Respondents' verbal attack on females, elderly persons, lesbians and students with disabilities created a hostile and offensive working environment for Alysia Battista. Respectfully, the record would not support any alternative finding by this Tribunal.

Importantly, Respondents' efforts to attack the credibility of Ms. Battista by categorizing her as both unreasonable and atypical are unavailing. Initially, common sense must prevail.

Regardless of Respondents' self-serving and rehearsed definitions/meanings for the various phrases used throughout the transcript, this Tribunal must evaluate same based on the meaning the general public would have, and since has, attributed to such relevant statements – that they are disgusting, sexually offensive, insulting, demeaning, and discriminating on their face. Further, to the extent this Tribunal is convinced that Respondents' efforts to apply the "reasonable person standard" to Ms. Battista are appropriate, which the Board remains steadfastly opposed to, the Board

argues that said standard has been satisfied – both Ms. DeLuca and Dr. O'Malley corroborated the reasonableness of her reaction to Respondents' Group Chat.

Thus, to categorize Ms. Battista's reaction to Respondents' commentary as "unreasonable" would be to implicitly identify such comments as acceptable. Moreover, the Board would be remiss to fail to point out the hypocrisy of Respondents' argument – *i.e.*, Respondents, in one breath, ask this tribunal to find that Ms. Battista's reaction to Respondents' comments was atypical or unreasonable, while in the other breath, argue that their "reaction" to Ms. Bleekinger's well accepted categorizations/classifications of special education students (*i.e.*, "low") was normal and a legitimate excuse to their behavior. Respondents' attempt to deflect this Tribunal's attention from their conduct, by yet again attacking Ms. Battista's person, should not be overlooked. The overwhelming record evidence illustrates that Respondents' conduct violated the Board's Affirmative Action and Sexual Harassment Policies.

Count 4 and 5 of Charge IV asserts that Respondents violated Board Policy 3211 and Board Policy 3281. The *Code of Ethics* policy states in relevant part that the educator "shall not intentionally expose the pupil to embarrassment or disparagement." Further, Policy 3211 requires that the "educator shall exert every effort to raise professional standards to promote a climate that encourages the exercise of professional judgment, to achieve conditions which attract persons worthy of the trust to careers in education, and to assist in preventing the practice of the profession by unqualified persons."

Board Policy 3281, *Inappropriate Staff Conduct*, indicates, in relevant part, "staff members have the public's trust and confidence to protect the well-being of all pupils attending the school district." Policy 3281 further requires that "school staff's conduct in completing their professional

responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments . . . about pupils." B-23.

The foregoing policies hold Board employees to the highest degree of morality and professional standards. Similarly, they confer expectations on Board employees to safeguard the trust and confidence conferred upon them by the public. However, Respondent's voluntary and willful conduct during the October 23, 2014 Group Chat, along with the content of said chat, constituted a grave lack of professional judgment and a breach in the trust attributed to these teachers by both the Board and the general public. More specifically, the 2.5-hour conversation between the Respondents, with no instructional/educational purpose, during an important Professional Development Training (a professional responsibility) was highly inappropriate and a drastic deviation from the administration's expectations for its employees to embrace the Engrade program and/or act with a certain level of respect and commitment during any professional development training.

Further, the content of same, specifically the derogatory references by Mr. Van Pelt and Ms. Lechelt about their special education / handicap students leapt across all bounds of decency. Perhaps most importantly, as a result of the words documented by Respondents, the young impressionable students (and their parents) previously assigned to Mr. Van Pelt and or Ms. Lechelt, at any time during the employment of Mr. Van Pelt and Ms. Lechelt, are forced to wonder which hurtful and derogatory grouping they were assigned to by their respective teacher. Thus, the Board has sustained its burden in establishing that Respondents' conduct violated Board Policies 3211 and 3281.

Count 6 refers to Board Policy 3351, *Healthy Workplace Environment*, which states, in relevant part, "employees [must] interact with each other with dignity and respect . . . Repeated

malicious conduct of any employee or group of employees directed toward another employee or group of employees in the workplace that a reasonable person would find hostile or offensive is unacceptable and is not conducive to establishing or maintaining a healthy workplace environment." Policy 3351 defines unacceptable conduct as conduct that constitutes the "use of derogatory remarks; insults; verbal . . . conduct that a reasonable person would find threatening, intimidating or humiliating. A single act of such conduct shall not constitute the unacceptable conduct prohibited by this policy unless it is especially severe and egregious."

Here, once again, the Board has sustained its burden in proving that Respondents have violated this Policy. By there own admission, the overall content of the Group Chat contained interactions devoid of both dignity and respect – *e.g.*, graphic and vulgar sexual comments concerning Mr. Van Pelt's desires with respect to Ms. Bleekinger; derogatory and insulting comments about Mr. Van Pelt and Ms. Lechelt's student groupings and special education students in general; baseless insulting and defamatory remarks about Dr. O'Malley's appearance and hiring/firing/promotional practices; derogatory and insulting remarks about woman, lesbians, elderly persons. B-13. Further, the Group Chat by Respondent's lasted 2.5 hours, encompassed 16 pages of a transcript and contained 318 separate comments, making the foregoing malicious conduct repeated conduct. B-13.

Finally, notwithstanding Respondents' unjustified and desperate claims that Ms. Battista is not a reasonable person and/or did not have a reasonable reaction to the content of the Group Chat, Ms. DeLuca and Dr. O'Malley certainly found Respondents' conduct hostile, offensive and humiliating as well. In reality, even a cursory review of the public comments associated with any of the printed news articles related to Respondents' conduct illustrates that the general public also

finds the content of Respondents' Group Chat hostile, offensive and humiliating. Thus, without question, the Board has also satisfied the *reasonable person* element of this Policy.

Respondent Van Pelt admitted to engaging in unbecoming conduct by masturbating on school property. The Board's proofs in support of this Charge are limited to an admission from the mouth of Mr. Van Pelt. Specifically, during the Training, Mr. Van Pelt came back to the room after roughly 5 minutes in the bathroom and after being told "you took a while" by Ms. Lechelt, stated "had to get the baby batter off the brain." During his November 11, 2014 meeting with Ms. DeLuca, Mr. Van Pelt explained that the foregoing phrase was a line from the Movie *Something About Mary* that meant masturbating prior to going on a date. Immediately after offering that he did not masturbate in the bathroom during the Training, Mr. Van Pelt stated "**at least not that time**," implying that he has engaged in such illicit behavior on past occasions. Said admission was clearly heard by Ms. DeLuca, who was only 3-4 feet away from Mr. Van Pelt. 2T 88:23-89-6.

Conveniently and predictably, Mr. Van Pelt denied making such an admission. However, similar to Ms. Lechelt, there is simply no reason for this Tribunal to discredit Mr. Van Pelt's original inculpatory admission in light of his later self-serving recantation (*i.e.*, his record of discipline and insubordination while employed by this Board). Most importantly, perhaps, at no point during his testimony did Mr. Van Pelt actually deny that he had masturbated on school property on prior occasions. Rather, he simply denied making an admission to Ms. DeLuca. Therefore, it is certainly fair for this Tribunal to infer that Mr. Koy failed to ask Mr. Van Pelt whether or not he had ever masturbated on Board property because Mr. Koy was fearful of the answer. Ultimately, the Board submits that when Ms. DeLuca's credibility is weighed against Mr. Van Pelts, this Tribunal will have

no option but to credit Ms. DeLuca's testimony. Thus, the Board has sustained this Charge - Mr. Van Pelt engaged in unbecoming conduct by masturbating on school property.

Respondent Van Pelt violated Article VI Section C of the CBA by conducting union activity during instructional time. Mr. Van Pelt has failed to overcome the overwhelming record evidence illustrating violations of Article VI Section C of the Collectively Bargained Agreement by conducting union activity during instructional time. Article VI Section C, *School Visitations by Association Representatives*, states that "representatives of the Association . . . shall be permitted to transact official Association business on school property at all reasonable times with the approval of the principal and/or Superintendent, provided that doing so shall not interfere with or interrupt normal school operations."

Specifically, on Thursday September 11, 2014 at 2:00PM and 3:01PM, during Math and Science / Social Studies respectively, Mr. Van Pelt drafted and forwarded electronic correspondence concerning union activities (concerning deduct days for an ETEA member) to ETEA President Bowden. B-28; B-32. Thereafter, on both Wednesday September 17th and Thursday September 18th during Math class, Mr. Van Pelt prepared and forwarded electronic correspondence concerning union activities (regarding teachers volunteering prep time to partake in professional development trains) to ETEA President Bowden. Then, on October 23, 2014 at 10:05AM, during Engrade Training, Mr. Van Pelt prepared and forwarded electronic correspondence to another teacher regarding the designation of a union representative for upcoming roundtable discussions. Finally, on Thursday October 23, 2014 at 12:13PM and 3:22PM, during Literacy Class and immediately following Science/Social Studies, Mr. Van Pelt prepared and forwarded electronic correspondence to ETEA President Bowden concerning union business (roundtable representatives and procedures for

communications between ETEA representatives and Assistant Superintendent Beams). Mr. Van Pelt's defense to the foregoing allegations consists of a general assertion that his schedule changed on a daily basis, with a more specific claim that on September 11, 2014 "there was an afternoon assembly."

Importantly, however, said allegations were proved to be wholly without merit and further exposed Mr. Van Pelt as a dishonest and desperate person. Specifically, Ms. DeLuca testified that: (1) Mr. Van Pelt's schedule did not change at all between September 2014 and October 23, 2014; and (2) there was not an assembly on September 11, 2014, or any of the other dates that Mr. Van Pelt was determined to have engaged in union business during instructional time.

Accordingly, the Board has satisfied its burden in establishing that Mr. Van Pelt engaged in union business during instructional time on at least seven separate occasions. Notwithstanding the fact that the Board exposed Mr. Van Pelt as completely incredible, Mr. Van Pelt's baseless and self-serving allegation that his schedule changed on a daily basis, without a shred of evidence in support of same, is wholly insufficient to overcome the substantial evidence established by the Board.

The record indicates that Respondent Van Pelt has demonstrated a pattern of misconduct and insubordination over a protracted period of time. Based upon the egregiousness of Mr. Van Pelt's disciplinary record, it is both disturbing and unclear as to why his employment has not been terminated earlier. Without question, Mr. Van Pelt has displayed a troubling lack of patience for dealing with superiors and a consistent lack of professional judgment. More specifically, Mr. Van Pelt's disciplinary record reads as follows:

- A written reprimanded for misusing the district's email system in December 2005 (*i.e.*, transmitting an email "which was not related to the educational mission of the Board, to every user in the school district"). B-33.

- Mr. Van Pelt refused to meet with former Superintendent Toth on three (3) separate occasions, prior to actually meeting with her, to discuss the foregoing issue. See B-33.

- In October 2006, Mr. Van Pelt attempted to intimidate and threaten Assistant Principal Rutan by stating "if I had a dog that shit over and over on my carpet, I would get rid of it." B-34.

- In or about July 2007 Mr. Van Pelt again demonstrated his unwillingness to cooperate with central administration by effectively refusing to be interviewed as a fact-witness in connection with an affirmative action investigation. B-35.

- In or about June 2007, Mr. Van Pelt was reprimanded for (a) possessing beer at the Rutgers Athletic Center during and/or shortly after the Edison High School Graduation Ceremony; and (b) arriving at the main office, the morning after graduation, and acting in a "belligerent, demanding, and loud manner," making the secretaries feel uncomfortable – resulting in a Detective being forced to escort Mr. Van Pelt from the premises. B-36.

- On or about August 20, 2007, Mr. Van Pelt's increments were withheld for the 2007-2008 school year. B-39.

- In or about September 28, 2007 Mr. Van Pelt received a written reprimanded for failing to "provide a signed Technology Agreement and Appendix A of the Alcohol and Drug Free Workplace." B-37.

- In or about June 2008, Mr. Van Pelt was arrested an issued a Temporary Restraining Order for physical assaulting his then wife and co-employee (Pursuant to the officer's police report, the victim suffered from visible bruises on her left arm, a swollen left cheek and blood in her left eye). B-46.

- As a result of the foregoing incident, Mr. Van Pelt entered into a consent order prohibiting him from contacting his wife and resulting in his transfer from Edison High School so he would not be in the same building as his wife. B-46.

- In or about June 2012, Mr. Van Pelt received a written reprimand for failing to provide a sufficient certification that an absence was due to a medical illness. Moreover, Dr. O'Malley expressed his concern with Mr. Van Pelt's attempt to supply a deficient and misleading doctor's note that was prepared by a family member. B-38

Despite receiving numerous reprimands, having an increment withheld and being warned that his behavior must improve, Mr. Van Pelt did not heed such advice. Rather, Mr. Van Pelt's poor

behavior and incomprehensibly reckless judgment culminated with the events of October 23, 2014, during which he soared across all bounds of decency associated with any public school teacher. Most troubling though, in a bit of an ironic twist, Mr. Van Pelt actually engaged in the same sort of misconduct that resulted in his first written reprimand – *i.e.*, a misuse of the District's network. Thus, Mr. Van Pelt has failed entirely to conform his behavior to any level of appropriateness. As such, his continued employment will only serve to further endanger the students and staff of the Edison Township School District.

Credibility is the value that the fact finder gives to the testimony of a witness. It contemplates an overall assessment of the witness's story in light of its rationality, internal consistency, and the manner in which it "hangs together" with the other evidence. Credible testimony must proceed from the mouth of the credible witness and must be such as common experience, knowledge and common observation can accept as probable under the circumstances. The Board cites judicial case law in this regard.

In deciding the facts of a case, the fact finder must decide which witnesses to believe and which witnesses not to believe based on the following factors: (1) interest in the outcome of this case; (2) witness' recollection; (3) ability to know what he/she was talking about; (4) contradictions or changes in testimony; (5) demeanor; (6) whether or not testimony makes sense; (7) reasonableness of testimony when considered in the light of other evidence. See, NJ Model Civil Jury Charge. Additionally, New Jersey law permits a fact finder to reject the entirety of a witness's testimony if a determination is made that the witness deliberately lied on any fact significant to the decision in the case.

Initially, all Respondents' display of remorse during the Hearing was incredible as the Board exposed the same glaring contradictions made by each Respondent. Respondents attempted to illustrate, through their testimony, remorse for their behavior during the Training. However, the authenticity of such remorse, only displayed to the person responsible for deciding their fate, after undergoing hours of preparation with their counsels, must certainly be undermined by the Respondents conduct (*i.e.*, lack of remorse) during their suspension meetings with Dr. O'Malley, November 11, 2014 interviews with Ms. DeLuca, Sworn Answers to the Tenure Charges and Answers to Interrogatories.

Notwithstanding the lone admissions of making the comments in the Transcript, as well as other various innocuous admissions, Respondents uniformly and consistently denied the remaining substantive allegations made by the Board in the Sworn Tenure Charges. Id. Therefore, the weight given to Respondents' staged showing of remorse during the Hearing must certainly be weighed in light of their failure to exhibit the same remorse when meeting with Dr. O'Malley and Ms. DeLuca, filing their Answers to the Charges and serving their Answers to the Board's Interrogatories. Such behavior by the Respondents bolsters the Board's assertion that Respondents were only sorry they got caught, but not sorry for what they had done.

Next, Respondents' efforts to assert an expectation of privacy in defense of their actions during the Group Chat is unreasonable based on the record and the law – *i.e.*, Board Policy 3321 expressly denies Board employees of any expectation of privacy when using the district's network; pursuant to state and federal law, when something is exposed to the public view, such as this Group Chat, same is not protected by an reasonable expectation of privacy. Thus, Respondents' efforts to push such an illogical argument/defense on this Tribunal illustrate Respondents' lack of credibility.

Mr. Van Pelt and Ms. Lechelt's lack of credibility is further borne from the unreasonableness of their defense to the Charge alleging that they made inappropriate comments directed towards special education / handicapped students – *i.e.*, that their perceived anger towards Ms. Bleekinger's direction to label a group of students "low" triggered their barrage of insulting and demeaning commentary. This argument is irrational because: (1) the district's Assistant Superintendent / Director of Special Services informed Ms. DeLuca that the use of the designation "low" is an acceptable norm; (2) all Respondent's acknowledged and accepted the District's practice, as well as the nationwide practice, of using various tests that ultimately label the students as "low", "very low" and "average"; and (3) not one of the Respondents confronted Ms. Bleekinger during the Training about her student *designations* or raised a concern with the administration with regard to their accepted use of such *offensive* tests/terms.

Rather, only after they realized they were in trouble for making such offensive comments did they devise, between each other, this defense. Mr. Van Pelt and Ms. Lechelt's position on this issue is so contrary to reality, and therefore, so inherently unreasonable, that it should be entirely discredited. More importantly though, the unreasonableness of Mr. Van Pelt and Ms. Lechelt's testimony on this issue illustrates their lack of candor and overall lack of credibility. With regard to Mr. Van Pelt individually, his lack of credibility must be also be determined as a result of his refusal and/or inability to be responsive to the Board's questions on cross-examination, his overall demeanor throughout this case (*i.e.*, his constant interruptions, blurt-outs and curt exchanges with both the Arbitrator and the Board's counsel), and his extensive record of discipline throughout his employment with the Board (including his arrest and receipt of a temporary restraining order for

physically assaulting his wife) – particularly his inability to concede same, despite an abundance of supportive testimonial and documentary evidence.

In fact, most telling perhaps was the testimony of Mr. Van Pelt's character witness – Christian Pedersen . He conceded that had he known about Mr. Van Pelt's lengthy disciplinary record he would not have testified that Mr. Van Pelt is someone with good character or someone who takes their job seriously.

Lastly, when engaging in credibility determinations related to each Respondent, it should not be lost on this Tribunal that all of the Respondents, rather than simply take ownership for their conduct, blamed and attacked others (*i.e.*, Ms. Bleekinger and Ms. Battista), for causing these grown teachers to act in the manner they chose to act. More specifically, the notions that Ms. Bleekinger's use of a uniformly accepted student classification; or that Ms. Bleekinger was inadequately prepared for the presentation; or that Ms. Battista was a "peeping tom" with the intention of bringing trouble upon the Respondent's are so ostensibly absurd that the credibility of the persons making such statements must be gauged against the lunacy of same. In other words, a credible witness/person would not make such arguments.

Thus, the Board submits that this record is replete with reasons that should cause this Tribunal pause when considering whether Respondents provided credible testimony.

As a point of legal argument, the Board asserts that Respondents had no right to privacy when engaging in the Group Chat during the October 23, 2014 training session. Throughout this process, have asserted that they had a good faith belief that the Group Chat was private. More specifically, in concert, Respondents argued that if the chat rooms were open to the public, student privacy concerns under FERPA and state law would be triggered. However, Respondents' efforts to assert

an expectation of privacy in defense of their actions during the Training are unavailing, as both the record and the law are fatal to such a defense. In fact, said argument is so suspect that it does nothing more than bolster the Board's assertion that Respondents are not remorseful for their conduct – *i.e.*, despite the baselessness of the claim, Respondents have conspired to stick with the defense through the resolution of this matter.

Board Policy 3321, *Acceptable Use of Computer Network(s)/Computers And Resources by Teaching Staff Members*, states – in relevant part – that "[the Board retains the right to have the Superintendent or designee monitor network activity, in any form necessary, to maintain the integrity of the network(s) and ensure its proper use." Further, every District employee is aware that there is no expectation of privacy when using the District's computer network, and there is no program and/or policy that trumps same. More specifically, Respondents were actually informed during Today's Meet training that the program was <u>not</u> private.

Here, Respondents all executed "Important Board Policies, Regulations, and Mandated Communications" Form, within which Respondents agreed to review and conform to all Board Policies. More importantly, Mr. Van Pelt and Ms. Weber acknowledged reviewing and being familiar with the Board's *Acceptable Use* Policy, along with the Board's right to monitor their network activity. Simply put, there is no way the Board could have been more explicit with the reality that employees do not enjoy any expectation of privacy when using the District's network.

FERPA is a Federal Law that controls the disclosure of personally identifiable information from an eligible student's *education records* to a third party unless the eligible student has provided written consent. The applicable statute defines education records as those records, files, documents and other materials which: (1) contain information directly related to a student; and (2) are

maintained by an educational agency or institution or by a person acting for such agency or institution. Importantly, without dispute, the Group Chat did not contain and/or reference specific students or information directly related to specific students. Further, the Board does not maintain the Group Chats and/or transcripts of the Chats, and there is simply no reason for Respondents to have thought otherwise. Thus, Respondents' efforts to grasp on to the protections of FERPA, despite the record evidencing that FERPA's application is unjustified, is merely an act of desperation.

A person cannot assert an expectation of privacy with regard to something exposed to the public view. There is no liability under the tort of invasion of privacy for observing a plaintiff or even taking his photograph while he or she is walking on a public highway, since he or she is not then in seclusion, and his or her appearance is public and open to the public eye. These premises are supported by judicial case law.

Here the record evidence is clear, Ms. Battista observed the conversation and identified the web address by viewing Ms. Lechelt's computer screen during a Training session. In fact, all Respondents engaged in the Group Chat on their computers in a room filled with thirty to forty other persons, with the screens open and on their desks for a two and a half hour period, during which they all, at one point or another, stood up and walked around, while not closing their computer screens. Had Respondents desired to avail themselves to an expectation of privacy, they surely would have found a way to be more discreet during the Group Chat. Thus, Respondent's expectation of privacy defense is contrary to well-established law. In fact, in the event this Tribunal feels compelled to give any deference to Respondents' FERPA based privacy argument – to which the Board contends none is warranted – Respondents' cavalier participation in the Group Chat during a training, visible to other members of the public, must trump any FERPA privacy considerations.

As to the charges serves on Respondents, the record confirms that the Board has proven by a preponderance of the credible evidence that Respondents are guilty of conduct unbecoming, insubordination and/or other just cause warranting dismissal. The infractions established in the record evidence cut to the core of Respondents' fitness to continue to teach. Unlike labor arbitration, this Tribunal's decision regarding any potential penalty must be first and foremost concerned with the welfare of students, not the employment rights of Respondent. There is ample, longstanding precedent for this proposition in the body of School Law in New Jersey that has developed over the last several decades, as well in the growing number of Tenure Hearing arbitral decisions under the recently revised Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TeachNJ Act").

With respect to just cause, in evaluating whether an employer has just cause to discipline an employee, Arbitrators follow guidelines similar to those utilized in Enterprise Wire Co., 46 LA 359, 363-64 (1966); Grief Brothers Cooperage Corp., 42 LA 555, 558 (1964). Consequently, it has been held that the employer should satisfy the conditions set forth in the above cases in order to prove "just cause" for the disciplining the employee.

The "inherent duties of a public employee include compliance with all reasonable rules and regulations, and duties arising from a fiduciary relationship to the public and from such duties as arise by the nature of the office held." Unless the penalty is unreasonable, arbitrary or offensively excessive under all of the circumstances, it should be permitted to stand. These statements have been well established by New Jersey courts.

Moreover, recent case law suggests that progressive discipline is ***not*** a fixed and immutable rule to be followed without question because some disciplinary infractions are so serious that

removal is appropriate notwithstanding a largely unblemished prior record. For example, in American Arbitration Association Decision, 2010 AAA LEXIS 439, Arbitrator Renovitch acknowledged that extremely serious offenses usually justify the enforcement of a discharge.

The holding that dismissal was warranted in the cited case resulted from a Grievant failing to perform an end-of-run check, which resulted in a sleeping student being left on her school bus. In that case, the arbitrator enforced a summary dismissal. Arbitrators Tener, Dichter and Simon enforced summary dismissals in other cases that reflected other fact patterns.

Moreover, since the implementation of the TeachNJ Act, Arbitrators have dismissed teachers for engaging in inappropriate conduct that has reflected poorly on both the teacher and the school district. The cited decisions were all issued since 2012.

In anticipation of the cases Respondents will likely seek to rely upon to argue that their dismissal is not warranted in this matter, the Board asserts same are readily and easily distinguishable from the matter at bar based on discrepancies in fact and proofs.

Here, the just cause conditions have been satisfied: namely, Respondents were forewarned prior to the Group Chat that dismissal could result from misusing the District's computer network and violating various Board Polices and standards of expected behavior; Respondents conduct on October 23, 2014 violated established Board Policy and any reasonable expectations of employee conduct; Respondents' conduct was investigated fully; substantial evidence, including Respondents' acknowledgments of wrongdoing, admissions and a copy of the actual transcript, were obtained; and termination was reasonably related to the seriousness of Respondents' offenses (*i.e.*, the duration and wholly inappropriate nature of the conversation, coupled with the grave lack of judgment displayed by Respondents) and the Respondents' past record. Specifically, Respondents' conduct with respect

to the group chat, without the consideration of progressive discipline, rose above and beyond the level of egregiousness necessary for dismissal.

Accordingly, satisfaction of the just cause standard, along with the arbitral precedents, must result in the termination of Respondents. Their acts are egregious on their face. In fact, the totality of their conduct, and each specific charge considered alone, are more egregious than that deemed sufficient for dismissal in the above-cited precedents. Respondents violated board policies and the common decency expected of public school teachers, as illustrated in the record evidence, by misusing the District's network to mock, insult, harass and offend others (including special education students, the superintendent of schools, the Engrade Training presenter, females, older persons and each other), while creating a hostile and unhealthy work environment for the one person who openly observed same; continuing such conduct for a period of 2.5 hours during scheduled instructional time; failing to comprehend the seriousness of their conduct by constantly making excuses, placing the blame elsewhere and disingenuously declaring remorse only when face-to-face with the assigned arbitrator after being prepped by their counsel as to what this tribunal wants to hear; and, in the case of Mr. Van Pelt, admitting to masturbating on school property.

Respondents showed a complete lack of concern for the parents and students of the Edison Township School District, and a callous sense of desperation by attempting to attack and demonize the VICTIM – Ms. Battista (*e.g.*, referring to her as a "*peeping Tom*", claiming that she went out of her way to discover their chat and ultimately blaming her for the trouble and embarrassment now endured).

The record, as discussed and documented above, clearly illustrates that Respondents recognize a large portion of their conduct was inappropriate. Specifically, Respondents concede, for

the most part, that they misused the District's network and made regrettable comments about other persons and classifications of persons

It is well established in case law that the term "unbecoming conduct" is a broadly defined, elastic term, encompassing any conduct that has a tendency to destroy public respect for government employees and competence in the operation of public services. In hearings similar to this one, arbitrators have determined that conduct unbecoming a teacher has been found to include a broad range of behavior that impacts a teacher's ability to perform his duties or otherwise renders him unfit to have the responsibility to care for children. In this matter, Respondents have unmistakably breached the public trust placed in their position as teachers.

Mr. Van Pelt should be dismissed from his tenured position based on his pattern of misconduct over a protracted period of time. Charges VIII of the charges alleges that the acts of misconduct set forth in the Charges and the Counts, jointly and severally, manifest a series of ongoing infractions over an extended period of time, despite prior warnings, constituting a pattern of conduct unbecoming a teacher. This pattern warrants dismissal. Notwithstanding that each charge warrants a finding of conduct unbecoming a teacher and/or just cause for dismissal, when taken together, a pattern of unbecoming emerges sufficient to warrant Mr. Van Pelt's dismissal from his tenured position.

The Commissioner has confirmed that a pattern of conduct that persists over a number of years warrants dismissal, even if the individual charges standing alone would not. It cites numerous decisions in this regard.

Mr. Van Pelt's pattern of unbecoming conduct began during the 2005-06 school year and continued thereafter. The Board has shown that Mr. Van Pelt has not satisfied the standards of one

whose profession is linked to the teaching and shaping of young minds , and who is held to a higher standard than is the general public. He has shown an unwillingness or inability to comply with prior warnings and has continued to engage in unbecoming conduct over and over again, culminating with the latest and perhaps most outrageous conduct. His actions directly injured his reputation, that of the district and the trust of the district's administration and parents.

Based on the foregoing, Respondents have failed to satisfy the standards of a profession predicated on public trust and respect. Mr. Van Pelt has done so time and again. He has been progressively disciplined and given repeated chances. He is not deserving of another one.

Regardless of the differences between Mr. Van Pelt and the other respondents, their misdeeds were not mere oversights or simple mistakes. His misconduct go to the heart of his character and fitness to be a public school teacher. He should be dismissed.

CONTENTIONS OF RESPONDENT:

Respondent argued as follows:

Picture a time before the internet, say 1980. A few teachers are involved in a private conversation during a training session. They whisper some comments back and forth as to their thoughts on some of the comments from the lecturer. They also throw some comedic barbs back and forth over the course of a few hours.

One person overhears the talking and shushes the group. The group lowers their voices but continue talking now and then. No one else in the room notices anything. The lone complainer is offended that the group did not adhere to her shushing and proceeds to listen in to their private conversation. Since the complainer was outside the range of the conversation, she sneaks up behind

the group in an effort to listen in. During the course of this espionage, she hears multiple items out of context and complains to the Board about this conversation.

It is hard to believe that the above would be even considered to be grounds for termination. A transcript that, when taken out of context, is the basis of the entire case.

Throughout the arbitration, there were discussions of privacy which were downplayed by the Board due to the computer policy. This policy should be used only in so far as to prove that the individuals were chatting during portions of the training (not an uncommon occurrence). To allow the out of context chat transcript, reported by a hypersensitive individual, to be the basis for tenure charges is akin to allowing Big Brother into the school.

All of the participants testified that they believed the chat was private and would not be able to be accessed by any outside party. This was proven to be true, as the only one who accessed the chat was Ms. Battista, who testified to the leaning and focusing outside the norm in order to retrieve the chat room title.

This privacy breach goes beyond a mere computer policy, but rather encourages other teachers to in effect spy on their co-workers and report any alleged over-hearings. The individuals in this chat were not posting on a public website expressing their viewpoints to the public a la Facebook and Twitter, but were merely having a private chat.

It is undisputed and admitted that portions of the chat were offensive and inappropriate. However, are we at the point where we all need to examine our own private conversations at the work place? It is hard to believe that anyone who examines all of their conversations among friends

would not, at one time or another, say something that they regret in jest.

No one is perfect and no one should be ultimately judged for jocular exchanges between consenting friends who are all adults. It must be noted that no students were involved or part of the chat in any way. It also should be noted that only one out of twenty five (25) teachers in the voluntary training were distracted or had any issue with the chat. To charge a teacher with termination under such circumstances sets a dangerous precedent where teachers and employees in a school would essentially be looking over their shoulder to see if Big Brother was indeed watching them and waiting to pounce on their private thoughts and conversations.

We ask that the Arbitrator keep an open mind and when reviewing the testimony, try to picture how people talk in private among friends.....and ask if you would like to be judged on a single documented conversation where there was thought to be complete privacy, whether there should be an expectation of it or not. Also, would you want to be judged, whether to be a competent employee or not, based upon an overheard private conversation with a friend.

This is how the Board wants to judge Tyler Van Pelt ("Van Pelt"). It is undisputed that Van Pelt participated in the chat. He has admitted such and has expressed remorse. Many of the items in the chat were inappropriate, but Van Pelt has explained that at no time were students involved or disparaged. Part of the problem with interpreting a conversation among friends as a third party is not being able to interpret the true intent of the parties. Through the testimony of Van Pelt and others, it is clear that the most serious accusation, disparaging students, has been explained for what it was – a mocking of the instructor for ridiculous categorization and not the students in any way. The rest of the conversation has also been exposed for what it was; jocular exchanges among friends.

While it was admitted to being inappropriate at times, it should not result in the loss of a promising career.

The Board also insists on viewing this incident with Van Pelt as some sort of pattern of wrong doing. The attempted bootstrapping of the Board is a desperate attempt to terminate Van Pelt. The other incidents pointed to by the Board are remote in time and were all dealt with in an appropriate manner, most without any type of formal discipline. There is no way that these past incidents resemble a pattern in any way. In fact, the loss of increment was not even a part of the tenure charges and as such may not be used against Van Pelt after the fact. If this was a significant event it would have been part of the charges.

When these charges are viewed in their proper context and without the manufactured "outrage" by the Board, we are left with reality. The reality of an excellent teacher who made the mistake of having an inappropriate conversation with friends during a training session. Van Pelt himself admits this is wrong. Van Pelt has made clear that it was an error in judgment and it will not happen again. However, to destroy this young man's career over an incident that has shown no direct harm except to a hypersensitive employee and bruised feelings of the Superintendent is not equitable. Van Pelt has paid for his actions and such conversation not in the presence of any student should not result in any further discipline.

It is important to note that Mr. Tyler Van Pelt ("Van Pelt") is an Elementary School Teacher with the Edison Township Board of Education, presently assigned to the fifth grade at the Lincoln School ***(TVP Tr. 72:7-8)***. Van Pelt has 15 years of experience as a teacher with significant experience in regular education and special education ***(TVP Tr. 72:11-75:5)***

During his 15 years in teaching, Van Pelt has been evaluated as superior and outstanding on a consistent basis ***(TVP 75:12-84:1 and TVP Exhibit 1).*** Yet, neither Superintendent, Dr. O'Malley nor Administrator, Ms. DeLuca have been in Van Pelt's classroom despite his outstanding and acknowledged record ***(TVP Tr. 84:2-8 and TVP Tr. 85:13-15).***

Nor, as the record states, have Dr. O'Malley and Ms. DeLuca taken into account Van Pelt's teaching record, commendations and accolades within their investigation and recommendation to pursue the tenure charges against him ***(DeLuca Tr. 154:1-155:22 and O'Malley Tr. 118:22-120:19).***

Van Pelt's record outside the classroom is also remarkable working with "struggling" students, and their academic proficiencies ***(TVP Tr. 85:22-87:5 and 88:22-90:17)***. Van Pelt has been recognized by the State of New Jersey for its SGP rating system. In fact, in the two years that the State has done this, Van Pelt has been the ONLY teacher in his school to achieve a rating of "highly effective" ***(TVP Tr. 86:25-87:10 and 88:12-21)***.

Van Pelt has been bestowed with many commendations and accolades ***(Exhibit TVP 2)***. It is important to note that Dr. O'Malley did not take any of this into consideration ***(O'Malley Tr. 118:22-120:19)*** in formulating his decision as to the tenure charges. Neither did Ms. DeLuca in completing her investigation ***(DeLuca Tr. 154:13-155:22).***

The incident that was the primary factor that led to the charges took place at a training session. Van Pelt initiated a chat room during the October 23, 2014 Engrade Training. He admits to this, as well as participation in the chat room throughout the 2.5 hour session (although his time dedicated to this chat was between 15 - 20 minutes).

The chat escalated, In fact, as to the issue, Group Labeling, as conveyed by the Training Presenter, and was the catalyst of Van Pelt continuing the Today's Meet chat. Van Pelt states, "What the presenter was putting forward struck a nerve in me....She was pitching a selling point ..... stating, you can label your kids ***low***, and they won't see it." ***(TVP Tr. 97:9-98:1; 217:3-19 and 212:13-214:21)***.

In stating that his reaction to the presenter's labeling, Van Pelt conveyed that his (chat) response was "clumsy" and "ludicrous". He also stated that the presenter created an environment that he reacted to by his special education commentary within the transcript ***(Van Pelt Tr. 217:3-19)***. Van Pelt expressed ***extreme remorse*** for his inappropriate, ill-timed comments in reaction to the presenter's expressions of labels for students with disabilities ***(TVP Tr. 98:1-99:23).***

As to Van Pelt initiating the "backchannel discussion", he again expresses extreme remorse and "would delete it in a heartbeat". And, he has expressed to every individual along the line his regret ***(TVP Tr. 103:13-25)***. Van Pelt thought the chat was private, as he was initially trained by Don Platvoet, District Staff Developer. Van Pelt conveyed that Platvoet stated the chat was "secure" for use with teachers and students ***(Van Pelt Tr. 246:23-247:4).*** Van Pelt thought it was "safe". Van Pelt validated this privacy after the fact by reviewing Today's Chat materials ***(See Lechelt Exhibit no. 2)*** as confirmation of what Mr. Platvoet stated ***(TVP Tr. 107:20-109:3 and 113:9-13).*** In addition, Van Pelt knew that in order to view the chat on one's computer screen, the specific and private address had to be typed in.

The Board called Mr. Platvoet, Professional Development Trainer, as a rebuttal witness. Mr. Platvoet stated that he did not convey an expectancy of privacy to his trainees. He considers the site

public because the URL (address) can relate to any individual and anyone that has knowledge of that URI can access the site (It is noted that anyone who does not have the site address would not be able to access the site) ***(Platvoet Tr. 7:8-8:22).***

It is important to note that the Board has endorsed all that was presented at the Training by Mr. Platvoet, through one of his supervisors, Steve Figruelli, Elementary Supervisor ***(Platvoet Tr. 12:19-22)***. As to Board document ***ED 1119***, Platvoet is asked what is the meaning of HTTPS? He stated that he did not know. When asked if the "s" meant "secure", Platvoet stated that he did not know ***(Platvoet Tr. 15:21-17:25).***

When questioned as to Board document ***ED 1123***, Platvoet states that he used this slide during his training presentation which had "HTTPS, TodaysMeet.com" on the last line. Platvoet again stated that he did not know the meaning of HTTPS ***(Platvoet Tr. 18:1-19:25).***

Finally, when questioned, "in a Today's Meet site, is it true the only way you could enter it is if you have the address?" Platvoet answers, "To the best of my knowledge, yes." Platvoet adds, "to access a particular chat room on Today's Meet, yes, you need the URL for that chat room" ***(Platvoet Tr. 21:9-20).*** Mr. Platvoet contradicts himself as to the privacy issue - during Direct Examination, he conveyed that the site is public, yet, he now states that you need a specific address (URL) to access a site. Therefore, *the argument of privacy is bolstered by Mr. Platvoet's own words* ***(Platvoet Tr. 22:13-18).***

The chat itself was during the 2.5 hour training, however, Van Pelt confirms that his actual keyboarding time was 15-20 minutes while admitting that the chat room transcript was valid ***(TVP***

116:3-20 and Board Exhibit 13). Ms. DeLuca did not look into the actual keyboarding time of Mr. Van Pelt ***(DeLuca Tr. 207:22-208:2).*** Neither did O'Malley ***(O'Malley Tr. 121:17-23)***. Nor did O'Malley access the chat site during his investigation ***(O'Malley Tr. 82:23-83:1).***

As to the chat itself, 8 names are attributed to the comments therein. "Ms. Deluca's report fails to explain why there were only four (4) chat room participants' conduct being investigated.

Van Pelt, commenting on ***TVP Exhibit 3/Board Exhibit 10***, Ms. Battista's Statement and Affidavit, has concerns with no. 4; her concerns that the teachers in the chat room were making fun of her; Van Pelt had never met Battista, nor had any knowledge of her presence behind them. In addition, Van Pelt challenges Ms. Battista's statements herein as inaccurate and not factual representations.

Van Pelt was interviewed by Affirmative Action Officer, Margaret DeLuca. He describes his meeting with DeLuca as being "guided through the chat" and he was honest and forthright ***(TVP Tr. 128:1-13)***. DeLuca took WRITTEN NOTES in response to Van Pelt's answers to her questions ***(TVP Tr. 128:14-23)***. DeLuca stated that she destroyed the written notes after she typed them; she never produced her actual hand written notes of the Van Pelt interview ***(DeLuca Tr. 60:24-61:2 and 78:22-82:1 and 104:6-10).*** O'Malley stated that he never told DeLuca to destroy her handwritten notes, nor did he instruct her to preserve her notes ***(O'Malley Tr. 115:23-116:7)***. *Therefore, the integrity of the interview and its transfer to Ms. DeLuca's notes (now typewritten) has been compromised.*

In response to Ms. DeLuca's testimony that he was not remorseful, Van Pelt stated, "Its not true". He continued by conveying, "The notion of, you know, we're sorry only because we got

caught of this widespread testimony about a lack of remorse on all individuals. My contention is two part with this notion that DeLuca testified": 1. Short of falling to our knees and resigning...in tears, I don't know what we could have done to express remorse to satisfy Ms. DeLuca; 2. The second notion was ... that we were caught. Van Pelt's understanding was an individual (Ms. Battista) was offended and brought an affirmative action complaint. Van Pelt doesn't know how else he could have expressed remorse to satisfy the Board's understanding of his regret, aside from being honest and trying to cooperate to the fullest extent, which he did, as well as deeply apologizing for any offense that he made ***(TVP Tr. 129:9-130:14).***

As to the Affidavit of Ms. DeLuca ***(Exhibit TVP 5)***, Van Pelt strongly objects to her conclusions as forwarded to Superintendent O'Malley. Specifically, Ms. DeLuca, under oath, swears to the following in no. 8, ".....I personally entered https://todaysmeet.com/engraderocks and accessed a copy of the relevant transcript to confirm it was open to the public. I had no difficulties accessing same." *DeLuca does not note that it was ONLY because she had the specific address for the chat site that she was able to access the site.* Therefore, her statement was not truthful.

As to ***TVP Exhibit 6/Board Exhibit 14, Ms. DeLuca's questions for Van Pelt***, her typed notes cannot be accurate representations of her handwritten notes. In fact, these "misinterpretations" are critical to the record herein. Van Pelt states, "There are a number of patently false statements attributed to me. Questions that are not accurate in terms of how they were asked. There are a number of incomplete responses contained herein:

Page one, how the chat works, TVP Exhibit 6/Board Exhibit 14 - DeLuca asked Van Pelt if he was surprised that she was able to access this chat by simply going online. It is obvious that

DeLuca needed the code/chat room address to gain access or she would not be able to gain access ***(Van Pelt Tr. 135:3-136:1 and DeLuca Tr. 164:6-165:9)***. Therefore, without the code/address, the chat room was ***private and secure***. In addition, Van Pelt testified that he, as well as the other Respondents had their confirmation of privacy from ***Exhibit Lechelt 2 (Van Pelt Tr. 207-16-208:17).***

On page 2, TVP Exhibit 6/Board Exhibit 14, Van Pelt points out where DeLuca's entries deviate from the actual interview as it occurred. Van Pelt conveys that DeLuca "wildly misinterpreted" his responses as to "short bus kids". DeLuca's entry was a "gross mischaracterization" and "oversimplification" of the response he provided to her at that time.

Also on ***page 2, bullet no. 7, TVP Exhibit 6/Board Exhibit 14***, Van Pelt commenting as to "you can tell by the lady's walk", Ms. DeLuca was making light of the fact that he was trying to be polite and explain the double entendre for a romantic interlude

On page 3, TVP Exhibit 6/Board Exhibit 14, Van Pelt states as to the "eating chicken" comment that DeLuca stated that his response was about oral sex and/or smoking marijuana. All that Van Pelt was conveying was his interpretation of a song by the Doors, which refers to a gentleman eating chicken - he treats women better - so he gets the chicken and then when she comes home, they get the pork and beans. He gets the good food, they get the scrap.

Also on page 3, TVP Exhibit 6/Board Exhibit 14, Van Pelt admits to the posts in reference to Supt. O'Malley. Van Pelt states, "what I said was regrettable again and this is an incomplete answer. I expressed my apologies for making that statement". Van Pelt also expressed to Ms. DeLuca that's not in keeping with his character. Not only do (I) regret it, (I) felt it was cowardly

(Van Pelt Tr. 139:19-140:4). This was missing from DeLuca's document.

On page 4, TVP Exhibit 6/Board Exhibit 14, Van Pelt elaborates as to DeLuca's entry that he admitted to her allegations of masturbation. He states, "This was the most profound inaccuracy of the entire transcript." Van Pelt asserted that he was politely trying to address her questions and comments. "She had already had these slang interpretations." Van Pelt explained to DeLuca that this was a reference to a euphemism ***[TVP Tr. 9:14]***. And she did aptly note that he didn't masturbate. But she also asserted that she was saying "TMI - too much information". DeLuca then stated that Van Pelt said, under his breath, that he did masturbate, as she categorized in her final report to the Superintendent which gave rise to the masturbation charge. There were no follow up questions and Van Pelt emphatically denies making any admission of this type ***(Van Pelt Tr. 141:1-142:1).*** The Board presented no proofs as to the support of their masturbation charge.

Van Pelt then concluded the DeLuca interview by stating *his regret and remorse*, commenting on his late brother who had special needs, as well as his disabled step-son. He also conveyed to DeLuca that this would never happen again and he understood that it was ill-worded, absolutely regrettable. ***(Van Pelt Tr. 142:3-143-16)***. Of course, this *did not make it into Ms. DeLuca's notes*.

Van Pelt commented, as to DeLuca's "conclusions" of her teacher interviews that no teacher other than Ms. Battista reported an alleged disturbance of any kind. Early in the Training, Ms. Lechelt turned in her seat. When she did, Ms. Battista saw comments on Ms. Lechelt's computer screen which allegedly offended Ms. Battista. This was a personal choice by Ms. Battista ***(Battista Tr. 107:25-108-3).*** In order to view the screen that the presenter was using, Ms. Battista had to lean

slightly to the right. Instead, she chose to reposition herself to the left to monitor and photograph the chat ***(Battista Tr. 126:4-127:24).*** More specifically, despite having a direct line of sight to the presenter, Ms. Battista took her iPhone out, repositioned herself to the left, moved forward towards Ms. Lechelt and Ms. Lechelt's computer, zoomed in on Ms. Lechelt's screen; and took several pictures of the screen ***(Board Exhibit 7, pp. 2-9; Battista Tr. 108-7, 126:2-127:24).*** It is clear that Ms. Battista wilfully took these actions on her own.

Ms. Einhorn, sitting right next to Ms. Battista, is not even on DeLuca's interview list. Ms. Einhorn was interviewed by her building principal and did not report any disturbance or anything of concern (DeLuca Tr. 171:22-172:15). No teacher interviewed by Ms. Battista's school principal, Mike Duggan, had seen anything ***(DeLuca Tr. 51:17-52:2).*** These interviews by Ms. DeLuca should be reason enough to ***impeach*** Ms. Battista's testimony as to her discomfort and being ill at ease.

As to Ms. DeLuca's ***Affirmative Action Report to the Superintendent, TVP Exhibit 8/ Board Exhibit 26***, Van Pelt comments on her conclusion that he should face the most severe consequences. However, Ms. Deluca's report contained no factual findings nor any conclusions she reached after interviewing those she deemed were the relevant witnesses. Ms. Deluca's report does not list or discuss any factor she took into consideration when recommending the "most severe consequences" for all Respondents. No conclusions were discussed with Van Pelt by the Superintendent or DeLuca, herself. The first time he saw these were subsequent to the tenure charges.

As to DeLuca's statement that "teachers may be in violation of other Board policies (4

policies listed), Van Pelt states that he was never contacted by anyone as to those allegations, yet he is accused of violating those policies within the tenure charges against him ***(Van Pelt Tr. 150:2-152:1)***. Ms. DeLuca conveys that she did not investigate these 4 policies ***(DeLuca Tr. 201:15-6)***. Supt. O'Malley claims that he did an investigation thereto, however, there is no evidence of this whatsoever ***(O'Malley Tr. 33:13-23)***.

In addition to recognizing his sustained remorse, Van Pelt has sustained significant qualitative and quantitative damages, and will sustain further penalty should the arbitrator render his decision beyond Van Pelt's current suspension from the classroom.

In addition, mending professional and family relationships will be needed and Van Pelt is ready to move into that arena. His marriage has dissolved and this incident has caused no chance at any reconciliation; he has special needs members of his family which he will need to address.

Any increment withholding will be at a loss of several thousands of dollars for one or more years. And should the arbitrator sustain the tenure charges against Van Pelt, his career as an outstanding teacher could be over. The impact of a decision to terminate Van Pelt's employment would have the effect of ending his teaching career. Mr. Van Pelt's conduct herein does not warrant this harsh penalty. With not only a financial impact, but his teaching certification and pension standing at risk, Van Pelt would be an endangered species, at best.

The Board has not documented any mitigating circumstances, Van Pelt's expressions of remorse, nor did the Board acknowledge the gravity of his misconduct, as Van Pelt surely did. The Board repeatedly exaggerated the conduct herein by introducing allegations against him when they

did not include these allegations within the Charges against Van Pelt.

The bottom line is that the record shows that Van Pelt is an outstanding teacher. That must be given serious recognition as to the scales of justice ***(Van Pelt Tr. 152:2-156:20).***

As to the specific written tenure charges filed against him, Van Pelt expressed concern that he has been singled out as a "union representative" therein ***(Van Pelt Tr. 158:20-159:12).*** Supt. O'Malley, when testifying as to Van Pelt's union leadership position, becomes evasive as to why his union status is even mentioned within the charges ***(O'Malley Tr. 125:19-128:16).***

As to Charge I, in addition to his prior testimony beginning with Charge One, Van Pelt added that he was surprised that the Presenter, Sara Bleekinger, did not offer any concern of her own ***(Van Pelt Tr. 160:14-161:7).*** In addition, Van Pelt states that he never used the presenters name, but he would agree that the comments were inappropriate ***(Van Pelt Tr. 238:8-23).*** He did not make comments ***to*** the presenter, but admits to making comments about her ***(Van Pelt Tr. 245:5-8 and 272:1-7).***

As to Count Two, Special Ed Students, Van Pelt stands on his prior testimony conveyed ***(Van Pelt Tr. 161:19-23)***.

As to Count Three, his commentary regarding the Superintendent, in addition to his prior testimony, Van Pelt sincerely apologized for those comments and he regrets them ***(Van Pelt Tr. 161:24-162:2).*** He denies making any derogatory comment to the Superintendent, but admits making the comments about the Superintendent ***(Van Pelt Tr. 244:17-245:3 and 272:1-7).***

As to Count Four, re: Ms. Battista, Van Pelt offers that this count is false; that he made no comment directed at Ms. Battista and he was unaware of her comments ***(Van Pelt Tr. 162:3-8).***

As to Ms. Battista, the parties on either side of her, Ms. McKenna and Ms. Einhorn did not report any disturbance. Ms. Battista reported to Ms. DeLuca that when she was sitting normally, the computer screen of Ms. Lechelt was in her direct line of sight. Ms. Lechelt was sitting directly in front of her, in a chair, with her computer screen on the table in front of her. Therefore, Ms. Battista would not be able to see the screen upon her normal seating position.

When Ms. Battista testified under cross by counsel for Ms. Lechelt that she saw the phrase "short bus kids", it occurred at the moment when Lechelt turned her body and "shot Battista a look" after being "shushed" - yet JB (Mr. Bauza) posts as to the "shushing" in the Today's Meet transcript, and it is separate from the "short bus kids" comment by 8 minutes according to the time stamps. This further impugns Battista's credibility and "reasonableness"

It was also damning that when Ms. Lechelt posted "looks like a turtle", Battista testified that she thought turtle meant "penis" - Battista then goes on to state, "Most of it [the transcript] was open to interpretation". How reasonable is it for one to be offended by text when one admits said text is "open to interpretation," particularly when one doesn't know the context for the text ***(Battista Tr. 138:14-139:6).***

As to Ms. McKenna's comments, she chose to look away and not see Ms. Lechelt's screen. Ms. DeLuca was asked,, "did it ever occur to you, in your mind at all, that Ms. Battista had an atypical idiosyncratic reaction to what was happening?" Ms. DeLuca stated that, "No, it never

occurred to me. She was legitimately upset".

Ms. DeLuca stated that she could not see Ms. Battista's pictures (of the computer screen) as they were blurry. And, in the first photo of the series, Ms. Battista could not see the screen at all as Ms. Lechelt was positioned between her screen and Ms. Battista. This calls into question that Ms. DeLuca did not take into consideration that Ms. Battista made it her business to look around Ms. Lechelt to see what was on the screen.

Ms. DeLuca did not think that was odd as she stated that Ms. Battista was trying to get a picture because nobody would believe her. Then, Ms. DeLuca was asked if she took into account the reasonableness of Ms. Battista's response in light of Ms. McKenna's response that Ms. Battista seemed consumed by the chat conversation.

Ms. DeLuca is then asked as to the severe and pervasiveness of the actions therein within her role of an investigator. Ms. McKenna is the reasonable woman; Ms. Battista is not. As the Board cited throughout the charges, they repeatedly said this was public. If only the two women saw the chat, then, it is not public. If the two woman saw the same snippets of the chat initially, the question is, ultimately, the Board of accusing these people of engaging in sexual harassment, and is framing a charge that they're guilty of sexual harassment. If the conduct is so severe and pervasive that a reasonable woman would just choose to look elsewhere, its relevant and probative. As such, the Board cannot prove the charge that this was public. The question is, did you consider whether Ms. Battista's reaction was mainstream or idiosyncratic ***(DeLuca Tr. 279:9-297:13).*** Even Supt. O'Malley admits that no other teacher, but Ms. Battista, stated that they could not concentrate/could not hear the presenter ***(O'Malley Tr. 85:23-86:2).***

When asked of the two people that viewed the screen, did he take into consideration that one was offended and one was not, and how Ms. Battista came to see what was on the screen via her cellphone pictures, the Supt. conveyed that was all he needed ***(O'Malley Tr. 113:2-114:7). See additional commentary within the legal analysis.***

As to Count Five, comments as to unidentified employees in the training, Van Pelt disagrees that the chat was visible to Ms. Battista and others. No other person, but Ms. Battista, made this claim. Van Pelt never named any individual therein. His comments would be considered vague at best therein ***(Van Pelt Tr. 162:9-17 and 239:3-17).***

As to Count Six, inappropriate and offensive comments between each other, Van Pelt offers that no participant within the chat was offended by each other's comment ***(Van Pelt Tr. 162:18-24).***

In summary to these Counts, Ms. DeLuca conveys that the presenter was not offended. Ms. Beams was not offended, Ms. Patuco was not offended, every other district employee was not offended, nor were parents offended as to her affirmative action investigation. Only after the fact complaints were conveyed by some parents to Ms. Beams, however, neither she nor Ms. DeLuca conveyed these to Mr. Van Pelt ***(DeLuca Tr. 202:7-25:19).***

As to Charge II, Disruption of Professional Development Training, Van Pelt relies on his previous comments, especially ***Exhibit TVP 7***, wherein Ms. DeLuca's and the Principal's interviews of the teachers in attendance showed no one but Ms. Battista indicated any disturbance.

As to Charge III (Failure to Pay Attention), Van Pelt asserts that he did pay attention. There may have been short moments of keyboarding time during the 2.5 hour training. As those moments occurred, Van Pelt still paid attention to the training program ***(Van Pelt Tr. 239:18-240:9).***

As to Charge IV, Misuse of the District's Computer Network, Van Pelt denies and relies on his previously cited testimony

As to Charge V, Masturbating in or around Board Property, Van Pelt offers discrepancies as to his interview with Ms. DeLuca as well as the discrepancies within her report ***(TVP Exhibit 6)***. In addition, he objects to the language within this charge to be "presumably" to masturbate ***(Van Pelt Tr. 162:25-163:164:1)***. As the Arbitrator notes, this must be proven. Also, the Board attempts to *"pile on"* by attempting to link a far fetched allegation of a "sticky substance" on gloves left in Van Pelt's classroom.

As to Charge VI, Violations of District Policies, Van Pelt "does not recall" any specific policy presentations by his Principal, Ms. Cavuto. Van Pelt does admit to signing the policy awareness document but notes that there was never any District follow up at all ***(Van Pelt Tr. 164:2-165:2).*** Ms. DeLuca, when questioned herein, states that *she never discussed any of these policies with Mr. Van Pelt, she never checked (she did not look into it) if Van Pelt's principal discussed any of these policies at a faculty meeting* ***(DeLuca Tr. 208:3-209:25).*** Also, Supt. O'Malley states, upon testifying as to the ***Use of Computer Policy (Board Exhibit 24)***, these policies were not distributed to teaching staff members, nor was there specific training as to what not to do with the computers ***(O'Malley Tr. 77:1-80:4).***

As to harassment, Ms. DeLuca disagrees as to what she needs to know about harassment. She states that she needs to know the Board policy. There in no "reasonable woman" standard within the policy. One must question Ms. DeLuca's training of same when there is consensual participation in conduct. Ms. DeLuca indicated that she took her original handwritten notes, then

transposed same into her report.

Specific thereto, Ms. DeLuca's typed notes inaccurately described what Ms. Battista was wearing during the Training. In her typed notes of her October 30-31, 2014 interview of Ms. Battista, Ms. Deluca stated that ***(Battista Tr. 130:8-9; Deluca Tr. 269:14-270:17)*** Ms. Battista told her she was wearing a red dress in the Training. However, Ms. Battista was wearing a red sweater ***(Battista Tr. 130:8-9; Deluca Tr. 269:14-270:17).*** This is material because Ms. Battista erroneously thought that Ms. Lechelt and others were talking about her in the chat when they referred to a woman in the second row wearing a red T-shirt even though she was sitting in the fifth row, wearing a sweater, not a red dress ***(Deluca Tr. 265-7 to 267-3).*** The inconsistency between Ms. DeLuca's alleged written notes and her typed notes are compromised.

Van Pelt denies violating the affirmative action policy and relies on his previous testimony herein. In addition, Ms. Deluca was supposed to investigate whether Respondents violated the Board's affirmative action policy ***(Board Exhibit 20)***. On her own, without the Board's direction, Ms. Deluca, in her report, suggested additional Board policies that she felt Respondents had violated ***(Deluca Tr. 200:20- 202:6).*** Within said policy is the mandate that "The Board shall provide professional training to all certificated and non-certificated school staff members on a continuing basis.....". That has not happened ***(Board Exhibit 20, page 2, para. 3).***

It is noted that the Board's focus was on the sexual harassment claims of Ms. Battista. There was no evidence to sustain that charge against Van Pelt. The conduct during the training was neither severe or pervasive which had the effect of "unreasonably altering or interfering with work performance or creating an intimidating, hostile or offensive environment..." ***(Board Policy***

3362/Exhibit 21).

With respect to Count 4 , Violation of Code of Ethics Policy , the Superintendent testifies as to ***Board Exhibit 22, the policy***. He bases his statement of a violation as to, "the educator shall observe every effort to raise professional standards, to promote a climate that encourages the exercise of professional judgment to achieve conditions which attract persons worthy of the trust to careers in education, and to assist in preventing the practice of the profession by unqualified persons" ***(O'Malley Tr. 42:1-19)***. Other than this statement, the Board does not offer anything into evidence to prove this charge. In addition, there has been no evidence produced that any "reasonable person" would have found the actions of Van Pelt to be hostile and offensive and there has been no citing of "repeated malicious conduct". As stated within the policy, there has been no "deliberate actions", "intentional actions", "exclusions", "denials", "misrepresentations", or any "disclosures of pupil information".

As to Count 5, Violation of Inappropriate Staff Conduct Policy, this policy, ***Board Exhibit 23***, was cited against Van Pelt referring to conduct, including the use of emails or social networking sites "that is directed and/or available to pupils or for public display". Van Pelt's role in what he thought was a ***private chat*** did not result in the above requisite conduct. This chat was not accessible to anyone who did not have the specific address. But for Ms. Battista's idiosyncratic conduct and her perception that she was being singled out, there would not have been anyone who saw/knew about the statements within the chat.

This Charge cannot be sustained as their proofs do not confirm the allegation of insubordination and misconduct, in light of the fact that the Charge maintains that Respondents'

communications "were available to pupils and for public display." This is not true. There has been no evidence produced that any "reasonable person" would have found the actions of Van Pelt to be hostile and offensive and there has been no citing of "repeated malicious conduct".

The Board positions the same conduct as multiple violations. This is not so

Count 6 alleges a violation of the healthy workplace policy. As to ***Board Exhibit 25/Policy 3351***, the requirement therein is, "employees interact with each other with dignity and respect". The policy cites the conduct of an employee or group of employees in the workplace that a reasonable person would find hostile and offensive is unacceptable and is not conducive to establishing or maintaining a healthy workplace environment".

There has been no evidence produced that any "reasonable person" would have found the actions of Van Pelt to be hostile and offensive. The proofs herein indicate that the chat was neither severe nor pervasive, and was not accessible to the public (one needed to have the specific address of the chat). Ms. Battista's actions, as described herein, indicate that she was unreasonable and idiosyncratic in her actions.

The Board positions the same conduct as multiple violations. This is not so. Therefore, the Board cannot sustain its Charge of insubordination and misconduct against Van Pelt.

With respect to Count 7, New Jersey case law clearly demonstrates, when teacher usage of school computers has been found to violate board policies, the violation of the policies, on its own, is not sufficient to support terminating the teacher's employment. The Board positions the same conduct as multiple violations. This is not so. Therefore, the Board cannot sustain its Charge of

insubordination and misconduct against Van Pelt.

Charge VII alleges a violation of the collective bargaining agreement. Van Pelt amplifies that the District reliance on his block schedule is flawed. He did not send the emails during student instructional time. When questioned, Ms. DeLuca admitted that ***she did not check*** into the accuracy of her claim as Van Pelt's student instructional time can change on a daily or minute to minute basis ***(Van Pelt Tr. 165:3-167:2 And 263:10-269:19).***

In another bite at the apple, the Board called Ms. DeLuca as a Rebuttal Witness. There can be no confusion as to Ms. DeLuca's testimony. She did not check Mr. Van Pelt's schedule for any deviation or disturbance to the normal schedule as she alleged Van Pelt sent these emails during instructional time. Therefore, Charge Seven should not be sustained, as well as not be included in any pattern of alleged discipline as by the Board in Charge Eight.

As to the final Charge VIII, Pattern of Unbecoming Conduct, Insubordination and/or other Just Cause over a Protracted Period of Time, Van Pelt relies on his representations herein, as well as emphasizing that the three (3) events actually cited by the Board within the Tenure Charges against him, are ministerial, incomplete (Van Pelt's missing response to the absent note dockage) and Remote in Time. Therefore, the Board has not met its burden of proving any pattern whatsoever.

The Board alleges that Mr. Van Pelt has been engaged in a course of misconduct extending over a protracted period of time, such that, his pattern of misconduct, jointly and severally, constitutes unbecoming conduct and manifestly demonstrates his unfitness to serve in a position of educational leadership, warranting his dismissal. More specifically, the Board cites within the Charge, "All of the allegations and facts set forth in the above Background Information, Charges and

Counts are incorporated by reference as if fully set forth herein." ***(See Charge VIII, lines 1-2).***

A complete review of the Background Information, Charges and Counts reveal only 3 cited allegations of Van Pelt's allegedly "imperfect record of employment, which Van Pelt vigorously rejects. These three citations are ministerial, incomplete, not disciplinary in nature, and remote in Time, to be further discussed herein, and, therefore, do not create any pattern of misconduct, whatsoever.

The Board then states, referring to these 3 allegations, "Perhaps, most troubling is that the foregoing disciplinary action taken against Mr. Van Pelt has not served to modify and/or improve his conduct moving forward. Rather, it appears to have emboldened him, particularly in light of his initiation of and participation in the egregious conversation that lies at the heart of the herein Charges". Most important to this issue of establishing a pattern against Van Pelt, is that the Superintendent did review Van Pelt's personnel file, as well as reviewing the personnel file of Van Pelt with the Board attorney. For the Board to exclude the listed incidents/allegations from the Charges is a blatant omission. The Board cannot be permitted to "back fill" this grave error of omission. They had access to any and all of Van Pelt's personnel documents (O'Malley Tr. 16:20-23).

As to this Charge, the Pattern, the arbitrator, during a lengthy colloquy, stated that each charge must be proven. Should the charge be proven, then the arbitrator will consider a penalty. If the charge is not proven, there would not be a penalty imposed (***Van Pelt Tr. 24:8-28:5).***

In the State of New Jersey, a tenured teacher shall not be dismissed from his or her position or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just

cause." N.J.S.A. 18A:6-10. A petitioning board of education has the burden of proving tenure charges brought against a respondent by the preponderance of the competent and credible evidence. In re: Tenure Hearing of Randall N. Kavet, Dist. of the City of New Brunswick, Middlesex Cty., OAL Docket Nos. EDU 13695-09 and EDU 1539-10, (Aug. 19, 2010). Van Pelt argues that it is questionable if the Board is able to prove unbecoming conduct, however, it is clear that the Board fails to meet the high threshold to establish termination as a penalty.

The Fulcomer case establishes the test as to the penalty in matter such as the one at bar. In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967). The Court broke the test down to two elements: (1) Did the employee engage in conduct unbecoming a teacher? and (2) If so, does the misconduct proven warrant the penalty of termination of employment or some lesser penalty? The following factors are to be considered when deciding the proper penalty under the Fulcomer standard:

- impact of the decision on the respondent's teaching career;
- the longevity of the respondent's career;
- the respondent's otherwise good teaching record;
- the respondent's unquestioned teaching ability;
- the absence of discipline by the school board during employment;
- the absence of past increment withholdings;
- the nature and gravity of the offenses under all the circumstances involved;
- evidence as to provocation, extenuation or aggravation, and
- any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system.

Id. at 422.

When reviewing the above factors, it is clear that the Board fails to meet its burden for conduct unbecoming as well as the high bar required to terminate. As noted above, the Board cannot meet the Fulcomer standards

The Board, during the hearing, attempts to establish an allegation that Van Pelt was recommended for an increment withholding ***(Board Ex. 36).*** The Board's exhibit did not show any discipline or record of an increment withholding. The exhibit was only a recommendation. This was eight years ago for an allegation not involving students or instruction. The Board did not choose to list this within the charges against Van Pelt.

The nature and gravity of the offense under review of all circumstances is again to be viewed in Van Pelt's favor. The remote in time offenses have been debunked above as mere window dressing by the Board in an attempt to establish a pattern that doesn't exist. The actual alleged offenses all relate from the chat.

It should be noted in Van Pelt's favor that this chat was at a voluntary training session away from any and all students. There are absolutely no allegations that Van Pelt or any of the respondents interacted inappropriately towards or in front of any student. The discussion took place within the context of all consenting adults who presumed that such discussion was private. No comments were made to any individual outside the consenting friends.

The most serious allegations resulting from the chat were as to certain comments regarding class of students; comments toward the Superintendent and certain jokes/commentary with sexual innuendos. Privacy is an essential theme in this case. Despite the Board's self-serving policies

entered into evidence, there is case law that establishes that Van Pelt had a legitimate expectation of privacy. The computer policy ***(Board Ex. 21)*** is a broad overreaching policy that does not necessarily address all contingencies. While the entire chat clearly did not have advanced educational purposes, portions were in relation to the training session and the discussions stemming from such instructor commentary. As such, there is an issue whether some content within the overall discussion violated such policy.

It has been found that a breach of policy with regard to use of computers does not necessarily justify an employer's claim of ownership to personal communications and information accessible therefrom or contained therein. Stengart v. Loving Care Agency, Inc. 408 NJ Super 54, 70 (App Div. 2009).

Computers are provided in almost all areas and types of employment. Computer use and communication through such communication is common. In the neighboring jurisdiction of New York, the Court in Thyroff recognized that a computer setting constitutes little more than a file cabinet for personal communication. Thyroff v. Nationwide Mut Ins. Co, 8 N.Y. 3d 283 (2007).

The court stated that even while a legitimate business purpose could support a search of such computer, when an employer examines documents stored on a computer it's akin to rifling through a folder containing an employee's private papers or reaching in and examining the contents of an employee's pockets. Stengart at 69.

A policy imposed by an employer purporting to transform all private communications into company property merely because the company owned the computer used to make such private

communications during work hours furthers no legitimate business interest. Id. At 71. The only legitimate interest for the company is that the employee may be engaging in business other than company business (i.e.: personal matters during work hours), however the right to discipline or terminate does not extend to the confiscation of the employee's personal communications. Id.

It is undisputed that the chat in question was meant and believed to be a private conversation between the participants. Van Pelt has acknowledged that portions of the chat were not related to educational purposes. Aside from this general fact, the content of the chat should not be a part of the consideration for discipline as it would breach his right to privacy.

That being said, it is fair to say that participating in other personal matters during the training session is a wrongful act, it is certainly not an act that would raise to the level of imposing serious discipline. If this is the case, then a floodgate of discipline should open to every teacher who uses his or her cell phone in any way (including Ms. Battista) during working hours.

It is only the content of the chat which the Board is relying on as the crux of its argument for discipline against Van Pelt. Regardless, if the chat haven was provided by the school, it is clear that the participants had an expectation of privacy and as such the information within the chat should not be considered negatively against Van Pelt. It was clearly established at the hearing that one needs the specific chat address to have access thereto.

The facts at hand are akin to four teachers having a private discussion with no intention of broadcasting these thoughts outside the individuals participating. Despite the Board's efforts to establish the chat room as "accessible to the public", it was exposed as wrong with the admissions

that one would have to know the group name in order to access the chat. The required group name is not available on Google or any public information. The only way to have the group name is to be an invited participant or an uninvited individual peering over the shoulders of the invited individuals as Ms. Battista.

Enforcing any discipline based on Ms. Battista's actions is ratifying a quasi-police state in the schools where other teachers, administration and students are encouraged to spy on their peers private conversations in hopes of uncovering any type of off the cuff commentary to be used against the targeted individuals.

In its tenure charges as well as throughout the proceedings, the Board alleges that Van Pelt's conduct constituted "sexual harassment". While the Board alleges that such harassment allegations were based upon the Board policy, ***Board Exhibit 21***, it is clear that such policy language mirrors the legal case law standard for sexual harassment as outlined in Lehman v. Toys R Us. As such, it is logical to analyze the facts at hand against the legal standard for sexual harassment. Lehmann v. Toys 'R' Us, Inc., 132 *N.J.* 587 (1993).

As there are no allegations of quid pro quo harassment, the issue is whether the actions of Van Pelt created a hostile work environment. In order to state a claim for hostile work environment sexual harassment, a female plaintiff must allege conduct that occurred because of her sex and that a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile, or offensive working environment. Id.

For the purposes of establishing and examining a cause of action, the test can be broken down into four prongs: the complained-of conduct (1) would not have occurred *but for* the employee's gender; and it was (2) *severe or pervasive* enough to make a (3) *reasonable woman* believe that (4) the conditions of employment are altered and the *working environment is hostile or abusive.* However, the second, third, and fourth prongs, while separable to some extent, are interdependent. One cannot inquire whether the alleged conduct was "severe or pervasive" without knowing *how* severe or pervasive it must be. The answer to that question lies in the other prongs: the conduct must be severe or pervasive enough to make a reasonable woman believe that the conditions of employment are altered and her working environment is hostile. Id at 604.

The fact patterns of many cases suggest, however, that most plaintiffs claiming hostile work environment sexual harassment allege numerous incidents that, if considered individually, would be insufficiently severe to state a claim, but considered together are sufficiently pervasive to make the work environment intimidating or hostile. Id.

Rather than considering each incident in isolation, courts must consider the cumulative effect of the various incidents, bearing in mind "'that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes.'" Burns v. McGregor Elec. Indus., 955 F.2d 559, 564 (8th Cir.1992) (quoting Robinson v. Jacksonville Shipyards, 760 F.Supp. 1486, 1524 (M.D.Fla.1991)).

Therefore, a plaintiff in a hostile work environment sexual harassment case establishes the requisite harm if she shows that her working conditions were affected by the harassment to the point at which a reasonable woman would consider the working environment hostile. Id.

A hypersensitive employee might have an idiosyncratic response to conduct that is not, objectively viewed, harassing. Allegations of such non-harassing conduct do not state a claim, even if the idiosyncratic plaintiff perceives her workplace to be hostile, because the complained-of conduct, objectively viewed, is not harassment, and the workplace, objectively viewed, is not hostile. Id at 613.

The Board attempts to establish a violation of sexual harassment through both the content of the chat as well as its effect on Ms. Battista.

Our courts have also noted that "it will be a rare and extreme case in which a single incident will be so severe that it would, from the perspective of a reasonable woman, make the working environment hostile," but it can occur. The New Jersey Supreme Court ruled in Taylor v. Metzger, 152 N.J. 490 (1998), that a supervisor's reference to an African-American subordinate as a "jungle-bunny," to her face and in front of witnesses, was determined to be one of those "rare and extreme cases" envisioned by the Lehmann Court where one incident could create a hostile working environment.

In that case, however, the kind of racial slur used by the employee's supervisor was an egregious manifestation of bigotry and unlawful discrimination known to our culture; it was viewed as the "extreme case" where an isolated incident might be sufficiently severe or pervasive to state an actionable claim. Though Taylor was a race discrimination case, it can be imputed to a sexual harassment hostile working environment.

Normally, a plaintiff is required to adduce evidence of "numerous incidents" which, taken together, could create the requisite degree of hostility. To be actionable as pervasive harassment,

conduct must be extreme. Courts consider the totality of circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance and whether it unreasonably interferes with an employee's work performance. Harassment is pervasive when incidents of harassment occur either in concert or with regularity. Andrews v. City of Philadelphia, 895 F2d 1475. Our courts have characterized pervasive harassment as "a gauntlet of sexual abuse". Mentor v. Vinson 477 U.S. 57(1986). It must be more than a single non-extreme circumstance. (cf. Taylor, supra.)

The case at bar simply does not rise to the level of severe and pervasive. Despite the failed attempt to connect to non-similar incidents from years ago, the charges are based upon the chat which was a one-time private event.

The contents of the chat were essentially innuendos and double-entendres. When viewed in context with the testimony of the respondents, it is clear that the content was a poor attempt at witty banter amongst friends in an attempt to one up each other. The majority of the comments were not graphic on its face, with many comments having to be looked up in order to learn their meaning. Unlike the Taylor case there were no comments made directly to anyone that was not a willing participant. It certainly does not rise to the "rare and extreme case" as cited by Taylor. As the chat does not rise to the severe and pervasive standard, Van Pelt could not have committed sexual harassment.

The second flaw in the Board's case as to sexual harassment is the reasonable woman standard. While not specifically cited in the policy, the reasonable woman standard is an integral part of any sexual harassment analysis. The standard would not make sense without it as there would

be no comparator to distinguish acceptable conduct, akin to the obscenity, "I'll know what's obscene if I see it" argument from a long ago era.

As there must be a reasonable woman standard, Ms. Battista is the quintessential "hypersensitive employee" referenced in the Lehman case. In most matters the Court needs to guess in order to see what the reaction of other women put in such a witnesses position would think. This is not the case here as other women interviewed observing the same commentary and behavior as Ms. Bautista were not concerned about it at all.

Ms. McKenna, who was sitting right next to Ms. Battista showed absolutely no concern with the chat. She even described Ms. Battista as "consumed" by the chat. ***(Board Ex 45)***. True sexual harassment victims are trapped by their harassers with no choice but to be exposed to the behavior. This is unlike Ms. Battista who had multiple choices that day to avoid exposure to the chat. Ms. Battista could have simply focused her attention on the presentation. She chose to focus on the chat which could not be viewed without her repositioning herself ***(Battista Tr. 126:4-127:24)***. She also chose to leave the room (due to being supposedly upset) and finally after being away from the supposed harassment, voluntarily returns to the room. Ms. Battista even went through the trouble of using her IPhone to zoom onto the screen (which would not have been visible otherwise), and took several pictures. ***(Board Ex 7)***. Finally despite choosing to return, the testimony about her over the top reaction to the chat simply must be characterized as hyper-sensitive.

If ten individuals were in the same position as Battista, it is fair to say that only she would react in the way that she did. According to the investigation notes, twenty-three other individuals

at the training were not disrupted. The fact that Ms. McKenna had no such reaction in any way brings credence to this characterization of hyper-sensitivity.

The Courts have stated that behavior that may be socially inapt and, no doubt, annoying, does not approach sexual harassment. Godfrey v. Princeton 196 NJ 178 (2008). The Court in Godfrey went so far as to state that "persons who are socially tone deaf are not, by that characteristic, necessarily the equivalent of sexual harassers. To allow the Law Against Discrimination to replace such basic human interaction trivializes the purpose for which the LAD was established." Id.

While Van Pelt fully admits that portions of the chat were inappropriate, there was no sexual harassment. The chat does not rise to the level of severe or pervasive nor would a reasonable woman in Ms. Battista's position have felt that the work environment was hostile based on such acts. Portions of the discussion may have been socially inapt but certainly not harassing. There is no legitimate reason for Ms. Battista to have the extreme reaction that occurred and as such proves herself to fall short of the reasonable woman standard.

In conclusion, this factor must also be viewed in favor of Van Pelt as the allegations do not rise to the level of nature and gravity to support further discipline.

One of the focuses of the "outrage" as to the chat are the references to the special education students. The testimony of all the Respondents was consistently clear that any and all comments regarding these students were in effect mocking the instructors insulting reference to the students as "lows". Van Pelt reacts strongly, stating in the chat stating "how many times is she going to

encourage us to use the phrase 'lower group kids'". For a complete recitation, ***see Factual Basis, section one, the Training Session.***

There was ample testimony during the proceedings of the offensive statements by the instructor regarding the "categorization" of students. This was offensive to Van Pelt and the other respondents. Van Pelt states, "What the presenter was putting forward struck a nerve in me....She was pitching a selling point ..... stating, you can label your kids *low*, and they won't see it." ***(TVP Tr. 97:9-98:1; 217:3-19 and 212:13-214:21).***

Based on the ridiculousness of the categorization statements by the instructor, Van Pelt made the various statements attributed to him regarding special education students. The Board attempts to take these statements out of context but all of respondents testimony clarified that these statements were made in response to these statements by the presenter. In addition, the mistakes in interpretation by Ms. DeLuca completely exacerbated this situation. For a complete recitation as to DeLuca's misinterpretations, ***see Factual Basis, The Investigation.***

There is no evidence of any discomfort or injury on anyone besides Ms. Battista who has been established as hypersensitive and should not be in equation. While it is regrettable that the Superintendent has hurt feelings over some portions of the chat, it is not enough of a basis for Van Pelt to lose his career. The Board supplied no direct evidence of parental, teacher or student concern with Van Pelt.

In summary to these Counts, Ms. DeLuca conveys that the presenter was not offended. During Ms. DeLuca's investigation, she spoke with Engrade's attorney, the employer of the presenter. The attorney informed Ms. DeLuca that the Presenter was not disrupted in any way during

the training session and was not aware of any disruption therein ***[DeLuca Tr. 243:1-25]***, she did not know if the Superintendent was offended, Ms. Beams was not offended, Ms. Patuco was not offended, every other district employee was not offended, nor were parents offended as to her affirmative action investigation.

Only after the fact complaints were supposedly conveyed by some parents to Ms. Beams, however, neither she nor Ms. DeLuca conveyed these to Mr. Van Pelt ***(DeLuca Tr. 202:7-205:19).*** It also should be noted that these supposed parent complaints were double hearsay and not authenticated by any credible direct testimony, though the opportunity was there for the Board to present such to the arbitration.

In sum, there was no written or verbal evidence presented by the Board that Van Pelt's continued employment would have a negative effect on the maintenance of discipline and the proper administration of the school system. As a result thereto, this final factor is in favor of Mr. Van Pelt's return to his classroom.

When reviewing the above factors based on the Fulcomer test, it is clear that the punishment of terminating Van Pelt is excessive. Van Pelt is an excellent teacher who made a mistake of having an inappropriate chat with his friends at the wrong time. No students or individuals were harmed as a result of this act. There is no evidence presented that there would be any cause for concern or outrage if Van Pelt was returned to the class room. Van Pelt expressed *extreme remorse* for his inappropriate, ill-timed comments in reaction to the presenter's expressions of labels for students with disabilities ***(TVP Tr. 98:1-99:23).*** As to Van Pelt initiating the "backchannel discussion", he

again expresses extreme remorse and "would delete it in a heartbeat". And, he has expressed to every individual along the line (his) regret. ***(TVP Tr. 103:13-25).***

In response to Ms. DeLuca's testimony that he was not remorseful, Van Pelt stated, "It's not true". He continued by conveying, "The notion of, you know, we're sorry only because we got caught of this widespread testimony about a lack of remorse on all individuals. My contention is two part with this notion that DeLuca testified "Short of falling to our knees and resigning...in tears, I don't know what we could have done to express remorse to satisfy Ms. DeLuca" Van Pelt doesn't know how else he could have expressed remorse to satisfy the Board's understanding of his regret, aside from being honest and trying to cooperate to the fullest extent, which he did, as well as deeply apologizing for any offense that he made (TVP Tr. 129:9-130:14).

Van Pelt admits to the posts in reference to Supt. O'Malley. Van Pelt states, "what I said was regrettable again and this is an incomplete answer. I expressed my apologies for making that statement". Van Pelt also expressed to Ms. DeLuca that that's not in keeping with his character. Not only do (I) regret it, (I) felt it was cowardly ***(Van Pelt Tr. 139:19-140:4).*** This Van Pelt representation was not present within Ms. DeLuca's document.

Van Pelt concluded the DeLuca interview by stating ***his regret and*** remorse, commenting on his late brother who had special needs, as well as his disabled step-son. He also conveyed to DeLuca that this would never happen again and he understood that it was ill-worded and absolutely regrettable. ***(Van Pelt Tr. 142:3-143-16)***. This also ***did not make it into Ms. DeLuca's notes***.

Van Pelt has already been suspended and lost valuable time in his career. He also has suffered an economic impact based upon the suspension. His suspension of 120 days, without pay, has already cost Van Pelt $38,000.00. Any further suspension without pay will cost him approximately $10,000.00 per month. Any increment withholding will be at a loss of several thousands of dollars for one or more years.

As such, it is respectfully requested that there are alternative penalties that could be imposed rather than termination. Upholding the 120 day unpaid suspension without pay would be a tough, but fair, punishment under the circumstances.

The Board bears the burden of proving such charges by the preponderance of evidence. In re Polk License Revocation, 90 NJ 550, 560 (1982); I/M/O Tenure Hearing of Marrero, 97 N.J.A.R 2d (EDU) 104 (1997). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro Bottling Co., 26 NJ 143 (1962). Preponderance is the greater weight of credible evidence in the case; that is, the evidence not necessarily having the greater number of witnesses but rather the evidence having the greater convincing power. State v. Lewis, 67 NJ 47 (1975).

Van Pelt's record outside the classroom is also remarkable working with "struggling" students, and their academic proficiencies ***(TVP Tr. 85:22-87:5 and 88:22-90:17)***. Van Pelt has been recognized by the State of New Jersey for its SGP rating system. In fact, in the two years that the State has done this, Van Pelt has been the ONLY teacher in his school to achieve a rating of "highly effective" ***(TVP Tr. 86:25-87:10 and 88:12-21)***.

Any findings must be well founded in reason and logic. Lesniewski v. W.B. Furze Corp., 308 NJ Super 270 (App Div 1998). After reviewing the detailed factual basis above, it is clear that the Board has not met this burden.

In addition to the Fulcomer test, arbitrators have also imposed a "just cause" standard In answering whether the termination was for just cause, in general, "just cause ... requires that before an employee is *disciplined* that employee should know of the existence of a pertinent rule, that the rule is reasonably related to the business of the employer, and the employee knew or should have known the possible consequences of the violation of the rule." Linden Bd. of Educ. v. Linden Educ. Ass'n ex rel. Mizichko, 202 N.J. 268, 278 (2010)

As Van Pelt is essentially charged for a private conversation, it is his position that there was no specific existence of this rule. There was also testimony as to the lack of presentation and guidance as to the policies in this matter. While Van Pelt acknowledges that portions of the chat were inappropriate and unrelated to educational purposes, he was clearly unaware of the severity of the implementation of such punishment regarding same.

During the course of the proceeding and within the charges, the Board attempts to establish a supposed "pattern" based on other as well as remote prior incidents. As stated earlier, the incidents were mischaracterized by the Board and do not rise to any level that should be considered in this arbitration.

In addition, the Board had the opportunity and did in fact address these incidents in the past. Although double jeopardy is a criminal concept and did not apply, the concept that an appropriate

penalty was already meted out, precluded the District from raising the same conduct again. In re Tenure Hearing of Jill Buglovsky, Randolph Township Board of Education, Agency Docket No. 265-9/12 (issued December 21, 2012) quoting: In the Tenure Hearing of Wachendorf, OAL Docket No: EDU 6860-04, decision of Administrative Law Judge May 3, 2005.

In Buglovsky, it was determined that "The Board cannot now retry Ms. Buglovsky based on conduct transpiring over three years ago, which did not involve harm or realistic potential harm to students, and was resolved at that time by an official reprimand. The Arbitrator rejected an alleged "pattern of misconduct" by Buglovsky thereby precluding use of a prior reprimand for that purpose as well. Supra.

As such, the Board is not able to institute a "pattern" against Van Pelt based upon these prior incidents.

Unbecoming conduct is a term which encompasses conduct which "destroys public respect for government employees and competence in the operation of public services". Karins v. Atl. City, 152 NJ 532 (1998).

When reviewing such cases of unbecoming conduct it is clear that there is a high threshold: repeated warnings for a teacher being directly verbally abusive and ridiculing students (using terms as "geek, dork and jerk" directly to students); a teacher distributing a secure test to students and then denying it when questioned[1]; a teacher engaged in corporal punishment with students; a teacher who participated in a scheme to defraud the State Health Benefits System common theme in these cases

1 In the Matter of the Tenure Hearing of Vincent Martone, State Operated School District of the City of Jersey City, Hudson County, C#650-97 (12/19/98)

is a teacher who has gone beyond the bounds of common decency and exhibited a total disregard for fulfillment of the responsibilities of his position as well as his welfare for his students.

The allegations against Van Pelt even taken at face value, do not rise to a level close to the threshold established. There were never any instances as to jeopardizing any safety or security of the students and faculty. The Board has not proven any evidence of destruction of public respect for Van Pelt.

When reviewing comparable cases, there are many examples of public employees charged with conduct far beyond what is alleged herein, but were not terminated from tenured positions. Many of the relevant cases illustrate that violating policy, including a computer policy in of itself, is not grounds for termination.

When reviewing the cited cases, all have a factual basis more serious than a private chat amongst friends. All of the above kept their job. Van Pelt should be given the same chance.

Based on the above, Van Pelt respectfully requests that any punishment be limited to time served as to his unpaid suspension. Van Pelt has shown great remorse and is eager to return to his life's calling of educating.

OPINION

After considering the documentary and testimonial evidence, the undersigned concludes that Tyler Van Pelt is guilty of Charges I- Counts 1,2, 3, 4, 5, 6, III, V, VI- Counts 1,2, 4, 5, 6. 7, and VII. Charges II, IV, VI-Count 3 VIII are dismissed.

ANALYSIS OF THE CHARGES

The charges are arranged such that the numbered charges and specifications are preceded by a section entitled *Background Common to All Charges.* It would be appropriate to address that section before considering the numbered charges and specifications.

The bulk of this section deals with established Board policies. The cited policies concern sexual harassment (BX21), inappropriate staff conduct (BX23), the code of ethics (BX22), affirmative action (BX20), acceptable use of computer networks and computers (BX24) and a healthy workplace environment (BX25). The relevant Board Policy Numbers are 3362, 3281, 3211, 1140, 3321 and 3351 respectively.

On the theory that employees cannot be held accountable for the implementation of policies of which they were not put *on notice,* it is first essential to determine if and how the teachers employed by the Board knew of the existence of these policies and how they knew or should have known the substantive content of the policies.

The Board met its burden of demonstrating that the teachers acknowledged their knowledge of the existence of said policies, the manner in which they could secure copies of the policies and their agreement to review the policies and to abide by them. It did so by producing a document entitled *Important Board Policies, Regulations and Mandated Communications Form.* The record indicates that Respondent Van Pelt executed this form on September 11, 2014 (BX17). Thus, he acknowledged that he was aware of the policies, that he would review them and conform to them.

In sum, Respondent Van Pelt was *on notice* both procedurally and substantively of the Board's policies central to these charges. More important, he agreed to review the policies, to be conversant with the policies and to conduct himself in accordance with them.

It is well settled that employers are entitled to establish policies and work rules and to require employees to conform to them. This statement is true provided the employees are notified of the policies and rules. In this case, Respondent Van Pelt acknowledged his responsibility to comply with them.

Van Pelt argued that the Board must have a legitimate business reason for enforcing the rules. That argument has no merit here because that Board had legitimate business reasons for adopting the policies. None of the policies are irrelevant to the *business* of running a school district. Moreover, there is nothing in the record to indicate that anyone at anytime challenged the legitimacy of the policies. Thus, how can enforcing those policies that relate to the management of the school district be anything but a legitimate business reason?

What is highly relevant here is that, under the circumstances, the failure to abide by the rules and policies is chargeable conduct. Since the failure to comply is chargeable, the Board is well within its rights to impose discipline on employees who are guilty of such breaches.

Suffice it to say, Boards of Education are expected to create policies for the District. Part of their mandate as elected officials is to do so.

The *business* of the District is to offer an educational program to the children in the school district. The implementation of the policies is relevant in terms of managing the District. It is

difficult to understand how Van Pelt does not recognize that the policies at issue here are legitimate interests in that they define appropriate professional conduct and set forth rules about the use of District equipment. Does he not recognize that his comments about various specific individuals and groups of individuals constitute violations of legitimate Board policies?

Van Pelt characterized the Board's policies as being self-serving. The term *self-serving* connotes a self-enhancement effort. There is no basis for the suggestion that the Board, individually and collectively, enacted policies that were personally beneficial.

Van Pelt may not appreciate the implementation of the policies. However, the policies are appropriate. There will be a full discussion of the applicability of the policies cited in the charges.

The second major component of *Background Common to All Charges* is a reference to a group chat on the *Today's Meet* website that was conducted through the District's computer network.

The 2 ½ hour group chat was alleged to have taken place on October 23, 2014 during a professional development program that was called an *Engrade Chromebook Training.*

The District provides the teachers with laptop computers, Chromebooks. Thus, those participating in the group chat did so on District owned computers.

The record suggests that *Engrade* is an educational program employed by the District. The October 23, 2014 meeting was devoted to the program.

It is unchallenged that the *Engrade* meeting took place on October 23, 2014, that the group chat lasted (from beginning to end) 2 ½ hours and that Respondent Van Pelt and approximately 25 other teachers were in attendance.

This section of *Background Common to All Charges* goes on to elaborate on the group chat and sets forth the allegedly unacceptable content of it. Van Pelt argued that the content of the chat was taken out of context. The record indicates that the entire chat was retrieved and placed in evidence. There was no objection raised as to the completeness of the document. Thus, the chat was not taken out of context. The transcript was the complete context. To the extent that these matters are included in the Charges and Specifications, they will be addressed below.

A section of this portion of the charges deals with Van Pelt's employment record. This issue will be dealt with below.

Charge I

This charge asserts that Respondent Van Pelt's participation in the group chat rises to the level of unbecoming conduct and/or just cause. It alleges that Van Pelt violated New Jersey law and Board policies, regulations and procedures concerning staff interactions. It charged that the chat room was public, was visible, accessible to other employees and students. It added that the chat room comments were offensive, discriminatory , rife with sexual innuendo and constituted a hostile work environment. This charge was the subject of six *counts* or specifications.

The immediate reason for the service of disciplinary charges is that the chat was held in a public place and was seen by one of the attendees at the training, Alysia Battisa. Ms. Battista complained about the chat and the District, pursuant to its polices and rules, addressed the complaint.

As noted in each of the counts, the chat comments made Ms. Battista sufficiently uncomfortable that she was unable to benefit from the training. She came to the training for appropriate professional reasons and the char prevented her from achieving her goal

While the above is expressed in each of the counts, it will not be repeated. However, it is applicable to each of the Charge I counts.

Count 1 concerned inappropriate comments about the Endgrade trainer, Sara Bleekinger. Van Pelt was charged with a course of misconduct toward Ms. Bleekinger. It stated that the group chat was foul, demeaning, offensive, harassing and sexual in nature. It cited 15 specific comments made by Van Pelt during the group chat.

It should be stated that the group chat lasted for 2 ½ hours. It was downloaded from the computers and it was 16 pages in length (BX13). The text of Van Pelt's comments were included in the charges served on him.

It must be noted that Van Pelt's comments must be read in the context of comments made by other participants in the group chat. There were three main participants, Maria Weber, Maryellen Lechelt and Tyler Van Pelt. All of them were served with charges. While the matter was consolidated relative to the hearings, separate decisions are being written for each of the three named participants.

There was a small number of additional participants in the chat. They were either not identifiable or no longer employed by the Board. In any event, their participation was limited and minor as compared to the three charged teachers.

When Van Pelt's comments are put in the context of the entire chat, their inappropriateness is magnified. Thus, an objective review of the comments concerning Sara Bleekinger suggests that Van Pelt's comments in and out of context with the total chat were inappropriate.

Despite the obvious, Van Pelt argued that, while there is no denying what his comments were, he is not guilty of this Count. He insisted that that he had an expectation of privacy relative to the chat. He posited that the chat would have gone unknown but for Alysia Battista, another attendee at the meeting, seeing it. Thus, in his view, the chat was private and his participation in it cannot be chargeable conduct.

As will be discussed in greater depth below, Van Pelt and his cohorts had no expectation of privacy. They were engaged in a chat in a public setting while using a District computer and a District network. The Board policy states it always has the right to examine that which is on the District owned computer's hard drive. Under the circumstances, the chat was public and the employer, the school district, had the right to view a chat that was not engaged in for educational purposes. In short, there could be no expectation of privacy.

The fact that Van Pelt thought that the chat was private is of no moment. Van Pelt claimed that one of the people who is a member of the staff that is engaged in computer technology, Mr. Platvoet, told him that he and the others did have a right to privacy. Platvoet testified and denied making such a statement. This subject will be elaborated on in the section devoted to Van Pelt's defenses. Assuming that he even thought about it at the time of the chat, regardless of what Van Pelt thought at the time of the chat, thinking something does not make it so.

Moreover, as is true of most of Van Pelt's defenses, there is no evidence that he or anyone else even considered the question of privacy or the consequences of engaging in it at the time of the chat.

Van Pelt's reasoning was that one needed an access code in order to see that chat's comments. That reasoning is fallacious. Anyone passing by could see what was on the screens of the computers. The fact that only one person complained about the chat is irrelevant. The chat was undertaken in a public setting and, irrespective of all of the issues concerning the ownership of the computer and the network, it fell into the public realm. Once that is recognized, it is readily apparent that Van Pelt had no expectation of privacy.

Much was said about Van Pelt's remorse for his conduct. While he in fact made certain comments about his remorse for having participated, his defense suggests that he has not taken responsibility for his participation in the chat.

Van Pelt initiated the chat and invited others to join him. He referred to the proposed chat as *his personal wiseass backchannel discussion.* He never intended for the chat to be other than what it was. He always had the option of logging out of the chat if it developed in ways unlike what he intended ir to be. As the initiator of the chat, he could have ended it.

He did neither, suggesting that the comments were not, in his view, inappropriate until he was called to task for it. When he was held accountable, he raised numerous meritless defenses. Much more will be said about the defenses in a section of the Opinion related specifically to them.

In addition, Van Pelt made a significant number of the comments in the chat transcript. Many of them were crude, vulgar and surprising given his level of education and his profession. His comments were not disputed.

Once the content of the chat became known, Van Pelt became the subject of charges of unbecoming conduct for making inappropriate comments about Sara Bleekinger. The fact that the comments were not known to Bleekinger is irrelevant. The comments were public and were treated that way.

This count alleges that Van Pelt's comments were disruptive and had a negative impact in another Engrade participant, Alysia Battista. These issues will be addressed below since they are part of many of the charges. In short, the Board met its burden relative to Count 1.

Count 2 concerns comments made about special needs students. The comments were undisputed. They referred to the children in outrageous pejoratives.

Van Pelt indicated that he made these comments in response to Bleekinger referring to a *low group.* He suggested that he was offended by the term *low group.* He added this brother had special needs and resented the thought that his brother would be described in such a way.

There is no way that Van Pelt can justify his comments. Even if he did feel offended, a proposition that the undersigned has difficulty accepting, if he really believed that Bleekinger's comments were improper, why would he not address her resentment like an adult and a professional. Under those conditions, he would have either privately or publicly expressed his displeasure.

He did not do so because, from the outset, Van Pelt considered the chat to be his *personal wiseass backchannel discussion.* He never intended the chat to be related to professional and/or educational matters. If he thought his comments were funny, no rational reader of the transcript would laugh.

Once again, even if Van Pelt had been offended by Bleekinger's characterization, his conclusion that *low group* is demeaning was arrogant and is a view that was unsupported by anything in the professional literature. By contrast, District witnesses cited to test and other professional literature that specifically referred to *low groups.*

In sum, Van Pelt has neither the credentials nor the standing to refute the use of an accepted term. He is entitled to have an aversion to it but he does not have the right to object to it by making the comments he made.

It must be added that Van Pelt's comments must also be viewed in the context of Lechelt's comments about special needs students. He and Lechelt were clearly having what they thought was a good time at the expense of handicapped students

To the extent that the chat was public, it had a negative effect on Alysia Battista. She was understandably made to feel uncomfortable. As noted above, the chat was public and Battista was exposed to offensive comments that interfered with her ability to benefit from the training.

For the reasons stated above, Van Pelt is culpable of Count 2.

Count 3 alleges that Van Pelt made inappropriate comments about Dr. O'Malley, the Superintendent of Schools. A review of the transcript reveals that Van Pelt's comments indicate his

reference to Dr. O'Malley as *little Richard* as well as his doubts about the Superintendent's ability *to pull chicks.* Van Pelt made other offensive comments.

However his comments must be read in combination with Lechelt's statements. They comment about his appearance. They are replete with sexual innuendo and suggest that his hiring practices are based on sexual issues and, therefore, are less than ethical and professional.

His comments were unacceptable. When put in the context of Lechelt's comments about the Superintendent and his responses to them, they become even more offensive. Van Pelt is guilty of Charge 3.

Count 4 addresses comments that Van Pelt made about Alysia Battista. Alysia Battista is the teacher who saw Lechelt's computer screen and became upset when she read the comments that were part of the chat .

The comments about Battista made by both Lechelt and Van Pelt were graphic. Lechelt chose to comment about Battista's tendency to pick at her lips when she is anxious. Lechelt made a negative comment about this tendency and made a derisive comment about the lips getting bigger.

Van Pelt responded to Lechelt's comments by indicating *dsl* (a term defined as *dick sucking lips).* Many of the comments in the exchange between Lechelt and Van Pelt were sexual in nature.

What is as distressing about Van Pelt's *dsl* comment was his effort at the hearing to characterize it as a reference to a computer technology phrase. This response was part of the context of extreme remorse. The context in which *dsl* was stated clearly had nothing to do with technology

and everything to do with a disgusting sexual reference. The comments about Battista rose to the level of unbecoming conduct. Van Pelt is guilty of Count 4.

Count 5 addresses comments made by Van Pelt about unidentified individuals attending the training. The comments were primarily made by Lechelt and Van Pelt.

As was true of the comments made about Ms. Bleekinger, Ms. Battista and Dr. O'Malley , the comments attributed to Lechelt and Van Pelt were offensive, crude and sexual in nature. Van Pelt seized on an apparently mature woman. He responded to a Lechelt comment about the woman by indicating *been there and done that* and followed that with *had her in her fucking prime.*

These comments were grossly offensive. They were also discriminatory with respect to the woman as well as to older people in general.

Count 5 was proven. The Board met its burden of proof in this regard.

Count 6 concerns comments made by Lechelt to Van Pelt and Weber. These comments concerned her becoming a supervisor because she is *cute and blonde,* made a reference to Van Pelt as being a *backchannel guy* (a reference to anal sex) and his response acknowledging same. Van Pelt commented about *eating chicken* (a reference to oral sex), references to Van Pelt's personal sexiness and replete with sexual fantasies.

Evidently, Van Pelt went to the rest room and returned and when he did so he commented about *getting the baby batter off the brain.* This comment refers to male ejaculation. This comment will become relevant in connection with Charge V.

A review of the comments is sufficient to conclude that they constituted unbecoming conduct. Van Pelt is guilty of Count 6.

Charge II

This charge is limited to a single count. It alleges that Van Pelt was insubordinate and guilty of unbecoming conduct in that he was involved in the disruption of Engrade training. An analysis of the allegation must be done before a determination is made about the charged misconduct.

The key word in this charge is *disruption.* An accepted definition of this word suggests that the action(s) of an individual or group interfered with the ability of others to continue an ongoing activity. Put another way, the actions of one or more people had to have prevented the organizers of a specific activity from continuing the activity to its planned conclusion.

With this definition in mind, one needs to examine the facts surrounding the instant matter. It is uncontested that the training started and ended on time. It is also clear that from the perspective of the trainer, Sara Bleekinger, she made her presentation in an uninterrupted manner. Thus, it is difficult to conclude that Van Pelt and others disrupted the training per se.

That is not to suggest that Alysia Battista was not upset by the contents of the chat. It must be said that Battista was the subject of negative comments by the three main participants in the chat. There was a good deal of blaming the victim.(Battista).

However, by any reasonable standard, there were many grossly offensive comments that were made during the chat. Any reasonable person would have found them offensive and large numbers of reasonable people would have been disturbed to read the comments, particularly in a professional

setting. As will be noted below, the fact that the woman sitting next to Battista did not react negatively to the chat does not suggest that Battista's response was unreasonable.

The undersigned hastens to add that an absence of disruption of the training session does not obviate the conclusion that Van Pelt was guilty of misconduct. As noted in the findings to Charge I, he was guilty of misconduct. Specifically in Charge I Counts 1, 3, 4, and 5, Van Pelt was found to be culpable of unbecoming conduct in connection with Alysia Battista, Dr. O'Malley and Sara Bleekinger. Furthermore, as will be seen in charges not yet addressed, he is guilty of additional misconduct.

However, it cannot be said that Van Pelt disrupted the training session. If the actions of Van Pelt and his two cohorts had not transpired, from the perspective of the vast majority of the attendees, it is likely that the session would have been no different than it was in the presence of the group chat. Thus, Charge II is dismissed.

Charge III

This charge is one of a single count of misconduct. Van Pelt is charged with a failure to pay attention during the Endgrade training and with making no effort to benefit from the instruction provided.

As has been previously documented, Tyler Van Pelt has been found guilty of various kinds of misconduct, ranging from inappropriate conduct with other staff members and with other participants in the group chat and individuals not in the employ of the District to significant violations of Board policy. In each of those charges and counts, the misconduct could be documented through

a review of the transcript of the chat and through a review of the conduct of Van Pelt in the context of the terms of several Board policies.

In this charge, Van Pelt is said to have not paid attention to the training and having made no effort to benefit from the instruction. The transcript of the chat shows the timing of the comments. At most, there was a time gap of four minutes between comments.

It makes no sense to limit the time spent on the chat to the amount of time writing comments. Van Pelt was paying attention to the chat for virtually the full 2 ½ hour duration of the session. The total time he was involved in the chat precluded his paying attention to the content of the training. Moreover, the maximum time between chat comments was four minutes. Van Pelt's attention was on the chat and not the training.

Finally, Van Pelt was on duty during the training. The session took place at a time when he would have been teaching. He had a professional obligation to make every effort to improve his teaching services by paying attention to the trainer. Instead, he opted to engage in an offensive, crude and grossly immature exercise of exchanging highly inappropriate comments on a chat.

Based on the record created, the Arbitrator concludes that, for practically the full length of the training session, Van Pelt did not pay attention and did not make appropriate efforts to benefit from instruction that was designed to improve his teaching. As such, Charge III must be sustained.

Charge IV

This charge alleges the misuse of the District's computer network through a group chat that was *inappropriate, foul, discriminatory, harassing, offensive and sexual in nature.* The District

alleged that the foregoing was a flagrant misuse of the Board's resources. The Board concluded that this conduct constitutes unbecoming conduct, insubordination and just cause for dismissal.

Without commenting on the merits of Charge IV, the Arbitrator points out that Charge VI Count 7 alleges, although worded in a slightly different way, the same misconduct in the context of Board Policy 3321.

Therefore, the issue of the alleged misuse of the District's computers and network will be addressed in the discussion of Charge IV Count 7. As such, Charge IV is dismissed.

Charge V

Van Pelt was charged with masturbating in or around Board property. The basis of this charge is related to a comment that Van Pelt made during his interview by Ms. DeLuca.

Ms. DeLuca questioned Van Pelt about the comment when she interviewed him. The transcript of the interview (DX14) indicates that Van Pelt explained that the expression refers to men masturbating before going on a date. The end of his response indicates that he denied masturbating when he went to the rest room on the day of the training and then added *at least not that time.*

Ms. DeLuca reasonably took the comment to mean that Van Pelt denied masturbating on Board property on the day of the training but admitted doing so at other times.

It is uncontested that, during the chat, Van Pelt made a comment about *getting the baby batter off the brain.* This phrase was previously defined as a reference to masturbation and ejaculation.

Van Pelt vigorously denied making such an admission. Since there was no one in the room, the question becomes which of the two people is credible.

On the one hand, De Luca has been found to be credible and forthright throughout the hearing. Moreover, she had no reason to fabricate. Van Pelt claimed that Ms. DeLuca was not credible due to lack of retention of her handwritten notes of his interview after word processing them. This argument will be considered in the section.

As to Van Pelt, it is patently clear that Van Pelt made the *baby batter* comment during the chat. Since De Luca wanted Van Pelt to explain the comment, she asked Van Pelt to explain it.

Van Pelt's answer, relative to the origin of the quote, was not disputed. However, he denied admitting that he masturbated on Board premises at times other than the date of the training.

It is not credible that De Luca's report was accurate with respect to everything about the quote except for the admission. Given its crudeness, it is difficult to believe that Van Pelt made the original comment during that chat. However, he made other comments during the chat that were equally inappropriate. Thus, the *baby batter* comment is consistent with the offensiveness of many of his other comments.

Moreover, he did not deny his explanation of the quote. Yet he would expect the undersigned to believe that the entry in Ms. DeLuca's report concerning this matter is accurate except for the admission.

Furthermore, the record suggests that Van Pelt made other statements that stretch credulity. De Luca did not, In short, De Luca's version of the Van Pelt's admission to having masturbated on Board property is credited. Thus, Van Pelt is guilty of Charge V.

Charge VI

This charge asserts that Tyler Van Pelt violated various District policies. The District posited that such misconduct constituted unbecoming conduct and/or just cause for dismissal.

Charge VI is comprised of seven counts. Each of the counts will addressed individually. It should be noted that, of the seven counts, only Count 3 does not allege that Van Pelt violated a specific District policy.

With that in mind, there are certain comments that apply to Counts 1, 2, 4, 5, 6, 7. Since it is more efficient to make certain observations about all six counts at the outset rather than repeat them in connection with each policy, the following observations apply to all of the cited Board policies.

As noted above, Van Pelt was *on notice* about each policy (BX18). This document (BX18) listed 34 policies and procedures in effect in the District. The policies cited in the six counts identified above are all listed on the document.

Van Pelt signed this document to acknowledge receipt of it as well as an acknowledgment of his awareness that the policies can be found on the Board's website. Finally, Van Pelt's signature reflects his agreement to conform to the listed policies and procedures.

What must be concluded is that Van Pelt was bound to comply with the policies. If he failed to review the policies in order to be able to comply with them, he did so at his own risk. In short, he was required to comply with the policies.

A second observation to be made is that Van Pelt and his two colleagues participated in the group chat. Their continued participation in the chat makes each of them responsible for its contents.

It is true that Van Pelt made some, not all, of the inappropriate comments. However, he was the one who initiated the chat and dubbed it his *Personal Wiseass Backchannel Discussion.* That being said, had he become concerned about his commitment to honor District policies, he would have either terminated the chat or, at the very least, logged off of the chat and, in so doing, disassociated himself from it. He did not do either and must now be held accountable for his actions.

What remains is an application of the facts of this case to the terms of the cited policies. Such an analysis will result in a determination of whether Van Pelt is guilty of one or more of the counts.

Count 1 alleges a violation of the Board's sexual harassment policy (Policy number 3362) (BX21). In relevant part, the policy states:

> The Board of Education recognizes that an employee's right to freedom from employment discrimination include the opportunity to work in an environment untainted by sexual harassment. Sexually offensive speech and conduct are wholly inappropriate to the harmonious relationships necessary to the operation of the school district and intolerable in a workplace to which the children of this district are exposed.
>
> Sexual harassment includes all unwelcome sexual advances, requests for sexual favors, and verbal or physical contacts of a sexual nature that

> would not have happened but for the employee's gender. Whenever submission to such conduct is made a condition of employment or the basis for an employment decision, or when such conduct is severe and pervasive and has the purpose or effect of unreasonably altering or interfering with work performance or creating an intimidating, hostile, or offensive working environment, the employee shall have cause for complaint.
>
> The sexual harassment of any employee of this district is strictly forbidden. Any employee or agent of the Board who is found to have sexually harassed an employee of this district will be subject to discipline which may include termination of employment.
>
> The Affirmative Action Officer shall instruct all employees and agents of the Board to recognize and correct speech and behavior patterns that may be sexually offensive with or without the intent to offend.

Before considering the facts, there needs to be analysis of the policy. The policy addresses two forms of sexual harassment, sexually offensive speech and sexually offensive advances, both physically and verbally. There is no evidence of sexual advances in any way, shape or form. Thus, the relevant language in this policy concerns the first paragraph above.

The sexual harassment in this case concerns sexually offensive speech. The purported sexually offensive speech was contained in the comments made during the group chat.

The facts suggest that Alysia Battista, a participant at the Engrade training was sitting behind and to the left of Maryellen Lechelt. She was able to see Lechelt's computer monitor and was able to read the ongoing comments of the group chat and became offended by the comments that were overtly sexual as well as those that had sexual innuendos.

Battista became upset by what she saw and left the meeting room. She filed a complaint about the chat and the instant proceeding resulted.

To be clear, counsel for Weber, Lechelt and Van Pelt all cited *Lehman v. Toys 'R' Us,* 132 N.J. 587 (1993) as the seminal case in New Jersey for matters involving sexual harassment. The undersigned read the cited case and concludes that it is applicable to the portion of the instant policy that deals with physical and verbal sexual advances. The facts in *Toys 'R' Us* relate to physical and verbal advances. This aspect of the policy is found in its second paragraph, not the first one.

Moreover, the language in the second paragraph tracks *Toys 'R' Us.* The same cannot be said for the first paragraph. It is evident that, if the Board intended for the *Toys 'R' Us* standards to apply to both paragraphs, it would have made such an indication in the policy. Thus, the plain language of the policy indicates that the Board intended to distinguish sexually offensive language from sexual advances of either a physical or a verbal nature.

Therefore, *Lehman v. Toys 'R' Us* is inapposite here. The standards set forth in *Toys 'R' Us* do not apply in matters involving sexually offensive comments. They are distinguishable from cases in which there was sexual advances of a physical or verbal nature.

This case deals with sexually offensive speech. The Board is well within its rights to issue policies that are relevant to the governance of the school district. Its policy in this regard is appropriate.

With the above analysis having been completed, the undersigned must now consider whether Van Pelt was guilty of the violation of the Board's sexual harassment policy in terms of participating in sexually offensive speech.

The Arbitrator is persuaded that he did so through direct comments, by responses to the comments of others and by participating in the group chat from beginning to end. He directly commented about Bleekinger, Battista and Dr. O'Malley in highly offensive language. He made comments about *backchannel discussions* with Bleekinger. The record suggests that *backchannel* refers to anal sex. He also engaged in verbal sexual fantasies about her. He took part in comments about Dr. O'Malley that dealt with his sexual practices and hiring methods. His *dsl* comment concerning Battista alluded to oral sex. In sum, Van Pelt made numerous other sexually offensive comments. Thus, Tyler Van Pelt violated the Board's policy proscribing sexually offensive speech. Therefore, he is guilty of Charge VI Count 1.

Count 2 alleges a violation of the Board's affirmative action policy (Policy Number 1140) (BX20). This policy is designed to promote the acceptance of people of diverse backgrounds regardless of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, gender, religion, disability, or socioeconomic status. The intent of the policy is spelled out in the first full paragraph of the policy statement.

While Van Pelt's comments were about previously identified people, some of them concerned unidentified participants at the training. The comments were disparaging of women, special needs students, lesbians and older people (BX13). He cannot credibly assert that he did not

violate this policy while sitting through and participating in a chat that was replete with comments about people protected by the policy. Thus, he is guilty of Charge VI Count 2.

Count 3 concerns a purported violation of the policies alluded to in Counts 1 and 2 pertaining to the Affirmative Action Investigation. This count is dismissed.

Van Pelt has already been found guilty of Counts 1 and 2. He is essentially being charged with the same misconduct a second time. In this regard, Count 3 is duplicative.

With respect to the interview per se, there are circumstances under which a interviewee's conduct at an interview could rise to the level of misconduct. However, under the facts of this case, Van Pelt was said to have not understood the seriousness of the matter but was not shown to have been guilty of misconduct at the interview per se. Thus, as indicated above, Charge VI Count 3 is dismissed.

Count 4 suggests a violation of the Code of Ethics policy (Policy Number 3211) (BX22). The key language in this policy is found in Principle II. It states as follows:

> The education profession is vested by the public with a trust and responsibility requiring the highest ideals of professional service.
>
> In the belief that the quality of the services of the education profession influences the nation and its citizens, the educator shall exert every effort to raise professional standards, to promote a climate that encourages the exercise of professional judgment, to achieve conditions which attract persons worthy of the trust to careers in education, and to assist in preventing the practice of the profession by unqualified persons.

Among other issues, this Code of Ethics requires teachers to endeavor to raise professional standards and to encourage the exercise of professional judgment. Van Pelt's participation in the group chat was inconsistent with both of these principles.

Van Pelt attended a professional development training session. It was offered in order to provide participants with the opportunity to improve their abilities with the Endgrade program. It is inconceivable that experienced educators would engage in group chat for 2 ½ hours while a trainer was engaged in a professional presentation. What makes the misconduct especially egregious is the content of the chat. It was demeaning, denigrating, offensive and discriminatory. There was nothing about the chat that reflected *an endeavor to raise professional standards*. It was crude by any standard and a clear violation of the District's Code of Ethics.

The Arbitrator is compelled to comment on the argument that the amount of time that Van Pelt was involved the chat was limited to the time spent in inputting the comments. This argument is invalid and inappropriate. It suggests that he may have spent 15-20 minutes actually inputting his entries in the chat.

It is highly disingenuous to assert that the chat lasted 150 minutes but that Van Pelt was involved in the chat for 15 or 20 minutes. That implies that the was focused on the training material for 130-135 of the 150 minutes. That suggests that he spent no time reading the other participant's *contributions* to the chat and that he spent no time watching his computer monitor while waiting for responses to previous inappropriate comments.

The chat lasted 2½ hours from beginning to end. The greatest time gap between comments was four minutes. This argument trivializes the misconduct and does nothing to reinforce the premise that he is sincerely remorseful for his actions.

The second aspect of the Code of Ethics that is pertinent here is the creation of a climate that encourages the exercise of professional judgment. The participation in the group chat is the antithesis of the exercise of professional judgment.

The Arbitrator is convinced that Van Pelt violated this policy. Thus, Van Pelt is guilty of Charge VI Count 4.

Count 5 addresses the Inappropriate Staff Conduct policy (Policy Number 3281) (BX 23). The relevant provision in this policy is found in the fourth full paragraph. It states as follows:

> School staff in completing their professional responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments to pupils or about pupils and shall not engage in inappropriate conduct towards the pupils.

There was an extensive string of comments concerning special needs students in the transcript of the chat. The comments, many of which were made by Van Pelt, were, to say the least, inappropriate and discriminatory.

What makes Van Pelt even more culpable is the fact that he is the brother of a special needs person. If such a teacher is not offended by negative statements about students like his brother, who will be?

Suffice it to say that Van Pelt violated the Inappropriate Staff Conduct policy. He is culpable of Charge VI Count 5.

Count 6 concerns the Healthy Workplace Environment Policy (Policy Number 3351) (BX25). The relevant language in this policy is found in the second full paragraph of the text. It sates as follows:

> A significant characteristic of a healthy workplace environment is that employees interact with each other with dignity and respect regardless of an employee's work assignment or position in the district. Repeated malicious conduct of an employee or group of employees toward another employee or group of employees in the workplace that a reasonable person would find hostile and offensive is unacceptable and not conducive to establishing or maintaining a healthy workplace environment.

As has been documented above, the record indicates that Supt. O'Malley was the subject of numerous comments to his appearance, hiring practices and his purported sexual practices. The comments were graphic and crude. The treatment that he received from Van Pelt and the others in the group chat was prototypical of what was proscribed in the policy.

Van Pelt made numerous offensive comments about various additional individuals. Therefore, there was *repeated malicious conduct.*

Therefore, he violated this policy. As such, Van Pelt is culpable of Charge VI Count 6.

Count 7 addresses the final policy allegedly violated. It is the policy concerning the acceptable use of district computers and computer networks (Policy Number 3321)(BX24).

The key language in this policy is as follows:

> The Board recognizes that telecommunications will allow teaching staff members access to information sources that have not been pre-screened using Board approved standards. The Board therefore adopts the following standards of conduct for the use of computer network(s) and declares unethical, unacceptable, inappropriate or illegal behavior as just cause for taking disciplinary action limiting or revoking access privileges, instituting legal action or taking any other appropriate action as needed necessary.
>
> The Board provides access to computer network(s)/computers for administrative and educational purposes only. The Board retains the right to have the Superintendent or designee monitor network activity, in any form necessary, to maintain the integrity of the network(s) and ensure its proper use
>
> Standards for Use of Computer Network(s)
>
> Any individual engaging in the following actions declared unethical, unacceptable or illegal when using computer network(s)/computer shall be subject to discipline or legal action:
>
> Item 3. Using the computer network(s) in a manner that:
>
> k. Engages in other activities that do not advance the educational purposes for which the computer network(s)/computers are provided.

Irrespective of the defenses offered by Van Pelt, there can be no question that he used the District's computers in a manner that was violative of this policy. There is no way that an educational purpose can be ascribed to the 2 ½ hour chat. The defenses will be discussed below. However, the use of the computers for the group chat was clearly in violation of the Board's policy.

Van Pelt, as one of participants in the chat, violated the policy concerning the use of District computers and computer networks. Thus, he is guilty of Charge VI Count 7.

Charge VII

Charge VII alleges that Van Pelt violated the CBA and that his doing so constituted insubordination and unbecoming conduct. Specifically, Van Pelt was the union building representative and he was charged with conducting union business at times when he was should have been teaching.

The relevant language in the CBA is found in Article VI Section C. It states as follows:

> **School Visitations by Association Representatives**
>
> Representatives of the Association, the Middlesex County Education Association, the New Jersey Education Association, and the National Education Association, shall be permitted to transact official Association business on school property at all reasonable times with the approval of the principal and/or Superintendent, provided that doing so shall not interfere with or interrupt school operations.

Charge VII is comprised of five counts. Each one alleges that Van Pelt sent emails related to union activities at time when he was expected to be teaching.

Count 1 indicates that Van Pelt sent such emails on September 11, 2014 at 2:00pm and 3:01pm (BX28). The District produced Van Pelt's schedule (BX32). September 11, 2014 was a Thursday and Van Pelt was scheduled to teach a Math class at 1:49-2:34pm and a Science/Social studies class at 2:36-3:21pm.

Therefore, the emails were sent during Van Pelt's teaching time.

Count 2 states that Van Pelt sent such an email at 2:14pm on September 17, 2012 (BX29). September 17, 2014 was a Wednesday and Van Pelt was assigned to teach a Math class at 1:49-2:34pm (BX32). Thus, this email was sent at a time when Van Pelt was supposed to be teaching.

Count 3 asserts that Van Pelt sent an email dealing with union affairs at 2:10pm on September 18, 2014 (BX29). His schedule shows that Van Pelt was expected to be teaching a Math class on that Thursday (BX32). Thus, the email was sent at a time when he was scheduled to teach.

Count 4 charges Van Pelt with sending union related emails at 12:13 and 3:22pm on Thursday, October 23, 2014 (BX30). His schedule indicated that Van Pelt had a Literacy/Math class at 12:15-1:00pm and a Science/Social Studies class at 2:36-3:21pm.

The 12:13pm email was sent when Van Pelt was supposed to be teaching. The 3:22pm mail was sent one minute after the end of the 2:36-3:21pm period. However, the CBA states that such business may be conducted within the school at reasonable times but only with the approval of either the principal or the Superintendent. There is no evidence that such approval was ever requested or granted.

Count 5 states that Van Pelt sent emails at 9:38am and 10:05am during the Endgrade training session on October 23, 2014 (BX31). The Endgrade training was scheduled at times when Van Pelt would ordinarily been teaching Literacy and Gym classes. Moreover, the training was a District program and the terms of Article VI apply here.

The defense offered by Van Pelt was that his schedule changes day to day and, at times, hour by hour. He claimed that one of the classes he was scheduled to teach on October 23, 2014 attended

an assembly program and that he was free to send the email. He added that the District did not meet its burden of proof because no one determined if Van Pelt's schedule was changed.

Ms. DeLuca appeared as a rebuttal witness and indicated that there were no changes in the schedule on any of the dates and times noted in Charge VII. She noted that the charges were proven.

Van Pelt offered nothing in the way of evidence, other than his self-serving testimony, in support of his assertion. The District provided evidence relative to Van Pelt's schedule. It cannot prove that the schedule had not been changed on the day in question. It is virtually impossible to prove a negative.

It was Van Pelt's burden to show that the schedule had been modified. He did not satisfy that burden.

The Arbitrator adds that Van Pelt argued that Ms. DeLuca's rebuttal testimony was giving her *a second bite of the apple.* That characterization was inapt and reflects a lack of understanding of the nature of rebuttal testimony.

Van Pelt claimed that the class in question went to an assembly. Ms. DeLuca rebutted the statement by stating that there were no assembly programs at the times when the emails were sent. The rebuttal testimony was proper and created additional evidence of Van Pelt's poor credibility.

In short, Van Pelt is guilty of Charge VII Counts 1-5.

Charge VIII

The District charged Van Pelt with a pattern of unbecoming conduct over a protracted period of time. This charge focuses largely on the reprimands and the withholding of a salary increment previously. These measures reflect on disciplinary actions previously imposed on Van Pelt.

It is well settled that employees may not be penalized twice for the same misconduct. The effect of this charge would be to do just that.

However, this is not to say that that the earlier disciplinary actions are irrelevant. They are considered for purposes of determining the appropriate penalty to be imposed.

In this particular setting, both the Fulcomer and the Just Cause standards call for a consideration of the charged employee's disciplinary history. Consistent with these approaches, Van Pelt's disciplinary record will be considered at the appropriate time.

However, this charge calls for the consideration of this record during the process of determining the scope of Van Pelt's misconduct. That cannot and will not be done. Therefore, Charge VIII is dismissed.

ANALYSIS OF THE DEFENSES

Van Pelt offered a number of defenses in an effort to mitigate the findings of misconduct. They are deserving of mention and discussion.

He acknowledged that some of the facts in this matter are undisputed. However, he urged that he has a very good record and that he has expressed sincere remorse for his actions.

He stressed that an application of the *Fulcomer* standards suggests that termination is unjustified in this case.

At the same time that Van Pelt makes the above statements in his own defense, he sees his actions as adding humor to the training session. As will be further discussed, he stressed that Alysia Battista acted improperly by looking at Lechelt's computer monitor and reading the contents of the chat. He further stated that the Board was creating a *police state* by responding to Battista's complaint. As will be seen, Van Pelt's defenses were not limited to these issues.

However, the two paragraphs above stand in contrast to each other. The first one seems to assume responsibility for his actions and simply suggests that a penalty short of termination would be appropriate. The second paragraph trivializes his misconduct in a number of ways. It leads the undersigned to doubt the sincerity of his remorse and his assumption of responsibility.

He objected to Ms. DeLuca's interview record by stating that her transcription of the notes she took at the interview into a printed document somehow rendered the printed interview record invalid.

It is true that Ms. DeLuca did not retain her handwritten notes. There is no rule compelling her to do so. Van Pelt's criticism was that she discarded the handwritten notes without Dr. O'Malley's approval.

This defense is meritless. The interview was conducted in the absence of a court reporter or a recording device. Ms. DeLuca could have written anything in her notes at the time of the interview and Van Pelt would have had no reason to know what she wrote. Thus, she could have

transcribed her handwritten notes, regardless of their content. Under those circumstances, would the presence of the handwritten notes made the printed copy more reliable?

Further, Van Pelt denied some of the specific statements in the report. He would have made the same denials even if the handwritten notes had been preserved.

The undersigned's findings relative to this issue were based on a credibility assessment of De Luca and Van Pelt. As a consequence, the Arbitrator credited Ms. DeLuca's testimony.

Ms. DeLuca was the subject of another of Van Pelt's assertions. She appeared as a rebuttal witness for the District. On Van Pelt's direct examination, in response to Charge VII, he claimed that there had been an assembly on October 23, 2014 and that he had been relieved of his teaching assignment at that time. Ms. DeLuca investigated this claim and appeared as a rebuttal witness to state that there was no assembly on that date.

Van Pelt characterized her appearance as a rebuttal witness as DeLuca being given *a second bite of the apple.* Such a statement is patently inaccurate and reflects an ignorance of established practice and procedure. In addition, it suggests that the proceeding was somehow biased in favor of the District. This argument is unseemly and reflects more on the maker of it than it does on the hearing.

Finally, Van Pelt criticized Ms. DeLuca because she recommended that Dr. O'Malley impose a serious penalty on him. She did make a recommendation to Dr. O'Malley. Her stature and her role in this matter suggests that she had the authority to recommend a penalty. She did not make the decision- Dr. O'Malley did. It is not clear what the basis of the objection was.

Van Pelt also objected to the fact that neither Dr. O'Malley nor Ms. DeLuca considered his teaching record. None of the charges concern Van Pelt's actual teaching and it is understandable that they would have considered the relevant facts and his disciplinary history rather than his classroom performance.

In this connection, Van Pelt suggested that, since his teaching per se was not the subject of disciplinary charges, he could not and should not have been served with the instant charges. His view is not valid.

Van Pelt's conduct in all areas of his employment is relevant. He is charged herein with misconduct, not incompetency. The charges are appropriate procedurally and substantively.

Van Pelt made a conscious effort to demonstrate that he has added to the tone of the school through his efforts with underachieving students. This training program was designed for the benefit of students.

The Arbitrator is taken by Van Pelt's lack of insight into his own actions. Did he not realize that the training might have given him additional skills with which he could help his students? By contrast, did he believe he knew all there was to know and, therefore, had no need to make an effort to learn as much as he could during the training.

The undersigned will discuss Van Pelt's belief that he had a right to privacy. However, the comments that he made during the chat were made in a public venue. Anyone passing by could have seen her computer screen. The fact is that the chat was seen by Alysia Battista. Rather than

recognizing that Battista read the chat in a public setting, Van Pelt excoriated Battista as being snooping on a private chat..

Aside from the public nature of the chat, there are other issues that militate against the privacy argument. Van Pelt asserted that the chat was inaccessible to others. Despite all of the claims that a right to privacy attached, even if there was a legal basis for a right to privacy, it was waived by the public nature of the chat.

Thus, even if one credits Van Pelt's theory of privacy, he waived it by conducting the chat in a public space. The computers and the network belong to the District. Based on Board policy, the District had the right to confiscate the computers and to examine its contents. So much for the chat being inaccessible to others. Had Van Pelt read the policy, he would have been aware of its contents.

If Van Pelt seriously believed that he had a right to privacy under the facts of this case, he is extremely misguided. Before engaging in the conduct that placed him in a position that could lead to his dismissal, he needed to have the curiosity needed to determine the extent of her liabilities.

It is difficult to credit the argument that Van Pelt believed that he really had a right to privacy. He knew or should have known the District's policy concerning the use of its computers and computer networks. He had to know that the chat substantively violated various Board policies as well as common decency. The Arbitrator concludes that this defense is contrived and should be afforded little weight.

A second area of Van Pelt's defense concerned Alysia Battista. He portrayed Battista as the villain. He claimed that Battista snooped on him and his chat cohorts and became the equivalent of an *informer.* Therefore, in Van Pelt's view, she reported the misconduct.

It should be added that Van Pelt viewed the District's response to the complaint as creating a *police state.* These two comparisons lay Van Pelt's insight into his own misconduct bare.

In his efforts to denigrate Battista, Van Pelt referred to her in ugly sexually offensive terms. His *dsl* comment stands out. This term was defined as *dick sucking lips.* That definition makes sense in the context of the chat. Lechelt had just commented that Battista, through a nervous mannerism, picked at her lips and that her lips became swollen. Van Pelt's response was *dsl.*

He argued that *dsl* is a computer technology term. The Arbitrator is aware of it, however, in context, it had nothing to do with technology and everything to do with oral sex.

Van Pelt opined that Battista's response to the chat was unreasonable. Such a view is self-serving and is devoid of credibility. As noted, the chat was offensive on numerous levels. It is not unreasonable that a third party reader of the chat's transcript would become offended.

Are there people who might not have been offended? There are. However, that does not make those who do become upset *unreasonable.*

Van Pelt engaged in a *blame the victim* exercise. Battista saw the chat and became upset by its crudeness. Objectively, the chat was crude. It would have been better for Van Pelt to indicate *mea culpa* without trying mitigate the misconduct by in some way blaming Battista for the situation in which he currently finds herself.

Another significant aspect of Van Pelt's defense is his allegedly being offended by Bleekinger's reference to some special needs students as being in the *low group.* As indicated above, Van Pelt's view of this term is based on nothing other than her opinion. While the District cited professional literature that refers to a *low group,* Lechelt and Van Pelt evidently decided that they were was the final authorities on this matter. Moreover, even if Van Pelt believed that he had a serious philosophical difference with Bleekinger, did he really think that making offensive and discriminatory comments about special needs students was the appropriate way to address the issue?

Van Pelt's purported reaction to *low group* suggests a possible sensitivity to this issue. Perhaps his sensitivity stems from the fact that his brother has/had special needs. That possibility might be understandable. What defies understanding is his justifying his sensitivity while deriding what may have been Battista's sensitivity to a chat that was laden with overtly and extremely offensive statements.

The undersigned adds that the last paragraph is laden with conditional language. That is so because of other Van Pelt statements that stretch the truth.

Van Pelt argued that the chat was private because of FERPA issues. This claim is also without merit. FERPA is a statute that protects the privacy of student records. Student records were in no way discussed at the Endgrade training.

The Arbitrator concludes that this assertion is further evidence of Van Pelt's failure to understand the seriousness of this matter and his propensity for contriving reasons for clearly inappropriate conduct.

It also suggests that his remorse is not sincere. The defenses he employed are transparently flawed and are offered in lieu of taking responsibility for his actions.

Van Pelt suggested that he is an effective professional. Would an effective professional describe Dr. O'Malley as she did? Would such an individual suggest that his hiring practices are based on sexual favors? This question is posed in the context of Dr. O'Malley having read the transcript of the chat multiple times.

Here again, Van Pelt expressed regret for his comments. It is difficult to conclude that he would have initially made very offensive comments that went to the heart of the Superintendent's professionalism and integrity. Given the nature of the comments and Van Pelt's other expressions of remorse, the Arbitrator questions the sincerity of Van Pelt's expression if remorse in connection with Dr. O'Malley.

As to Charge VI Count 1, Van Pelt observed that, under *Toys 'R' Us,* he is not guilty of sexual harassment. The Arbitrator has addressed this matter in connection with the charge related to the violation of the Board's sexual harassment policy. That analysis need not be repeated here. Needless to say, this argument is not persuasive.

Here again, the Board policy is clear and unambiguous. The Board's policy proscribed sexually offensive language (as set forth in Paragraph 1 of the policy).

Toys 'R' Us is a case that addresses physical and verbal advances. This kind of sexual harassment is covered by Paragraph 2 of the policy.

Van Pelt was accused of sexually offensive language. Therefore, the terms of Paragraph 1 are applicable. In short, *Toys 'R' Us* has limited relevancy here.

A final element of the defense concerned the interview conducted by Ms. DeLuca after becoming aware of the alleged misconduct. She outlined the interview by indicating the questions asked and the responses received (DX15).It is necessary to comment on this matter since, under *just cause,* the undertaking of a fair investigation is required.

DeLuca interviewed numerous people. She could not identify all of the possible interviewees but she made a reasonable effort to identify those who should be interviewed. The fact is that a large number of attendees at the training knew little or nothing about the matter at hand.

Van Pelt claimed that many of her comments are not reflected in DeLuca's report. However, at the end of the interview, DeLuca specifically provided Van Pelt with an opportunity to make any additional comments. Evidently, Van Pelt availed herself of the opportunity and DeLuca included them in the summary of the interview.

DeLuca indicated that she took notes during the interview and then transcribed her notes. She was criticized for not preserving her hand written notes. No authority was cited that indicated that handwritten notes must be preserved.

In the final analysis, the resolution of this matter comes down to a credibility determination. On the one hand, aside from the issue over DeLuca's notes, there were no serious provable credibility issues raised in connection with DeLuca.

The same cannot be said relative to Van Pelt. As detailed above, and as will continue to be shown, Van Pelt's responses to various issues have lacked credibility and consistency.

The summary of the interview is lengthy and detailed. De Luca credibly stated that the summary was complete and accurate. In this regard, the undersigned credits DeLuca's testimony.

In a broader context, the Arbitrator is persuaded that DeLuca conducted a fair and comprehensive investigation of the instant matter. This is fundamental to a finding of *Just Cause*.

One of the defenses raised by Van Pelt is that these charges were brought as a result of anti-union animus. There is no evidence to support such a claim.

Van Pelt challenged the District's reference to his union activities. The reference to his union role was not made in a vacuum. Charge VII concerns his conducting union business during teaching time and/or without the authorization of the principal or the Superintendent.

Interestingly, essentially the same charges were brought against Maria Weber and Maryellen Lechelt. According to the record, they have no official involvement with the union. Is Van Pelt suggesting that the District brought disciplinary charges against two other people in order to charge him? How does he explain many of the facts are undisputed and that he and the other teachers engaging in the chat have been found guilty of many of the charges?

It is significant to note that Van Pelt asserted that he is remorseful for some of his actions. What is he remorseful about if the charges were a ruse to further some unknown agenda to punish him for his union activities? This issue represents one more example of Van Pelt's lack of credibility and unwillingness to assume responsibility for his actions.

Van Pelt made much of his theory that his prior disciplines have no relevancy and his prior loss of a salary increment should not be considered. While the undersigned dismissed Charge VIII, that finding was based on the fact that teachers should not be disciplined twice for the same misconduct.

There was a further reference to the Fulcomer standards. One of them specifically calls for a recitation of prior disciplinary actions.

The same is true of whether the charged teacher was ever denied a salary increment. Thus, the Fulcomer standards, which Van Pelt argued should be given significant weight, require consideration of issues that Van Pelt says are irrelevant here.

It must be added that these factors were given consideration in the companion cases. Those teachers benefitted from the analysis. Is the Arbitrator being asked to consider the Fulcomer standards only when it is beneficial to a charged teacher?

This matter is continuing evidence of a lack of consistency in Van Pelt's arguments. It further weakens his credibility.

Van Pelt's treatment of Alysia Battista was especially noteworthy. Consistent with his declaration that the District was establishing a *police state* through its follow up on Battista's complaint and its implementation of its own policies, he characterized Battista's actions as being part of a *big brother* venture and that paying attention to her complaints encourages teachers to *spy* on each other.

He apparently believes that there was little wrong with the chat. Is he suggesting that Battista was fabricating the nature of the chat? Is he implying that viewing offensive and discriminatory conduct in a public and reporting it is *big brother?*

His *co-chatters* clearly understood that the chat was improper. They may not have appreciated Battista's reporting it, but they did not argue that Battista was somehow unethical or immoral for doing so.

Van Pelt was in the hearing room throughout the hearing and heard all of the testimony. Perhaps he paid as much attention to what the other charged teachers said as he did to Sara Bleekinger's training session.

Van Pelt claimed that the chat caused no harm to either Battista or Dr. O'Malley. The Arbitrator has found the chat to have been crude, offensive and discriminatory. Van Pelt argued that Battista was the only one who complained about it.

Thus, in his view, unless many people complain, the single complainant should not be afforded the protections offered by Board policies. The reality is that of the approximately 25 attendees at the training, other than the participants in the chat, evidently only two people saw it, Battista and the woman sitting next to her.

The woman sitting next to Battista chose to ignore it. Battista could not or would not do the same. Following Van Pelt's logic, the fact that one person ignored precluded another one from being offended to the point that it interfered with her ability to benefit from training that she sought.

The fact that Van Pelt could not even consider the possibility that Battista was emotionally injured by the vulgarity of the chat says more about Van Pelt than it does about Battista.

Van Pelt does not believe that Dr. O'Malley was injured. He went so far as to indicate that Dr. O'Malley's feeling may have been hurt.

Does Van Pelt seriously think that casting aspersions on Dr. O'Malley's sexual activities and Van Pelt's participation in a chat that suggests that Dr. O'Malley's hiring practices are improper and based on sexual considerations are not injurious to his professional standing? Are the results of the chat to be summarized as Dr. O'Malley having his feelings hurt?

Once again, Van Pelt's inconsistencies are mind-boggling. Van Pelt expressed great remorse and contrition when he testified and then argued that the injury suffered by the Superintendent was limited to *hurt feelings.*

Van Pelt, when he testified, said that Mr. Platvoet, a District employee involved in computer technology, assured him that the chat would be private. Platvoet was called as a rebuttal witness and denied making such a statement.

What was the result? Van Pelt proceeded to attack Platvoet's technical knowledge. Platvoet was not called to testify as a computer expert. The District called him to confirm or deny what he (Platvoet) allegedly told Van Pelt. When Van Pelt did not get the answers he wanted, he treated Platvoet in the same way he treated Battista.

Van Pelt produced a character witness, Christian Pederson. He testified in positive terms about Van Pelt being an upstanding individual. On cross-examination, he was asked if he was

aware of Van Pelt's prior disciplines. He stated that he had no knowledge of them. He then conceded that had he known about these matters, he would not have appeared as a character witness on behalf of Van Pelt.

Van Pelt's treatment of Pederson suggests that his credibility is so poor that he did not even give a person who was willing to help him a clear picture of the person who he is trying to help. If Van Pelt is willing to withhold crucial information from people trying to help him, how much more true of his interactions with people trying to hold him accountable.

A review of the defenses offered by Van Pelt reveals that they are contrived, irrelevant and, in very large measure, meritless. What is equally disturbing is the evidence he produced of his own lack of credibility, terribly poor judgment and disregard for the damage that he does to others.

THE *FULCOMER* STANDARDS

The Board is seeking the termination of Van Pelt's services as a teacher. He argued that the leading New Jersey case concerning the termination of tenured teachers as a consequence of unbecoming conduct is *In re Fulcomer,* 93 N.J. Super. 403 (App. Div. 1967). This was a case in which the Commissioner of Education concluded the Fulcomer engaged in unbecoming conduct and that dismissal was required.. The Appellate Division disagreed and held that the trier of fact must first determine if the respondent teacher engaged in unbecoming conduct and, if so, whether the misconduct warranted discharge or a lesser penalty.

The application of *Fulcomer* is not mandated. However, it is useful since, like *Just Cause,* it establishes an objective set of guidelines to be considered in case such as this one.

In this regard, the Court determined that the following factors should be considered:

1. The potential impact on the charged teacher's career.

It is evident that, should Van Pelt be terminated, the District would be required to report the dismissal to the State Board of Examiners for the possible revocation of his teaching certificates. It is reasonable to conclude that a termination in this case would dramatically increase the likelihood of Van Pelt's teaching career being ended in New Jersey and probably in other states.

2. The longevity of Van Pelt's career.

Tyler Van Pelt has been a teacher in New Jersey for about fifteen years. He is a senior teacher and, under certain circumstances, could be given the consideration not afforded teachers with many fewer years of effective service.

However, Fulcomer does not suggest that length of service precludes the discharge of senior teachers. It is simply one factor among others to be considered when determining if termination of services is appropriate.

3. Van Pelt's overall teaching record.

Van Pelt's teaching record is devoid of negative comments. However, the only evaluation he provided in which he was rated on a scale of *Developing* to *Distinguished* was for the 2013-14 school year. His overall rating was *Accomplished.* This rating was second from the top rating.

He provided evaluation for 2012-13, 2009-10, 2008-09 and 2007-08. Those evaluations were much less structured and the evaluations were not pursuant to the scale used in 2013-14. The comments about Van Pelt's performance were reasonably positive and he was recommended continued employment by the school district.

Noticeable by their absence were the evaluations for 2011-12 and 2010-11. No reason was given for their for not being produced. This gives pause for the Arbitrator to consider why two evaluations in a seven year sequence were missing.

4. Van Pelt's teaching ability

A review of Van Pelt's evaluations reveals that there is little evidence of limited teaching ability. With the possible exception of the two missing evaluations, te has been consistently rated positively both as a provisional and a tenured teacher.

5. Whether there was an absence of prior discipline affecting Van Pelt during his employment.

Van Pelt has been disciplined on a number of occasions. He was reprimanded in January 2006 for the improper use of the District's email system. It should be noted that it took several memos from the superintendent for Van Pelt to meet with her over the matter. It required a threat of being charged with insubordination before a meeting was scheduled (DX33). Thus, aside from Board policy, Van Pelt was well aware of the need to use District networks only for educational purposes

An element in the above matter suggests conduct with respect to a Superintendent the lessens one surprise about Van Pelt's treatment of Dr. O'Malley.

While it was not subject of discipline, in October 2006, Van Pelt was held to have intimidated and threatened an assistant principal by stating *if I had a dog that shit over and over on my carpet, I would get rid of it.* (DX34). This suggests that Van Pelt's resorting to crude and offensive language in a professional setting was not out of character with him when he did so during the chat during the training.

Van Pelt was given formal reprimands in June and September 2007 (DX36 &37). The June reprimand was for being in possession of beer during or after the graduation ceremonies as well as for acting belligerently in the school's office the following day.

The September reprimand was for his failure to provide a signed Technology Agreement and Appendix A of the *Alcohol and Drug Free Workplace* (DX37). Is this not similar to Van Pelt's disregarding Board policies in the instant matter?

In June 2012, Van Pelt was reprimanded for failing to provide sufficient certification to suggest that an absence was due a medical illness (DX38).

Last, Van Pelt's former wife was District employee. In June 2008, he was arrested and charged with domestic violence. His wife was issued a Temporary Restraining Order. As a result, Van Pelt entered into a Consent Order banning him from being in contact with his former wife. The domestic violence took place while he was off duty. However, in order for it to comply

with the Consent Order, the District was required to transfer Van Pelt to another school. Thus, Van Pelt's off duty violence impacted on the District's ability to manage its schools (BX46)

6 . Whether there was an absence of past increment withholdings.

In August 2007, Van Pelt had a salary increment withheld

7. The nature and the gravity of the offenses under all of the circumstances involved.

The misconduct described herein is very serious. He was part of a group of teachers who violated several important Board policies. He made numerous arguments in defense of his actions. As noted above, they were unpersuasive and were given little weight.

8. Evidence as to provocation, extenuation or aggravation.

Van Pelt claimed that he was provoked by certain comments made by Bleekinger. about special needs children. This claimed provocation is without merit.

9. Any harm or injurious effect which Van Pelt's conduct had on the maintenance of discipline and the proper administration of the school system.

This matter ultimately became public. It had an impact on the manner in which the community views the school. Further, the comments made about Dr. O'Malley had to be personally embarrassing and offensive and could have had the effect of weakening his image as the Superintendent of Schools.

Furthermore, Van Pelt's lack of remorse and assumption of responsibility indicate that he would repeat his misconduct were he to be reinstated. This would result in the need for the Superintendent to devote unreasonable resources to Van Pelt's supervision

JUST CAUSE

Van Pelt argued that the District lacked Just Cause to discharge him. Just cause is a term of art and stems from *Enterprise Wire,* 46 LA 359 (1966). There are seven tests associated with a determination of whether the Just Cause standards were satisfied. A discussion of those standards follows.

1. Was the employee forewarned of the consequences of his actions?

At its core, Van Pelt was alleged to have breached five Board policies. Van Pelt was on annual notice of the policies and, on September 11, 2014, acknowledged in writing that he was expected to review numerous policies, including the ones relevant here, and to abide by them (DX17).

These policies are part of the instant record. A review of the text of the policies reveals that most of them explicitly state that violation of the policies subject the person who breaches them to discipline. The other policies make it clear that violations of the policies will not be tolerated.

Thus, Van Pelt knew or should have known the contents of relevant Board policies. He also knew or should have known that breaching the policies could lead to discipline being imposed.

2. Were the rules/policies reasonably related to business efficiency and employee performance?

These policies relate to the manner in which employees are expected to respect the rights of

others to have a work environment that is free from offensive and discriminatory conduct of others in the workplace. One of the policies regulates the use of employer owned computers and networks.

All of these policies relate to business efficiency in that they are needed to maximize the productivity of employees. They also prevent the abuse of District equipment by limiting the use of the equipment to educational purposes. Education is the business of a school district and the employees can be expected to conduct themselves and to use District equipment to further the educational process. Violations of these policies deter the actualization of the District's educational program.

3. Was an effort made to determine if the employee was guilty as charged?

The instant matter was received and was promptly investigated. The charged employees were interviewed by Ms. DeLuca, the District's Affirmative Action Officer, in fewer than 30 days from the date of the training session at which the misconduct took place. Ms. DeLuca interviewed Van Pelt and his responses were taken down in handwritten form and then transcribed to a printed document.

Other attendees were interviewed by their principals. If it became apparent that they were not guilty of misconduct or knew nothing about the misconduct, they were not interviewed by Ms. DeLuca.

4. Was the investigation fair and objective?

Ms. DeLuca could not identify all of the attendees and some resigned and were no longer employees of the District The three people who participated in the chat were interviewed by Ms.

DeLuca. The interview questions were related to the chat and the interviewees were afforded the opportunity to explain their actions and to express their remorse.

The approach taken by Ms. DeLuca was consistent and focused on the specifics of the chat. Some of the terms used by the interviewees were slang and they were asked to define those terms. In sum, the investigation was fair and objective.

5. Was there substantial evidence of guilt?

The text of the chat was downloaded from the computers. Thus, it is unchallenged that the transcript of the chat is an accurate reflection of the comments made. Those comments formed the basis for the charges. Thus, the guilt of the employees was proved by substantial evidence.

6. Were the rules/policies applied fairly and without discrimination?

The policies were applied to all of the chat participants equally. They were the only employees who were guilty of the instant misconduct.

There were another person who violated the policies. He resigned shortly after the misconduct came to light. Thus, everyone who was purportedly guilty was charged and the same penalty was sought for all three of them.

7. Was the discipline related to the seriousness of the offense and the employee's past record?

Van Pelt violated several Board policies. He was in notice that he was required to abide by them.

His violation of the policies resulted on his use of sexually offensive offense language concerning a significant number of identified and unidentified people. His misconduct resulted in Alysia Battista being upset such that she could not benefit from training that was designed to improve her skills and those of other people.

He seriously denigrated Dr. O'Malley. The chat might have demeaned him professionally and damaged both his and the District's reputation for appropriate hiring and promotions.

He also violated the CBA by conducting union business at times when he was to be engaged in professional activities. His misconduct in this regard was not a singular occurrence. He exacerbated the issue by making a claim that he could not substantiate that a class that he was scheduled to teach was attending an assembly program.

Therefore, his misconduct was serious and rises to the level of unbecoming professional conduct. This must be placed in the context of his prior record.

As detailed in the section devoted to the Fulcomer standards, Van Pelt's record suggests that he has been the subject of prior warnings and reprimands. In addition, he also engaged in off duty conduct that impacted on the District in that it needed to transfer him to another school in order for a Consent Order to be honored. Moreover, as noted above, Van Pelt's conduct resulted in his having a salary increment withheld.

Given the seriousness of the misconduct and in the light of Van Pelt's disciplinary history, the District had Just Cause to discipline him and to seek his termination.

CONCLUSIONS

The first two paragraphs of Van Pelt's arguments reflect his reflections on his assessment of his own culpability. He thinks he did nothing wrong and believes that these charges are improper since other people are to blame for the chat and its aftermath. After all is said and done, Van Pelt does not hold himself accountable for his own misconduct.

A review of the *Fulcomer* and Just Cause standards persuades the Arbitrator that the Board was justified in serving disciplinary charges on Tyler Van Pelt. While he has expressed remorse, it is apparent that these expressions lack sincerity and his remorse s for having been discovered for having engaged in very serious misconduct.

He superficially accepted responsibility for his actions. However, when his statements are closely examined he finds fault with Alysia Battista, Margaret DeLuca, Sara Bleekinger and even Don Platvoet.

But for his own actions, he would not be in his current situation. It is entirely clear that he does not accept responsibility for his own actions. He initiated the chat and played a major role in setting its tone. He, on his own, violated valid and rational Board policies. Instead of admitting his guilt and accepting the consequences, he chose to try to hold others responsible.

What distinguishes Van Pelt from the two other chat members, is his record. He tried to characterize his prior misconduct as being remote in time. That is not true and, in addition, as noted above, there are similarities between these charges and the earlier misconduct.

It is evident that Van Pelt believes that he did little that was wrong. In that context and in the presence if having been disciplined in the past such that he should know that employers are

entitled to have employees who act in a professional, appropriate and mature manner. Thus, the Arbitrator concludes that were Tyler Van Pelt to be reinstated, it is very likely that he would repeat the kind of misconduct that preceded this proceeding.

Counsel for the parties researched the relevant issues and presented numerous cases for the consideration of the Arbitrator. The cases were reviewed and considered. However, given the number of cases cited by both parties and their non-precedential nature, the cases are not cited in the Opinion.

Finally, at the outset, the District moved to have Van Pelt's Answer to the Sworn Charges and his application for an extension to file said Answer deemed untimely. Its application to the Arbitrator sought to have Van Pelt summarily dismissed. Given the above findings, that application need not be addressed at this time.

Thus, the Arbitrator finds that appropriate penalty to be imposed on Tyler Van Pelt is termination of his services as a teacher in the Edison Township school district. Therefore, based on the above, the undersigned makes the following

AWARD

1. Tyler Van Pelt is guilty of Charge I -Counts 1, 2, 3, 4, 5, 6, Charge III, Charge V,Charge VI-Counts 1, 2, 4, 5, 6, 7 and Charge VI.I

2. The following charges are dismissed: Charge II, Charge IV, Charge VI- Count 3 and Charge VIII.

3. The penalty imposed on Tyler Van Pelt is termination of his services as a teacher in the Edison Township school district.

Dated: June 30, 2015

Hewlett Harbor, NY

ARTHUR A. RIEGEL, ESQ

ARBITRATOR

AFFIRMATION

STATE OF NEW YORK)

COUNTY OF NASSAU)

I, Arthur A. Riegel, am the individual described in and who executed the foregoing instrument, which is my Opinion and Award.

ARTHUR A. RIEGEL

AGENCY DKT. NO. 307-10/14

BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
J.G., ON BEHALF OF MINOR CHILD, B.G.	:	ORDER
RESPONDENT.	:	

On April 30, 2015, a final agency decision was rendered in this matter, wherein the Commissioner granted summary decision to petitioner Board and assessed respondent $15,669 in tuition to compensate the Board for his child's period of ineligible attendance in the public schools of the district during the 2013-2014 school year, pursuant to *N.J.S.A.* 18A:38-1. The Board subsequently notified the Commissioner that respondent has failed to comply with his decision, and requested that the Commissioner seek entry of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. Respondent offered no reasons why the judgment against him should not be so docketed, although given an opportunity by this agency to do so.

Accordingly – pursuant to *N.J.S.A.* 2A:58-10 – Jack Gulli is now subject to entry of a judgment by the court in the amount of $15,669, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/30/15

Date of Mailing: 7/01/15

225-15

LEARNING COMMUNITY CHARTER SCHOOL, SOARING HEIGHTS CHARTER SCHOOL, ETHICAL COMMUNITY CHARTER SCHOOL, AND GOLDEN DOOR CHARTER SCHOOL,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENTS.	:	

SYNOPSIS

The petitioners – four Jersey City charter schools – challenged the manner in which charter schools are funded pursuant to the Charter School Program Act of 1995 (CSPA), *N.J.S.A.* 18A:36A-1 to -18, and the School Funding Reform Act of 2008 (SFRA), *N.J.S.A.* 18A:7F-43 to -63. Petitioners contend that they are statutorily and constitutionally entitled to additional funding, specifically a portion of the State "Adjustment Aid" allocated to the Jersey City Board of Education. They further assert that New Jersey's Thorough and Efficient education requirement mandates that charter schools receive at least the "base per pupil amount" of funding, and this requires a portion of Jersey City's Adjustment Aid to raise the city's charter school funding to the mandated minimum level. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there is no genuine issue of material fact herein, and the matter is ripe for summary decision; the funding for charter schools is specifically prescribed by statute; pursuant to the statutory framework, petitioners are not entitled to receive a portion of the Adjustment Aid received by Jersey City; the Appellate Division has recognized that charter schools are not required to be funded at the same level as traditional public schools; the funding scheme for charter schools represents the Legislature's judgment in maximizing the allocation of scarce State resources; the thorough and efficient mandate in the New Jersey Constitution requires that all students have an equal educational opportunity; a funding disparity between petitioners' schools and traditional public schools in Jersey City does not demonstrate a lack of equal educational opportunity for petitioners' students as their attendance at a charter school is voluntary; they have the option of attending a traditional public school in Jersey City that receives Adjustment Aid, and are therefore not being denied Adjustment Aid. The ALJ concluded that petitioners failed to establish a claim under the thorough and efficient clause of the State Constitution, and have not demonstrated that current funding received deprives petitioners' students of a thorough and efficient education. Accordingly, the ALJ granted summary decision to the respondents, denied petitioners' motion for summary decision, and dismissed the petition.

Upon full consideration, the Commissioner adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

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

Issued 7/07/15

OAL DKT. NO. EDU 1069-12
AGENCY DKT. NO. 343-11/11

LEARNING COMMUNITY CHARTER SCHOOL, SOARING HEIGHTS CHARTER SCHOOL, ETHICAL COMMUNITY CHARTER SCHOOL, AND GOLDEN DOOR CHARTER SCHOOL,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENTS.	:	

This controversy involves a challenge to the manner in which charter schools are funded pursuant to the Charter School Program Act of 1995 (CSPA), *N.J.S.A.* 18A:36A-1 to -18, and the School Funding Reform Act of 2008 (SFRA), *N.J.S.A.* 18A:7F-43 to -63. The record and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have petitioner's exceptions – filed in accordance with *N.J.A.C.* 1:1-18.4 – and the New Jersey State Department of Education's ("Department") reply to the exceptions. The untimely reply filed by the Board of Education of the City of Jersey City ("Jersey City BOE") was not considered by the Commissioner in rendering this determination.[1]

The petitioners – four charter schools located in Jersey City – contend that they are statutorily and constitutionally entitled to additional funding. (Amended Petition[2] at 2)

[1] Jersey City BOE never sought an extension of time to file its reply, which was submitted over a month late.

[2] On January 23, 2012, the Acting Commissioner determined not to consider this matter as one for declaratory ruling pursuant to his discretionary authority under *N.J.A.C.* 6A:3-2.1(a), but instead found that it should proceed as a Petition of Appeal.

Specifically, petitioners assert that Jersey City BOE should be required to share its State "Adjustment Aid"[3] with petitioners pursuant to the CSPA and the SFRA. In further support of their claim, petitioners argue that the Thorough and Efficient (T&E) clause of the New Jersey Constitution requires charter schools to be funded at mandated minimum levels and that – without a portion of Jersey City BOE's Adjustment Aid – petitioners' funding falls below that minimum. Therefore, petitioners maintain they should receive at least the same "base per pupil amount"[4] given to the district's public schools. Respondents contend that petitioners are not entitled to any of Jersey City BOE's Adjustment Aid under the plain language of the CSPA or the SFRA, and that petitioners fail to establish a valid claim for additional funding under the T&E clause of the New Jersey Constitution.

Following transmittal to the OAL, Jersey City BOE and the Department filed motions for summary decision, and petitioners cross-moved for summary decision. Ultimately, the Administrative Law Judge issued a comprehensive Initial Decision concluding that: 1) the matter was ripe for summary decision; 2) pursuant to the relevant statutory framework, petitioners are not entitled to receive any portion of Jersey City BOE's Adjustment Aid; and 3) petitioners failed to establish a claim under the T&E clause of the New Jersey Constitution. In their exceptions, petitioners express their disagreement with the outcome and essentially recast and reiterate the arguments presented below, which were comprehensively addressed by the ALJ in her Initial Decision. Consequently, the Commissioner finds petitioners' exceptions do not warrant additional discussion.[5]

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[3] "Adjustment Aid" is defined in the SFRA, at *N.J.S.A.* 18A:7F-58, and discussed in detail by the ALJ in her Initial Decision.
[4] "Base per pupil amount" is defined in the SFRA, at *N.J.S.A.* 18A:7F-45, and discussed in detail by the ALJ in her Initial Decision.

[5] The Department replied to petitioners' exceptions and expressed its support for the ALJ's findings of fact and conclusions of law.

Upon full consideration, the Commissioner adopts the Initial Decision as the final decision in this matter for the reasons set forth therein. Accordingly, respondents' motions for summary decision are granted, petitioners' cross-motion for summary decision is denied, and the amended petition is hereby dismissed.

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: 7/06/15

Date of Mailing: 7/07/15

[6] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.*36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 01069-12
AGENCY DKT. NO. 343-11/11

LEARNING COMMUNITY CHARTER SCHOOL, SOARING HEIGHTS CHARTER SCHOOL, ETHICAL COMMUNITY CHARTER SCHOOL AND GOLDEN DOOR CHARTER SCHOOL,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, AND STATE OF NEW JERSEY DEPARTMENT OF EDUCATION,

Respondents.

Mark A. Berman, Esq., and **Michelle A. Smith**, Esq., for petitioners (Hartmann, Doherty, Rosa, Berman & Bulbulia, attorneys)

Richard E. Shapiro, Esq., for respondent Jersey City Board of Education

Geoffrey N. Stark, Deputy Attorney General, for respondent Department of Education (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: March 12, 2013 Decided: April 23, 2015

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners filed an Amended Petition for Declaratory Ruling that (1) respondent Jersey City Board of Education (Jersey City) is required to pass along to Jersey City charter schools 90 percent per pupil enrolled in the charter school of the Adjustment Aid it receives from the State; (2) petitioners must be funded at constitutionally mandated minimum levels under the thorough-and-efficient clause of the New Jersey Constitution, N.J. Const. art. VIII, § 4, ¶ 1; (3) the current funding formula, which petitioners allege arises from a misinterpretation of a statutory ambiguity concerning Adjustment Aid, has resulted in petitioners receiving a level of funding below the constitutional minimum; and (4) petitioners are entitled to receive, at a minimum, the "base per pupil amount" of funding determined by the Commissioner of Education and the Legislature as necessary to satisfy the State's obligation to provide a thorough and efficient education to all children in its public schools. The Department of Education (the Department) and Jersey City filed answers to the Amended Petition, and the matter was transmitted to the Office of Administrative Law for determination as a contested case. Subsequently, the Department and Jersey City filed motions for summary decision, petitioners cross-moved for summary decision, and oral argument on the parties' respective motions was entertained.

FACTUAL DISCUSSION

Petitioners are four charter schools located within the Jersey City School District. The Learning Community Charter School (Learning Community) opened in September 1997 with ninety-eight students in grades K–2, and currently serves approximately 520 students in grades K–8. (Amended Petition at ¶36.) The Soaring Heights Charter School (Soaring Heights) is one of the first thirteen charter schools formed in New Jersey and serves 250 students in grades K–8. (Id. at ¶37.) The Ethical Community

Charter School (Ethical Community) was founded in 2009 with kindergarten and first-grade students, the school has added a grade each year, and it has approximately 200 students. (Id. at ¶38.) The Golden Door Charter School (Golden Door) was founded in 1998 as one of Jersey City's first charter schools and it currently serves approximately 500 students in grades K–8. (Id. at ¶39.)

For the 2008–2009, 2009–2010, 2010–2011, and 2011–2012 school years, Jersey City received the following State aid:[1]

School Year	Total State Aid	Equalization Aid	Adjustment Aid
2008–2009	$474,786,062	$277,591,645	$110,391,114
2009–2010[2]	$477,325,497	$277,385,300	$106,564,559
2010–2011	$455,737,104	$260,694,099	$100,076,071
2011–2012	$484,373,394	$270,464,463	$115,906,457

In addition to State aid, Jersey City's budget was also supported by local tax levy as follows:[3]

School Year	Local Tax Levy	Local Tax Levy Inflated by CPI
2008–2009	$82,809,873	$85,203,078
2009–2010	$86,122,268	$88,998,752
2010–2011	$93,012,049	$93,012,049
2011–2012	$102,313,254	$103,571,707

For the 2008–2009, 2009–2010, 2010–2011, and 2011–2012 school years, petitioners received the following funds:

[1] See Exhibits A, B, C, and D attached to the Department's brief.
[2] Although the Department's brief states that the total State aid and Equalization Aid were $474,325,497 and $277,054,829 respectively, Exhibit B reflects total State aid of $477,325,497 and Exhibits B and F reflect Equalization Aid of $277,385,300.
[3] See Exhibit E at DOE39, Exhibit F at DOE32, Exhibit G at DOE120, and Exhibit H at DOE113 attached to the Department's brief.

Learning Community[4]

School Year	Funds From Jersey City	State Funds
2008–2009	$2,940,567	$522,134
2009–2010	$4,321,187	-
2010–2011	$4,436,160[5]	-
2011–2012	$4,723,889	$380,489

Soaring Heights[6]

School Year	Funds From Jersey City	State Funds
2008–2009	$2,119,417	$139,171
2009–2010	$2,256,524	-
2010–2011	$2,336,110	-
2011–2012	$2,497,172	-

Ethical Community[7]

School Year	Total Funds from Districts	Funds From Jersey City	State Funds
2009–2010	$1,057,221	$994,290	-
2010–2011	$1,287,009	$1,257,914	-
2011–2012	$1,898,416	$1,874,443	-

[4] See Exhibit I attached to the Department's brief.
[5] Although the Department's brief states that the funds from Jersey City were $2,940,567, Exhibit I reflects that they were $4,436,160.
[6] See Exhibit J attached to the Department's brief.
[7] See Exhibit K attached to the Department's brief. Ethical Community received funds from several districts, but the majority of its district-provided funds were from Jersey City.

Golden Door[8]

School Year	Funds From Jersey City	State Funds
2008–2009	$5,110,922	$227,411
2009–2010	$5,327,143	$11,190
2010–2011	$5,022,270	$316,063
2011–2012	$5,332,430	$5,903

LEGAL DISCUSSION AND CONCLUSIONS

The Summary-Decision Standard

Pursuant to N.J.A.C. 1:1-12.5(b), summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This rule is substantially similar to the summary-judgment rule embodied in the New Jersey Court Rules. See Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In Brill v. Guardian Life Insurance Co., 142 N.J. 520, 540 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in deciding the motion:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2.
>
> [Citations omitted.]

[8] See Exhibit L attached to the Department's brief.

In evaluating the merits of the motion, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Judson, supra, 17 N.J. at 75. However, "[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." N.J.A.C. 1:1-12.5(b).

The pivotal issue presented in this matter is a legal issue involving an interpretation of the relevant statutes governing funding for charter schools and whether petitioners are entitled to receive a portion of the Adjustment Aid provided to Jersey City. I **CONCLUDE** that there is no genuine issue as to any material fact and the matter is ripe for summary decision.

The Charter School Program Act

In 1995, the Legislature enacted the Charter School Program Act of 1995 (CSPA), N.J.S.A. 18A:36A-1 to -18. In connection therewith, the Legislature found that "the establishment of charter schools as part of this State's program of public education can assist in promoting comprehensive educational reform by providing a mechanism for the implementation of a variety of educational approaches which may not be available in the traditional public school classroom." N.J.S.A. 18A:36A-2. The Legislature further determined that "the establishment of a charter school program is in the best interests of the students of this State and it is therefore the public policy of the State to encourage and facilitate the development of charter schools." Ibid.

A charter school is "a public school operated under a charter granted by the [C]ommissioner" of Education (the Commissioner). N.J.S.A. 18A:36A-3(a). It "is operated independently of a local board of education and is managed by a board of trustees," who are "deemed to be public agents authorized by the State Board of Education to supervise and control the charter school." Ibid. An initial charter granted by the Commissioner is for a term of four years. N.J.S.A. 18A:36A-17. A charter may later be renewed for a five-year period. Ibid.

Charter schools are open to all students on a space-available basis. N.J.S.A. 18A:36A-7. However, enrollment preference must be given to students who reside in the school district in which the charter school is located, and the school may not charge tuition to district residents. N.J.S.A. 18A:36A-8. Student enrollment in a charter school is completely voluntary, and a student may withdraw from a charter school at any time and enroll in a traditional public school. See N.J.S.A. 18A:36A-9.

Pursuant to N.J.S.A. 18A:36A-12, charter schools are funded on a "per pupil" basis. Specifically, the statute instructs in pertinent part:

> The school district of residence shall pay directly to the charter school for each student enrolled in the charter school who resides in the district an amount equal to 90% of the sum of the budget year equalization aid per pupil and the prebudget year general fund tax levy per pupil inflated by the CPI rate most recent to the calculation. In addition, the school district of residence shall pay directly to the charter school the security categorical aid attributable to the student and a percentage of the district's special education categorical aid equal to the percentage of the district's special education students enrolled in the charter school and, if applicable, 100% of preschool education aid. The district of residence shall also pay directly to the charter school any federal funds attributable to the student.
>
> [N.J.S.A. 18A:36A-12(b).][9]

In addition to the above funding, charter schools are permitted to "[s]olicit and accept gifts or grants for school purposes." N.J.S.A. 18A:36A-6(g). Such gifts may include real property for use as a school facility. N.J.S.A. 18A:36A-6(c). Charter schools may also receive federal funds. See N.J.S.A. 18A:36A-10.

In order to receive its charter, a charter school must undergo an extensive application process. N.J.S.A. 18A:36A-5. The application must include a financial plan

[9] The statute further provides that, "in the case of a student who was not included in the district's projected resident enrollment for the school year, the State shall pay 100% of the amount required pursuant to [N.J.S.A. 18A:36A-12(b)] for the first year of the student's enrollment in the charter school." N.J.S.A. 18A:36A-12(d).

for the charter school. N.J.S.A. 18A:36A-5(l). "That plan . . . must be formulated within the funding parameters [in the CSPA] providing for ninety percent per pupil operational funding and no facilities funding." J.D. ex rel. Scipio-Derrick v. Davy, 415 N.J. Super. 375, 380 (App. Div. 2010). The financial plan must also "satisfy the Commissioner that the charter school can adequately serve the educational needs of the prospective students." Id. at 381. Students who attend a charter school are "required to meet the same testing and academic performance standards as established by law and regulation for public school students," and must "also meet any additional assessment indicators which are included within the charter approved by the [C]ommissioner." N.J.S.A. 18A:36A-5(d). During the operation of a charter school, the Commissioner must "annually assess whether each charter school is meeting the goals of its charter, and shall conduct a comprehensive review prior to granting a renewal of the charter." N.J.S.A. 18A:36A-16(a). The Commissioner may further revoke a school's charter if the school has not fulfilled any condition of its charter or if the school has violated any provision of its charter. N.J.S.A. 18A:36A-17. The Commissioner may also place a charter school on probationary status to allow implementation of a remedial plan and, if that plan is unsuccessful, the charter may be summarily revoked. Ibid.

The School Funding Reform Act

In 2008, the Legislature passed the School Funding Reform Act of 2008 (SFRA), N.J.S.A. 18A:7F-43 to -63. The SFRA "is the product of the State's most recent, lengthy and painstaking effort to craft a redesigned school funding formula that satisfies the constitutional standard." Abbott v. Burke, 199 N.J. 140, 147 (2009) (Abbott XX). It was designed "to resolve the question of the level of funding required to provide a thorough and efficient system of education for all New Jersey school children," and to develop and implement "an equitable and adequate school funding formula [that] will not only ensure that the State's students have access to a constitutional education as defined by the core curriculum content standards [CCCS], but also may help to reduce property taxes and assist communities in planning to meet their educational expenses." N.J.S.A. 18A:7F-44(q). That funding formula "accounts for the individual characteristics of school districts and the realities of their surroundings, including the need for additional

resources to address the increased disadvantages created by high concentrations of children at-risk." N.J.S.A. 18A:7F-44(h).

The New Jersey Supreme Court upheld the constitutionality of the SFRA in Abbott XX and concluded that "[t]he State has constructed a fair and equitable means designed to fund the costs of a thorough and efficient education, measured against delivery of the CCCS." Abbott XX, supra, 199 N.J. at 172. The Court explained that the SFRA is

> a weighted school funding formula. SFRA identifies a base cost associated with the education of an elementary pupil without any particular special needs. Once identified, the per-pupil amount is increased to reflect characteristics that are widely accepted as increasing the cost of education. Those characteristics are: 1) grade level, and whether the pupil is 2) an at-risk pupil (defined as one eligible for a free- or reduced-price lunch), 3) a Limited English Proficiency (LEP) pupil, or 4) a special education student of mild, moderate, or severe classification.
>
> [Id. at 152.]

The funding formula includes an Adequacy Budget that is "wealth equalized, which means that it is based on the community's wealth and ability to provide funding through local resources." Id. at 153. The Adequacy Budget includes four categories of aid: "'1) a base aid amount for elementary, middle, and high school students, 2) additional weights for at-risk and LEP students, and vocational districts, 3) two-thirds of the census-based costs for special education, and 4) all census-based costs for speech-only special education.'" Ibid. (citation omitted); see N.J.S.A. 18A:7F-51.

"The per-pupil amount is intended to represent the cost of educating an elementary school student, that is, of providing that student with the CCCS and extracurricular and co-curricular activities necessary for a thorough and efficient education." Id. at 153; see N.J.S.A. 18A:7F-45 (defining "base per pupil amount" as "the cost per elementary pupil of delivering the core curriculum content standards and extracurricular and cocurricular activities necessary for a thorough and efficient

education"). Pursuant to N.J.S.A. 18A:7F-49, the "base per pupil amount" for the 2008–2009 school year was $9,649, and the base per pupil amount is subject to adjustment in later years. According to the Education Funding Report submitted by Acting Commissioner Christopher D. Cerf dated February 23, 2012, the base per pupil amount (elementary) was $9,971 for fiscal years 2010 and 2011; $10,256 for fiscal year 2012; and $10,555 (recommended) for fiscal year 2013. (See Exhibit E attached to Petitioner's Brief at 68.)

In accordance with the statutory framework, the base per pupil amount is adjusted upward using specific weighing factors. Grade-level weights are applied to account for the additional resources needed to educate higher grade levels. Abbott XX, supra, 199 N.J. at 154; see N.J.S.A. 18A:7F-50. The formula also includes additional weights for "at-risk" and LEP pupils. Abbott XX, supra, 199 N.J. at 154; see N.J.S.A. 18A:7F-51.[10] There is also an adjustment for geographic cost. Abbott XX, supra, 199 N.J. at 155; see N.J.S.A. 18A:7F-51. The total calculation is the school district's Adequacy Budget. Abbott XX, supra, 199 N.J. at 155.

The Adequacy Budget is not the amount of State aid provided to a school district. Rather, the school district's local fair share (LFS) must first be determined. See N.J.S.A. 18A:7F-52 (setting forth the formula to calculate a district's local share). The difference between a school district's Adequacy Budget and its LFS is the amount of State aid due the school district in the form of Equalization Aid. Abbott XX, supra, 199 N.J. at 155. As the Court explained in Abbott XX, supra, 199 N.J. at 155:

> Equalization Aid is State-provided aid to support the Adequacy Budget by funding the difference between a district's Local Fair Share (LFS) and its Adequacy Budget. A district's LFS is the amount it is required to contribute in support of the Adequacy Budget. That amount is determined by adding a district's equalized property wealth and its equalized income wealth. Under SFRA, a district must provide the lesser of either its LFS, as calculated using

[10] The SFRA defines "at-risk pupils" as "those resident pupils from households with a household income at or below the most recent federal poverty guidelines available on October 15 of the prebudget year multiplied by 1.85." N.J.S.A. 18A:7F-45.

> SFRA's formula, or the local share it raised in the previous year.

The SFRA also provides for Educational Adequacy Aid, which is aid "provided to certain Abbott districts currently spending below their Adequacy Budgets," and "is intended to help bring the district up to adequacy if the district is failing to meet education adequacy standards or is municipally overburdened." Abbott XX, supra, 199 N.J. at 157; see N.J.S.A. 18A:7F-58(b). The SFRA further includes provisions for Categorical Aid, which is provided to districts for certain specific education expenses, such as a portion of the costs for special education, security aid, preschool aid, extraordinary aid for special education and transportation aid. See Abbott XX, supra, 199 N.J. at 155–57; N.J.S.A. 18A:7F-54 to -57.

As part of the SFRA, the Legislature also created Adjustment Aid. As explained in Abbott XX, supra, 199 N.J. at 157, 165:

> Adjustment Aid is provided as transition assistance to SFRA's funding methodology. It is designed to enable districts that are spending above their Adequacy Budget to maintain their existing level of spending without significant tax levy increases. Adjustment Aid is provided if the sum of a district's Equalization Aid, Categorical Aid, Extraordinary Aid, and Transportation Aid is less than the district's 2007–2008 spending, plus two percent. If a district's current-year aid is less than that amount, the district receives Adjustment Aid for the difference.
>
> . . . .
>
> Adjustment Aid ensures that no district in 2008–2009 will receive less aid than it received in the 2007–2008 year plus two percent. The amount of funding then continues in subsequent years so that no district will receive less than its 2008–2009 aid.

N.J.S.A. 18A:7F-58(a), which addresses Adjustment Aid, states:

> (1) For the 2008–2009 school year, each school district and county vocational school district shall receive adjustment aid in such amount as to ensure that the district

receives the greater of the amount of State aid calculated for the district pursuant to the provisions of this act or the State aid received by the district for the 2007–2008 school year multiplied by 102%. The State aid received by the district for the 2007–2008 school year shall include the following aid categories: Core Curriculum Standards Aid, Supplemental Core Curriculum Standards Aid, Education Opportunity Aid, Above Average Enrollment Growth Aid, High Expectations for Learning Proficiency Aid, Instructional Supplement Aid, Demonstrably Effective Program Aid, Stabilization Aid, Supplemental Stabilization Aid, Adult and Postsecondary Education Grants, Bilingual Education Aid, Special Education Aid, County Vocational Program Aid, Transportation Aid, School Choice Aid, Consolidated Aid, Additional Formula Aid, Full-day Kindergarten Supplemental Aid, Targeted-At-Risk Aid, Abbott-Bordered District Aid, Nonpreschool ECPA, Extraordinary Special Education Aid paid in 2006-2007, and Aid for Enrollment Adjustments, taking into consideration the June 2008 payment made in July 2008.

(2) For the 2009–2010 and 2010–2011 school years a school district or county vocational school district shall receive adjustment aid in such amount as to ensure that the district receives the greater of the amount of State aid calculated for the district pursuant to the provisions of this act or the State aid, other than educational adequacy aid, received by the district for the 2008–2009 school year.

(3) For the 2011–2012 school year and for each school year thereafter, a school district or county vocational school district that does not have a decline in its weighted enrollment, adjusted for bilingual education pupils and at-risk pupils, between the 2008–2009 school year and the budget year that is greater than 5% shall receive adjustment aid in such amount as to ensure that the district receives the greater of the amount of State aid calculated pursuant to the provisions of this act or the State aid, other than educational adequacy aid, received by the district for the 2008–2009 school year.

(4) For the 2011–2012 school year and for each school year thereafter, a school district or county vocational school district that has a decline in its weighted enrollment, adjusted for bilingual education pupils and at-risk pupils, between the 2008–2009 school year and the budget year that is greater than 5% shall have its adjustment aid reduced in an amount equal to the district's 2008–2009 per pupil adjustment aid

> amount multiplied by the decline in its resident enrollment that is greater than 5%.
>
> [Emphasis added.]

Against this backdrop, petitioners aver that the Commissioner is required to ensure that each Jersey City charter school receives 90 percent of the Adjustment Aid paid by the State to Jersey City, proportional to each child enrolled in that charter school, under N.J.S.A. 18A:36A-1 et seq. and N.J.S.A. 18A:7F-43 to -63. (Amended Petition at ¶47.) Petitioners argue that the SFRA "establishes an objective measurement of the 'base per pupil amount' necessary to meet 'core curriculum content standards' to provide a thorough and efficient public education," "the current funding of Jersey City charter schools fails to meet this constitutionally mandated minimum," and "[t]his shortfall is the result of a statutory ambiguity concerning the Adjustment Aid paid by the State to Jersey City." Petitioners maintain that "[b]ecause of Jersey City's extensive use of long-term corporate tax-abatements, Adjustment Aid is a critical component of school funding in Jersey City" and has "become essential and indispensable State-provided aid in support of the per pupil Adequacy Budget." Petitioners contend that Jersey City's tax abatements "drastically decrease the general fund tax levy, thereby severely reducing local revenue for Jersey City schools"; "[a]s a result, the Local Fair Share . . . bears no relation to the amount of tax revenue Jersey City actually collects"; and "[c]onsequently, Jersey City's Equalization Aid calculation, which is supposed to support the per pupil Adequacy Budget, is suppressed." Petitioners aver that, "[t]o ensure that Jersey City can meet its Adequacy Budget, Jersey City schools depend upon the receipt of substantial financial assistance from the State in the form of Adjustment Aid," and the "Adjustment Aid statute is the legislative means by which schools in districts with a smaller tax base and insufficient Equalization Aid can maintain funding at constitutionally adequate levels." Petitioners urge that the "Legislature simply did not anticipate the critical shortfall experienced by Jersey City charter schools as a result of Jersey City tax abatements, which artificially reduce both the tax levy and Equalization Aid as sources of funding," and the "Legislature did not intend that [Jersey City] retain Adjustment Aid allocated based upon charter school students it does not educate." Petitioners argue that the Adjustment Aid statute and the CSPA should be interpreted to require that petitioners are entitled to receive their fair

share of State Adjustment Aid "to comport with the objective financial standard set by the Commissioner and the Legislature as the minimum constitutional level of funding for public school students." In short, the Department and Jersey City maintain that petitioners are not entitled to Adjustment Aid pursuant to the governing statutes.

The funding for charter schools is specifically prescribed by statute. The issues presented necessitate an interpretation of two statutes: N.J.S.A. 18A:36A-12(b), the provision in the CSPA governing the aid to be paid to charter schools, and N.J.S.A. 18A:7F-58(a), the provision in the SFRA authorizing Adjustment Aid.

The principles governing statutory construction are well-settled. The "overriding objective in determining the meaning of a statute is to 'effectuate the legislative intent in light of the language used and the objects sought to be achieved.'" McCann v. Clerk of Jersey City, 167 N.J. 311, 320 (2001) (citation omitted). The general rule of statutory construction requires an examination of the language of a statute to determine whether the language is clear or ambiguous and susceptible to more than one interpretation. "If the statute is clear and unambiguous on its face and admits of only one interpretation, [it is necessary to] delve no deeper than the act's literal terms to define the Legislature's intent." State v. Butler, 89 N.J. 220, 226 (1982). As the Supreme Court explained in Murray v. Plainfield Rescue Squad, 210 N.J. 581, 592 (2012) (citations omitted)

> [t]he objective of all statutory interpretation is to discern and effectuate the intent of the Legislature. To achieve that objective, we begin by looking at the statute's plain language, ascribing to the words used "their ordinary meaning and significance." We do not view the statutory words in isolation but "in context with related provisions so as to give sense to the legislation as a whole." If the Legislature's intent is clear on the face of the statute, then we must apply the law as written. It is not our function to rewrite a plainly written statute or to presume that the Legislature meant something other than what it conveyed in its clearly expressed language.

The CSPA establishes a discrete funding mechanism for charter schools, including a specific list of the various types of aid that a school district of residence must directly pay to the charter school for each resident student enrolled in the charter

school. Pursuant to the expressed and unambiguous language of N.J.S.A. 18A:36A-12(b), the payments that the school district must make to the charter school for each student enrolled in the charter school who resides in the district are limited to: (1) "an amount equal to 90% of the sum of the budget year equalization aid per pupil and the prebudget year general fund tax levy per pupil inflated by the [most recent] CPI rate"; (2) "the security categorical aid attributable to the student"; (3) "a percentage of the district's special education categorical aid equal to the percentage of the district's special education students enrolled in the charter school"; (4) "100% of preschool education aid" if applicable; and (5) "any federal funds attributable to the student." Petitioners do not assert that Jersey City has failed to pay them the funding detailed in the above five categories but, rather, claim that they are also entitled to receive a share of Jersey City's Adjustment Aid.

Succinctly stated, the plain and unambiguous language of the statute does not provide that charter schools are entitled to 90 percent, or some other percentage, of all aid received by the school district. Rather, the Legislature expressly enumerated and limited the specific types of aid that must be paid to charter schools. Adjustment Aid is not one of the designated funding sources for charter schools, and the statute does not impose any requirement that a portion of the Adjustment Aid received by a school district must be shared with charter schools.

Similarly, N.J.S.A. 18A:7F-58(a) is clear and unambiguous as to the intended recipients of Adjustment Aid. The statute specifically directs that Adjustment Aid is to be provided to a "school district" and a "county vocational school district." Charter schools are not listed among the recipients of such aid. They are also not included in the SFRA definitions of a "school district" or "county vocational school district." See N.J.S.A. 18A:7F-45.[11] The plain language of the statute limits the intended recipients of Adjustment Aid and does not suggest that any portion of the Adjustment Aid received by a school district should be passed on to charter schools in the school district. And, no

[11] A "school district" is defined as any local or regional school district established pursuant to N.J.S.A. 18A:8-1 et seq. or N.J.S.A. 18A:13-1 et seq., and a "county vocational school district" is defined as any entity established pursuant to N.J.S.A. 18A:54-11 et seq. N.J.S.A. 18A:7F-45.

provision in the SFRA expands the nature of the funding provided for in the CSPA that charter schools are entitled to receive.

I concur with respondents' position that the CSPA and the SFRA are both clear and unambiguous regarding the funding due to charter schools and the recipients of the SFRA-created Adjustment Aid, and that the Adjustment Aid petitioners seek is not authorized by the SFRA, the CSPA or any other statute. The absence of any reference to Adjustment Aid in N.J.S.A. 18A:36A-12(b), and the absence of any reference to charter schools in N.J.S.A. 18A:7F-58(a), evidences the Legislature's intent that Adjustment Aid funding was intended solely for the school district. "The Legislature is presumed familiar with prior legislation" and, had the Legislature intended to include Adjustment Aid as a funding source for charter schools, "it would have been an easy matter to have expressed such an intent" in either the CSPA or the SFRA. N.J. Coal. of Health Care Prof'ls v. N.J. Dep't of Banking & Ins., 323 N.J. Super. 207, 256 (App. Div.), certif. denied, 162 N.J. 485 (1999). Indeed, although Adjustment Aid was created as part of the SFRA, and certain changes were also made to N.J.S.A. 18A:36A-12 during the enactment of the SFRA, the Legislature made no change to N.J.S.A. 18A:36A-12(b) to add Adjustment Aid as part of the funding scheme for charter schools. Accordingly, I **CONCLUDE** that, pursuant to the statutory framework, petitioners are not entitled to receive a portion of the Adjustment Aid received by Jersey City.

Petitioners further argue that, without receiving Adjustment Aid, their students are being denied a thorough and efficient education in violation of the New Jersey Constitution. Petitioners assert that "[t]he result of Jersey City's unique funding situation is a tremendous disparity in 'base per pupil funding' and 'actual per pupil funding' between [Jersey] City's non-charter public schools and charter public schools," and that this "disparity" is not only "unfair," but "is unconstitutional because it results in charter school funding below the constitutionally mandated minimum amount of funding necessary to provide a thorough and efficient education to Petitioners' students."[12] Petitioners contend that "[c]harter school students in Jersey City, like their non-charter

[12] Petitioners' brief includes tables reflecting the base per pupil amount of educational funding, and the actual per pupil amount of educational funding, for Jersey City's non-charter public schools and petitioners' charter schools for the 2008–2009, 2009–2010, 2010–2011 and 2011–2012 school years.

school peers, are constitutionally entitled to receive a thorough and efficient public school education"; petitioners do not "receive the 'base per pupil amount' defined by the Legislature as necessary for 'delivering the core curriculum content standards and extracurricular and cocurricular activities necessary for a thorough and efficient education'"; and, without petitioners receiving their fair share of State Adjustment Aid, "the funding of Jersey City charter schools does not meet the constitutionally mandated minimum necessary to provide a thorough and efficient education." Petitioners further note that, because charter schools are excluded from receiving State or local funding for facilities, they must also pay for facility expenses out of their operating budgets and, consequently, their "per pupil expenditures on instructional academic services fall well below the objective minimum amount of funding needed to deliver the core curriculum content standards and extracurricular activities necessary for a thorough and efficient education, as determined by the Legislature and Commissioner." Petitioners assert that they "cannot long survive, much less grow and thrive, in this precarious funding predicament," and seek a ruling that "Jersey City charter schools are entitled to receive their fair share of State Adjustment Aid so that they are funded at least at the minimum level required to provide their students a thorough and efficient education, as required by the New Jersey Constitution." The Department and Jersey City dispute petitioners' constitutional claim.

The New Jersey Constitution requires that the Legislature must "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen." N.J. Const. art. VIII, § 4, ¶ 1. This constitutional mandate requires a funding scheme of public schools that provides all students with an equal educational opportunity. See Abbott XX, supra, 199 N.J. at 144; Abbott v. Burke, 119 N.J. 287 (1990). In enacting the SFRA, the Legislature similarly declared that "[e]very child in New Jersey must have an opportunity for an education based on academic standards that satisfy constitutional requirements regardless of where the child resides, and public funds allocated to this purpose must be expended to support schools that are thorough and efficient in delivering those educational standards." N.J.S.A. 18A:7F-44(d).

As noted, the Supreme Court upheld the constitutionality of the SFRA in Abbott XX. Pursuant to the SFRA, charter schools are not entitled to receive Adjustment Aid under N.J.S.A. 18A:7F-58. Abbott XX further does not indicate that Adjustment Aid was part of the aid in the SFRA formula designed to fund the costs of a thorough and efficient education, measured against delivery of the CCCS. Rather, as the Court explained, this aid was "provided as transition assistance to SFRA's funding methodology" and "designed to enable districts that are spending above their Adequacy Budget to maintain their existing level of spending without significant tax levy increases." Abbott XX, supra, 199 N.J. at 157. Adjustment Aid is also not part of the base per pupil amount (see N.J.S.A. 18A:7F-49 and N.J.S.A. 18A:7F-46), and it is not allocated on a per pupil basis (see N.J.S.A. 18A:7F-58). (See also Education Funding Report at 55, noting that Adjustment Aid "is completely unmoored from district size or even student needs," and that "under the SFRA funding formula, no school district can receive less State aid than 102% of its 2007–2008 spending, even where the SFRA itself declares that less State aid would be 'adequate' to provide a 'thorough and efficient' education for the district's students".)

In Davy, the plaintiffs brought a class action on behalf of several thousand Newark charter school students, contending that the Educational Facilities Construction and Financing Act and the CSPA violate their equal protection rights under the New Jersey Constitution because "charter schools receive only ninety percent of the per pupil funding provided to traditional public schools" and "charter schools are excluded from receiving any state or local funding for facilities." Davy, supra, 415 N.J. Super. at 377–78. Although Davy involved an equal protection claim, the underlying "affected right" in that case, as here, was the right to receive a thorough and efficient education. Id. at 391. The Appellate Division recognized:

> Limited state funds are available for funding a thorough and efficient system of education throughout the State. That system stands ready to accommodate all who choose to attend traditional public schools.
>
> [Id. at 390.]

The court also noted the distinction between charter school students and students in traditional public schools in terms of the voluntary nature of a charter student's enrollment:

> Unlike the students involved in the Robinson and Abbott cases, who, by virtue of their residence, were required to attend specific public schools in their district, plaintiffs' enrollment in their charter schools is completely voluntary. They can withdraw at any time and enroll in the traditional public schools in Newark which are receiving the full funding which they seek for their charter schools. See In re 1999–2000 Abbott v. Burke Implementing Regulations, 348 N.J. Super. 382, 441, 792 A.2d 412 (App. Div. 2002) (rejecting constitutional challenge to regulations for excluding charter schools from the definition of "Abbott districts" because a charter school is an "*optional* program . . . [and] students may, at any time, exercise the option of withdrawing from the charter school if they wish to benefit from the Abbott remedial measures").
>
> [Id. at 391–92.][13]

The Appellate Division in Davy further recognized that, while charter schools are not funded in the same manner or to the same level as traditional public schools, the schools are not regulated to the same extent as traditional public schools. Rather, "the legislative history makes clear that charter schools are permitted to seek waiver of most board regulations in order to give them maximum control to devise innovative and creative methods of education," and charter school students, "unlike traditional public school students, receive an education largely exempt from regulation." Id. at 392. The court added:

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[13] The Appellate Division in In re 1999–2000 Abbott, supra, 348 N.J. Super. at 441 (citation omitted), stated:

> [I]t is our view that the charter school concept does not fit within the Abbott school construct simply because it is an *optional* program available to parents and students who opt not to accept the advantages and remedial measures placed upon the Abbott school districts. They make this voluntary choice because they wish to participate in a program offering the "potential to improve pupil learning." . . . Unlike the parents of students enrolled in traditional Abbott school districts, parents of charter school students may, at any time, exercise the option of withdrawing from the charter school if they wish to benefit from the Abbott remedial measures.

> [A]ny time plaintiffs or their parents or guardians are dissatisfied with the education plaintiffs are receiving, they are free to give up the benefits conferred on charter schools and enroll in a traditional public school. The voluntariness of the program vitiates any asserted deprivation of a right to receive an education at a school that is fully funded to the same extent as other Newark public schools when charter school students have the unabridged option of attending one of those traditional public schools in their district.
>
> [Id. at 393.]

The court noted that "'[t]he justification for the restriction [in charter school funding] is the public need to reduce the diversion of scarce resources from existing traditional public schools so that the State may continue to provide a thorough and efficient education to all students." Id. 393–94.

The Appellate Division found that the Legislature's decision to fund charter schools at the 90 percent per pupil level and to prohibit them from receiving facilities funds was "not an arbitrary decision," and held that the statutes "constituted an effort to ensure a thorough and efficient education for all children, not undermine it." Id. at 395. It further concluded that "this method of legislative compromise was well within the State's purview." Ibid.; see Barone v. Dep't of Human Servs., 107 N.J. 355, 370 (1987) ("State funds available for public assistance programs are limited. It is the Legislature that has the duty to allocate the resources of the State. As long as the classification chosen by the Legislature rationally advances a legitimate governmental objective, it need not be the wisest, the fairest, or the one we would choose. It is not for the courts to determine if there is a better way to allocate resources under these programs.")

Turning to the within matter, as the Appellate Division recognized in Davy, charter schools are not required to be funded at the same level as traditional public schools. Rather, the funding scheme for charter schools represents the Legislature's judgment in maximizing the allocation of scarce State resources and evidences the Legislature's intention to fund charter schools at levels lower than traditional public schools. As observed by Jersey City, petitioners' claim that under the thorough-and-

efficient clause students in their schools must be funded at the same constitutionally mandated minimum levels as public school students, would, if carried to its logical conclusion, require the invalidation of the current 90 percent per pupil funding for charter schools because it differs from the constitutionally required per pupil funding for the public schools, a contention that the Appellate Division in Davy has already rejected.

The thorough-and-efficient mandate requires that all students have an equal educational opportunity. A funding disparity between petitioners' schools and traditional public schools in Jersey City does not demonstrate a lack of equal educational opportunity for petitioners' students. Rather, as the Appellate Division in Davy explained:

> Throughout the Robinson and Abbott decisions, it is clear that the constitutional [thorough-and-efficient] mandate requires an equal educational "opportunity." Plaintiffs' allegation of inequality between Newark charter schools and Newark traditional public schools is based solely upon the disparity in funding. Plaintiffs fail to demonstrate how they are deprived of the equal opportunity to attend the fully funded traditional public schools available to them in their city.
>
> [Id. at 397.]

In other words, "[t]he voluntariness of the program vitiates any asserted deprivation of a right to receive an education at a school that is fully funded to the same extent as other . . . public schools when charter school students have the unabridged option of attending one of those traditional public schools in their district." Id. at 393. These principles apply with equal force to the within matter. Petitioners' students have the option of attending a traditional public school in Jersey City that receives Adjustment Aid and, thus, they are not being denied Adjustment Aid.

Beyond this, petitioners have failed to raise a genuine issue that they are unable to provide their students a thorough and efficient education with the funding available to them. Although petitioners submitted affidavits by representatives at their respective schools addressing the impact of not receiving their fair share of the Adjustment Aid,

petitioners' submissions are bereft of any specific facts to support the constitutional claim that the education at their schools "fell below applicable state regulations, guidelines and criteria as required to fulfill the [thorough-and-efficient] obligation," Davy, supra 415 N.J. Super. at 391, and do not cite any statute or regulation that petitioners have failed, or will fail, to meet with their current funding. Indeed, petitioners acknowledge that they are "currently satisfying state educational criteria in objective performance measures."

Finally, as previously noted, a charter school must undergo an extensive application process, including the submission of a financial plan that must be formulated within the funding parameters in the CSPA. See N.J.S.A. 18A:36A-5(l); Davy, supra, 415 N.J. Super. at 380. And, "remedies other than funding remedies are available" to the Commissioner to address a charter school that does not meet its thorough-and-efficient-education obligation. Davy, supra, 415 N.J. Super. at 393.

Based upon the foregoing, I **CONCLUDE** that petitioners have failed to establish a claim under the thorough-and-efficient clause of the New Jersey Constitution. I **CONCLUDE** that the record does not demonstrate that the funding currently received by petitioners deprives their students of an equal educational opportunity or prevents petitioners from providing their students with a thorough and efficient education.

ORDER

I **ORDER** that the Department's and Jersey City's motions for summary decision be and hereby are **GRANTED**. I further **ORDER** that petitioners' motion for summary decision be and hereby is **DENIED** and that the Amended Petition for Declaratory Ruling be and hereby is **DISMISSED**.

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

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

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

April 23, 2015
DATE

Margaret M. McNaw
MARGARET M. MONACO, ALJ

Date Received at Agency: April 23, 2015

Date Mailed to Parties: April 23, 2015

jb

229-15L

229-15

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

July 2, 2015

Y[redacted] V[redacted], *pro se*
683[redacted]
Elizabeth, New Jersey 07202

Board Secretary
Elizabeth Public Schools
Mitchell Building
500 North Broad Street
Elizabeth, New Jersey 07208

Re: *Y.V., on behalf of minor child, K.T. v. BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY, AGENCY DKT. NO. 77-4/15*

Dear Parties:

Upon review of the Petition of Appeal filed in connection with the above captioned matter – and based upon the Board's failure to submit an Answer to the petition – I have determined to grant summary decision in favor of petitioner.

On April 14, 2015, Y.V. filed a Petition of Appeal in accordance with *N.J.A.C.* 6A:3-8.1 *et seq.* claiming that her minor child, K.T., was entitled to attend school in the District pursuant to *N.J.S.A.* 18A:38-1 *et seq.* A copy of the Petition of Appeal was served upon the Board Secretary via facsimile as per *N.J.A.C.* 6A:3-8.1(a)2 on April 15, 2015, together with an acknowledgment of filing and notice that an Answer to the petition was due within 20 days. *N.J.A.C.* 6A:3-1.5.

Because the Board failed to respond to the initial notice, on May 5, 2015, a second and final notice was sent to the Board Secretary via certified and regular mail. The second and final notice clearly indicated that, absent receipt of an Answer to the Petition of Appeal within 10 days, each count in the petition would be deemed admitted and the matter may be decided on a summary decision basis pursuant to *N.J.A.C.* 6A:3-1.5(e). The certified mail return receipt card indicates that the Board received the second and final notice on May 8, 2015. However, the Board failed to respond to it.

To date, no Answer has been filed on behalf of the Board. Accordingly, petitioner's claim that her minor child, K.T., is entitled to attend school in the District

pursuant to *N.J.S.A.* 18A:38-1 *et seq.* is deemed admitted by the Board. The Board is hereby ordered to continue to admit K.T. into its public school system, free of charge, so long as there is no change in circumstances that would alter that entitlement.*

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library

DCH/MKD/DCS

VIA REGULAR MAIL

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

AAA SCHOOL LLC / EL ELDESOUKY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
PASSAIC COUNTY EDUCATIONAL SERVICES COMMISSION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner AAA School, LLC (AAA) – a company that provides transportation services to public schools – owns six (6) seven-passenger minivans. On July 31, 2014 it was awarded a contract by respondent Passaic County Educational Services Commission (PCESC) for one transportation route which required this type of vehicle. On August 11, 2014, petitioner filed a challenge to respondent's determination that it did not qualify to receive contracts for four other routes for which it submitted the lowest bid, along with an application for emergent relief. On September 5, 2014, the ALJ denied the motion and dismissed the petition in its entirety. Subsequently, in a decision dated October 16, 2014, the Commissioner remanded the matter to the OAL after finding that there were factual issues in the instant controversy that required resolution, and that petitioner had not been afforded a hearing on the merits. In so doing, the Commissioner outlined the factual disputes to be resolved and instructed that the issues that remained be settled by fact-finding based on witness testimony or certifications.

On remand, the ALJ once again found, *inter alia*, that: there are no genuine issues of material fact, and the matter is ripe for summary decision; petitioner has failed to state a claim upon which relief can be granted; petitioner has filed three emergent applications addressing the same issue, and has been denied relief in all three; the Commissioner issued a final decision in this matter on July 10, 2014, affirming the denial of emergent relief and reasoning that the petitioner cannot be successful in his appeal. As to the Commissioner's order on remand to address the merits, the ALJ found that policy determinations by local boards of education are entitled to a presumption of correctness; the respondent's requirement of sixteen passenger buses for the four bus routes at issue was not arbitrary, capricious or unreasonable; and petitioner's contention that respondent has not followed State rules, and has discriminated against bus operators who own seven passenger minivans, is without merit. Accordingly, the ALJ once again granted respondent's motion for summary decision, and ordered the petition dismissed with prejudice.

Upon comprehensive review, the Commissioner – while concurring with the ALJ's determination that petitioner has not met the standards for a grant of emergent relief – found that the factual issues in dispute in this specific case still have not been fully adjudicated, and petitioner remains entitled to a hearing and a decision on the merits regarding the disputed material facts. Further, the Commissioner's prior decision in this specific matter – dated October 16, 2014 – was not a final decision on the merits, but rather was limited to a finding that petitioner had not satisfied the four-prong criteria for emergent relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Accordingly, the ALJ's Initial Decision was rejected in its entirety and the matter was again remanded to the OAL for a hearing and decision on the merits that includes a determination on the disputed factual issues that were previously outlined in the Commissioner's October 16, 2014 decision.

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

ISSUED 7/07/15

OAL DKT. NO. EDU 13493-14
(EDU 10510-14 ON REMAND)
AGENCY DKT. NO. 222-8/14

AAA SCHOOL LLC/ EL ELDESOUKY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
PASSAIC COUNTY EDUCATIONAL SERVICES COMMISSION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner and the Passaic County Educational Services Commission's (Commission) reply thereto. Upon careful review of the record and proposed Initial Decision of the OAL, and for the reasons that follow, the Commissioner again remands the matter to the OAL for further proceedings.

On June 18, 2014, respondent solicited bids for transportation services for the 2014-2015 school year. The bids were opened on July 31, 2014, and petitioner won a contract for one of the routes. By way of a petition to the Commissioner – filed on August 11, 2014 and transmitted to the OAL on August 18, 2014 – petitioner challenged four of the other contract awards. The petitioner maintained that as low bidder he should have won those contracts – notwithstanding that they called for sixteen-passenger yellow school buses, which he does not own or operate. An application for emergent relief accompanied the August 11, 2014 petition. On September 5, 2014, the Administrative Law Judge (ALJ) heard argument on the emergent

relief motion. The decision issued by the ALJ on the same date both denied the motion and dismissed the petition in its entirety.

In a decision dated October 16, 2014, the Commissioner adopted the ALJ's determination that the petitioner was not entitled to emergent relief. At the same time, the Commissioner expressly rejected the ALJ's summary dismissal of the petition of appeal. Instead, the Commissioner remanded the matter to the OAL for a hearing and a determination of the merits based upon the fact that there were factual issues in dispute that were not fully resolved at the OAL. Moreover, in the October 16, 2014 decision, the Commissioner outlined the factual disputes that require a hearing on the merits, and instructed that the issues that remain "should be settled by fact-finding based upon witness testimony, or at the least, certifications." Yet, the petitioner was not afforded an opportunity on remand to have a hearing before the OAL, and the petition of appeal was again dismissed via summary decision. Notably, the Initial Decision failed to include a determination with respect to the factual disputes as directed by the Commissioner.

The Commissioner is mindful that the parties have been involved in a series of cases that at times appear to be an attempt by the petitioner to revisit legal issues that have already been decided in prior litigation between the same parties. However, the factual issues in dispute that have been alleged by the petitioner in this specific case have not been fully adjudicated, and the petitioner remains entitled to a hearing and a decision on the merits regarding the disputed material facts and the legal conclusions which the factual findings implicate.

It is also important to recognize that simply because a petitioner does not establish a likelihood of success during an emergent relief application, it does not deprive a petitioner of

the opportunity for a full plenary hearing on the merits where he or she may attempt to prove entitlement for the relief sought. Despite the ALJ's assertion to the contrary, the Commissioner's decision in this matter with respect to the application for emergent relief was not a final decision on the merits. Instead the decision was limited to a finding that the petitioner did not satisfy the four-pronged criteria for emergent relief under *Crowe v. DeGioia,* 90 *N.J.* 126 (1982).

Accordingly, the recommended decision of the ALJ is rejected in its entirety. The Commissioner hereby remands this matter to the OAL for a hearing and a decision on the merits that includes a determination on the disputed factual issues that were previously outlined in the October 16, 2014 decision.

IT IS SO ORDERED. *

COMMISSIONER OF EDUCATION

Date of Decision: 7/07/15

Date of Mailing: 7/07/15

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36, *N.J.S.A.* 18A:6-9.1

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 13493-14
AGENCY DKT. NO. 222-8/14

AAA SCHOOL LLC / EL ELDESOUKY,
Petitioner,
v.
PASSAIC COUNTY EDUCATIONAL SERVICES COMMISSION,
Respondent.

ON REMAND EDU 10510-14

El Eldesouky, petitioner, pro se

Derlys Gutierrez, Esq., for respondent (Adams, Gutierrez & Lattiboudere, attorneys)

Record Closed: May 26, 2015 Decided: May 27, 2015

BEFORE **JOANN LASALA CANDIDO**, ALJ:

Petitioner, the owner of the bus company, AAA School, initially brought this action seeking emergency relief along with an underlying petitioner on the same issue on June 26, 2014, wherein the Commissioner of Education transmitted the matter to the Office of Administrative Law on June 27, 2014. Petitioner challenged the decision of respondent, Passaic County Educational Services (PCESC), an educational services

commission that provides coordinated transportation services to school districts, to not accept his bids on four sixteen-passenger school bus routes that he bid the lowest.

On June 11, 2014, petitioner submitted a bid specification and challenged respondent's sixteen-passenger bus routes even though he did not own sixteen-passenger buses, requesting these routes to be modified to permit a seven-passenger minivan. Although he was the lowest bidder on four of the school routes, those routes required a sixteen-passenger bus.

Although Judge Barry Moscowitz decided this same issue on emergent relief on June 18, 2014, denying petitioner's request and finding that PCESC followed the applicable bidding requirements, I heard and decided this second request for emergent relief on July 7, 2014. An Order was issued denying emergent relief and the matter was scheduled for October 30, 2014, addressing the exact same issues. The undersigned also heard and decided another emergent relief hearing on September 5, 2014, filed by petitioner under OAL Docket No. EDU 10510-14. Both emergent relief matters held on July 7 and September 5, 2014, were denied.

On September 30, 2014, the undersigned received the Commissioner's Final decision. The Commissioner stated that the petitioner cannot prevail under a legal authority when the facts of this case are applied. I agreed. The Commissioner further stated in part " . . . the Commissioner cannot conclude that a balancing of the equities would favor petitioner. Petitioner's motion for emergent relief is consequently denied."

On October 17, 2014, respondent filed a Motion to Dismiss alleging that because petitioner does not own sixteen-passenger buses on the sixteen-passenger bus routes he bid for and addressed in the emergent applications, there are no additional issues to be determined. Petitioner filed a response on October 24, 2014, requesting that this matter be returned to the Commissioner "without trial and without order [judgment]" from the undersigned or "any other OAL/Newark judge." Petitioner also requested that " . . . the responsible people at OAL/NEWARK not to accept any future cases to me or my company to have a trial there . . . ." He also requested another judge hear the matter and for the undersigned to recuse myself. I denied that request.

Respondent, in its initial Motion to Dismiss, asserted that the petitioner fails to demonstrate that the denial was unreasonable, arbitrary, capricious or contrary to law and instead argues that it was correctly and reasonably decided under controlling regulations and case law. It asserts the same in its current Motion to Dismiss and reiterates that there are no factual issues in dispute. Petitioner complains that the District is using sixteen-passenger buses for one or two students and that his vans should be considered for these routes.

Although couched as a motion to dismiss, respondent's motion may also be seen as a request for summary decision. N.J.A.C. 1:1-12.5, governing motions for summary decision, permits early disposition of a case before the case is heard if, based on the papers and discovery which have been filed, it can be decided "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:12-5(b). The provisions of N.J.A.C. 1:1-12.5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. To survive summary decision, the opposing party must show that "there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. Failure to do so entitles the moving party to summary decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995).

The matter is appropriate for summary decision as there are no genuine issues as to any material facts. Petitioner has failed to state a claim upon which relief can be granted as held by the Commissioner by Final Decision. He has filed three emergent applications addressing the same issue and has been denied relief in all three. The Commissioner issued a final decision in this matter on July 10, 2014, affirming the denial of emergent relief, reasoning that petitioner cannot be successful.

The matter was remanded to the undersigned to address the merits. Petitioner argues that the district is not following State rules when requesting sixteen-passenger buses for one student, thereby discriminating against bus owners such as he who own seven-passenger minivans that can transport this one student.

It is a well-settled principle that policy, legislative, and quasi-legislative determinations are committed to the judgment of local governmental bodies. Riggs v. Long Beach Twp., 109 N.J. 601, 610-11 (1988); United Advertising Corp. v. Metuchen, 42 N.J. 1, 8 (1964). Such determinations enjoy a distinct presumption of validity, First Peoples Bank of N.J. v. Medford Township, 126 N.J. 413, 418 (1991); Hutton Park Gardens v. West Orange Town Council, 68 N.J. 543, 564 (1975), and will remain undisturbed absent a showing of arbitrary, capricious or unreasonable action on the part of the governmental agency. Palamar Constr. v. Pennsauken Twp., 196 N.J. Super. 241, 250 (App. Div. 1983).

These principles apply to policy determinations made by local Boards of Education. See Parsippany-Troy Hills Educ. Ass'n v. Bd. of Educ. of Twp. of Parsippany-Troy Hills, 188 N.J. Super. 161, 167 (App. Div.), certif. denied, 94 N.J. 527 (1983); Kopera v. Bd. of Educ. of W. Orange, 60 N.J. Super. 288, 294 (App. Div. 1960). When such a body acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. The agency's factual determinations must be accepted if supported by substantial credible evidence. Quinlan v. Bd. of Educ. of N. Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962); Schinck v. Bd. of Educ. of Westwood Consol. Sch. Dist., 60 N.J. Super. 448 (App. Div. 1960).

The terms "arbitrary" and "capricious" embrace a concept which emerges from the due process clauses of the 5th and 14th Amendments of the United States Constitution and operate to guarantee that acts of government will be grounded on established legal principles. See Canty v. Bd. of Educ., City of New York, 312 F. Supp. 254, 256 (D.C.S.D.N.Y. 1970). Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. State v. Jones, 66 Wash.2d 199, 401 P.2d 841, 842 (Wash. Sup. Ct. 1965). Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is

substantial evidence to support the ruling. Kansas City Southern Ry. Co. v. Louisiana Public Serv. Comm'n, 254 La. 160, 223 So. 2d 132, 136 (La. Sup. Ct. 1969).

Petitioner cites no legal authority in support of his appeal. In fact, he does not own the prerequisite sixteen-passenger bus whose routes he is disputing. He does not cite any legal authority that shows the bid specifications are unlawful or discriminatory. He presents no proofs that respondent falsified information sheets submitted by the Districts. I **CONCLUDE** that petitioner has failed to shoulder the burden of proving his various claims.

Accordingly, since no violations occurred, no interim measures or remedies are available to petitioner. I therefore **CONCLUDE** that there are no remaining issues to determine in this matter.

Based on the foregoing, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law and respondents' Motion for Summary Decision is ripe for determination.

ORDER

Based upon the forgoing, respondent's motion for summary decision is **GRANTED**. It is **ORDERED** that petition is **DISMISSED WITH PREJUDICE**.

It is further **ORDERED** that petitioner is foreclosed from filing a new application raising the same issues filed in this petition, in the petition filed under OAL Docket No. EDU 10510-14, or under Docket No.EDU 07495-14, which are identical.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

May 27, 2014
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency:

JUN - 1 2014

Date Mailed to Parties:

ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

2-51-15

ALBERT J. FIELDS, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SALEM COUNTY VOCATIONAL SCHOOLS, SALEM COUNTY AND MARIE ALLEVA,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner herein was referred by the Salem County One Stop Career Center (One Stop) to participate in the Salem County Vocational School's Medical Assistant/Multi-Skilled Technician program, one of the district's adult education programs. Subsequent to his completion of Phases I and II of the program, petitioner was notified on June 25, 2014 that he was disqualified from participating in the Phase III externship for failure to disclose his criminal history. On June 26, 2014, petitioner filed a tort claim notice , and thereafter filed successive litigation in Superior Court. On February 2, 2015, petitioner filed the within appeal, seeking $4,000 in damages based on tuition payments made by the One Stop agency on his behalf, as well as $7,000 to compensate him for footwear, uniforms, school supplies and lost contract benefits. The respondent filed a motion to dismiss in lieu of an answer, asserting that petitioner's claims are time-barred pursuant to *N.J.A.C.* 6A:3-1.3(1).

The ALJ found, *inter alia*, that: petitioner was notified on June 26, 2014 that he was rejected by the externship due to his undisclosed criminal history, and this date starts the 90 day clock under *N.J.A.C.* 6A:3-1.3; petitioner had adequate notice of the action taken by the district; petitioner chose to file claims in Superior Court instead of filing with the Commissioner, and only after his claims were dismissed by the Court did he file the within appeal; petitioner's appeal needed to be filed by September 24, 2014 in order to comply with the 90-day rule; the instant petition was filed on February 2, 2015, which was 131 days beyond the deadline for the filing of an appeal. The ALJ concluded that the petition is untimely and that there are no reasons to waive or relax the time limits set forth in *N.J.A.C.* 6A:3-1.3. Further, petitioner was verbally warned by the Vocational School staff several times that he had to be truthful about his criminal history, and was also received written warning in the program forms that he executed that he had to divulge information about any criminal history or there would be consequences for the externship program. The ALJ granted the respondent's motion to dismiss the matter as untimely, and dismissed the petition.

The Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision as the final decision in this matter. Accordingly, the petition was dismissed.

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

July 7, 2015

231-15

OAL DKT. NO. EDU 2562-15
AGENCY DKT. NO. 19-2/15

ALBERT J. FIELDS, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SALEM COUNTY VOCATIONAL SCHOOLS, SALEM COUNTY AND MARIE ALLEVA,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Albert Fields, and the Salem County Vocational School's reply thereto.

Upon review, the Commissioner concurs with the Administrative Law Judge's (ALJ) determination – for the reasons stated in the Initial Decision – that the petition of appeal was time-barred under *N.J.A.C.* 6A:3-1.3(i). The Commissioner is not persuaded that the exceptions submitted by the petitioner dictate a different result, as the arguments advanced by the petitioner in his exceptions were considered and fully addressed by the ALJ in the Initial Decision.

Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/07/15
Date of Mailing: 7/08/15

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 2562-15
AGENCY DKT. NO. 19-2/15

ALBERT J. FIELDS, JR,
Petitioner,
v.
BOARD OF EDUCATION OF THE SALEM COUNTY VOCATIONAL SCHOOLS, SALEM COUNTY AND MARIA ALLEVA,
Respondents.

Albert F. Fields, Jr., petitioner, pro se

Caitlin Pletcher, Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record Closed: May 7, 2015 Decided: May 26, 2015

BEFORE **W. TODD MILLER**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about June 26, 2014, the Salem County Vocational School (respondent or district) verbally notified petitioner, Albert Fields (Fields or petitioner) that he was

ineligible to participate in an externship under its Medical Assistant/Multi-Skilled Technician program due to the failure to disclose his criminal history.

On February 2, 2015, Fields filed a petition with the Commissioner of Education seeking $4,000 in damages based upon tuition payments made by the One Stop Agency on his behalf. Fields also sought another $7,000 to compensate him for footwear, uniforms, school supplies and loss contract benefits (Petition at page 3).

On February 19, 2015, the district filed a motion to dismiss, in lieu of filing an answer. The motion was filed with the Commissioner and transmitted to the Office of Administrative Law (OAL) with the file. The district asserts that petitioner's claims are untimely under education law and must be dismissed (ninety-day limitation of action N.J.A.C. 6A:3-1.3(i)).

On February 20, 2015, the matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A telephone prehearing conference was held on March 31, 2015. Fields was instructed to file opposition to the district's motion to dismiss, and same was received on May 7, 2015.

Fields attempted to recover damages in the civil courts, prior to commencing the present administrative matter. On July 10, 2014, Fields filed a complaint in the Superior Court, Law Division, Special Civil Part, Salem County seeking contract damages. (Respondent's May 8, 2015, letter brief) On or about August 5, 2014, Fields filed another complaint in the Superior Court, Chancery Division, Salem County against the same district and Maria Alleva, the program coordinator. Fields sought specific performance and monetary damages under the Consumer Fraud Act. By order dated November 21, 2014, the Chancery Division dismissed the complaint pursuant to R. 4:6-2(e) (failure to state a claim). On January 9, 2015, the Chancery Division denied Field's motion for reconsideration.

For the reasons explained below, the district's motion to dismiss, in lieu of filing an answer is **GRANTED**.

FACTUAL BACKGROUND

The Salem County Vocational School is a public school that offers career and technical educational programs to high school age students and adult students. (See Certification of Maria Alleva[1], the district's Adult Admissions Coordinator, dated October 28, 2014, hereinafter "Alleva Cert.") at ¶ 3. One of the district's adult education programs is the Medical Assistant/Multi-Skilled Technician program ("Program"). Id. at ¶ 5. The program specializes in technical training, including phlebotomy and EKG procedures. Id. at ¶ 6.

The program is composed of three phases totaling 600 hours. Id. at ¶ 7. Students must successfully complete all three phases of the program in order to be eligible to sit for the National Healthcareer Association certifications. Id. at ¶ 8.

Phase I consists of the instructional component of the program. This is the **only** component of the program that is provided by the district. Id. at ¶ 7. During Phase II of the program, students receive their Basic Life Support Certification through the Red Cross. Ibid. And, in phase III of the program, students complete 180 hours of a clinical experience/externship. Ibid. For phase III, students apply to off-site externships and representatives of the externships determine whether or not to accept the applicants. Ibid. Indeed, the district is not involved in the acceptance or rejection of a student for an externship. Ibid. Students must also agree to release their "criminal background check," to the off-site externships. Id. at ¶ 10.

Salem County One Stop Career Center ("One Stop") referred Albert Fields to the district for participation in the program. Id. at ¶ 11. On February 5, 2014, Maria Alleva, presented an Introduction to Health Career Pathway program. Id. at ¶ 12. Fields

[1] The certification of Alleva was submitted in the Superior Court matter and therefore it contains a different caption, references to plaintiff and defendant and exhibits to the Superior Court complaint.

attended the seminar. Ibid. Alleva provided the attendees with important information regarding the medical programs including, but not limited to, criminal background clearance requirements for externships. Id. at ¶ 13. Alleva emphasized several times that candidates are encouraged to disclose any criminal offenses. Ibid. Alleva explained that the disclosure of criminal offenses is critical because students who have criminal backgrounds are barred from externships in the medical field. Ibid.

On March 13, 2014, Alleva conducted an entrance interview of Fields. Id. at ¶ 14. Alleva again reviewed the requirements of the program. Ibid; Exhibit "A". Alleva also discussed Field's employment and educational experience and directly asked Fields if he had a criminal history. Id. at ¶ 15. Fields told Alleva that he did not have a criminal history. Ibid. Fields also signed a "Release of Information" form that authorized the district to release records pertaining to his criminal history to the externship where he would apply. Id. at ¶ 16; Exhibit "1". And Fields signed a "Postsecondary Agreement" and agreed "to purchase educational services from the district" and to "comply with the policy regarding pre-enrollment counseling, testing, and documentation." Id. at ¶ 17; Exhibit "B" to Plaintiff's Complaint. Field's signature on the Agreement certified "that all of the information provided by [him] is true to the best of [his] knowledge." Id. at ¶ 18; Exhibit "B". Field's signature also acknowledged that "a student may be terminated prior to completion for unsatisfactory attendance, non-payment of tuition or failure to comply with board policy and administrative rules and regulations without a refund." Ibid.

Fields claims that the district did not provide him with "an opportunity to sit for the certification examinations as provided by the contract." However, nowhere in the contract does it state that the district would provide Fields with an opportunity to sit for the NHA certifications. And, the contract does not guarantee graduation from the program or placement in an externship. Ibid.

On April 24, 2014, Fields attended an orientation for the program. Id. at ¶ 20. Fields executed a "Disclosure Statement", wherein he certified that he does "not have a

criminal background and understand[s] that failure to disclose any relevant information may result in removal from the program without refund." Id. at ¶ 21; Exhibit "2".

Fields completed Phase I of the program. He attended an externship conference on June 9, 2014. Id. at ¶ 23. Fields selected an externship with the Salem County Correctional Facility ("Correctional Facility"), as one of his top choices. Ibid; Exhibit "3".

Fields completed an externship application, wherein he certified that "the information included on and with [his] application and on accompanying materials is accurate and true." Id. at ¶ 24. Fields acknowledged that he understood "that if [he] chose or am unable to meet the requirements to complete my externship as per affiliated site, [he] will forfeit the externship placement opportunity without refund." Ibid; Exhibit "4".

On June 25, 2014, a representative from the Correctional Facility informed the district that Fields had a criminal history and was recently incarcerated in the correctional facility. Id. at ¶ 25. Fields did not meet the requirements for an externship in the medical field because of his criminal history. The correctional facility could not provide him with a placement as a result. Ibid. The respondent immediately informed Fields that he was disqualified from the externship program due to his criminal history and failure to disclose same. On June 26, 2014, Fields filed a tort claims notice. (Respondent's May 8, 2015, letter brief). He thereafter filed successive litigation in the Superior Court. Each of these reflects that Fields was well aware of the action taken by the district.

The total tuition for the Program was $4,350 and One Stop paid $4,000 of this amount. Id. at ¶ 26. The remaining $350 was Field's responsibility and he has not paid this money to the district. Ibid; Exhibit "5".

CONCLUSIONS

The district cites N.J.A.C. 6A:3-1.3 for the proposition that the administrative claim filed by Fields, is untimely. The regulation provides, in relevant part:

> (a) To initiate a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws, a petitioner shall prepare a petition of appeal conforming to the requirements of N.J.A.C. 6A:3-1.4 and serve such petition upon each respondent. . . .
>
> . . .
>
> (i) The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education . . . which is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation, or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

The timeline presented by the district is as follows: On June 26, 2014, Fields was notified by Alleva that he was rejected from the externship program offered at the correctional facility due to his (undisclosed) criminal history. (Field's Petition ¶ 8; page 2). June 26, 2014 starts the clock for applicability of N.J.A.C. 6A:3-1.3. On August 5, 2014, Fields filed a complaint in the Superior Court seeking a remedy (consumer fraud and specific performance) in connection with his termination or exclusion from the externship program (District's brief; Exhibit 1). On November 21, 2014, the complaint was dismissed the Chancery Judge. On February 2, 2015, Fields filed the present administrative action with the Commissioner seeking monetary relief and other remedies.

Ninety days from June 26, 2014, is September 24, 2014. From September 24, 2014, to February 2, 2015 is 131 days. The district contends that the complaint filed with the Commissioner was out of time by 131 days.

Petitioner had adequate notice of the action taken by the district through its agent and program coordinator; he acknowledged that he had adequate notice by filing claims in this, and other forums certifying in his pleadings when he received notice; petitioner chose to file claims in the Superior Court first, instead of filing with the

Commissioner; and only after his claims were dismissed by the Superior Court did he file with the Commissioner; albeit well out of time under school law. N.J.A.C. 6A:3-1.3

In Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 587 (1993) the Supreme Court defined adequate notice as:

> Adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate. *See Burns v. West Am. Corp.*, 137 *N.J. Super.* 442, 446, 349 *A.*2d 142 (Dist.Ct.1975). Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period. *See Apex Roofing Supply Co. v. Howell*, 59 *N.J.Super.* 462, 467, 158 *A.*2d 49 (App.Div.1960). A limitations period has two purposes. The first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims. *Ochs v. Federal Ins. Co.*, 90 *N.J.* 108, 112, 447 *A.*2d 163 (1982). The second purpose is "'to penalize dilatoriness and serve as a measure of repose'" by giving security and stability to human affairs. *Ibid.* (quoting *Farrell v. Votator Div.*, 62 *N.J.* 111, 115, 299 *A.*2d 394 (1973)).

The Supreme Court went on to explain in Kaprow:

> When a **plaintiff knows or has reason to know** that he has a cause of action against an identifiable defendant and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar his action. [*Farrell, supra*, 62 *N.J.* at 115, 299 *A.*2d 394.]
>
> [Emphasis added]

As explained by the Supreme Court, Kaprow learned that the Board had in fact taken formal and final action. This was illustrated when he (Kaprow) wrote a letter to the secretary of the Board confirming that he had sufficient knowledge of the relevant facts to bring a RIF claim. Kaprow wrote:

> I have recently become aware that the position of Assistant Superintendent, to which I retain tenure rights, was reinstated as late as September 1986, if not before. Additionally, the duties which I performed as Assistant Superintendent have been transferred to a new position entitled District Supervisor of Elementary Education. I am certain that those duties were consolidated under one individual prior to the appointment of the District Supervisor of Elementary Education.

The Supreme Court explained that Kaprow's attempt to resolve his claim through negotiations with the local board was irrelevant. It does not negate the fact that he received adequate notice on February 23, nor does it toll the running of the limitations period. Riely v. Hunterdon Central Bd. of Educ., 173 N.J. Super. 109, (App. Div. 1980).

The present matter is similar to the facts embodied in Kaprow as to notice and similar to Wagner v. Bridgewater-Raritan Reg'l School Dist. Bd. of Ed., 1978 S.L.D. (November 3, 1978) as to procedure. In Wagner, a non-tenured teacher was notified in March 1976 that her contract would not be renewed for the following school year. She filed a grievance and demanded arbitration, which went forward resulting in an award. The board had refused to participate in the arbitration. On March 21, 1977, the board rejected the arbitrator's award which favored the teacher. In June 1977 the teacher filed a petition with the Commissioner again challenging her non-renewal. The board moved to dismiss and the Commissioner granted the motion to dismiss because the action that was filed with the Commissioner (1977) was over one year after the non-renewal notice was issued to petitioner (1976).

The Commissioner in Wagner was mindful that limitation regulation (N.J.A.C. 6:24-1.2) was not in effect when the board gave notice to the teacher that her contract would not be renewed. The Commissioner nonetheless reasoned that it should have been obvious to petitioner after the decision in Union Cty. Bd. of Ed. v. Union Cty. Teachers Ass'n, 145 N.J. Super. 435, 437 (App. Div. 1976), certif. den. 74 N.J. 248 (1977), and the "rule changes codified in Title 6, Chapter 24, that administrative relief should be requested from the Commissioner [within ninety days]." The Commissioner held that the petitioner had ninety days from the adoption of the rule in which to file her

appeal. Waiting for more than six months [after arbitrator's ruling and its rejection by the board] before appealing, clearly rendered the teacher's action as untimely.

I **CONCLUDE** that the action filed by petitioner is untimely. N.J.A.C. 6A:3-1.3(i). Fields confirmed that he had notice of the action taken by the respondent when he filed the tort claim notice on June 26, 2014 and civil actions on July 10, 2014 and August 5, 2014. Petitioner intentionally chose to pursue his remedies in the Superior Court rather than filing with the Commissioner. He certified that he was notified by the district on June 26, 2014, of his disqualification from the program due to his criminal history as verified in each of the aforementioned civil complaints. He waited until February 2, 2015, to file the present action with the Commissioner, only after the Superior Court dismissed his case. The action should have been filed on or before September 24, 2014, to meet the ninety-day limitation found in N.J.A.C. 6A:3-1.3(i).

I **CONCLUDE** that there are no reasons to waive, relax or suspended the time limits in N.J.A.C. 6A:3-1.3(i). Petitioner already sought monetary damages in the Superior Court. This relief was denied. He is now seeking a second attempt at monetary damages ($7,000) in an administrative proceeding. Ordinarily monetary remedies are left to the Superior Court – thus petitioner had a substantial portion of his day in court in a prior matter.

Petitioner is also seeking a refund ($4,000) on behalf of the One Stop entity as outlined in his petition. He has no standing to pursue claims on behalf of One Stop. It unclear if the One Stop has filed a claim against petitioner and thus what petitioner is really seeking is insulation against a claim by the One Stop against him.

Finally, petitioner was verbally warned several times that he had to be truthful about his criminal history. And he was also warned in the program forms that he executed that he had to be truthful regarding his criminal history and if he was not truthful, there would be consequences for the externship program. Amazingly, petitioner failed to divulge his criminal history, and then applied for an externship with

the county corrections department where he was recently incarcerated. I see no reason to relax the time limit regulation under these circumstances.

ORDER

I **ORDER** that the district's motion seeking a dismissal of the within matter as being filed untimely, is **GRANTED**. The action field by the petitioner is **DISMISSED**.

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

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

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

May 26, 2015
DATE

W. TODD MILLER, ALJ

Date Received at Agency: May 26, 2015

Date Mailed to Parties: 5-29-15

/jb/lam

DOCUMENTS RELIED UPON

Petition, dated 2/2/15

Respondent's Motion to Dismiss, In Lieu of Filing an Answer, with Attachments, dated 2/19/15

Petitioner's Opposition Brief, dated 4/28/15 (filed 5/7/15)

Respondents Reply Brief dated May 8, 2015

233-15

S.L., ON BEHALF OF MINOR CHILDREN, J.L., J.L., AND O.L.

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner challenged the residency determination of the respondent Board that her children are not entitled to a free public education in the Union Township schools. Respondent's determination was based on a residency investigation conducted during the months of March, April, and May 2014, which concluded that S.L.'s children were not domiciled at the Union address provided to the school district, and likely were living at their father's house in Irvington. Petitioner contended that she did reside with her children at the Union address, but that her work schedule required the children were frequently cared for by their grandmother at her home in Maplewood. The Board sought to have S.L.'s children removed from Union schools, and sought reimbursement of tuition for the period of their ineligible attendance.

The ALJ found, *inter alia*, that: petitioner bears the burden of proof by a preponderance of the evidence that she is domiciled within the school district; in this case, S.L. has failed to present any evidence that she was domiciled in Union during the 2013-2014 school year; petitioner was unable to provide any documents linking her name to the Union address provided to the district, and likewise failed to present testimonial evidence substantiating her alleged domicile on Tampa Terrace in Union. The ALJ concluded that S.L. failed to meet her burden to prove that her children were eligible for a free public education in Union schools, and assessed tuition costs – as set forth by the Board through March 4, 2015 – of $64,499.40 for the 2013-2014 and 2014-2015 school years. The ALJ further ordered that petitioner will owe additional per-diem costs to be added beyond March 4, 2015 for continued ineligible attendance for the remainder of the 2014-2015 school year.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion that the petitioner's minor children were not entitled to a free public education in Union schools for the time period in question. The Commissioner ordered petitioner to reimburse the Board for tuition in the amount of $64,499.40 for the 2013-2014 and 2014-2015 school years. The Commissioner, however, noted that he was not provided with any information confirming that the minor children continued to attend Union schools beyond March 4, 2015, or setting forth the exact number of days of ineligible attendance by S.L.'s children. Therefore, no addition per diem tuition costs could be assessed to the petitioner. The petition was dismissed.

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

Issued 7/08/15

OAL DKT. NO. EDU 10536-14
AGENCY DKT. NO. 188-7/14

S.L., ON BEHALF OF MINOR CHILDREN, J.L., J.L., AND O.L.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter[1] and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner failed to sustain her burden of establishing that she was a domiciliary of Union Township during the 2013-2014 school year. Additionally, the Commissioner concurs with the ALJ's conclusion that the minor children were, therefore, not entitled to a free public education in the District's schools during this time. Pursuant to *N.J.S.A.* 18A:38-1b, the Board is entitled to tuition reimbursement for the time period during which petitioner's minor children were ineligible to attend in the amount of $64,499.40 for the 2013-2014 school year and the 2014-2015 school year (calculated through March 4, 2015) as detailed in the ALJ's comprehensive Initial Decision.

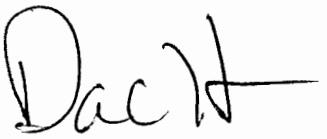
Although the ALJ recommended that petitioner be assessed additional per-diem tuition costs beyond March 4, 2015 for any future ineligible attendance by the minor children,

[1] The record included transcripts of the November 5, 2014 and November 25, 2014 proceedings which took place at the Office of Administrative Law.

the Commissioner was not provided with any information confirming that the minor children continued to attend school in the District beyond March 4, 2015 – or setting forth the exact number of days of ineligible attendance during the time period in question. Therefore, no additional per-diem tuitions costs can be assessed to petitioner.

Accordingly, the Initial Decision – as modified herein – is adopted as the final decision in this matter. Petitioner is assessed tuition in the amount of $64,499.40 for her minor children's ineligible attendance in the District, and is directed to compensate the Board in accordance with this decision. The instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]



COMMISSIONER OF EDUCATION

Date of Decision: 7/08/15

Date of Mailing: 7/08/15

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10536-14
AGENCY DKT. NO. 188-7/14

S.L. on behalf of minor children,
J.L., J.L. and O.L.,
Petitioners,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF UNION, UNION COUNTY,
Respondent.

S.L. o/b/o **J.L.**, **J.L.** and **O.L.**, petitioner, pro se

Neha Patel, Esq., for respondent (Apruzzese, McDermott, Mastro, & Murphy, attorneys)

Record Closed: March 4, 2015 Decided: June 4, 2015

BEFORE **IMRE KARASZEGI, JR.**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, S.L., challenges the residency determination made by the Union Township Board of Education (Board) with regard to the minor children, J.L., J.L., and O.L. On August 14, 2014, respondent submitted an answer, which was filed with the

Commissioner of Education on August 15, 2014. Respondent's demand included a request that the Commissioner dismiss the petition, that the children be removed from the district, and that the petitioner be assessed a tuition charge for each day of ineligible attendance of J.L., J.L., and O.L. in the Board's schools.

The matter was transmitted to the Office of Administrative Law (OAL) on August 19, 2014, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Hearings were held on November 5, 2014, and November 25, 2014. The parties submitted written summations, and following their receipt, the record closed. An Order was entered extending the time for filing this decision.

FACTUAL DISCUSSION

After carefully considering the testimonial and documentary evidence presented, and having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I **FIND** the following **FACTS**:

S.L. is the mother of three children, J.L., J.L. and O.L. The children's father, O.L., resides at 56 38th Street, Irvington, New Jersey. He has lived in Irvington the last thirteen years. S.L. and O.L. have never been married or engaged to each other and there is no court order governing the custody of the children or defining parental rights.

S.L.'s employment and work schedule are largely undisputed. Specifically, S.L. has been employed as a diet technician at Bayonne Medical Center since November 2013. Since February 2014, she worked from 10:30 p.m. to 7:00 a.m., three to four days a week, including weekends. S.L. worked the same hours during the period of March 2014 to May 2014 when the Board conducted its investigation. S.L. also is employed by ARAMARK Food Service, Monday through Friday, from 8:30 a.m. to 2:00 p.m.

S.L. testified that at one time, she and her three children lived in her mother's home at 2036 Tampa Terrace, Union, New Jersey. When her mother lost the home in early 2011, S.L. and her children moved to Mr. O.L.'s residence in Irvington, New

Jersey and lived there from April 2011 to January 2012. In January 2012, S.L. and her children moved to 2039 Tampa Terrace, Union, New Jersey.

S.L. noted that when she works at night, her children stay with her mother, J.A., at 181 Burnett Avenue, Maplewood, New Jersey. At the end of the school day, S.L. would pick up her children and take them to 2039 Tampa Terrace, where she would prepare their dinner. S.L. added that if she is working at night, she would get the children ready and take them to her mother's house in Maplewood, and then go to work. When S.L. works on weekends, J.A. would watch the children in Maplewood. S.L. explained that on the nights that she would work, she would get done with her job at Bayonne Medical Center around 7:00 a.m., drive approximately thirty to forty-five minutes to her mother's house in Maplewood, pick up her children, and drive them to school.

S.L. elaborated as to the living arrangements at 2039 Tampa Terrace. She stated that the house is a single-family home. The owners of the home, referred to as "aunt" and "uncle," have two children of their own, who reside in the house. S.L. indicated that she resides "downstairs," which consists of one room, one bathroom, and a kitchen. S.L. added that she does not pay rent and cannot produce proof of any payment towards utilities. She also could not produce filed income tax returns with her name and address, paystubs from Bayonne Medical Center, or W-2s from Bayonne Medical Center. The documents that S.L. could produce; Sally Mae student loan documents, driver's license and doctor bills, were recently issued and outside the period in question.

J.A., S.L.'s mother, testified on S.L.'s behalf. J.A. stated that S.L. and her children reside at 2039 Tampa Terrace, Union, New Jersey. J.A. clarified that the owners of 2039 Tampa Terrace, referred to as "aunt" and "uncle," are not related to J.A. or S.L. by blood. J.A. initially indicated that S.L.'s children would stay at her home two to four times a week, including weekends. Later she stated that the children would only stay two to three nights each week, including weekends. She would have clothes and toys at her house and the children would eat dinner at her house every night that they

would stay there. J.A. testified that she does not know where the children's father, O.L., resides or whether the children spend any time with him.

Tom Sheridan, a residency investigator for the Board since 1996, testified on behalf of respondent. Sheridan stated that since there had been a residency investigation in a prior year, the Board wished to verify the residency status of S.L.'s three children. Sheridan indicated that he conducted surveillance at 2039 Tampa Terrace, Union, New Jersey, from 6:00 a.m. until 9:00 a.m. on the following dates in 2014: March 28, March 31, April 1, April 2, April 3, April 4, May 13, May 14, May 22, May 23, May 27. Sheridan observed that he did not see S.L.'s three children exiting the house on any of the dates and times that he was present. He did confirm the children's attendance at school on the aforementioned dates. Sheridan recalled that on April 4, 2014, he spoke to the owner of 2039 Tampa Terrace who advised Sheridan that S.L.'s children do not live there but that they live in Irvington. The owner of the house, however, did not testify at this hearing. Sheridan noted his observations and submitted a written investigation report to the Board with his findings.

Donna Hubbard, an administrative assistant to the Board, testified on respondent's behalf. Hubbard noted the respective children's grades and the applicable tuition expense. The following tuition rates applied to the respective children for the 2013-2014, 180-day school year; J.L. ($13327 – fifth grade), J.L. ($13327 – fifth grade), O.L. ($11979 – kindergarten) for a total of $38633 for all three children. The tuition rate for the 2014-15, 180-day school year with per diem rates are as follows; J.L. ($13965 – sixth grade/$77.58 per diem), J.L. ($13965 – sixth grade/$77.58 per diem), O.L. ($13642 – first grade/$75.79 per diem). During the 2014-15 school year, there were 112 school days between September 4, 2014, (start of school) through March 4, 2015, (hearing record close) for total tuition due of $25866.40. The total tuition for 2013-14 and 2014-15, applicable to J.L., J.L., and O.L., through March 4, 2015, is $64499.40.

LEGAL ANALYSIS AND CONCLUSIONS

Under N.J.S.A. 18A:38-1(a), "[a]ny person who is domiciled within the school district" is entitled to a free education from that district."[1] However, "[i]f the superintendent or administrative principal of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district . . . , the superintendent or administrative principal may apply to the board of education for the removal of the child." N.J.S.A. 18A:38-1(b)(2). The parents may contest a local school board's decision regarding the student's right to attend school in the district to the Commissioner of Education and "shall have the burden of proof by a preponderance of the evidence" to prove domicile in the school district. N.J.S.A. 18A:38-1(b)(2). The State Board of Education has promulgated various rules implementing N.J.S.A. 18A:38-1 and governing student domicile and eligibility to attend school. See N.J.A.C. 6A:22-1.1 to -6.3.

"A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district." N.J.A.C. 6A:22-3.1(a)(1). "Domicile" has been "defined as 'the place where [a person] has his [or her] true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has an intention of returning.'" See D.L. v. Bd. of Educ. of Princeton Reg'l Sch. Dist., 366 N.J. Super. 269, 273-74 (App. Div. 2004) (quoting T.B.W. v. Bd. of Educ. of Belleville, EDU 5959-96, Initial Decision (April 30, 1998), adopted, Comm'r (June 18, 1998), <http://www.njlaw.rutgers.edu/collections/oal/>. "A person may have several residences or places of abode, but only one domicile at a time." D.L., supra, 366 N.J. Super. at 274.

N.J.A.C. 6A:3-8.1's special procedures governing appeals of a local school board's "determinations with respect to entitlement to attend school" do not "preclude a district board of education from seeking payment of tuition, consistent with the

[1] The school district must also provide a free education to "[a]ny person who is kept in the home of another person domiciled within the school district" when that person "is supported by such other person gratis as if he were such other person's own child" in certain circumstances if the other person files certain documentation with the secretary of the local board of education. N.J.S.A. 18A:38-1(b)(1). This is referred to as an "affidavit student." A.M.S. v. Bd. of Educ. of Margate, 409 N.J. Super. 149, 158 n.4 (App. Div. 2009); see also N.J.A.C. 6A:22-3.1(a)(2).

provisions of N.J.A.C. 6A:22-6.1(a), for a student it determines to be ineligible to attend school in the district." N.J.A.C. 6A:3-8.1(e). Under N.J.A.C. 6A:22-6.1(a),

> [i]f no appeal to the Commissioner is filed by the parent, guardian, adult student, or district resident keeping an "affidavit" student following notice of an ineligibility determination, the district board of education may assess tuition for up to one year of a student's ineligible attendance, including the 21-day period provided by N.J.S.A. 18A:38-1 for appeal to the Commissioner.[2]

The rules also provide for the Commissioner to assess tuition where the petitioners appeal a local school board's determination that their child was not entitled to attend school in the district. N.J.A.C. 6A:22-6.2(a) applies where the petitioners do not prevail in their appeal; it provides that

> [i]f an appeal to the Commissioner is filed by the parent, guardian, adult student, or school district resident keeping an "affidavit" student and the petitioner does not sustain the burden of demonstrating the student's right to attend the school district . . . the Commissioner may assess tuition for the period during which the hearing and decision on appeal were pending, and for up to one year of a student's ineligible attendance in a school district prior to the appeal's filing and including the 21-day period to file an appeal.

In this case, petitioner S.L., failed to present any evidence that she was domiciled in Union, New Jersey during the 2013-2014 school year. Petitioner was unable to produce any documents linking her name to the 2039 Tampa Terrace address during the 2013-2014 school year. Petitioner was also unable to produce any testimonial evidence substantiating her alleged domicile at 2039 Tampa Terrace as well. The testimony provided by petitioner's mother, J.A., was unpersuasive in this regard.

I **CONCLUDE** that S.L. failed to meet the burden of proof that her children, J.L., J.L., and O.L., met the requirements to receive a free education within the Union

[2] Thereafter, "[i]f the responsible party does not pay the tuition assessment, the district board of education may petition the Commissioner pursuant to N.J.A.C. 6A:3[-1.1 to -13.1] for an order assessing tuition." N.J.A.C. 6A:22-6.1(a)(1).

Township Board of Education public schools for the 2013-2014 and 2014-2015 school years, calculated through March 4, 2015, the hearing record close date. I therefore **CONCLUDE** that J.L., J.L., and O.L., were not entitled to a free public education in the Union Township Board of Education public schools during the period of time in question. I further **CONCLUDE** that the tuition costs set forth by respondent are undisputed. Therefore, petitioner is assessed tuition in the amount of $64499.40 for the 2013-2014 and 2014-2015 school years, calculated through March 4, 2015, with a per-diem rate for the 2014-2015 school year of $77.58 (J.L. and J.L.) and $75.79 (O.L.).

ORDER

It is hereby **ORDERED** that petitioner's appeal of respondent's determination is **DENIED**. It is **ORDERED** that petitioner be assessed tuition costs as set forth above for the period of ineligible attendance for J.L., J.L., and O.L., with additional per-diem costs to be added beyond March 4, 2015, for continued ineligible attendance for the remainder of the 2014-2015 school year.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

June 4, 2015
DATE

IMRE KARASZEGI, JR., ALJ

Date Received at Agency:

Date Mailed to Parties: JUN - 4 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

APPENDIX

LIST OF WITNESSES

For Petitioner:

S.L.

J.A.

For Respondent:

Donna Hubbard

Thomas Sheridan

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

None

For Respondent:

R-1A Student enrollment J.L. 2013-2014

R-1B Student enrollment J.L. 2014-2015

R-1C Student enrollment J.L. 2013-2014

R-1D Student enrollment J.L. 2014-2015

R-1E Student enrollment O.L. 2013-2014

R-1F Student enrollment O.L. 2014-2015

R-2 Student addresses

R-4 Sheridan investigation report

R-5 Board residency letter to S.L., dated April 7, 2014

R-6 S.L. letter to Board

R-7 Board hearing letter to S.L., dated May 15, 2014

R-8 Hubbard hearing notes, June 10, 2014

R-9 Board decision letter to S.L.

R-10A 2013-2014 Tuition rates

R-10B 2014-2015 Tuition rates

R-11 S.L. answers to interrogatories

R-12 Document request to S.L.

R-13A S.L. Facebook page (September 2, 2014)

R-13B S.L. Facebook page (September 3, 2014)

R-13C O.L. Facebook page (September 3, 2014)

232-15

J.C., ON BEHALF OF MINOR CHILD, J.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent Board that her daughter, J.C., is not domiciled in the Linden School District and therefore not entitled to a free public education in Linden schools. The respondent Board contended that petitioner and J.C. reside at a home in Roselle, New Jersey, which petitioner and her husband purchased in 1993, and consequently owe tuition for the period of J.C.'s ineligible attendance in Linden schools. Petitioner asserted that she is no longer domiciled at the Roselle house because she is separated from her husband. A hearing in the matter was conducted on September 9, 2014.

The ALJ found, *inter alia*, that: the burden of proving that she is now domiciled in Linden rests with petitioner; petitioner's proofs regarding her domicile included an incomplete lease and a blank personal check, which items are insufficient to corroborate petitioner's legal domicile; petitioner last voted in Roselle; and utility bills for the Linden address are not in petitioner's name, but in her eldest daughter's name. The ALJ concluded that petitioner failed to submit sufficient evidence of legal domicile in Linden, and accordingly determined that petitioner and her daughter, J.C., are not residents in the respondent's school district. The ALJ ordered the petitioner to reimburse the Board at the per diem rate of $85.67 for the period of J.C.'s ineligible attendance in its schools.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions in this matter, but determined that the record lacks information required to calculate the amount of tuition owed to the school district, specifically the number of days of J.C.'s ineligible attendance. Accordingly, Commissioner remanded the case to the OAL for calculation of tuition due and supplementation of the record as warranted.

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

Issued 7/08/15

OAL DKT. NO. EDU 7290-14
AGENCY DKT. NO. 136-5/14

J.C., ON BEHALF OF MINOR CHILD, J.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The parties did not file exceptions.

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner failed to sustain her burden of establishing that she was a domiciliary of Linden during the 2013-2014 school year. The Commissioner further concurs with the ALJ's conclusion that the minor child was, therefore, not entitled to a free public education in the District's schools during this time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in Linden. However, the present record lacks information required to calculate the amount of tuition monies owed to the District – specifically, the number of days of ineligible attendance by the minor child.[2]

[1] The Commissioner was not provided with a transcript of the September 9, 2014 hearing at the OAL.

[2] While respondent's certification (R-12) establishes the district's tuition rates for 2013-2014 and 2014-2015, it fails to establish the minor child's date of enrollment in the district and the total number of days of ineligible attendance. Pursuant to *N.J.S.A.* 18A:38-1b, "tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local school district multiplied by the number of days of ineligible attendance."

Accordingly, this matter is remanded to the OAL for calculation of tuition due to the District and supplementation of the record as warranted.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 7/08/15

Date of Mailing: 7/08/15

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 07290-14
AGENCY DKT. NO. 136-5/14

J.C. o/b/o J.C.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,
Respondent.

J.C., pro se

Margaret A. Miller, Esq., for respondent (Weiner Lesniak, attorneys)

Record Closed: September 26, 2014 Decided: May 29, 2015

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals the decision of the respondent that determined that her daughter was not eligible to attend the Linden Public Schools because she is not a resident of the District.

The matter was transmitted to the Office of Administrative Law for hearing on June 12, 2014. A hearing was held and concluded on September 9, 2014. The record remained open for receipt of additional documents.

FINDINGS OF FACT

1. Petitioner, J.C., has a fifteen-year-old daughter "Amber" who attends the Linden Public School System.[1]
2. Petitioner also has a thirty-six-year-old daughter, R.C., who resides in Linden, New Jersey at _____.
3. Petitioner is married and has been for thirty-six years. The marital home is located at 570 West _____ Avenue in Roselle, New Jersey and the petitioner's husband resides there. Petitioner's name is on the marital home. They have owned the property since September 10, 1993.
4. Petitioner testified that she and her husband are separated. Partially, because they disagree on the appropriateness of getting a reverse mortgage.
5. Petitioner works in East Orange, New Jersey at Kidsville Daycare Center. Her work day starts at 7:00 a.m. She shares the commute with a J.G., who picks her up at the residence at 6:00 a.m. J.G. drops Amber off at her dad's in Roselle, who then takes her to school. Dad also picks up Amber after school.
6. Amber is a high honor student and involved in ROTC and the school's band.
7. Amber was adopted by petitioner and her husband. In 1998, petitioner was named Foster Parent of the year.
8. Petitioner's electric bill is in her daughter's name. Her cell phone is in her husband's name.
9. In the November 2013 election, petitioner voted in Roselle.
10. In 2013-2014 petitioner registered her daughter as an Affidavit Student. Petitioner did not present proof of residency; however, her eldest daughter did. Petitioner reported living on Price Street in Linden.

[1] Amber is a fictitious name so as to maintain the confidentiality.

11. Martha Fekete is the Attendance Officer for Linden High School and conducted a residency investigation on the petitioner. Fekete conducted a stake-out surveillance.
12. Fekete went to the Price Street address where petitioner reported living and left her business card instructing petitioner to call her.
13. Fekete learned of petitioner's home in Roselle.
14. On November 18, 2013, petitioner advised the Board that she, R.C., and Amber were evicted from the Price Street address. (R-8.)
15. Petitioner's name is on the lease agreement dated December 11, 2013, where she is referred to as a tenant along with R.C., but there is no signatory page.
16. Fekete found that petitioner had moved to East Henry Street.
17. On June 12, Fekete observed Amber being dropped off at the High School by her father.
18. In January 2014, the District sent also John Horre, Attendance Officer, to visit the petitioner's Linden address. On May 6, 2015, R.C. told Horre that petitioner and Amber did not live there. They left and moved in with "Dad" in Roselle.
19. Horre did subsequent visits on May 12, 15, 21, 23, 28, and June 3, 2014. (R-5.) Horre sent his findings to his supervisor, which are set forth in R-5.
20. Joanne Hamilton is the Director of Assessment and Pupil Personnel. Her duties include residency determination. She was told by the Attendance Officer that petitioner no longer resided in Linden and that she owned a home in Roselle. (R-4.)
21. Hamilton testified that December 13, 2013, was the deadline for submission of all residency documents. (R-10.) Hamilton received a lease from the petitioner but it was incomplete.
22. Petitioner was given a Disenrollment Form on May 7, 2014. (R-11.)
23. Residency is determined by a 6-point system and petitioner received 1 point. All applicants must obtain 6 points to establish residency.

FINDINGS, DISCUSSION AND CONCLUSION

Pursuant to N.J.S.A. 18A:38-1(a) "[a]ny person who is domiciled within the school district" is entitled to a free education from that district. "[I]f the superintendent or administrative principal of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district . . . the superintendent or administrative principal may apply to the board of education for the removal for the child." N.J.S.A. 18A:38-1(b)(2). The parents bears the burden of proving by a preponderance of the evidence that they are in fact domiciled in the school district. N.J.S.A. 18A:38-1(b)(2).

Domicile is the place of a person's abode where he or she, if absent, intends to return. Mercandante v. City of Paterson, 111 N.J. Super. 35, 39 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). A person may have multiple residences, but may only have one true domicile at a time. Therefore, residence may coincide with domicile, but does not alone determine domicile. State v. Benny, 20 N.J. 238, 251 (1955). Intent is the decisive factor in establishing domicile. It is the manifestation of a person's intent that converts residence from a mere place in which a person lives to a domicile. Ibid. The New Jersey Supreme Court held in Lyon v. Glaser, 60 N.J. 259, 264 (1972), that domicile requires proof of physical presence and the intention to remain there indefinitely. Domicile is acquired upon the "concurrence, even for a moment, of physical presence at a dwelling place with the intention of making it a permanent abode." Ibid.

The domicile or residence of children, for school purposes under Title 18A, is the domicile of the parent. I.P. v. Bd. of Educ. of the Borough of Leonia, 93 N.J.A.R.2d (EDU) 128 132 (1993); see also V.R. on behalf of A.R. v. Hamburg Bd. of Educ., N.J.A.R. 283, 286 (EDU) (1980), aff'd, State Bd., 1981 S.L.D. 1553, rev'd on other grounds, Rabinowitz v. New Jersey State Bd. of Educ., 550 F. Supp. 481 (DNJ 1982).

In the instant matter, petitioner contends that she is no longer domiciled at the Roselle address. She contends that she is separated from her husband. The law

respects the right of married couples to live in separate abodes. It is generally recognized that where a student's parents are divorced or separated and residing in different school districts, then one of the parent's districts must be chosen as the student's domicile. Where there is no court order or written agreement between divorced or separated parents designating a district for a school attendance, the student is domiciled with the parent with whom the student resides for the majority of the school year, regardless of which parent has legal custody. See, N.J.A.C. 6A:22-3.1(a)(1)(i).

Further, where one of the parents temporarily resides in a district and the other is either domiciled or temporarily residing in another district, a district may require a parent or legal guardian to demonstrate that this temporary residence is not solely for purposes of the student attending school within the district of temporary residence. N.J.A.C. 6A:22-3.2(c)(1).

As noted above, the burden of proof lies with the petitioner. I **FIND** that petitioner has failed to prove by a preponderance of the evidence that she is domiciled in the District or that she is residing in Roselle with the intent to stay. Petitioner presented no corroborating testimony or evidence to support her testimony. The lease that she submitted is incomplete. The blank personal check that contains a Linden address is not sufficient corroborating evidence. Notably, petitioner did not provide her monthly bank statement for the account.

I further **FIND** petitioner last voted in Roselle. Her utility bills are not in her name, but in her eldest daughter's name. She presented no corroborating proof that is in fact separated from her husband. Petitioner has failed to submit a driver's license, a utility bill, or a voter registration document, all of which are indicative of domicile.

Finally, the sworn statement given by her daughter, R.C., that denied that she told the investigator that her mother had moved back to Roselle is nothing other than hearsay. Hearsay is not legally competent testimony, thus it is insufficient to support a finding of fact thereon.

Thus, while petitioner cannot be faulted for desiring to give her daughter the best education, she must, like all citizens abide by the law. In this case the law requires that she be domiciled in Linden to be entitled to a free education for Amber. I **CONCLUDE** that petitioner and her daughter are not a residents of the District.

ORDER

I therefore **ORDER** the petitioner to reimburse the respondent the per diem tuition rate of $ 85.67 from the date of Amber's enrollment to the close of record herein or September 24, 2014.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

May 29, 2015

DATE

IRENE JONES, ALJ

Date Received at Agency: May 29, 2015

Date Mailed to Parties: JUN -- 2 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

sej

APPENDIX

WITNESSES

For Petitioner:

J.C.

For Respondent:

Martha Fekete

Joanne Hamilton

EXHIBTS

For Petitioner:

P-1 Prose Residency Appeal dated 5/28/14

P-2 Letter to Jessica Chinn from Health Insurance Marketplace dated 1/10/14

For Respondent:

R-12 Certification of Kathleen Gaylord

2-34-15

ROBERT VICKERY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL, HISTORY REVIEW UNIT,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a school bus driver – appealed the respondent Department's determination to suspend his school bus endorsement pursuant to *N.J.S.A.* 18A:39-29 after incident in which V.Z. – a high school foreign exchange student, with limited English language skills – fell asleep on a school bus driven by petitioner, missed his bus stop, and was driven to the bus yard before petitioner discovered that there was still a student on the bus. The Department contended that petitioner failed to meet his obligation to inspect his bus at the end of his route to ensure that no students remained on board, as required under *N.J.S.A.* 18A:39-26 *et seq.* Petitioner asserted that his conduct was at all times compliant with statutory requirements because he did not leave the child alone on the bus and conducted a visual inspection upon his return to the bus yard, which was the end of his route. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts in dispute, and the matter is ripe for summary decision; although the statute could be subject to differing interpretations, prior decisions have made clear that, in the Commissioner's view, the law requires that an inspection be conducted when the last child is dropped off during the route – not after the vehicle has finished its drop-offs and returned to the garage; petitioner failed to inspect his bus at the end of the route, thereby leaving a student aboard until he was discovered at the bus lot; and *N.J.S.A.* 18A:39-29 mandates a six-month suspension of the school bus "S" endorsement on the petitioner's drivers license. Accordingly, the ALJ granted the Department's motion for summary decision and dismissed the petition.

Upon full review and consideration of the record, Commissioner concurred with the findings and determinations of the ALJ. Accordingly, the petition was dismissed and the respondent was directed to notify the Motor Vehicle Commission of its obligation to suspend petitioner's school bus endorsement pursuant to *N.J.S.A.* 18A:39-28 et seq., and to notify petitioner's employer that he is ineligible for the period of suspension for continued employment as a school bus driver.

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

Issued 7/09/15

OAL DKT. NO. EDU 83-15
AGENCY DKT. NO. 338-11/14

ROBERT VICKERY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL, HISTORY REVIEW UNIT,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge that the Office of Criminal History Review Unit is entitled to summary decision. Accordingly, the petition of appeal is dismissed. Respondent is directed to notify the Motor Vehicle Commission of its obligation pursuant to *N.J.S.A.* 18A:39-28 *et seq.* to suspend petitioner's school bus endorsement for the mandatory six-month period, and to notify petitioner's employer that he is ineligible for the period of suspension for continued employment as a school bus driver.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/09/15
Date of Mailing: 7/09/15

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00083-15
AGENCY DKT. NO. 338-11/14

ROBERT L. VICKERY,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,
Respondent.

Stephen Wellinghorst, Esq., for petitioner (Harwood Lloyd, attorneys)

Geoffrey N. Stark, Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: May 26, 2015 Decided: June 2, 2015

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Petitioner, Robert Vickery, a school bus driver, appeals the determination by the Department of Education, Criminal History Review Unit, (the Department), that he failed to meet his obligations to inspect his bus at the end of its route, and ensure that no

students had remained on board, as required by the School Bus Safety Act, N.J.S.A. 18A:39-26 et seq. Vickery contends that his conduct was at all times compliant with statutory requirements; the Department disagrees and seeks the suspension of his driver's license in accordance with N.J.S.A. 18A:39-29.

PROCEDURAL HISTORY

Vickery filed a petition of appeal with the Commissioner of Education (the Commissioner) on November 20, 2014, and filed a corrected version thereof on December 11, 2014. An answer was filed on behalf of the Department on December 19, 2014, and the contested case was transmitted to the Office of Administrative Law on December 31, 2014.

The parties asked to proceed on a stipulated record. Cross-motions for summary decision, and briefs were filed on May 1, 2015. Replies were filed on May 22, 2015, and May 26, 2015, at which time the record closed.

FINDINGS OF FACT

The pertinent facts were agreed upon by the parties, who filed a Joint Stipulation of Fact, and I **FIND** as follows:

1. Vickery is employed as a school bus driver by the Havens Bus Service, Inc. (Havens).

2. Havens is located at 112 Clark Rd. in Sussex, NJ, 07461.

3. Havens has a contract with the High Point Regional High School District, which provides bus services to the Vernon Township School District (District or Vernon).

4. Vickery is assigned to drive busses that carry Vernon students.

5. Vickery's school bus is equipped with a system that requires him to pull a lever at the rear of the bus before he shuts the bus down.

6. On October 29, 2014, Vickery drove his assigned route, carrying high school students.

7. Vickery's assigned route was the P.M. route designated HP3.

8. V.Z. was a passenger on Vickery's bus on October 29, 2014, for the HP3 P.M. route.

9. V.Z. was a foreign exchange student from China, and was sixteen-years-old at the time of the incident. V.Z. was very limited in his ability to speak the English language.

10. The HP3 Route is scheduled to begin at the Veritas Christian Academy at approximately 2:30 P.M.

11. The HP3 P.M. route is scheduled to pick up students at Pope John XXIII Regional High School (Pope John) at approximately 2:38 P.M.

12. V.Z. boarded Vickery's bus at Pope John.

13. V.Z. was scheduled to exit the bus at the intersection of Route 565 and Drew Mountain Road, at approximately 3:46 P.M.

14. The final stop of the route is at the Holland American Bakery, 246 NJ-23, at approximately 3:56 P.M.

15. At the conclusion of the route Vickery did not see any students on the bus.

16. Vickery then yelled out in the bus "is there anyone on the bus?" or some similar question approximately three times.

17. Vickery did not hear a response.

18. V.Z. was asleep on the bus at the conclusion of Vickery's bus route.

19. Vickery then drove the bus to the Havens bus yard, located at 112 Clark Rd. in Sussex, NJ, 07461.

20. V.Z. remained on the bus while Vickery drove to the Havens bus yard.

21. V.Z. woke up while riding to the bus yard.

22. When the bus stopped at the bus yard, V.Z. approached the front of the bus and spoke to Vickery, while Vickery was still seated at the front of the bus.

23. Vickery told V.Z. to exit the bus while Vickery conducted his inspection of the bus.

24. Vickery walked to the rear of the bus and pulled the lever allowing him to shut down the bus alarm.

25. Upon exiting the bus, V.Z. contacted his host family via mobile phone.

26. According to Vickery, he exited the bus immediately after V.Z., while V.Z. stated that Vickery exited the bus "right behind" V.Z.

27. While V.Z. was on the phone with his host family, Leo Martin, another Havens employee, approached Vickery and V.Z. outside Vickery's bus.

28. Martin spoke with V.Z.'s host mother, and provided her directions to the bus yard.

29. Martin took V.Z. to the bus yard office to wait for his host family to arrive.

30. Vickery left the bus yard after Martin took V.Z. to the bus yard office.

31. Martin waited with V.Z. until V.Z.'s host mother arrived.

CONCLUSIONS OF LAW

Both the Department and Vickery seek relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c), which provides that "the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214.

I **CONCLUDE** that this matter is ripe for summary decision. There are no material disputed facts which require a plenary hearing, and the Department is entitled to judgment as a matter of law. My determination in this case is governed by the requirements of N.J.S.A. 18A: 39-28, which provides that

> A school bus driver shall visually inspect the school bus to which he is assigned at the end of the transportation route to determine that no pupil has been left on the bus. For the purposes of this act, "school bus" means every motor vehicle operated by, or under contract with, a public or governmental agency, or religious or other charitable organization or corporation, or privately operated for compensation for the transportation of children to or from school for secular or religious education, which complies with the regulations of the Department of Education affecting school buses, including "School Vehicle Type I" and "School Vehicle Type II" as defined pursuant to R.S.39:1-1.
>
> [Emphasis supplied.]

Vickery urges that he complied with the statute, because he did not leave the child alone on the bus, and conducted a visual inspection, albeit after he had already returned the bus to its depot and had discovered that the foreign exchange student, who had fallen asleep, was still with him. But the Department replies that Vickery misunderstands the definition of "end of the transportation route," and misapprehends when his obligation to conduct an inspection arose.

While concededly, the statute could be subject to differing interpretations, the Commissioner has made it clear that, in his view, the law requires that an inspection be conducted when the last child is dropped off during the route, and not after the vehicle has finished its drop-offs and has returned to its garage or depot. See Klein v. New Jersey State Dep't of Educ., Crim. Hist. Rev. Unit, EDU 00852-11, Initial Decision (January 5, 2012), rev'd, Comm'r (February 21, 2012), <http://njlaw.rutgers.edu/collections/oal/>. There, the Commissioner determined that the "'end of route' . . . terminates at the point where all of the children in that group leave the bus to enter their school and the bus is empty of riders, and before the driver moves on to her next route." In language expressly dismissing the argument made by Vickery

here, the Commissioner held that "[a]ccepting petitioner's argument that the inspection did not have to take place until the bus returned to the depot at the end of day defies reason and eviscerates the fundamental purpose of the statute – to protect our children and ensure their safety." See also Firman v. N.J. Dep't of Educ., Crim. Hist. Rev. Unit, EDU 04415-10, Initial Decision (February 7, 2011), adopted, Comm'r (March 24, 2011), <http://njlaw.rutgers.edu/collections/oal/>.

The intent of a statute or regulation should be gleaned from a view of the whole and of every part of the statute, with the real intention prevailing over the literal sense of its terms. Schierstead v. City of Brigantine, 29 N.J. 220 (1959). The Commissioner's interpretation of N.J.S.A. 18A:39-28 is a reasonable one and is consistent with the statute's clear purpose and intent. Moreover, insofar as the Commissioner is tasked with overseeing all aspects of school operations in New Jersey, his view is informed by his regulatory obligations. Vickery's argument that this requirement would be absurd, because it would necessitate that "school bus drivers . . . stop the bus and visually inspect same after each and every stop . . . " is unavailing. That is not what the law requires; rather, it demands an inspection at the last stop for discharging students, and before the return of what should be an empty vehicle to its depot. Vickery urges elsewhere in his brief that the Department's arguments "would mean that all school bus drivers, at their last drop off spots, are required to pull the bus over to the side of the road and visually inspect same for children before driving back to their bus depots. Intuitively, we do not surmise that such is what the legislature intended." But per Klein, that is exactly what the law requires, and it is an eminently reasonable and doable requirement. Indeed, is not the bus already stopped at the last point where it discharges students?

Having determined that Vickery indeed failed to inspect his bus in the manner required by the statute and that accordingly, a student was left on the bus after the end of his route, N.J.S.A. 18A:39-29 mandates a six-month suspension of Vickery's license. It provides as follows:

> In the event that, after notice and opportunity to be heard, a school bus driver is found to have left a pupil on the school

> bus at the end of his route, his school bus endorsement shall be:
>
> a. suspended for six months, for a first offense
>
> b. permanently revoked, for a second offense
>
> [N.J.S.A. 18A:39-29.]

Accordingly, the statute does not permit me to consider mitigating circumstances, or to consider the fact that, gratefully, this student was unharmed. The statute speaks in the imperative. For this reason, Vickery's reliance on N.J. Department of Children and Families v. M.H., 2014 N.J. Super. Unpub. LEXIS 1778 (App. Div. 2014), is misplaced. There, the driver left a four-year-old child on the bus, after having done no visual inspection at all. Here, the failure to inspect here took place only too late, rather than not at all; and the child left behind was not of tender years, and thus mature enough to advocate for himself, notwithstanding a language barrier. Notwithstanding these differences from the facts in M.H., the law does not permit me to alter the penalty expressly required by law.

ORDER

It is hereby **ORDERED** that the Department's motion for summary decision be **GRANTED** and the petition of appeal **DISMISSED**. Vickery's motion for summary decision is **DENIED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

June 2, 2015

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: June 29 2015

Date Mailed to Parties: JUN - 4 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

236-15IM

236-15

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

July 14, 2015

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Re: *In the Matter of the Tenure Hearing of Ursula Whitehurst, State-Operated School District of the City of Newark, Essex County, Agency Dkt. No. 70-3/15*

Dear Counsel:

Upon review of the parties' submissions, relevant sections of Title 18A, and the corresponding regulations, it is apparent that the Commissioner lacks jurisdiction to hear and decide petitioner's Motion for Emergent Relief requesting an order staying the arbitration pending appeal to the Appellate Division since this matter is presently before an arbitrator for final determination. Under these circumstances, and in accordance with *N.J.A.C.* 6A:3-5.5(b), the parties are free to direct requests to hold the matter in abeyance to the assigned arbitrator.

The Commissioner's jurisdiction to hear and decide tenure matters is limited by statute. At the outset, *N.J.S.A.* 18A:6-9 provides that an arbitrator "shall hear and make a final determination" on controversies and disputes arising under the tenure laws, codified at *N.J.S.A.* 18A:6-10 *et seq.* The Commissioner is required to promptly refer such matters to a panel of arbitrators, subject to the criteria set forth in *N.J.S.A.* 18A:6-16 and *N.J.S.A.* 18A:6-17.3. In an effort to further expedite the tenure hearing process, *N.J.S.A.* 18A:6-17.1(d) mandates a 45-day timeframe for issuance of arbitrators' written decisions. Pursuant to *N.J.S.A.* 18A:6-17.1(e), an arbitrator's final determination is not appealable to the Commissioner or the State Board of Education, but is subject to judicial review and enforcement in the Superior Court. *See N.J.S.* 2A:24-7 through *N.J.S.* 2A:24-10.

Notwithstanding an arbitrator's broad jurisdiction to hear and decide tenure matters, *N.J.S.A.* 18A:6-10 *et seq.* grants the Commissioner limited authority to perform certain related functions following referral of a tenure matter to an arbitrator for final determination pursuant to *N.J.S.A.* 18A:6-16 or *N.J.S.A.* 18A:6-17.3. For example, the tenure laws require the Commissioner to "approve or disapprove" within five days an arbitrator's request for extension of the mandated 45-day timeframe. *N.J.S.A.* 18A:6-17.1(g). If an arbitrator fails to adhere to the 45-day timeframe absent Commissioner approval of an extension request, *N.J.S.A.* 18A:17-1(h) allows the Commissioner to remove that arbitrator

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from the case and assign the matter to a new arbitrator within five days. However, the tenure laws do not bestow upon the Commissioner any authority to hear and decide related motions once a given matter is transmitted to an arbitrator for final determination.

Furthermore, *N.J.A.C.* 6A:3-5.5(b) provides specific guidance as to whom the parties should direct requests to hold a tenure matter in abeyance. The ultimate answer to this inquiry hinges upon whether the Commissioner has already referred the matter to an arbitrator:

> Where a party to a tenure matter requests, the Commissioner may agree to hold the matter in abeyance at any time prior to transmittal to an arbitrator. Thereafter, requests to hold the matter in abeyance shall be directed to the arbitrator.

Once a tenure matter is before an arbitrator for final determination, the Commissioner lacks jurisdiction to determine whether a stay should be granted. In this instance, the Commissioner referred the matter to an arbitrator via letter dated April 24, 2015. Subsequently, petitioner's Motion for Emergent Relief requesting a stay of the arbitration was filed with the Bureau of Controversies and Disputes on June 19, 2015.

In its reply, petitioner insists that its request for relief is made pursuant to *N.J.A.C.* 6A:3-1.6, and not *N.J.A.C.* 6A:3-5.5 – although its Notice of Motion for Emergent Relief clearly requests "an Order staying the arbitration." *N.J.A.C.* 6A:3-1.6(a) provides, in relevant part, that "where the subject matter of the controversy is a particular course of action by a district board of education or any other party *subject to the jurisdiction of the Commissioner*", a petitioner can move for emergent relief "*pending the Commissioner's final decision in the contested case*." (emphasis added) Because *N.J.S.A.* 18A:6-9 grants an arbitrator – not the Commissioner – jurisdiction to "hear and make a final determination" on controversies and disputes arising under the tenure laws, *N.J.A.C.* 6A:3-1.6 is inapplicable here.

For the foregoing reasons, the Commissioner lacks jurisdiction to hear and decide petitioner's Motion for Emergent Relief. This determination shall not preclude the parties from seeking the desired relief before the arbitrator pursuant to *N.J.A.C.* 6A:3-5.5(b).

Sincerely,

David C. Hespe
Commissioner of Education

c: Arbitrator Robert Simmelkjaer
Donna Arons, DAG

DCH/MKD/DCS
Via Facsimile & Regular Mail

237-15LM

State of New Jersey

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Re: *In the Matter of the Tenure Hearing of Ratiba Ahmed, State-Operated School District of the City of Newark, Essex County, Agency Dkt. No. 50-3/15*

Dear Counsel:

Upon review of the parties' submissions, relevant sections of Title 18A, and the corresponding regulations, it is apparent that the Commissioner lacks jurisdiction to hear and decide petitioner's Motion for Emergent Relief requesting an order staying the arbitration pending appeal to the Appellate Division since this matter is presently before an arbitrator for final determination. Under these circumstances, and in accordance with *N.J.A.C.* 6A:3-5.5(b), the parties are free to direct requests to hold the matter in abeyance to the assigned arbitrator.

The Commissioner's jurisdiction to hear and decide tenure matters is limited by statute. At the outset, *N.J.S.A.* 18A:6-9 provides that an arbitrator "shall hear and make a final determination" on controversies and disputes arising under the tenure laws, codified at *N.J.S.A.* 18A:6-10 *et seq.* The Commissioner is required to promptly refer such matters to a panel of arbitrators, subject to the criteria set forth in *N.J.S.A.* 18A:6-16 and *N.J.S.A.* 18A:6-17.3. In an effort to further expedite the tenure hearing process, *N.J.S.A.* 18A:6-17.1(d) mandates a 45-day timeframe for issuance of arbitrators' written decisions. Pursuant to *N.J.S.A.* 18A:6-17.1(e), an arbitrator's final determination is not appealable to the Commissioner or the State Board of Education, but is subject to judicial review and enforcement in the Superior Court. *See N.J.S.* 2A:24-7 through *N.J.S.* 2A:24-10.

Notwithstanding an arbitrator's broad jurisdiction to hear and decide tenure matters, *N.J.S.A.* 18A:6-10 *et seq.* grants the Commissioner limited authority to perform certain related functions following referral of a tenure matter to an arbitrator for final determination pursuant to *N.J.S.A.* 18A:6-16 or *N.J.S.A.* 18A:6-17.3. For example, the tenure laws require the Commissioner to "approve or disapprove" within five days an arbitrator's request for extension of the mandated 45-day timeframe. *N.J.S.A.* 18A:6-17.1(g). If an arbitrator fails to adhere to the 45-day timeframe absent Commissioner approval of an extension request, *N.J.S.A.* 18A:17-1(h) allows the Commissioner to remove that arbitrator

from the case and assign the matter to a new arbitrator within five days. However, the tenure laws do not bestow upon the Commissioner any authority to hear and decide related motions once a given matter is transmitted to an arbitrator for final determination.

Furthermore, *N.J.A.C.* 6A:3-5.5(b) provides specific guidance as to whom the parties should direct requests to hold a tenure matter in abeyance. The ultimate answer to this inquiry hinges upon whether the Commissioner has already referred the matter to an arbitrator:

> Where a party to a tenure matter requests, the Commissioner may agree to hold the matter in abeyance at any time prior to transmittal to an arbitrator. Thereafter, requests to hold the matter in abeyance shall be directed to the arbitrator.

Once a tenure matter is before an arbitrator for final determination, the Commissioner lacks jurisdiction to determine whether a stay should be granted. In this instance, the Commissioner referred the matter to an arbitrator via letter dated March 30, 2015. Subsequently, petitioner's Motion for Emergent Relief requesting a stay of the arbitration was filed with the Bureau of Controversies and Disputes on June 19, 2015.

In its reply, petitioner insists that its request for relief is made pursuant to *N.J.A.C.* 6A:3-1.6, and not *N.J.A.C.* 6A:3-5.5 – although its Notice of Motion for Emergent Relief clearly requests "an Order staying the arbitration." *N.J.A.C.* 6A:3-1.6(a) provides, in relevant part, that "where the subject matter of the controversy is a particular course of action by a district board of education or any other party *subject to the jurisdiction of the Commissioner*", a petitioner can move for emergent relief "*pending the Commissioner's final decision in the contested case.*" (emphasis added) Because *N.J.S.A.* 18A:6-9 grants an arbitrator – not the Commissioner – jurisdiction to "hear and make a final determination" on controversies and disputes arising under the tenure laws, *N.J.A.C.* 6A:3-1.6 is inapplicable here.

For the foregoing reasons, the Commissioner lacks jurisdiction to hear and decide petitioner's Motion for Emergent Relief. This determination shall not preclude the parties from seeking the desired relief before the arbitrator pursuant to *N.J.A.C.* 6A:3-5.5(b).

Sincerely,

David C. Hespe
Commissioner of Education

c: Arbitrator Ernest Weiss
Donna Arons, DAG

DCH/MKD/DCS
Via Facsimile & Regular Mail

235-15

235-15LM

State of New Jersey
DEPARTMENT OF EDUCATION
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July 14, 2015

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Re: *In the Matter of the Tenure Hearing of Linda Kelly-Gamble, State-Operated School District of the City of Newark, Essex County, Agency Dkt. No. 53-3/15*

Dear Counsel:

Upon review of the parties' submissions, relevant sections of Title 18A, and the corresponding regulations, it is apparent that the Commissioner lacks jurisdiction to hear and decide petitioner's Motion for Emergent Relief requesting an order staying the arbitration pending appeal to the Appellate Division since this matter is presently before an arbitrator for final determination. Under these circumstances, and in accordance with *N.J.A.C.* 6A:3-5.5(b), the parties are free to direct requests to hold the matter in abeyance to the assigned arbitrator.

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In its reply, petitioner insists that its request for relief is made pursuant to *N.J.A.C.* 6A:3-1.6, and not *N.J.A.C.* 6A:3-5.5 – although its Notice of Motion for Emergent Relief clearly requests "an Order staying the arbitration." *N.J.A.C.* 6A:3-1.6(a) provides, in relevant part, that "where the subject matter of the controversy is a particular course of action by a district board of education or any other party *subject to the jurisdiction of the Commissioner*", a petitioner can move for emergent relief "*pending the Commissioner's final decision in the contested case.*" (emphasis added) Because *N.J.S.A.* 18A:6-9 grants an arbitrator – not the Commissioner – jurisdiction to "hear and make a final determination" on controversies and disputes arising under the tenure laws, *N.J.A.C.* 6A:3-1.6 is inapplicable here.

For the foregoing reasons, the Commissioner lacks jurisdiction to hear and decide petitioner's Motion for Emergent Relief. This determination shall not preclude the parties from seeking the desired relief before the arbitrator pursuant to *N.J.A.C.* 6A:3-5.5(b).

Sincerely,

David C. Hespe
Commissioner of Education

c: Arbitrator Michael J. Pecklers
Donna Arons, DAG

DCH/MKD/DCS
Via Facsimile & Regular Mail

238-15

OAL DKT. NO. EDU 3097-15
AGENCY DKT. NO. 22-2/15

IN THE MATTER OF THE SUSPENSION	:	
OF THE CERTIFICATE OF DEBORAH	:	COMMISSIONER OF EDUCATION
SOUTHWOOD-SMITH, BOARD OF	:	DECISION
EDUCATION OF THE BOROUGH OF	:	
RIDGEFIELD, BERGEN COUNTY.	:	

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. According to the Agreement, the suspension of the respondent's teaching certificate began on June 17, 2015. This date has preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of the settlement payment. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement. This matter will be transmitted to the State Board of Examiners to effectuate the suspension of the respondent's certificate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/15/15

Date of Mailing: 7/15/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INIITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 03097-15
AGENCY DKT. NO. 22-2/15

IN THE MATTER OF SUSPENSION OF THE TEACHING CERTIFICATE OF DEBORAH SOUTHWOOD-SMITH, BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY.

Marla Wolfe Taus, Esq., (Winne, Banta, Hetherington, Basralian & Kahn, attorneys) for petitioner

Sheila E. O'Shea-Criscione, Esq., (Deutsch Atkins, attorneys) for respondent

Record Closed: June 2, 2015 Decided: June 2, 2015

BEFORE **JESSE H. STRAUSS**, ALJ:

The Department of Education Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law (OAL) on March 2, 2015 for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13. The parties reached an amicable resolution of the matter, and submitted the Board's Resolution and the Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with law.

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

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

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

June 2, 2015
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency: 6-5-15

Date Mailed to Parties: JUN - 5 2015
id

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SETTLEMENT AGREEMENT

THIS Settlement Agreement (the "Agreement") is entered into this 21 day of May, 2015 by and between the Ridgefield Board of Education (the "Petitioner" and/or "Board") and Deborah Southwood-Smith ("Respondent")(collectively referred to as the "Parties"). For purposes of this Agreement, the term the "Board" shall mean and include the Ridgefield Board of Education, its agencies, authorities, its current and former elected and appointed officials, officers, directors, agents, administrators, employees, designees, insurers, independent contractors and all of their predecessors and successors.

RECEIVED
2015 JUN -2 P 2:42
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

WITNESSETH

WHEREAS, Respondent is a former employee of the Petitioner; and

WHEREAS, a dispute ensued concerning Respondent's resignation from the Petitioner's employ prior to the required statutory 60 days notice pursuant to N.J.S.A. 18A:28-8; and

WHEREAS, on or about February 5, 2015, Petitioner filed an action against Deborah Southwood-Smith, through an Order to Show Cause with the Commissioner of Education , OAL Docket No. EDU 03097-2015N, Agency Ref. No. 22-2/15 (the "Action") seeking a suspension of Respondent's teaching certificate; and

WHEREAS, in order to avoid further expense of litigation, the Parties entered into this Agreement, and by so doing, they seek and intend to fully resolve, terminate, and settle all disputes, claims, and actions between them related to the Action as set forth herein.

NOW, THEREFORE, in consideration of the promises and material covenants contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. Deborah Southwood-Smith agrees to a suspension of her teaching certificate by the New Jersey Department of Education for a period of two (2) months effective June 17, 2015 with a reinstatement date of August 17, 2015.

2. This Agreement contains the entire agreement and complete settlement between the Board and supersedes any and all previous agreements of any kind whatsoever between them, whether written or oral. All prior and contemporaneous discussions and negotiations have been and are merged and integrated into, and are superseded by, this Agreement. This is an integrated document.

3. In the event that any provision of this Agreement or the application thereof should be held to be void, voidable, unlawful or, for any reason, unenforceable, the remaining portion shall remain in full force and effect, and, to that end, the provisions of this Agreement are declared to be severable.

4. This Agreement is made and entered into, and shall be subject to governed by an interpreted in accordance with the laws of New Jersey and shall be fully enforceable in the courts of that state. Respondent acknowledges and agrees that she is entering into this Agreement voluntarily, and that she is not being forced or coerced in any way by the Board or any other entity or person into signing this Agreement. Respondent acknowledges that this Agreement was negotiated by Respondent and Respondent's Attorney, that Respondent was given the opportunity to consult with an attorney of her choice before signing this Agreement and that she is satisfied with the advice of her attorney. No provision of this Agreement shall be construed against any Party based upon the fact that a party or its attorney proposed or drafted the term or provision in dispute without regard to principles of conflict of laws.

5. This Agreement is subject to formal approval of the Ridgefield Board of Education.

WHEREFORE, intending to be legally bound, the Parties have agreed to the aforesaid terms and indicate their agreement by signing below.

AGREED AND ACCEPTED:

Deborah Southwood-Smith Date: May 22nd, 2015

DEBORAH SOUTHWOOD-SMITH

Subscribed and sworn to before me

this 22day of May, 2015

Marianne Schwartz

Notary Public

MARIANNE SCHWARTZ
A Notary Public of New Jersey
My Commission Expires January 23, 2019

I hereby acknowledge and affirm that I have full authority to act on behalf of and to bind the Board to the terms set forth in this Agreement.

RIDGEFIELD BOARD OF EDUCATION

BY: K Fayerle Board President

Date: 5/28/15

Subscribed and sworn to before me

this 28TH day of May, 2015.

Notary Public MARLA WOLFE TAUS
Attorney at Law of NJ

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2015 JUN -2 P 2:03
STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL

Ridgefield Public Schools

...valuing each and every student

555 Chestnut Street, Ridgefield, NJ 07657
Phone: 201-945-7747 Fax: 201-945-7830

Frank Romano, III, Ed.D.
Superintendent of Schools

Richard Guarini
Business Administrator

The Ridgefield Board of Education met at 7:00 p.m. on Thursday, May 28, 2015 in the High School Auditorium, Ridgefield, New Jersey.

It is hereby moved by Mr. Grippa and seconded by Ms. Narvaez that the Board of Education adopted the following resolution:

WHEREAS, the Board of Education filed an action against Deborah Southwood-Smith, a former employee, through an Order to Show Cause with the New Jersey Commissioner of Education, OAL Docket No. EDU 03097-2015N, Agency Ref. No. 22-2/15 (the "Action"), seeking suspension of her teaching certificate stemming from a dispute concerning Ms. Southwood-Smith's resignation prior to the required statutory 60 days notice pursuant to N.J.S.A. 18A:28-8; and

WHEREAS, in order to avoid further expense of litigation, the former employee and the Board enter into the attached Settlement Agreement, and by so doing, they seek and intend to fully resolve, terminate and settle all disputes, claims and actions between them related to the Action; and

WHEREAS, the Superintendent of Schools has recommended that this matter be settled according to the terms and conditions reflected in the Settlement Agreement attached hereto as Exhibit A.

NOW, THEREFORE BE IT RESOLVED that the Ridgefield Board of Education authorizes the settlement of the action on the terms and conditions reflected in the Settlement Agreement attached hereto as Exhibit A and hereby authorize the Board President or Vice-President to execute the Settlement Agreement.

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Upon Roll Call Motion carried by the following vote:

6 Ayes

Richard A. Guarini
Business Administrator/Board Secretary

5-29-2015
Date

242-15

IN THE MATTER OF THE TENURE	:	
HEARING OF SHEILA SLAPPY,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK,	:	
ESSEX COUNTY.	:	

SYNOPSIS

Petitioning Board filed tenure charges of chronic and excessive absenteeism against respondent, a tenured teacher, and sought to terminate her employment with the district. Neither respondent nor any attorney acting on her behalf filed an answer to the petition following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.4(h), the allegations – which respondent has chosen not to deny – may be deemed admitted and are sufficient to warrant termination of the respondent from her tenured position. Accordingly, the Commissioner granted summary decision to the petitioner, dismissed the respondent from her tenured position in petitioner's school district, and forwarded a copy of this decision to the State Board of Examiners for review and action as that body deems appropriate.

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

July 16, 2015

AGENCY DKT NO. 137-6/15

IN THE MATTER OF THE TENURE:

HEARING OF SHEILA SLAPPY,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK,	:	
ESSEX COUNTY.	:	

For the Petitioner, Robert M. Tosti, Esq.
No appearance by or on behalf of Respondent, Sheila Slappy

This matter was opened before the Commissioner of Education on June 19, 2015 through tenure charges of conduct unbecoming certified by Cami Anderson, State District Superintendent of the State-Operated School District of the City of Newark, together with supporting evidence against Sheila Slappy, a teaching staff member in the petitioner's employ. The petitioner provided respondent with written notice of such certification at the respondent's last known address, via Federal Express, on June 18, 2015. The petitioner also served a copy of the tenure charges on the respondent's union representative.

On June 19, 2015, the Commissioner directed the respondent – via both certified and regular mail – to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*" and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. No reply to the tenure charges was received from, or on behalf of, respondent.

The certified tenure charges and statement of supporting evidence filed by the petitioner in this matter indicate that respondent has engaged in a pattern of chronic and excessive absenteeism since the 2011-12 school year. Additionally, respondent has been absent from work without having been granted a leave of absence, or without personal, sick, or vacation leave time having been approved by the District. Although respondent was deemed fit to return to work by a physician as of December 2, 2014 – and warned about her excessive absenteeism on numerous occasions – she failed to return, and – to date – remains absent without leave ("AWOL").

Deeming the allegations to be admitted and noting that respondent has failed to respond to the charges certified against her, the Commissioner finds that petitioner's charges of conduct unbecoming a teaching staff member have been proven and warrant the respondent's dismissal from employment.

Accordingly, summary decision is hereby granted to the petitioner, and the respondent is dismissed from her tenured position with the District. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/16/15

Date of Mailing: 7/17/15

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

243-15

OAL DKT. NO. EDU 1023-15
AGENCY DKT. NO. 373-12/14

P.H., on behalf of minor child, B.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. According to the Agreement, the settlement payments are due on June 1, 2015 and July 1, 2015. These dates have preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of the settlement payment. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/17/15
Date of Mailing: 7/17/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01023-15

AGENCY DKT. NO. 373-12/14

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

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

Respondent.

Maria I. Velez, Esq., for petitioner

Stephen J. Christiano, Esq., for respondent

Record Closed: June 8, 2015 Decided: June 8, 2015

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

On or about December 24, 2014, petitioner P.H. on behalf of minor child B.H. filed an appeal with the Commissioner of Education challenging the residency determination by respondent Board of Education of the Township of West Orange (the Board). The Department of Education transmitted the matter to the Office of Administrative Law, where it was filed on January 21, 2015, for determination as a contested case. The

hearings scheduled for April 2 and May 21, 2015, were adjourned at the parties' request. Subsequently, counsel for the Board submitted under letter dated June 2, 2015, the attached Settlement Agreement, along with an extract from the minutes of the Board's meeting on June 1, 2015, approving the Settlement Agreement.

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

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

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

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

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

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

June 8, 2015
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: 6-10-15

Date Mailed to Parties: JUN 10 2015
jb

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Stephen J. Christiano, Esq.
179 Eagle Rock Avenue
West Orange, NJ 07052
(973) 736-1636
Attorney for Respondent

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2015 JUN -8 A 10:09

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
AGENCY DOCKET NO. 373-12/14
OAL DOCKET NO. EDU 1023-2015

P.H., ON BEHALF OF MINOR CHILD, B.H.,
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent.

SETTLEMENT AGREEMENT

The parties hereby stipulate as follows:

1. The petition is withdrawn with prejudice.
2. B.H. shall be permitted to remain a student in respondent's district so long as he meets school residency requirements.
3. Petitioner agrees to pay tuition to respondent in the amount of $400. Payments of $200 shall be made on June 1 and July 1, 2015. Any payment not made within 10 days of its due date shall cause the petitioner to be held in default, which shall allow respondent to seek a tuition award of $2,529 against petitioner, less payments made.
4. Checks or money orders for the tuition payments shall be payable to the West Orange Board of Education and mailed/delivered to Stephen J. Christiano, Esq.,

179 Eagle Rock Avenue, West Orange, NJ 07052.

5. This settlement resolves all claims petitioner may have against respondent.

Dated: 5-8-15

Patricia Hamamoto, Petitioner

BOARD OF EDUCATION OF THE
TOWNSHIP OF WEST ORANGE

Dated: 6-1-15

By: _____
President

EXTRACT FROM THE MINUTES OF A MEETING
OF THE WEST ORANGE PUBLIC SCHOOLS
BOARD OF EDUCATION, WEST ORANGE, ESSEX COUNTY, NJ
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the West Orange School District, West Orange, in the County of Essex, New Jersey, convened in Regular/Work session on June 1, 2015 at 6:21 P.M., at the Administration Building, 179 Eagle Rock Avenue, West Orange, NJ.

The following members of the Board of Education were present:
Mr. Charles, Mrs. Casalino, Mrs. Mordecai, Mr. Robertson

The following motion was offered by Mr. Robertson and seconded by Mrs. Mordecai and adopted by the Board of Education by the following roll call vote:

Recommend approval of settlement agreement in the matter of Student ID #1311005 v. the West Orange Board of Education. Petitioner agrees to pay District tuition in the amount of $400 for the period of non-residency.

ROLL CALL: Ayes: Mr. Charles, Mrs. Casalino, Mrs. Mordecai, Mr. Robertson

Abstain: None

CERTIFICATE

I, John Calavano, Board Secretary, of the West Orange Public Schools, West Orange, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on June 1, 2015, has been compared by me with the original minutes as officially recorded in my office in the minute book of said West Orange Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 2nd day of June 2015.

John Calavano, Board Secretary

239-15LM

239-15

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

July 15, 2015

Ramon E. Rivera, Esq.
Scarinci & Hollenbeck, LLC
1100 Valley Brook Avenue
P.O. Box 790
Lyndhurst, New Jersey 07071-0790

Nancy I. Oxfeld, Esq.
Oxfeld Cohen, P.C.
60 Park Place, Suite 600
Newark, New Jersey 07102

Re: *In the Matter of the Tenure Hearing of Toni Lenz, State-Operated School District of the City of Newark, Essex County, Agency Dkt. No. 97-4/15*

Dear Counsel:

Upon review of the parties' submissions, relevant sections of Title 18A, and the corresponding regulations, it is apparent that the Commissioner lacks jurisdiction to hear and decide petitioner's Motion for Emergent Relief requesting an order staying the arbitration pending appeal to the Appellate Division since this matter is presently before an arbitrator for final determination. Under these circumstances, and in accordance with *N.J.A.C.* 6A:3-5.5(b), the parties are free to direct requests to hold the matter in abeyance to the assigned arbitrator.

The Commissioner's jurisdiction to hear and decide tenure matters is limited by statute. At the outset, *N.J.S.A.* 18A:6-9 provides that an arbitrator "shall hear and make a final determination" on controversies and disputes arising under the tenure laws, codified at *N.J.S.A.* 18A:6-10 *et seq.* The Commissioner is required to promptly refer such matters to a panel of arbitrators, subject to the criteria set forth in *N.J.S.A.* 18A:6-16 and *N.J.S.A.* 18A:6-17.3. In an effort to further expedite the tenure hearing process, *N.J.S.A.* 18A:6-17.1(d) mandates a 45-day timeframe for issuance of arbitrators' written decisions. Pursuant to *N.J.S.A.* 18A:6-17.1(e), an arbitrator's final determination is not appealable to the Commissioner or the State Board of Education, but is subject to judicial review and enforcement in the Superior Court. *See N.J.S.* 2A:24-7 through *N.J.S.* 2A:24-10.

Notwithstanding an arbitrator's broad jurisdiction to hear and decide tenure matters, *N.J.S.A.* 18A:6-10 *et seq.* grants the Commissioner limited authority to perform certain related functions following referral of a tenure matter to an arbitrator for final determination pursuant to *N.J.S.A.* 18A:6-16 or *N.J.S.A.* 18A:6-17.3. For example, the tenure laws require the Commissioner to "approve or disapprove" within five days an arbitrator's request for extension of the mandated

45-day timeframe. *N.J.S.A.* 18A:6-17.1(g). If an arbitrator fails to adhere to the 45-day timeframe absent Commissioner approval of an extension request, *N.J.S.A.* 18A:17-1(h) allows the Commissioner to remove that arbitrator from the case and assign the matter to a new arbitrator within five days. However, the tenure laws do not bestow upon the Commissioner any authority to hear and decide related motions once a given matter is transmitted to an arbitrator for final determination.

Furthermore, *N.J.A.C.* 6A:3-5.5(b) provides specific guidance as to whom the parties should direct requests to hold a tenure matter in abeyance. The ultimate answer to this inquiry hinges upon whether the Commissioner has already referred the matter to an arbitrator:

> Where a party to a tenure matter requests, the Commissioner may agree to hold the matter in abeyance at any time prior to transmittal to an arbitrator. Thereafter, requests to hold the matter in abeyance shall be directed to the arbitrator.

Once a tenure matter is before an arbitrator for final determination, the Commissioner lacks jurisdiction to determine whether a stay should be granted. In this instance, the Commissioner referred the matter to an arbitrator via letter dated April 30, 2015. Subsequently, petitioner's Motion for Emergent Relief requesting a stay of the arbitration was filed with the Bureau of Controversies and Disputes on June 22, 2015.

Petitioner insists that its request for relief is made pursuant to *N.J.A.C.* 6A:3-1.6, and not *N.J.A.C.* 6A:3-5.5 – although its Notice of Motion for Emergent Relief clearly requests "an Order staying the arbitration." *N.J.A.C.* 6A:3-1.6(a) provides, in relevant part, that "where the subject matter of the controversy is a particular course of action by a district board of education or any other party *subject to the jurisdiction of the Commissioner*", a petitioner can move for emergent relief "*pending the Commissioner's final decision in the contested case.*" (emphasis added) Because *N.J.S.A.* 18A:6-9 grants an arbitrator – not the Commissioner – jurisdiction to "hear and make a final determination" on controversies and disputes arising under the tenure laws, *N.J.A.C.* 6A:3-1.6 is inapplicable here.

For the foregoing reasons, the Commissioner lacks jurisdiction to hear and decide petitioner's Motion for Emergent Relief. This determination shall not preclude the parties from seeking the desired relief before the arbitrator pursuant to *N.J.A.C.* 6A:3-5.5(b).

Sincerely,

David C. Hespe
Commissioner of Education

c: Arbitrator Gerard G. Restaino
Donna Arons, DAG

DCH/MKD/DCS
Via Facsimile & Regular Mail

244-15

IN THE MATTER OF THE TENURE HEARING OF

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY	:
"Petitioner"	:
and	:
GAY BROWN	:
"Respondent"	:
Agency Docket No. 300-10/14	:

For Petitioner – Louis R. Lessig, Esquire; Benjamin S. Teris, Esquire

For Respondent – Robert M. Schwartz, Esquire; Andrew W. Schwartz, Esquire

Arbitrator - Scott E. Buchheit

PROCEDURAL HISTORY

The procedural history of this case is in large part set forth in the December 23, 2014 Opinion and Award of Arbitrator Walt DeTreux ("DeTreux Award"). The DeTreux Award is attached to this Award as Appendix A, and is incorporated herein in its entirety.

On January 8, 2015, the Department of Education ("DOE") appointed the undersigned to replace Arbitrator DeTreux in this matter. DOE subsequently approved extension of the statutory time limitation for concluding this case until July 15, 2015.

The arbitration hearing took place on April 17, 2015, May 5, 2015, May 21, 2015 and June 1, 2015. On June 26, 2015, both parties submitted extensive post-hearing briefs.

FACTS[1]

In 1992, Respondent began her employment in the Camden School District as a Math Teacher. Respondent remained a Math Teacher until September 2009. While serving in this capacity, Respondent was assigned to the Camden High School and the Veterans Memorial Middle School.

In September 2009, Respondent became a Vice Principal at the Woodrow Wilson High School. She remained in that position until February 2013, when she was reassigned to the Pyne Point Middle School. Respondent was a Vice Principal at that school for the remainder of the 2012-2013 school year.

[1] What follows is a basic statement of facts. The full recitation of facts, at least from the perspective of Petitioner and Respondent, is set forth in their briefs. Other facts of relevance are set forth in the DeTreux Award.

On May 1, 2013, Respondent received correspondence advising that she would not be renewed as a Vice Principal for the 2013-2014 school year for reasons of economy. Respondent anticipated that she would be reassigned as a Teacher.

Respondent applied for Unemployment Compensation benefits for the summer of 2013. She received at least one unemployment check.

On July 25, 2013, Respondent was notified that she was being reassigned to the Dudley Family School ("Dudley"), a K-8 school, as Vice Principal. This correspondence instructed Respondent to report to Dudley no later than August 2, 2013.

Peggy Nicolosi ("Nicolosi"), the interim Superintendent of Schools, had made the recommendation that Respondent be reassigned to Dudley. By then the State had already assumed operation of the District pursuant to the State Intervention Statute, with the takeover occurring on June 25, 2013.

On or about August 2, 2013, Respondent did report to Dudley. Respondent thereafter discovered that the Principal of the School, Joseph Ortiz ("Ortiz"), was on medical leave.

On August 21, 2013, Respondent attended a convocation for Principals and Vice Principals. Part of the discussion entailed the new rubrics used to evaluate Teachers, Principals and Vice Principals. Attendees were given a document titled "Attachment 1: Vice Principal Evaluation and Support in Camden City Public Schools, 2013-2014".

On August 26, 2013, Respondent met with Nicolosi. As a result of this meeting, Nicolosi offered assistance to Respondent to prepare Dudley for its opening. She assigned Diane Hathaway to assist Respondent, as well as the former Vice Principal at Dudley.

On September 2, 2013, Dudley Teachers reported for their first day of service. On September 10, 2013, Dudley students reported for their first day of school. At that time, Respondent was the administrator responsible for Dudley.

On or about September 19, 2013, Ortiz returned and assumed his Principal position at Dudley. Until that date, Respondent was the Administrator in charge of Dudley.

On October 9, 2013, Respondent commenced a medical leave for weight reduction surgery. She remained on leave from that surgery through December 5, 2013.

Respondent received three evaluations during the 2013-2014 school year. All had the same format.

The rubric used for Respondent's evaluations had four domains – Instructional Leadership, Internal Leadership, Organizational Leadership, and Effectiveness of Teacher Evaluations. Each domain had sub-domains. For each sub-domain, Respondent received one of four possible scores ("ineffective", "partially effective", "effective" or "highly effective"), followed by narratives titled "Evidence" and "Recommendations". The ratings for each sub-domain, which earned scores of 1 ("ineffective") to 4 ("highly effective") were averaged, leading to an overall score for each domain, and ultimately an overall score for the entire evaluation. At the conclusion of the evaluation form was a section titled "Evaluator's Summary Comments".

Respondent's first evaluation, dated January 10, 2014, was given by Dr. Victor Gilson ("Gilson"). Respondent's overall rating was 1.95 ("partially effective").

Respondent's second evaluation, dated March 31, 2014, was also given by Gilson. Respondent's overall rating was 1.85 ("partially effective").

Respondent's third evaluation, dated June 12, 2014, was given by Thomas Fleming ("Fleming"). Respondent's overall rating was 2.05 ("partially effective").

In late June 2014, Gilson completed an Annual Performance Report for Respondent. Respondent's average

overall score was 1.95 ("partially effective"). Gilson had a summative evaluation conference with Respondent on or about June 27, 2014, where he discussed the summative evaluation with Respondent.

On July 30, 2014, Petitioner served Respondent with tenure charges for inefficiency. On August 22, 2014, Respondent submitted an answer to the charges. On October 8, 2014, the District certified the charges to the Commissioner of Education. On October 24, 2014, Respondent submitted an answer to the certified charges.

Thereafter, the Commissioner referred the matter to Arbitrator DeTreux. The procedural history of this matter before Arbitrator DeTreux is set forth in the DeTreux Award.

POSITION OF PETITIONER[2]

To ensure students are able to achieve their full potential, the Camden City School District needs effective school leaders with the ability and desire to implement high-level instructional practices. In the early stages of State intervention of a failing school district, broad powers are bestowed upon the State District Superintendent to effectuate swift and efficient reform. The law mandates

[2] The following is taken from a Preliminary Statement set forth in Petitioner's 45-page brief.

the school district to conduct three (3) evaluations of building principals and vice principals within the first twelve (12) to eighteen (18) months of State intervention. If a school district deems a vice principal inefficient following those evaluations, the law permits the State District Superintendent to dismiss her/him. That is exactly the basis of the inefficiency charge against Respondent.

Those inefficiency charges must be sustained. Rather than accepting any responsibility for her performance deficiencies as a vice principal, Respondent blames others using half-baked excuses. She blames the District for assigning her to an elementary school, even though it was actually a family school, she has an elementary teacher certification, and her principal certification qualifies her to serve as a family school principal. She blames the District for not providing her any support to open her school, even though the District assigned an experienced principal coach, a former vice principal, and others to help. She blames her abysmal evaluation ratings on a lack of training, even though the District provided her with ample professional development sessions to help her succeed. She blames other performance deficiencies on a dispute with her principal, even though a reasonable

professional would have found ways to work both with him and around him. She blames her evaluators for not helping her, even though they provided her with numerous recommendations on how to improve and she never reached out to them for help. Respondent simply blames everyone but herself.

In short, Respondent has proven through her actions and inaction that she is not going to take part in the important changes the District is trying to effectuate. She can no longer be permitted to be a roadblock to student achievement. The tenure charges must be sustained and Respondent permanently dismissed from employment.

POSITION OF RESPONDENT[3]

The charges filed by Petitioner against Respondent are procedurally and substantively defective. The procedural defects are fatal and substantive defects render the charges arbitrary and capricious. Both warrant dismissal.

First, Petitioner failed to comply with the twelve-month assessment cycle required by the State Intervention Statute. The assessment cycle could not have begun until the assessment unit was in place, which did not occur until the fall of 2013. However, because Respondent was not

[3] The following is taken from a Preliminary Statement set forth in Respondent's 55 page brief.

employed during the month of July 2013, and only began as the vice principal at Dudley effective August 2, 2013, even assuming that the assessment cycle began on the date of take-over as the Petitioner contends, the requirement that the "assessment cycle" be "not less than 12-months" still has not been met.

Additionally, the Petitioner failed to implement a CAP as required by its own process, and by TEACHNJ, and its implementing regulations. Arbitrator DeTreux, in his decision that is the law in this case, said it governs this matter and must be read "in concert" with the State Intervention Statute.

Moreover, Petitioner failed to provide Respondent the "additional support" and "at least one additional observation" required by the explanatory document, the Petitioner's representatives drafted and disseminated at the convocation held for administrators during the week of August 19, 2013.

In addition, Petitioner paid only lip service to the training that was to occur on the evaluation rubrics as they applied to vice principals and principals. The applicable TEACHNJ regulation states in relevant part that Petitioner was required to provide "training, on and descriptions of each component of the evaluation

rubric...and provide more thorough training for any teaching staff member who is being evaluated in the school district for the first time." The only training that occurred on the evaluation instrument for principals and vice principals was on August 21, 2013, and that only lasted for at best a couple of hours and it only included training on the evaluation rubrics as they applied to teachers.

Petitioner has interpreted the Intervention Statute in such a way as to render as meaningless the procedures put into place by both that Statute and TEACHNJ. They are to be read in concert with each other and are intended to offer a measure of employee protections as a counterweight or balance to the Intervention Statute's otherwise expansive authority.

The case law, particularly the TEACHNJ arbitration decisions, hold that districts must adhere to the requisite procedures. There is no exception for a State Operated School District.

Substantively, Petitioner posits its entire case on the three evaluations. For Petitioner, nothing else mattered. As Petitioner did not pay any heed to procedures, either its own or those in statute and/or

regulation, it did not take into account at all material factual circumstances.

That Respondent made every effort to implement the recommendations made of her first evaluator, under what was acknowledged by him to be very difficult circumstances, and in fact implemented many of those recommendations, was of no moment. That the Petitioner's evaluators did not adhere to the inter-rater reliability between evaluators touted by Gilson also didn't matter. For Petitioner, only the evaluation scores mattered, even if the evaluations themselves were flawed.

The tenure charges against Respondent must be dismissed.

OPINION

As set forth above, the parties have placed before me numerous arguments. I, however, have neither the time[4] nor

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[4] TEACHNJ includes the following provision: "The arbitrator shall receive no more than $1250 per day and no more than $7500 per case". A simple mathematical calculation establishes that under this Statute an Arbitrator cannot work for the State more than six days on any case (less if she/he wishes to be reimbursed for travel expenses).

Suffice it to state that for this case - involving various administrative matters, four days of hearing resulting in a transcript of 882 pages, 76 exhibits (many lengthy), and 100 pages of post-hearing briefs (with accompanying material) - I have worked all of those six days.

need to analyze more than one of these arguments in order to decide properly this case.

More specifically, I agree with Respondent that Petitioner's actions towards her were arbitrary and capricious because Petitioner did not strictly adhere to its own "Evaluation and Support System" ("ESS") prior to bringing tenure charges against her. A detailed, six-page document[5] containing the ESS was distributed to all Principals and Vice Principals, including Respondent, at a

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I reject any suggestión that arbitrators must work beyond the allotted compensated days in order to afford the parties due process. What constitutes adequate due process is governed by what creates the dispute resolution system, in this case TEACHNJ.

Moreover, even if arbitrators were routinely willing to work uncompensated days on TEACHNJ cases, I respectfully suggest that this would not be effectuating the legislative intent. If the expectation is that arbitrators will work beyond the six day limitation, the inevitable result will be that TEACHNJ cases, particularly inefficiency cases that often involve fact intensive matters, will frequently turn into much more lengthy and resource depleting proceedings than apparently envisioned by the legislature when enacting TEACHNJ.

Thus, under TEACHNJ the parties and arbitrator must make difficult decisions about how to best use the six allotted days. Possibilities include not only limiting the arbitrator's Opinion, but also limiting the scope of the arbitration hearing itself. This could even include the exclusion of relevant evidence because its probative value is substantially outweighed by a danger of undue delay (See Fed. R. Evid. 403), as dictated by TEACHNJ.

[5] The document is titled "Vice Principal Evaluation and Support in Camden City Public Schools, 2013-2014".

gathering on August 21, 2013. Thereafter, the ESS remained in place for the entire 2013-2014 school year.

Although Respondent contends that Petitioner failed to adhere to the ESS in several different ways, my focus is on the fact that Respondent never received a Corrective Action Plan ("CAP"). In addition, as should have occurred once Respondent received a CAP, she never received at least one additional observation beyond the three that are required for all Vice Principals[6].

I reject Petitioner's assertion that the ESS did not entitle Respondent to receive a CAP. While not a model of clarity in every respect, it is stated in more than one place in the ESS that a Vice Principal who, like Respondent, is rated as ineffective or partially effective "will" receive additional support through a CAP. For example, on page seven of the ESS is written the following:

> Corrective Action Plan (CAP): Any teaching staff member who is rated Ineffective or Partially Effective on his or her evaluation will receive additional support through a CAP. The teaching staff member will work with his or her supervisor to create a plan of professional development that is designed to correct the needs identified in the evaluation. The CAP will include timelines for professional improvement and growth and clearly delineate responsibilities of the

[6] It is stated in the ESS that among the "minimum requirements" is that "All Vice Principals are required to have at least three observations a year...Vice Principals on Corrective Action Plans...must have at least one additional observation per year".

teaching staff member in implementing the plan. (emphasis added)

I do not accept the testimony of Interim State Takeover Superintendent Nicolosi that Respondent was in fact placed on a CAP. According to Nicolosi, that CAP was set forth in all three evaluations Respondent received in the "Recommendation" section that was at the conclusion of each sub-domain. Nicolosi's opinion on this point is not persuasive, as there is a clear distinction between a CAP and Recommendations.

Presumably, Vice Principals routinely receive Recommendations in their evaluations. It does not follow, however, that all of these Vice Principals have received a CAP, as that term is used generally and in the ESS. As set forth above, under the ESS a CAP must adhere to a number of specific standards, few if any of which are included in Recommendations.

I further reject any argument by Petitioner that the "actionable feedback" contained in the Recommendations section of Respondent's evaluation was the functional equivalent of a CAP. Whatever the merits of this argument might be for other Vice Principals, it is not persuasive in the context of Respondent's individual situation.

In this regard, the conditions under which Respondent worked during the 2013-2014 school year were, to say the least, highly unusual. Those factors are fairly characterized by Respondent as including the following: (1) Respondent's late assignment to the Dudley Family School; (2) her lack of elementary experience; (3) that the principal was on leave until September 19, 2013; (4) that Respondent herself was on leave from October 9 through December 5, 2013;[7] or (5) that there was little, if any, meaningful communication, cooperation and/or collaboration from Principal Ortiz during the school year.

It is this final factor that in particular made Respondent's situation so unique. On direct examination, Evaluator Fleming candidly testified about this dysfunctional relationship between Ortiz and Respondent, and who was responsible for that dysfunction, as follows:

> I don't think that there was any meaningful communication. And I have to say, that I don't think it was because of Ms. Gay Brown's action. I would more so attribute that to the Principal's actions or lack of actions.

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[7] During this leave Respondent underwent weight reduction surgery. Respondent testified that she was "morbidly obese", according to the medical definition of that term, and that she lost 100 pounds as a result of the surgery. Given this testimony, I cannot agree with Petitioner that this was elective surgery. Although Petitioner stresses that Respondent did not submit any medical documentation to support her contention about the need for the surgery, neither is there any evidence to refute it.

On cross-examination Fleming reaffirmed his previous testimony about this dysfunction and who was at fault. Fleming then testified as follows:

> I just did the final evaluation, and I think I mentioned it in my – my summary, the lack of cooperation between Miss Gay Brown and her principal, it was unheard of, it was unheard of. And as I stated earlier, I don't think that's because of Miss Gay Brown's actions. And I also evaluated the principal. And I would attribute most of that resistance to communication to the principal. So being evaluated by the rubric, she did not fare well. (emphasis added)

While Petitioner argues that Respondent should have found ways to work both with and around her Principal, notwithstanding the "unheard of" situation between them, that expectation was an undue burden for Respondent. This is particularly so because, according to Respondent's unrebuted testimony, Ortiz told her that if she went "over his head" then "I'm going to deem it insubordination and I'm going to write you up".

Petitioner chose to ignore all of these considerations when evaluating Respondent. All that mattered to Respondent's evaluators when rating her, as well as Petitioner itself when deciding to bring tenure charges against her, was how Respondent performed in each of the domains and sub-domains, without any serious consideration to the context in which that performance occurred.

While I in no way review, let alone take issue with, the determinations made by Respondent's evaluators as to the quality of Respondent's administrative performance, I do find that because of the strict accountability the evaluators and Petitioner demanded of her, Respondent likewise could demand strict accountability from Petitioner when applying to her the ESS. For the reasons set forth above, and perhaps others[8], Petitioner failed to meet that standard. It follows that Petitioner's actions towards Respondent, a long-term employee about whom there is no indication that prior to the 2013-2014 school year she had ever been considered a roadblock to student achievement, were arbitrary and capricious.

Accordingly, notwithstanding Petitioner making every possible argument to the contrary, I must and will dismiss the tenure charges against Respondent in their entirety. I will also, as requested by Respondent, order that she be reinstated with all back pay and emoluments owed.

[8] I make no judgments on the merits of the arguments that I have not analyzed in this Opinion.

AWARD

The tenure charges against Respondent are dismissed and she shall be reinstated with all back pay and emoluments owed.

Signed this 14th day of July 2015.

SCOTT E. BUCHHEIT, ARBITRATOR

State of New Jersey
County of Camden

My Commission Expires
February 5, 2019

Appendix A

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearings of:

LEON MASHORE, EDWARD BROWN, GAY S. BROWN, BRIAN MEDLEY, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN

Agency Docket #303-10/14; 290-9/14; 300-10/14; 291-9/14

Walt De Treux, Esq., Arbitrator

Decision Date: 12/23/14

Appearances: For Respondents Mashore, E. Brown, G. Brown – Robert M. Schwartz, Esq.; Andrew W. Schwartz, Esq., *SCHWARTZ LAW GROUP LLC;*
For Respondent Medley – Wayne Oppito, Esq., *NJ PRINCIPALS AND SUPERVISORS ASSOCIATION*
For Petitioner School District – Louis R. Lessig, Esq.; Benjamin S. Teris, Esq.; Lauren E. Tedesco, Esq., *BROWN & CONNERY, LLP*

Introduction and Statement of Relevant Facts

On June 25, 2013, the State of New Jersey assumed operation of the Camden City School District pursuant to the State Intervention Statute, N.J.S.A. 18A:7A-45. As part of the takeover, the State District Superintendent directed an evaluation of each building principal and vice-principal during the 2013-14 school year. The State-appointed officials employed an evaluation instrument, approved by the New Jersey Commissioner of Education, that was intended to comply with the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ") evaluation criteria, N.J.S.A. 18A:6-123, and its related regulations, N.J.A.C. 6A:10-1.1 *et seq.*

The principals and vice-principals were evaluated in four domains – instructional leadership, cultural leadership, organizational leadership; and effectiveness of teacher evaluation. In each area, the administrators were scored "ineffective," "partially effective," "effective," or "highly effective." The ratings earned a score of 1 ("ineffective") to 4 ("highly effective"). The scores were averaged for a total score on the 1 to 4 scale with a corresponding rating.

During the 2013-14 school year, principals and vice-principals in the Camden City School District were evaluated three times. Respondents Mashore, E. Brown, G. Brown, and Medley received ratings of "ineffective" or "partially effective." After the conclusion of the school year, the State District Superintendent brought tenure charges against Respondents, seeking their removal for inefficiency. The Commissioner of Education found that the charges, if proven, are sufficient to warrant dismissal and referred the case of each Respondent to an Arbitrator for a tenure hearing.[1]

On November 7, 2014, prior to receipt of the Commissioner's assignment of the Mashore case to Arbitrator Edmund Gerber, Counsel for Respondent Mashore filed a Motion To Dismiss, arguing that the tenure charges "were defective and premature in that such charges were not based on a two-year evaluative cycle pursuant to N.J.S.A. 18A:6-17.3 and were not preceded by the issuance of a corrective action plan as required by N.J.A.C. 6A:10-2.5." In short, Respondent

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[1] The tenure case of Brian Medley was referred to Arbitrator Joseph Licata; the case of Edward Brown to Arbitrator James Mastriani; the case of Leon Mashore to Arbitrator Edmund Gerber, and the case of Gay Brown to Arbitrator Walt De Treux.

asserted that the District did not comply with the legal requirements of TEACHNJ regarding evaluations.

The Commissioner's referral of the Mashore case to Arbitrator Gerber overlapped Respondent Mashore's motion. Counsel for Respondents Medley, E. Brown, and G. Brown indicated their intention to file similar motions in each Respondent's case, leading to several discussions between Counsel for Respondents and Petitioner, the four assigned Arbitrators, and the Commissioner's office.

For purposes of judicial economy and efficiency and to achieve uniformity regarding the resolution of what would be identical motions in four separate cases, Respondents and Petitioner agreed to treat the Mashore Motion To Dismiss as a consolidated motion, applicable to each of the four tenure cases, to be decided by one Arbitrator. The parties executed a consent order encompassing that agreement and submitted it to the Arbitrators and the Department of Education's Division of Disputes and Controversies.

The parties submitted written briefs in support and opposition to the Motion To Dismiss. Oral argument was heard on the motion on December 2, 2014, and Respondents filed a reply brief and Petitioner a sur-reply brief soon thereafter. The Motion was then submitted to the Arbitrator for a decision.

Issue

Should Respondent's Motion to Dismiss the tenure charges be granted or denied?

Analysis and Decision

Procedural Objection

In its Brief In Opposition to Respondents' Motion To Dismiss, Petitioner raised several procedural objections. First, it argues that the motion is untimely in that the Mashore motion was not "filed with the time allotted for the filing of an Answer." (citing N.J.A.C. 6A:3-5.3(a)(1)) Second, it contends that a motion to dismiss cannot be filed after the Commissioner has referred the charges to an Arbitrator. Finally, it asserts that the American Arbitration Association Labor Arbitration Rules do not allow for submission and consideration of dispositive motions.

The four cases present a novel legal argument and complex procedural concerns in that each of the four cases had been referred to a different Arbitrator. As identical motions would have been filed in each case, there was the likelihood of four different outcomes, beginning with the question of whether each individual arbitrator would have entertained a Motion To Dismiss or would have addressed Respondents' legal argument only after a hearing on the merits. Depending on the Arbitrators' rulings on the motion or on the ultimate issue of whether the tenure charge should be sustained, the parties would have been faced with the decision to appeal each case individually or to consolidate the cases for appeal. The possibility

of different motion and hearing procedures and of different outcomes hardly presented a model of judicial economy and efficiency.

For that reason, the parties wisely agreed to consolidate the Motion To Dismiss before one Arbitrator. And for that reason, Petitioner's procedural objections to the Motion are misplaced. If the Motion To Dismiss is denied for procedural reasons, Respondents still have the opportunity to raise the substantive challenges asserted in the Motion at the tenure hearings before each Arbitrator. Respondents would argue to the Arbitrators that the tenure charges "were defective and premature in that such charges were not based on a two-year evaluative cycle pursuant to N.J.S.A. 18A:6-17.3 and were not preceded by the issuance of a corrective action plan as required by N.J.A.C. 6A:10-2.5." The parties would once again be faced with the possibility of four separate outcomes related to a common issue in each of the four cases – the very result they were trying to avoid by consolidating the Motion before one Arbitrator.

For that reason alone, I find that the Consent Order waives any procedural argument to the Motion To Dismiss.

Moreover, the Petitioner's procedural objections are without merit. Respondent Mashore's Motion To Dismiss was, in effect, a motion for summary decision since he had already filed an Answer. N.J.S.A. 18A:6-16 provides that the Commissioner may decide a motion for summary decision prior to referral of the case to an Arbitrator. Respondent Mashore filed his Motion on November 7, 2014, three calendar days before receiving notice of the Commissioner's referral of the case to Arbitrator Gerber. The Motion and referral may have "crossed in the mail,"

but at least at the time Mashore filed the Motion, he had not been advised that his case had been referred to an Arbitrator. Accordingly, his motion was not untimely.

As Petitioner has agreed to consolidate the remaining three cases with the Mashore case for purposes of deciding identical motions that would have been filed in each case, it cannot now argue that the Motion is untimely in those three cases.

Finally, the AAA Labor Arbitration Rules may not specifically provide for dispositive motions; but it is within the Arbitrator's discretion to allow such motions. In the present tenure cases, the four Arbitrators acknowledged and, in effect, affirmed the parties' agreement to allow the Mashore Motion to Dismiss to be applicable to all four cases.

For these reasons, the Petitioner's procedural objections are without merit.

State Intervention Statute and TEACHNJ

The State Intervention Statute, N.J.S.A. 18A:7A-45, first effective January 1988, allows the state to essentially take over a school district that is not providing a "thorough and efficient" education for its students. The state-appointed officials are charged with making sweeping changes to reverse the failed course of the district. To that end, the State District Superintendent is authorized to remove administrators and supervisors after s/he has the opportunity to evaluate their effectiveness or lack thereof.

N.J.S.A. 18A:7A-45(b) requires principals and vice-principals to be evaluated a minimum of three times within the first 18 months after the state-operated school district has been established. N.J.S.A. 18A:7A-45(c) provides, in relevant part,

> "Notwithstanding any other provision of law or contract, the State district superintendent, after the completion of an assessment cycle of not less than 12 months, may dismiss any tenured building principal or vice-principal for inefficiency, incapacity, unbecoming conduct or other just cause as defined by the criteria for principal or vice-principal performance in districts under full State intervention established by subsection a. of this section...

Accordingly, principals and vice-principals in a state-operated school district can face tenure charges after a minimum of three evaluations in an assessment cycle of not less than 12 months. N.J.S.A. 18A:7A-45(a) requires that the evaluations be based on criteria adopted by the Commissioner of Education.

As Respondents note, neither the statute nor the current regulations provide defined criteria for the evaluation of principals and vice-principals in a state operated school district. In the present case, Timothy Matheney, Chief Intervention Officer for the New Jersey Department of Education, was tasked with approving an evaluation instrument and criteria for principals and vice-principals in the Camden City School District after it became subject to state intervention. The evaluation instrument developed under his supervision "was intended to comply" with the TEACHNJ evaluation criteria, i.e., the four cited domains – instructional leadership, cultural leadership, organizational leadership, and effectiveness of teacher evaluation – on a 1 to 4 scale from "ineffective" to "highly effective." The New Jersey Department of Education's Office of Evaluation approved the evaluation instrument and criteria.

Respondents seize upon the District's use of the TEACHNJ evaluation criteria to argue that evaluation of principals and vice-principals in a state-operated school district must be governed by TEACHNJ and its requirement for a two-year assessment cycle and a corrective action plan.

TEACHNJ, N.J.S.A. 18A:6-117, *et seq.*, effective August 2012, revised the process for removing ineffective teachers from the classroom. Under TEACHNJ, districts could file tenure charges against ineffective teachers after a two-year evaluation period and a corrective action plan. In the case of *I/M/O Tenure Charge of Inefficiency of Sandra Cheatham and the School District of the City of Newark,* Agency Dkt. #226-8/14, Arbitrator Bluth held that the TEACHNJ evaluation criteria set forth in N.J.A.C. 6A:10-2.1 applied to teachers in all districts, including state-operated school districts. Respondents contend that the TEACHNJ evaluation process must be extended to principals and vice-principals in state-operated school districts.

TEACHNJ does not specifically reference the State Intervention Statutes as it applies to the evaluation of principals and vice-principals in state-operated school districts. By its terms, it does not supersede the State Intervention Statute. Respondents nonetheless argue that TEACHNJ replaces the evaluation process outlined in the intervention statute for principals and vice-principals in state-operated school districts.

The State Intervention Statute requires three evaluations and an assessment cycle of not less than 12 months for principals and vice-principals in state-operated school districts, "notwithstanding any other provision of law or contract." The legislature chose not to specifically override that provision of N.J.S.A. 18A:7A-45 when it passed TEACHNJ. Accordingly, the State Intervention Statute and TEACHNJ have to be read in concert.

One of the goals of the State Intervention Statute was to allow the State District Superintendent to remove ineffective administrators and supervisors early in the process of rebuilding and revitalizing the failing district. Extending the assessment cycle for principals and vice-principals from "no less than 12 months" to 2 years would be a significant departure from the goal of the intervention statute. It is unlikely the legislature would enact such significant change without clearly stating so in the TEACHNJ statute.

Arbitrator Bluth found that the 2-year TEACHNJ evaluation period applied to teachers in state-operated school districts. The State Intervention Statute does not address the evaluation of teachers, so the Arbitrator's ruling was not an affirmation that TEACHNJ supersedes the intervention statute. Further, TEACHNJ dramatically revised teacher evaluations in a way that the new criteria allowed for more effective removal of ineffective teachers. Applying the 2-year assessment cycle to principals and vice-principals in state-operated school districts would result in an arguably less effective removal process than currently permitted by the State Intervention Statute. Again, if the legislature so intended, it would be expected to specifically reference such a significant change in the evaluation process.

Absent specific language in TEACHNJ superseding N.J.S.A. 18A:7A-45, one must conclude that the legislature did not intend to change the evaluation process for principals and vice-principals in state-operated school districts.

Petitioner's utilization of an evaluation instrument intended to comply with the TEACHNJ criteria to evaluate principals and vice-principals does not mandate that Petitioner adopt all aspects of the TEACHNJ evaluation process, such as the 2-

year assessment cycle. The intervention statute instructs that the Commissioner adopt the evaluation criteria. In the present cases, the Commissioner adopted the criteria from TEACHNJ. The adoption of criteria developed pursuant to another statute does not remove the evaluation of principals and vice-principals in state-operated school districts from the State Intervention Statute, particularly when the legislature has not expressly overridden the provisions of the intervention statute.

For these reasons, I find that Petitioner properly brought tenure charges against Respondents for inefficiency pursuant to the provisions of the State Intervention Statute as it relates to the number of evaluations and the length of the assessment cycle.

Corrective Action Plan and Alleged Non-Compliance with the 12-Month Assessment Cycle

Respondents also argue, either in their brief and/or reply brief, that Respondents were not trained in the evaluation rubrics as required by N.J.A.C. 6A:10-2.2 and were never given a correction action plan as required by N.J.A.C. 6A:10-2.5. Petitioner counters that Respondents had notice of the criteria by which they were to be evaluated as early as June 25, 2013 and were provided feedback and the opportunity to improve.

Additionally, at oral argument and in their reply brief, Respondents argue that Petitioner violated the requirement in N.J.S.A. 18A:7A-45 that tenure charges of inefficiency may only be filed after "not less that a 12 month assessment cycle." Respondents assert that Petitioner filed charges before the 12-month period had

lapsed. Petitioner first objects to Respondents raising this matter for the first time in their reply brief, and it counters the argument by asserting that it has complied with the 12-month assessment cycle requirement.

These issues – notice of the evaluation criteria, the imposition of a corrective action plan, if required, and/or the opportunity for feedback and improvement, and compliance with the timeline for filing tenure charges after an assessment period – raise genuine issues of material fact that can only be resolved through an arbitration hearing on the merits of the charges. As the parties dispute the facts giving rise to their arguments, the arguments cannot be disposed of through the present Motion To Dismiss.

Award

Respondents' Motion To Dismiss tenure charges is denied. The cases shall proceed to hearing before the assigned Arbitrators. Pursuant to the parties' Consent Order, the undersigned hereby withdraws from the Gay S. Brown case, and the Department shall appoint a new arbitrator to hear the matter.

WALT De TREUX

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearings of:

LEON MASHORE, EDWARD BROWN, GAY S. BROWN, BRIAN MEDLEY, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN	**Agency Docket #303-10/14; 290-9/14; 300-10/14; 291-9/14**

Affirmation

I, Walt De Treux, affirm that I am the individual who executed this Decision and Award.

WALT De TREUX

246-15

ASKIAA NASH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION

SYNOPSIS

The petitioner herein was imprisoned on May 16, 2002 and released in 2013 after the Supreme Court found that – based on new evidence that would likely change the jury's verdict – a new trial for Mr. Nash was essential. In April 2013, the Judgments of Conviction against petitioner were vacated, and the indictments against him dismissed in their entirety upon motion from the Essex County Prosecutor. In the instant matter, petitioner seeks indemnification pursuant to *N.J.S.A.* 18A:6-6.1 for legal fees and costs expended between 2001 and 2003 relating to his criminal trial and subsequent application for a new trial following his conviction in 2002.

The ALJ found, *inter alia,* that: petitioner bears the burden of demonstrating his claims under *N.J.S.A.* 18A:6-6.1 by a preponderance of the evidence; it is undisputed that the criminal charges against petitioner arose from his employment as a teaching staff member in respondent's school district, that his convictions have been reversed, and that the Essex County Prosecutor's Office has dismissed the indictments. The initial decision also recited that *N.J.S.A.* 18A:6-6.1 provides a board of education shall reimburse a staff member for the reasonable counsel fees and expenses of the "original hearing or trial and all appeals," the respondent's argument that petitioner is unable to demonstrate the reasonableness of the counsel fees that he incurred, and is therefore ineligible for reimbursement, is without merit and that under the circumstances present in this matter, petitioner has demonstrated that the fees paid to his attorneys were reasonable and subject to reimbursement by the district. Certain other documented fees clearly related to petitioner's defense, which were raised at hearing, are also subject to reimbursement, but other fees claimed by petitioner for which inadequate documentation was provided, or which were first raised in a post-hearing brief, are not subject to reimbursement. Accordingly, the ALJ concluded that petitioner demonstrated that the legal fees and costs specifically delineated in the Initial Decision are reasonable and should be reimbursed by the school district pursuant to *N.J.S.A.* 18A:6-6.1.

Upon independent review of the record, the Commissioner concurred with the ALJ's findings and adopted the Initial Decision of the OAL as the final decision in this matter. The respondent was ordered to reimburse petitioner in the amount of $44,112.00, representing the reasonable fees and costs expended for his defense.

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

July 29, 2015

246-15

OAL DKT. NO. EDU 6056-14
AGENCY DKT. NO. 85-4/14

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

This matter involves the application of *N.J.S.A.* 18A:16-6.1 and whether the counsel fees expended between 2001 and 2003 for which petitioner sought reimbursement – following lengthy criminal proceedings, appeals, and ultimate dismissal of the indictments[1] lodged against him – are reasonable.

N.J.S.A. 18A:16-6.1 provides, in pertinent part: "Should any criminal or quasi-criminal action be instituted against any such person for any such act or omission and should such proceeding be dismissed or result in a final disposition in favor of such person, the board of education shall reimburse him for the cost of defending such proceeding, including *reasonable counsel fees and expenses of the original hearing or trial and all appeals*."[2] (emphasis added)

Based upon the testimony and certifications of Felix Lopez Montalvo, Esq. and Jonathan Gordon, Esq. – the two attorneys who represented petitioner between 2001 and 2003 – as well as the extensive trial and new-trial-motion transcripts, the Administrative Law Judge

[1] Because the Initial Decision contains a detailed recitation of the procedural history in this matter, which spans over 13 years, it will not be reiterated here. On April 29, 2013, the Judgment of Conviction entered against petitioner was vacated, and the indictments were dismissed by the Essex County Prosecutor. (Initial Decision at 4)

[2] It is uncontroverted that petitioner is eligible for reimbursement. (Initial Decision at 14)

(ALJ) determined that the record contains sufficient evidence to demonstrate that the costs and fees incurred by, and on behalf of, petitioner were reasonable under all of the circumstances.[3]

In his exceptions, petitioner seeks modification of the Initial Decision to include reimbursement for $1,546.44 in outstanding fees and costs due to the Office of the Public Defender, but concedes that reimbursement of same was not sought during the proceedings until the submission of post-hearing briefs – and after the record was closed. Respondent maintains that, because the judgments memorializing said costs were recorded against petitioner sometime between 2003 and 2006, petitioner could have included this request for reimbursement in his petition of appeal. In addition, respondent contends that because the relevant evidence was not presented at the hearing, petitioner is precluded from discussing it in his exceptions per *N.J.A.C.* 1:1-18.4.

Additionally, in its own exceptions, respondent argues that the ALJ erred in finding that petitioner demonstrated the legal fees and costs incurred through representation by attorneys Montalvo and Gordon were reasonable, and therefore reimbursable, under *N.J.S.A.* 18A:16-6.1. In essence, respondent asserts that petitioner failed to provide sufficient information for calculation of the lodestar (*i.e.* the number of hours an attorney reasonably devoted to the case multiplied by a reasonable hourly rate), thereby rendering it impossible for the ALJ to determine whether the fees incurred were reasonable. Because respondent's contentions as to reasonableness were asserted below, and thoroughly addressed by the

[3] Because Montalvo and Gordon represented petitioner more than 11 years ago, neither attorney could provide a copy of their retainer agreement or detailed hourly billing records. As noted by the ALJ, however, "the applicable ethics guidelines only require an attorney to retain a file for seven years after the file has been closed." *See* Advisory Committee on Professional Ethics Opinion No. 692, http://njlaw.rutgers.edu/collections/ethics/acpe/acp692_1.html (Initial Decision at 17)

ALJ in her Initial Decision, the Commissioner will not recapitulate them here. (Initial Decision at 16-20)

Upon independent review of the record[4] and the Initial Decision of the Office of Administrative Law (OAL), plus the parties' exceptions and respondent's reply to petitioner's exceptions filed pursuant to *N.J.A.C.* 1:1-18.4, the Commissioner concurs with the findings and conclusions of the ALJ. Petitioner has demonstrated, by a preponderance of evidence, the reasonableness of the legal fees and costs incurred as delineated in the ALJ's comprehensive Initial Decision.

The ALJ's findings in this regard are adequately supported by the record, and consonant with the purpose of *N.J.S.A.* 18A:16-6.1 – to require the Board to reimburse the legal expenses of an employee successful in defending against a criminal action that arose out of the course of his or her employment. See *Bower v. Board of Educ.*, 287 *N.J. Super.* 15, (App. Div. 1996), *aff'd* 149 *N.J.* 416 (1997). Montalvo, who had been in private practice for more than 10 years when he represented petitioner, "provided both testimony and a certification as to the fees he was [sic] charged, the fees he received, and the reasonableness of his fees." (Initial Decision at 14) Gordon, who was also in private practice for more than 10 years when he represented petitioner, "provided both testimony and a certification as to the fees he received (i.e., that he had been 'paid in full' for his services), and to their reasonableness." (Initial Decision at 14) Furthermore, "the work performed by both attorneys is self-evident from the extensive trial and new-trial-motion transcripts." (Initial Decision at 14) Finally, in accordance with *Rendine v. Pantzer*, 141 *N.J.* 292 (1995), the ALJ's analysis included the calculation and comparison of appropriate lodestar amounts – taking into account that, here, counsel for petitioner both charged

[4] The record included transcripts of recorded proceedings at the Office of Administrative Law, which took place on December 15, 2014 and January 21, 2015.

flat fees – in an effort to ensure the reasonableness of the recommended fee reimbursement under the unique circumstances presented here. (Initial Decision at 19-20)

As to the additional monies requested by petitioner in his exceptions, the Commissioner declines to award $1,546.44 due to the Office of the Public Defender at this time since – as recognized by the ALJ – petitioner did not request reimbursement of same in his petition, nor did he raise the issue during the hearing.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. Respondent shall reimburse petitioner in the amount of $44,112.00 ($9,220/Montalvo + $30,700/Gordon + $2,392/transcripts + $1,800/expert) representing the reasonable fees and costs expended for his defense.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 7/29/15

Date of Mailing: 7/30/15

[5] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 06056-14
AGENCY DKT. NO. 85-4/14

ASKIAA NASH,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Edward Cridge, Esq., for petitioner (Mellk O'Neill, attorneys)

Adam S. Herman, Esq., for respondent (Adams, Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: May 1, 2015 Decided: June 15, 2015

BEFORE **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about March 31, 2004, petitioner Askiaa Nash filed the Verified Petition in this matter, seeking indemnification pursuant to N.J.S.A. 18A:6-6.1 for legal fees and costs expended between 2001 and 2003 relating to a criminal trial and subsequent

application for a new trial after his conviction. The matter was transmitted to the Office of Administrative Law (OAL) on May 19, 2014.

The hearing was scheduled for and held on December 15, 2014, and January 21, 2015. The parties requested an opportunity to submit post-hearing briefs. Following receipt of the last reply brief, the record was closed.

FACTUAL DISCUSSION

In 2000, petitioner was employed as an educational media specialist by the Newark School District in the library at the Morton Street School. On October 12, 2000, he was arrested and charged with the sexual assault of two students, J.B. and K.L. The assaults were alleged to have taken place at the Morton Street School, during school hours. He was indicted on January 16, 2001, and a trial took place in Essex County in May 2002, at which petitioner was represented by Felix Lopez Montalvo, Esq.

At his trial, petitioner testified, and denied having any inappropriate contact with either student. He explained that J.B. was a special-needs student, with disciplinary problems, and had an aide assigned to him, Crystal St. Louis. Specifically, petitioner testified that either an adult or a non-special-needs student would accompany J.B. to the bathroom. Petitioner insisted that he never escorted a student to the bathroom, and stated that J.B. was always escorted by an aide throughout the school building.

Carl Gregory, the principal of the school, testified on rebuttal for the State. He claimed that J.B. was not assigned a "personal aide," which he defined as a person who "work[s] with a particular student throughout the day." Neither the prosecutor nor the defense attorney asked Mr. Gregory whether J.B. was assigned any other type of aide who shadowed him during the day. This testimony had "devastating consequences" for the defense. State v. Nash, 212 N.J. 518, 530 (2012). On May 16, 2002, petitioner was convicted of the assaults, and he was imprisoned on that date.

Following his conviction, petitioner filed a motion for a new trial, and retained a new attorney, Jonathan L. Gordon, Esq., to represent him. After a three-day evidentiary

hearing, the motion for a new trial was denied. Petitioner, represented by Mr. Gordon, also appealed his convictions and portions of the denial of his new-trial motion. His convictions were affirmed on appeal.

In 2005 petitioner filed another motion for a new trial, which was denied. In May 2006 he filed a petition for post-conviction relief, which was denied by the trial court; however, the trial court's decision was reversed by the Appellate Division in August 2009. In February and March 2010 the court conducted a post-conviction-relief hearing.[1]

The trial court again denied petitioner's petition for post-conviction relief, which denial was affirmed by the Appellate Division. The Supreme Court granted his petition for certification, and reversed.

The Supreme Court found that the evidence demonstrating that J.B. was closely monitored throughout the school day was the sort of evidence "'that would probably change the jury's verdict if a new trial were granted.'" Id. at 552 (citation omitted).

The Supreme Court found that a new trial must be conducted on all charges, including those involving K.L., since Principal Gregory's misleading trial testimony shattered Nash's credibility, "branding him as a liar." Id. at 553. There were "no

[1] At that hearing, Crystal St. Louis testified that Principal Gregory had ordered her to act as a one-on-one aide to J.B. after he attempted to jump off the roof of the school building. She further testified that whenever J.B. went to the bathroom, she would send another student into the bathroom with him, while she stood outside. She testified that after petitioner was arrested, Principal Gregory issued a "gag order" and told her not to respond to questions concerning the matter. Id. at 535–36.

Saundra Sharpe-Conte also testified that Principal Gregory had issued a "gag order" preventing staff from answering questions about the allegations or cooperating with Mr. Nash's counsel. She confirmed that Ms. St. Louis monitored J.B. throughout the school day. She further testified that J.B. was a "pathological liar" who "made up stories." She explained that she had never informed the Prosecutor's Office that Ms. St. Louis was a full-time aide to J.B. because she was never asked a question on the subject. Id. at 536.

In December 2004, Carl Gregory executed a Certification clarifying the testimony he had provided at Mr. Nash's criminal trial. Specifically, he certified that, while J.B. did not have a "personal" aide, he did, in fact, have a "classroom aide," Crystal St. Louis, whom he had instructed to accompany J.B. throughout the school day. He explained that he was not asked any questions about "classroom aides" during Mr. Nash's criminal trial, nor was he asked any questions that would have given him the opportunity to clarify Ms. St. Louis's role vis-à-vis J.B. Id. at 532–33.

witnesses and no physical evidence to support either K.L.'s charge or Nash's denial. The case was a simple credibility contest. Gregory's misleading testimony cast Nash as untrustworthy, and that alone was enough to tip the scales unfairly against Nash." Id. at 554.

On April 29, 2013, the Judgments of Conviction entered against petitioner were vacated, and the indictments against him dismissed, in their entirety, upon the Motion of the Essex County Prosecutor. (See P-B.[2])

Petitioner was imprisoned on May 16, 2002, the date of his conviction, and was released from prison in 2013.

On or about March 31, 2004, Mr. Nash filed the Verified Petition in this matter, seeking reimbursement of the costs and fees expended on his behalf in the defense of the criminal charges. A plenary hearing was held on December 15, 2014, and January 21, 2015.

COSTS AND FEES SOUGHT

The costs and fees that petitioner is seeking are as follows:

Check No. 1055:	$1,000.00
Check No. 1056:	$13,000.00
Check No. 1021:	$292.00
Check No. 1059:	$2,000.00
Check No. 1058:	$1,000.00
Check No. 1062:	$700.00
Check No. 1061:	$13,000.00
Check No. 527:	$600.00
Check No. 523:	$600.00
Check No. 1038:	$800.00
Check No. 1044:	$1,000.00
Check No. 1020:	$900.00
Fee Paid to Felix Lopez Montalvo:	$9,220.00

[2] Petitioner's exhibits were pre-marked with letters instead of numbers.

Total (including fee paid to Mr. Montalvo): $44,112.00

TESTIMONY

Felix Lopez Montalvo

Mr. Montalvo testified that he is an attorney and has been in private practice since 1987 or 1988. He knows Mr. Nash, as he was retained to represent him in a criminal matter.[3] When shown the transcript of the trial (P-C), Montalvo testified that the charges against petitioner were aggravated sexual assaults of minors. He stated that he prepared for months with petitioner. He had difficulty with witnesses, including one who had left the state and refused to speak to him even when threatened with a subpoena, and another who came in drunk, and so a determination was made not to use her.

Regarding the agreement he had with petitioner, Mr. Montalvo testified that at that time he handled cases like this for $20,000 or $25,000. He recalled that petitioner was low on funds at the time, and also had been referred by a friend of Montalvo's from Seton Hall University, and so he agreed to reduce the fees charged. He testified that petitioner paid a portion of the fee, but he is still owed $4,800 to this day. He has never represented Mr. Nash in any other matter. Mr. Montalvo testified that the client ledger in this matter indicates that a fee of $14,000 was quoted. A deposit of $6,500 was made; however, that check bounced, and a $10 overdraft fee was added. Thereafter, the petitioner made a payment of $6,010, another payment in the amount of $300, and another in the amount of $1,700. He then made a payment of $1,210, leaving a balance of $4,800, which was never paid. Mr. Montalvo did not recall and could not produce any written retainer agreement that may have been in place, and he said that he would not have his records now in any event from 2002. He also agreed that there was no certification of services available detailing what he did to prepare or during trial

[3] The petitioner released Mr. Montalvo from any attorney-client privilege that could be asserted, on the record.

and no record of the number of hours spent at trial. He agreed that the flat fee of $14,000 was quoted and that his ledger shows that he received $9,220 of that amount.

Mr. Montalvo did not recall whether there were any efforts to collect the balance due, and he no longer has the entire file, as it is more than ten years old. There was also animosity on the part of petitioner, which he understood completely; however, he wanted to collect the balance due, and so he informed petitioner's mother that the balance was still due and owing. Montalvo indicated his preference to be paid in full before trial or during trial, but he agreed that he never sued for the balance due. The next time he saw petitioner was when petitioner was released from jail.

Jonathan L. Gordon

Mr. Gordon is a self-employed attorney who was admitted to practice in December 1990. He was retained by petitioner's father to represent him in a motion for a new trial, which his family wished to pursue following petitioner's conviction of aggravated-sexual-assault charges. The motion was filed and at least one hearing was held on the motion; however, it was ultimately denied. (P-I; P-J; P-K; P-L.) In connection with that motion in which Mr. Gordon represented petitioner, an expert, Dr. Frank J. Dyer, was retained. Dr. Dyer's fee was paid by petitioner's father, with whom Mr. Gordon indicated he had several meetings. Mr. Gordon testified that he could have had a retainer agreement with petitioner, and believes he did, but the file is long gone. He never represented the petitioner in any other matters, and all fees he was owed were related to this case.

Mr. Gordon identified his certification (P-N) and identified copies of three checks paid out of his attorney trust account related to transcript fees. Mr. Gordon indicated that he received checks from petitioner's mother; however, due to the passage of time he does not recall any specific checks in specific amounts from specific people. He believes he was paid in full the approximate amount of $30,700. Mr. Gordon currently has no details as to motion preparation, the appeal to the Appellate Division, or specifics as to the time spent, services performed or total hours; however, he does recall spending significant preparation time, especially initially, when he was reviewing

transcripts and preparing the case with family members and communicating with the prosecutor. He and petitioner's father, James Nash, had many lengthy discussions, and he visited two different residences at times to speak to him and other family members. Mr. Gordon recalled that there was an issue that arose right away regarding an aide at the school who may not have testified, and also an issue regarding the failure to challenge the credibility of at least one of the child witnesses. Gordon stated that he was surprised in reviewing the transcripts that Montalvo had not aggressively cross-examined one of the alleged victims. He remembers those issues in the motion, and he retained Dr. Dyer to assist with the motion for a new trial. He does not recall the specifics, but recalls that the motion was denied and an appeal was filed in the Appellate Division. The appeal was denied, and the matter was not appealed to the Supreme Court.

Mr. Gordon identified several checks (P-N). The first check discussed was number 1055 dated June 30, 2003, made payable to his trust account in the amount of $1,000. The back of the check is not shown. Check 1056 in the amount of $13,000 was made payable to Jonathan L. Gordon, and again the back of the check is not depicted. No proof was provided that either of these checks was deposited.[4] The next checks addressed by the witness were numbered 1058 in the amount of $1,000, 1059 in the amount of $2,000, and 1062 in the amount of $700. Check 1059 is made payable to Jonathan L. Gordon and is dated May 30; check 1058 is made payable to Mr. Gordon's trust account and is also dated May 30; and check 1062 is dated July 9, 2003, and is also made payable to Mr. Gordon's trust account. No copies were provided of the back of any of the checks and no proof was offered that the checks were deposited. Check 1061 is also depicted, but only the front of the check, which is in the amount of $13,000 made payable to Mr. Gordon.[5]

[4] The amount of the check, which is typically depicted in the lower right corner after the check has been negotiated, is missing from both these checks.

[5] At this juncture the petitioner handed his attorney what were purported to be copies of the backs of several checks. Mr. Cridge, representing petitioner, indicated that he had asked his client for all the documents relevant to the matter and had produced what he thought was all the documents to Mr. Herman. He represented that he had learned the previous week that petitioner's sister might be in possession of copies of the backs of additional checks, and when that was confirmed to be the case, those were provided as well. During the cross-examination of Mr. Gordon the petitioner handed his attorney what appeared to be copies of the backs of several additional checks, which petitioner purportedly told his attorney he had located that morning. Counsel agreed those should have been provided long ago to Mr. Herman; however, his client had just provided them to him. Mr. Cridge argued

Mr. Gordon agreed that check 1061 contained no reference to Mr. Nash, and no proof was offered that he received it or deposited it, and the same was true of check 1062. Mr. Gordon testified that he also had no idea how many hours he spent preparing and no idea how many hours he spent in court in this matter, on any of the appearances. Mr. Gordon testified that there was no other reason for Anita Nash to write him a check, and that he spent many hours over many days in extensive preparation for this matter. He then estimated that it was likely over 100 hours.

Anita Nash

Anita Nash has been a library technician at Kean University for twenty-seven years, and petitioner is her brother. In October 2000 her brother was arrested, and she helped with his criminal defense and gave him funds for transcripts. She testified that the checks she wrote included those in Exhibit P-N, including the following:

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that the checks were simply overlooked, and that under the circumstances they should be accepted into evidence, notwithstanding that it was halfway through the hearing, because they appeared to the attorney to contain the signatures of Mr. Gordon, and that newly discovered evidence was appropriate to move into evidence. Mr. Herman, however, referred back to the discussion prior to commencing the hearing where three issues were discussed, one of which addressed bank records, and said that he found it curious that now, halfway through the day, copies of the backs of checks are being handed by petitioner to his attorney. There were multiple document requests, and halfway through the cross-examination of the second witness the petitioner should not be able to offer new documentation. Mr. Herman said petitioner insisted throughout the pendency of this matter that everything he had, had been provided as of day one, and that all discovery requests had been complied with and any documentation related to Mr. Gordon's fees had been submitted. Mr. Herman added that notwithstanding the discovery request in August, four months in advance of the hearing, ten days before the commencement of the hearing they received a CD with thousands of pages of documents on it. Moreover, the Friday before the hearing Mr. Herman received from opposing counsel a certification from Dr. Dyer, because he was not available to testify, and thereafter checks for transcription companies and for Dr. Dyer followed. After asking for copies of checks throughout the entire discovery period to substantiate petitioner's request for reimbursement, documents are continuing to arrive at the last moment, and Mr. Herman sought to bar the backs of any checks not previously produced. He also requested that all copies of checks relating to Mr. Gordon be stricken from the record as a sanction. Mr. Herman also asked that the record be preserved, articulating that if petitioner had provided these documents, and believes that they might prove his case, prior to the hearing, the matter may well have been resolved.

Mr. Cridge reiterated that he had an obligation to provide documents up to the last moment, and when he realized the case would not settle he provided the additional CD counsel referred to.

Based on the arguments of the parties, the request to admit the copies of backs of checks purporting to be the backs of the same checks in the exhibit binder was denied because there was no indication exactly what checks they were the backs of. There was nothing to connect them to the checks already discussed by Mr. Gordon.

Check 2366 in the amount of $238, about which she does not remember the details, dated April 9, 2001

Check 1055 to Mr. Gordon's trust account in the amount of $1,000 dated June 20, 2003

Check 1056 to Mr. Gordon in the amount of $13,000 dated June 30, 2003

Check 1021 to Susan Scardilli, a court reporter, in the amount of $290 dated June 19, 2002

Check 1059 to Mr. Gordon in the amount of $2,000 dated May 30, 2003

Check 1058 to Mr. Gordon's trust account in the amount of $1,000 dated May 30, 2003

Check 1062 to Mr. Gordon's trust account in the amount of $700 dated July 9, 2003

Check 1061 to Mr. Gordon in the amount of $13,000 dated May 30, 2003

She also discussed checks written by her father (P-B), numbered 523 and 527, both for trial transcripts. Check 523 was written on January 9, 2004, in the amount of $600, and check 527 on January 19, 2004, also in the amount of $600, both payable to G & L Transcripts. She also testified that she wrote four other checks to Frank J. Dyer and others as follows:

Check 1038 to Frank J. Dyer in the amount of $800 dated December 23, 2002

Check 1044 to Frank J. Dyer in the amount of $1,000 dated February 11, 2003

Check 1020 to Susan Scardilli in the amount of $900 dated June 30, 2002

Check 1032 to Vanessa Johnson to reimburse her for money she advanced to Gordon in the amount of $3,000

She agreed that she had no substantiation to indicate what Vanessa Johnson was paid for other than a notation of "legal fees." While the checks were from her parents' account she had seen them previously, because she took care of her father's account, as well; however, she has no documentation, bills, letters or any other writing from Mr. Gordon to indicate the hourly rate for the total fee charged. Ms. Nash agreed that she had no idea what checks were for which services and what each check was specifically for, other than the ones that were for transcripts.

Frank J. Dyer

Dr. Dyer has been a self-employed psychologist since 1979. He holds a bachelor's degree from Upsala College, a master's degree from Montclair State University and a Ph.D. from New York University. His practice currently consists of forensic work only, and he was asked to review records provided by petitioner's attorney twelve years ago and testify at the hearing for a new trial.

Dr. Dyer indicated that he reviewed a large volume of records submitted to him pertaining to one of the complaining witnesses, and subsequently testified at the hearing regarding a number of psychological aspects. The doctor identified his testimony within P-I, and indicated that he was paid the sum of $1,800 to review the record and appear at the hearing. He submitted a bill (P-O), and he was paid. He provided no services to Mr. Nash other than those rendered in connection with this matter.

His recollection is that the record review he conducted at the time was at a $200-per-hour fee and it took approximately four hours, and the trial appearance for half a day was at a flat rate of $1,000.

Askiaa J. Nash

Mr. Nash testified that he is currently unemployed. In 2000 he was employed at the Newark Public Schools, where he started on September 1, 1993, as an educational media specialist. He spent eight years working at the Morton School.

In the year 2000 he was arrested and alleged to have had inappropriate conduct with students at the Morton Street School. He was indicted and a trial was held in May 2002 in Essex County Superior Court. Petitioner identified Exhibits P-C, P-D, P-E, P-F, P-G and P-H as his trial transcripts. He testified that Mr. Montalvo represented him at trial and was paid $9,400. He was convicted and sentenced to twenty-two years in State prison, and thereafter filed a motion for a new trial, represented by Jonathan L. Gordon. Exhibits P-I, P-J, P-K and P-L are transcripts from his motion for a new trial. Nash testified that his convictions were ultimately overturned by the Supreme Court, and he identified the copy of the Supreme Court decision as Exhibit P-A.

The indictments against petitioner were dismissed after the reversal of his convictions. Nash testified that neither Mr. Gordon nor Mr. Montalvo represented him in any other capacity at any time. Petitioner now seeks to recover the costs and fees for his trial and motion for a new trial. Mr. Nash agreed that he had no documentation indicating whether a retainer agreement was entered into, nor what Mr. Montalvo's hourly rate was in 2002, and no documents reflecting the number of hours spent by the attorney either preparing or at trial. He testified that he made installment payments to Montalvo, including a check for $6,500 that bounced, but which he ultimately "made good on." He is aware that Mr. Montalvo asserts that he is still owed $4,800, but he testified that Montalvo has never tried to collect it. Petitioner was released from prison in 2013.

Nash agreed that he also had no retainer agreement with Mr. Gordon, and he does not know if his father did, because he was in prison when his father retained Gordon. He has no documentation related to the time spent by the attorney or the hourly rate, but indicated that his father paid Mr. Gordon through his sister, and that his sister handled their father's business. Petitioner also detailed at length his basis for his belief that Mr. Montalvo did a poor job in representing him at trial, and that he was wrongly convicted.

Petitioner also testified that numerous matters that Mr. Gordon could have raised were not argued on his behalf. Sometime later, in 2005, a public defender represented

petitioner in another motion for a new trial, prior to petitioner's pro se petition for post-conviction relief in 2006. His motions and appeals were denied up to the Appellate Division, and then the matter ultimately went to the Supreme Court, by virtue of the petition for post-conviction relief.

LEGAL DISCUSSION

Petitioner seeks reimbursement for the legal costs and fees associated with the defense of the criminal charges against him pursuant to N.J.S.A. 18A:16-6.1, which provides:

> Should any criminal or quasi-criminal action be instituted against any such person for any such act or omission and should such proceeding be dismissed or result in a final disposition in favor of such person, the board of education shall reimburse him for the cost of defending such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals. No employee shall be entitled to be held harmless or have his defense costs defrayed as a result of a criminal or quasi-criminal complaint filed against the employee by or on behalf of the board of education.

The applicability of the statute was described by our Supreme Court in Bower v. Board of Education of East Orange, 149 N.J. 416, 423 (1997):

> N.J.S.A. 18A:16–6.1, read in connection with the [complementary] provisions of N.J.S.A. 18A:16–6, prescribes a two-part standard for determining whether board of education employees are entitled to indemnification of counsel fees and expenses incurred in the defense of criminal charges: (1) any act or omission on which the criminal charges are based must arise "out of and in the course of the performance of the duties" of the position held by the employee, and (2) the charges must either be dismissed or result in a final disposition favorable to the employee.

Pursuant to Bower, the right of a board of education employee to reimbursement or indemnification accrues when the criminal charges result in an acquittal or otherwise are

dismissed. Bd. of Educ. of Florham Park v. Utica Mut. Ins. Co., 172 N.J. 300, 308 (2002).

In Bower, the Court described the circumstances under which an employee makes the required showing that the criminal charges "arose out of" his employment:

> Where the record in the criminal proceeding reveals no evidence of any conduct other than the employee's performance of his lawful duties, the factual basis for the indictment becomes inextricably linked with the employee's duties as a teacher.
>
> [Bower, supra, 149 N.J. at 431.]

As the Bower Court explained, where there are no adjudicatory facts, and where the only undisputed facts are that the alleged events took place in school, during school hours, while the employee was required to be engaged in performing his duties, the employee will have met his burden in demonstrating that a lawsuit arose from a duty-related act. Ibid. Indemnification cannot be denied merely because the alleged criminal or tortious acts, if committed, would have been beyond the scope of an employee's lawful duties. Indeed, such an interpretation of a "duty-related act" would exclude all allegedly criminal conduct from reimbursement, and frustrate the express intent of the Legislature. See Powers v. Union City Bd. of Educ., 124 N.J. Super. 590, 595 (Law. Div. 1973).

Moreover, the Court in Bower explained:

> The State Board [of Education] correctly perceives that the statute may mandate indemnification in cases in which, despite a favorable disposition of the criminal charges, doubts may persist about the actual innocence of the teacher seeking reimbursement. The State Board may question the soundness of that legislative judgment **but it cannot disregard the statute's clear mandate.** To the extent that the State Board may conceive that the statutory requirements could be more effectively implemented through rulemaking that might address prospectively and more specifically the scope of the evidentiary hearing and the

> requisite burden of proof required to implement the legislative will, we foresee no obstacle to the adoption of regulations consistent with the statute and specifically designed for that purpose. **We hold only that the imposition of proof requirements specific to Bower's claim in the adjudicatory proceeding instituted by Bower was impermissible.**
>
> [Bower, supra, 149 N.J. at 434 (emphasis added).]

It is undisputed that the criminal charges against petitioner arose from his employment as a teaching staff member with the District. It is also undisputed that his convictions have been reversed, and that the Essex County Prosecutor's Office has dismissed the indictments. As such, pursuant to Bower and Florham Park, petitioner has met his burden to establish his eligibility for reimbursement pursuant to N.J.S.A. 18A:16-6.1.

Petitioner bears the burden of demonstrating his claims under N.J.S.A. 18A:16-6.1 by a preponderance of the evidence.

The procedural history of petitioner's arrest, indictment, trial, conviction, and all post-conviction efforts are set forth by our Supreme Court in State v. Nash, supra, 212 N.J. 518, and are uncontroverted. Felix Lopez Montalvo, Esq., who had been in private practice for more than ten years when he represented Mr. Nash, provided both testimony and a certification as to the fees he was charged, the fees he received, and the reasonableness of his fees. Likewise, Jonathan L. Gordon, who had also been in private practice for more than ten years when he commenced representation of Mr. Nash, provided both testimony and a certification as to the fees he received (i.e., that he had been "paid in full" for his services), and to their reasonableness. Both attorneys credibly explained that they no longer possessed their entire client files pertaining to Mr. Nash due to the age of those files, indeed, there is no requirement that files of that age be maintained. Moreover, the work performed by both attorneys is self-evident from the extensive trial and new-trial-motion transcripts.

The District argues that petitioner cannot recover the fees paid to Felix Lopez Montalvo, Esq., because of the allegations raised by petitioner in post-conviction proceedings that Mr. Montalvo's representation was ineffective. The District further argues that petitioner is not entitled to recovery of Mr. Gordon's fees, since Mr. Gordon's representation of petitioner "centered around attacking Mr. Montalvo's legal representation of Petitioner during the criminal trial." The District's position ignores both the findings of the Supreme Court in State v. Nash, 212 N.J. 518 (2012), and the plain language of N.J.S.A. 18A:16-6.1.

Notwithstanding the arguments raised by petitioner during his appeals, the Supreme Court determined that Mr. Montalvo had not been ineffective in his representation of Mr. Nash:

> In light of our constitutional jurisprudence and deferential standard of review, we concur with the PCR court's determination that Nash's trial counsel did not render constitutionally deficient performance. . . . Here, according to defense counsel, his investigation was thwarted by the lack of cooperation of school officials. Witnesses, such as classroom aide St. Louis and Principal Gregory, refused to talk to defense counsel, and Vice Principal Torelli refused to return his calls and letters. Likewise, J.B.'s special-education classroom teacher, Sharp-Conte, did not return calls and declined to be interviewed. From the beginning, Nash told his attorney that an aide followed J.B. everywhere. Nonetheless, defense counsel could not corroborate this important fact through his own investigatory efforts. As we now know, Gregory's gag order had the probable effect of interfering with trial counsel's investigation and defense.
>
> When the State presented its case-in-chief, defense counsel did not question Sharp-Conte about an aide, fearful that he might elicit an answer that would undermine his defense. Gregory's rebuttal testimony that J.B. did not have a personal aide came from the principal—the foremost authority figure in the school. That testimony evidently caught defense counsel flat-footed. Not knowing the difference between a classroom and personal aide, counsel made the strategic decision not to reinforce testimony that proved damning.

> The PCR court heard defense counsel's extensive testimony. The court concluded that, even with limited financial resources, counsel made a reasonably diligent investigation. Defense counsel cannot be faulted if he was stonewalled. Courts are cautioned to avoid looking at events through the distorting lens of hindsight and second-guessing reasonable decisions made by counsel. There is sufficient credible evidence in the record to support the PCR court's conclusion that defense counsel's performance was not constitutionally deficient.
>
> [State v. Nash, supra, 212 N.J. at 543–44 (citations omitted).]

Accordingly, there is no basis for the District's claim that the quality of Mr. Montalvo's representation precludes Mr. Nash from recovery of his fees. Indeed, it was the District's agent—Principal Gregory—whose actions were found to have interfered with Mr. Montalvo's investigation and defense.

Furthermore, N.J.S.A. 18A:16-6.1 provides that a board of education shall reimburse a staff member for the reasonable counsel fees and expenses of "the original hearing or trial and all appeals." On its face, the statute contemplates that a teacher may have to appeal a conviction, and that the teacher will be entitled to the costs and fees associated with the trial that resulted in the conviction if the appeal is successful. This is precisely what happened here. Accordingly, the fact that petitioner argued in post-conviction proceedings that Mr. Montalvo's representation was ineffective is irrelevant to his claims under N.J.S.A. 18A:16-6.

The District argues that petitioner is unable to demonstrate the reasonableness of the counsel fees that he incurred, and that he is therefore ineligible for reimbursement under N.J.S.A. 18A:16-6.1. This claim is based upon the fact that neither attorney was able to produce a retainer agreement, evidence of the hourly rate at which he billed petitioner, nor hourly billing records detailing the work that he performed on petitioner's behalf. Contrarily, under all of the circumstances, there is sufficient evidence in the record to demonstrate that the costs and fees incurred by and on behalf of petitioner were reasonable.

Mr. Montalvo testified that he was retained on a flat-fee basis. Similarly, Mr. Gordon certified that he represented petitioner on a flat-fee basis, both for the motion for a new trial, and later the subsequent appeal. Both Mr. Montalvo and Mr. Gordon certified that they no longer had copies of their files, having represented petitioner in 2002 and 2003—more than eleven years ago. The applicable ethics guidelines only require an attorney to retain a file for seven years after a file has been closed. See Advisory Committee on Professional Ethics Opinion No. 692, <http://njlaw.rutgers.edu/collections/ethics/search.php>. Accordingly, the fact that their files are no longer available is the fault of neither Mr. Montalvo nor Mr. Gordon, nor petitioner. The purpose of N.J.S.A. 18A:16-6.1 is to protect a person who is a defendant in a criminal action from being asked to absorb the financial loss of the defense of that action when the defense has secured a final favorable disposition. Sekuler v. Montgomery Twp. Bd. of Educ., App. Div. Dkt. No. A-01-96T1. That goal would be eviscerated if petitioner's claim were to be denied based upon a destruction of records over which he had no control, which took place during his lengthy incarceration.

Notwithstanding this, the record is clear as to the nature and extent of the services performed by Mr. Montalvo and Mr. Gordon. Mr. Montalvo testified as to the extent of the pretrial efforts he undertook for Mr. Nash:

> We were in preparation for this trial for months with Mr. Nash. We were attempting also to contact some prospective witnesses. We had occasion to make an appointment with one witness who came to the office and after speaking with her we decided not to use her, because she was inebriated at the time she came to my office. There was another witness that had relocated out of state which we attempted to bring back and question her. She refused to speak to us. . . . We spent a lot of time in preparation for this case. . . . We didn't know [about Principal Gregory's "gag order"] until the hearing, but it just made our job of preparing for trial that much harder.

The pretrial efforts undertaken by Mr. Montalvo were also described in State v. Nash:

> According to Nash's trial attorney, Nash said that he could not have committed the crime because an aide—St. Louis—

> escorted J.B. everywhere in the building. The presence of an aide shadowing J.B. became the main defense. Nash provided the defense attorney with the names of St. Louis, Vice Principal Torelli, and Ida Jenkins as potential witnesses. Although the defense attorney recognized that retaining an investigator before trial is "extremely important," Nash did not have the resources to do so, and therefore the attorney or his staff made contact with the witnesses. The attorney contacted St. Louis but "she did not want to get involved." She imparted that, if subpoenaed, "I'm going to say things about your client that you're not going to like." For that reason, he decided not to chance calling her as a witness. On the other hand, the defense attorney acknowledged that had St. Louis stated before Nash's criminal trial that she was J.B.'s one-on-one aide, as she did in her 2004 certification, that would have been his "ace in the hole." In that circumstance, he would have presented the information to the prosecutor's office, and then "[the prosecutor] may have walked away from the case."
>
> The defense attorney contended that he did not call Ida Jenkins because Jenkins had complained about Nash taking students out of the classroom. He did not call Vice Principal Torelli as a witness because he was unable to contact her, either by telephone or mail. Likewise, Sharp-Conte did not return any of his telephone calls, and he was not able to interview her before trial. The defense attorney, moreover, did not cross-examine Sharp-Conte about whether J.B. was assigned an aide because he was uncertain how she would respond. He declined to call as a witness Johnson-Shavers, who assisted Nash in the library, because she told him during an interview that she did not escort children to the bathroom, but rather she gave them a pass. Last, the defense attorney did not challenge Principal Gregory on cross-examination because the attorney did not know about the distinction between personal and classroom aides and because he was afraid that questioning Gregory would open the door to unfavorable testimony, including testimony about Nash's presence with students alone in the hallways and calling students to the library.
>
> [State v. Nash, supra, 212 N.J. at 537–38.]

Beyond the pretrial preparation undertaken by Mr. Montalvo, the record of Mr. Montalvo's trial work on behalf of petitioner is self-evident from the trial transcripts

(400 pages), which record Mr. Montalvo's appearances in the Essex County Superior Court for trial proceedings on May 7, 8, 9, 14, 15, and 16, 2002.

Likewise, Jonathan Gordon testified as to the nature and extent of the services he undertook on behalf of Mr. Nash:

> I couldn't give you a specific hour number, but I could tell you that I spent a significant amount of time on the Nash matters in preparation, especially initially in gathering information and understanding the case, reviewing the trial transcripts, other information that I was able to get through his family members, speaking to people in the courts, the court staff. I was familiar with the Prosecutor Nicole Amato (phonetic) and speaking to her generally about the case. So there was a—a significant amount of time.

While Mr. Gordon could not state with certainty the number of hours spent, he did estimate that it was "more than 100 hours." Moreover, his court appearances are recorded in 437 pages of transcripts generated in handling the motion for a new trial on petitioner's behalf.

Both Mr. Montalvo and Mr. Gordon were experienced private practitioners who had been practicing law for fourteen years (Montalvo) and twelve years (Gordon) by the time they represented Mr. Nash. Mr. Montalvo certified that the time and effort that he expended in preparation for the trial was considerable, and commensurate to the length of the trial and the severity of the charges faced by Mr. Nash. He further certified that his fees were fair and reasonable. (P-M.) Likewise, Mr. Gordon certified that his fees were fair and reasonable, given the amount of time expended in preparation for and during the hearing in connection with the motion for a new trial, and the subsequent appeal of Mr. Nash's convictions. (P-N.)

Finally, notwithstanding the fact that Mr. Montalvo and Mr. Gordon represented Mr. Nash on a flat-fee basis, a comparison of their efforts and fees to the hourly rate accepted by the Commissioner for counsel of similar experience demonstrates that those fees were reasonable. In Salaam v. Board of Education of Irvington, Essex County, No. A-5592-11 (App. Div. February 4, 2014),

<http://njlaw.rutgers.edu/collections/courts/>, the court, affirming the Commissioner of Education, addressed fees sought for the defense of disorderly persons[6] offenses in 2008 and 2009 and determined that an hourly rate of $250 per hour was reasonable. The court further recognized that this rate was reasonable, even though Mr. Salaam's counsel had been paid at the "volume discount rate" of $142 to $145 per hour through the teacher's union. As the court stated:

> We reject the Board's argument that the Commissioner erred in awarding a higher hourly rate than that allowed by the NJEA legal services program through which Salaam procured Smith's representation. The NJEA legal fund allowed payment of Smith's fees at a "volume discount rate" of $142 to $145 per hour. However, as noted, N.J.S.A. 18A:16-6.1 mandates the reimbursement of "reasonable" counsel fees. As the ALJ aptly stated, the fact that a third-party finances the defense does not relieve the Board of its statutory obligation to pay those reasonable fees. We agree with the ALJ that the purposes and policies of the statute are advanced by allowing a school employee to rely upon his union's insurance policy as a means to fund his legal representation, and thereby "protect himself from the potentially ruinous defense costs," which in turn "cannot inure to the benefit of the Board."

An application of this hourly rate ($250) to the scope and extent of the work performed by Mr. Montalvo and Mr. Gordon demonstrates that it is more likely than not that the fees charged by these counsel were reasonable. At that rate, the $9,220 paid to Mr. Montalvo would have been satisfied after only 36.88 hours, while Mr. Gordon's $29,650 in legal fees (accounting for the $1,050 in checks written from his trust account for transcripts) would be met after 118.6 hours, a time commensurate to the "more than 100" hours that Mr. Gordon estimated he spent on the case.[7]

Under all these circumstances, Mr. Nash has demonstrated that the fees paid to Mr. Gordon and Mr. Montalvo were reasonable, and subject to reimbursement by the District.

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[6] Charges far less serious than those faced by Mr. Nash.

[7] Even calculated at a significantly lower rate ($200), the evidence demonstrates that it is more likely than not that Mr. Montalvo's and Mr. Gordon's fees were reasonable, since the hours required to meet that rate would be only 46.1 and 148.25, respectively.

Petitioner also seeks reimbursement in the amount of $3,000 purportedly paid to a Vanessa Johnson, based upon a personal check written from Anita Nash to Johnson. The check contains no reference to petitioner or his case. Anita Nash testified that the check was issued to repay Ms. Johnson for funds advanced to Mr. Gordon on petitioner's behalf, yet no documentation was offered and no explanation tendered as to who Ms. Johnson is. Accordingly, petitioner has not demonstrated that any of the $3,000 allegedly paid to Ms. Johnson is even related to his legal defense, and as such, he is not entitled to reimbursement for this amount.

Moreover, the check from Anita Nash to Marlin LLC in the amount of $238 also bears no reference whatsoever to petitioner or his legal defense, and no invoice or any documentation was produced. Anita Nash testified candidly that she did not know who Marlin LLC was and did not recall what the payment was for. Finally, the check is dated April 9, 2001, and as petitioner's trial commenced thereafter, on May 7, 2002, it appears unlikely that this check was written in payment for a transcript, and, as such, petitioner has not demonstrated entitlement for reimbursement of this amount. The remainder of the checks claimed to be for transcripts do reference petitioner or his case, and, as such, are eligible for reimbursement.

Finally, in or about 2005, representation of petitioner was assumed by the public defender, including the work undertaken on behalf of Mr. Nash before the Supreme Court. By letter of April 27, 2015, petitioner was notified by the State of New Jersey, Office of the Attorney General, that he owes approximately $1,546.44 to the New Jersey Office of the Public Defender. Mr. Nash received this notice in connection with his settlement of a case brought against the State of New Jersey under the New Jersey Mistaken Imprisonment Statute, N.J.S.A. 52:4C-1 et seq., captioned Nash v. Treasurer, State of New Jersey, Docket No. MER-L-2399-13.

These fees were not addressed during the hearing in this matter, and are raised now for the first time in a post-hearing brief, and, as such, are not now subject to reimbursement.

CONCLUSION

Based upon all of the foregoing, I **CONCLUDE** that petitioner has demonstrated that the legal fees and costs as specifically delineated above, expended on his behalf in defense of the foregoing criminal charges, are reasonable and should be reimbursed by the District, pursuant to N.J.S.A. 18A:16-6.1.

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

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

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

June 15, 2015
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: 6-15-15

Date Mailed to Parties: JUN 16 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

dr

APPENDIX

Witnesses

For Petitioner:

Felix Lopez Montalvo

Jonathan L. Gordon

Anita Nash

Frank J. Dyer

Askiaa Nash

For Respondent:

None

Exhibits

For Petitioner:

P-A State v. Nash, 212 N.J. 518 (2013)

P-B Verified Petition

P-C Transcript of Trial 5/7/02

P-D Transcript of Trial 5/8/02

P-E Transcript of Trial 5/9/02

P-F Transcript of Trial 5/14/02

P-G Transcript of Trial 5/15/02

P-H Transcript of Trial 5/16/02

P-I Transcript of Motion for New Trial 2/11/03

P-J Transcript of Motion for New Trial 2/21/03

P-K Transcript of Motion for New Trial 3/4/03

P-L Transcript of Motion for New Trial 4/3/03

P-M Certification of Felix Lopez Montalvo, Esq.

P-N Certification of Jonathan L. Gordon, Esq.

P-O Certification of Frank Dyer, Ph.D.

P-P Additional check copies

For Respondent:

R-1 Petitioner's pro se request for a new trial

R-2 Transcript of proceedings for post-conviction relief dated March 4, 2010

R-3 Petition for post-conviction relief dated October 2000

247-15

IN THE MATTER OF THE SUSPENSION OF THE	:	
CERTIFICATE(S) OF JACQUELINE BORDON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF EDISON, MIDDLESEX COUNTY.	:	

SYNOPSIS

The Edison school district filed a petition requesting that the teaching certificate(s) of respondent be suspended for unprofessional conduct in accordance with *N.J.S.A.* 18A:26-10 for failure to honor the terms of her employment agreement with the district. In September 2014, an Order to Show Cause was served upon respondent – a non-tenured teacher – requiring her to show cause why her teaching certificate should not be suspended for resigning her position as a teacher of World Languages without providing adequate notice. The respondent contended that she only resigned because an injury prevented her from performing the duties required by her teaching assignment for the 2014-2015 school year.

The ALJ found, *inter alia*, that: the respondent herein suffered a debilitating injury to her right leg when she was chased by goats while on a trip in May 2014; medical records support respondent's contention that her injury left her unable to drive or climb stairs; the central purpose of *N.J.S.A.* 18A:26-10 is to provide notice to the school district that a member of its teaching staff will not complete the terms of his or her teaching contract, thereby allowing the district time to arrange for a suitable replacement without adversely impacting students; the decision to suspend a teaching certificate pursuant to *N.J.S.A.* 18A:26-10 is discretionary and the Commissioner has historically evaluated all circumstances specific to each case; here, although petitioner did leave her contracted teaching position to accept another at a school closer to her home; she did not change jobs for a salary increase; rather, the new job resolved problems related to her reduced mobility; nonetheless, her abrupt departure in August 2014 was unprofessional conduct within the meaning of *N.J.S.A.* 18A:26-10. The ALJ concluded that petitioner's conduct was not motivated by personal gain, but rather by a medical crisis, and – under the circumstances – the Board had an obligation to discuss accommodations with petitioner and should have shown her a modicum of compassion. Accordingly, the ALJ ordered that petitioner's teaching certificate(s) be suspended for a period of three months.

Upon independent review of the record, the Commissioner concurred with the findings of the ALJ, and adopted the Initial Decision as the final decision in this matter. Accordingly, respondent's certificate was suspended for a period of three months from the date of the filing of this decision – a copy of which was forwarded to the State Board of Examiners for the purpose of effectuating this order.

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

July 29, 2015

OAL DKT. NO. EDU 12810-14
AGENCY DKT NO. 281-9/14

IN THE MATTER OF THE SUSPENSION OF THE	:	
CERTIFICATE(S) OF JACQUELINE BORDON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF EDISON, MIDDLESEX COUNTY.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) – for the reasons outlined in the Initial Decision – that the respondent's certificate(s) should be suspended pursuant to *N.J.S.A.* 18A:26-10 because she resigned without providing the Board with the requisite notice required by her contract. The Commissioner is also in accord with the ALJ's determination that – based on the mitigating circumstances in this case – a three month suspension of the respondent's certificate(s) is the appropriate penalty.

Accordingly, the Initial Decision is adopted as the final decision in this matter. The respondent's teaching certificate(s) is suspended for a period of three months from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/29/15
Date of Mailing: 7/30/15

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 12810-14
AGENCY DKT. NO. 281-9/14

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF JACQUELINE BORDON, SCHOOL DISTRICT OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY.

Ari Schneider, Esq., for petitioner, Edison Board of Education (The Busch Law Group, attorneys)

Liam Jones, Esq., for respondent, Jacqueline Bordon (Guillermo Arango, attorneys)

Record Closed: June 9, 2015 Decided: June 18, 2015

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the Board of Education of the Township of Edison (the Board), seeks an order suspending respondent's teaching certificate for a period of one year contending that she resigned from her teaching position with inadequate notice. Respondent, Jacqueline Bordon, replies that she resigned only because an injury

dated June 3, 2015, that "[b]ased upon the complete disability with inability to use the right leg Jacqueline underwent a course of platelet rich plasma injection on 10/16/14 followed by Graston therapy . . . ." (R-11.) Bordon's condition slowly improved, and she was cleared to begin driving on March 4, 2015.

At the time of her injury, there were several weeks left in the 2013-2014 school year, and Bordon completed her duties. Her husband drove her to school and back home; she testified that the trip took about one hour and fifteen minutes each way. Additionally, Bordon had committed to teach a summer ESL course. She kept that commitment as well, with her husband driving her daily to Edison. Bordon urged that she loved working in Edison; loved her students; and was passionate about her involvement with several student clubs. But the record is clear that even before her injury, Bordon had begun to explore other employment opportunities. She admitted that she had made application to a charter school in Pennsylvania, Lehigh Valley Charter High School of the Arts, in or about February, 2014. She likewise admitted that she had made application to at least one other school prior to her injury. Importantly, however, I heard no evidence that would lead me to find that, had Bordon been offered alternative employment prior to her injury, she would have necessarily accepted it or would have left Edison without notice.

Bordon received her teaching schedule for the 2014-2015 school year in early August and immediately became concerned that her health would preclude her from fulfilling her professional responsibilities. She was slated to teach four classes at the high school, and one class at the middle school. Bordon would have to navigate several classrooms at the high school, and then travel by car to the middle school. She noted that her direct supervisor, Virginia Santoro, was well aware of her physical limitations as she had observed Bordon finish out the prior school year from a wheelchair. Bordon felt helpless and uncertain how to proceed. She testified that suddenly a solution presented itself, in the form of an offer of employment from Lehigh Valley Charter, where she had applied for a teaching position earlier in the year. This school was only twenty-five minutes from her home. Bordon conducted a demonstration lesson at the school on August 13, 2014, and signed a contract of employment on August 25, 2014. Although the contract employs her effective August

was not entirely credible. A credibility determination requires an overall assessment of the witness' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Bordon's testimony was a bit evasive, nonresponsive, and inconsistent. Indeed, the emails with Santoro were not produced, and despite inquiry by me, no explanation for their nonproduction was offered. Bordon urged that she had attached the email exchange with Santoro to the answer she filed with the Department; but when I shared the answer with her, she was forced to admit that they had not been attached.

Moreover, the contention that she asked to explore other options is inconsistent with the tenor of Bordon's letter of resignation, which is vague about her reasons for leaving, and unequivocal in its expression of her intent to leave at once. Bordon does not invite a discussion of options that would permit her to remain in Edison, either for the whole year, or long enough to secure a suitable replacement. I **FIND** that Bordon was struggling to commute to Edison each day, and that once she was injured continuing to do so presented a terrible hardship to her and her family. I also **FIND** that once she was offered employment closer to home, Bordon promptly accepted that employment; viewed it as the best solution to her problem; and made no effort to work out a compromise of any sort that would allow her to fulfill her contractual obligations. Indeed, the job at Lehigh Valley so better met her needs at the time that she was willing to take a significant cut in pay to work there.

But there is blame to go all around. Bordon forwards her letter of resignation to Santoro and cites her health as the reason for her abrupt departure. Bordon credibly testified that Santoro knew of her injury, and had witnessed her confinement to a wheelchair. Bordon's email notes that she has thought and "prayed" for a while, a clear indication to Santoro that Bordon had struggled with a solution to her concerns. Santoro simply forwards the email on to Pitucco; neither of them inquire further about Bordon's health; nor do they invite a conversation about helping her to remain in Edison. If there are emails that reflect anything other than a somewhat cold and callous

imposed suspensions for the one-year maximum period. Black Horse Pike Reg'l Sch. Dist. v. Mooney, 1984 S.L.D. 821; In re Suspension of the Teaching Certificate of Capshaw, EDU 12318-06, Initial Decision (April 30, 2007), modified, Comm'r (June 12, 2007), <http://njlaw.rutgers.edu/collections/oal/>; E. Amwell Twp. Bd. of Educ. v. Acken, 1986 S.L.D. 2803. But, the Commissioner has declined to order a full-year suspension when presented with compelling mitigating circumstances. Black Horse Pike Reg'l, supra, 1984 S.L.D. 821.

Here, Bordon did walk off the job, and did so to take a position at another school. She did not do so because she was going to earn more money; rather, because the new position resolved a personal crisis for her. Once Bordon was injured, she did initially conduct herself with professionalism. She could have immediately called in sick, but instead, finished the year, and even kept her promise to provide instruction during the summer. Nonetheless, her abrupt departure in August was "unprofessional conduct" within the meaning of N.J.S.A. 18A:26-10. Clearly, her conduct impaired the quality of instruction for Edison students. She could have and should have, at a minimum, explored solutions to her situation that might have accommodated both her needs and those of her students in Edison, and she did not. But I likewise **CONCLUDE** that the Board, through its administration, had a concomitant obligation to discuss accommodations with her, and to talk through a difficult situation with a previously reliable employee who was struggling with a debilitating injury and was likely overwrought under the circumstances. I **CONCLUDE** that the Board, through its administration, should have showed Bordon a modicum of compassion.

In determining an appropriate penalty, the Commissioner's decision in In the Matter of the Suspension of the Teaching Certificate of Rogers, 1989 S.L.D. 1962, is instructive. There, a certificate was suspended for only three months, in part because fortuitously, the board had located a replacement within a week. But the judge noted that her paramount consideration for reducing the penalty was the employee's motivation for his early departure; there it was to work with severely disabled students in an environment where it was difficult to secure and keep talented staff.

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

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

June 18, 2015
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: June 18, 2015

Date Mailed to Parties: June 19, 2015

Laura Andres
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

R-7 Not admitted

R-8 Not admitted

R-9 Not admitted

R-10 Employment Contract

R-11 Letter dated June 3, 2015

248-15

SUSAN J. HERMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a school bus driver – appealed the respondent Department's determination to suspend her school bus endorsement pursuant to *N.J.S.A.* 18A:39-29(a) of the School Bus Safety Act ("Act") after an incident in which O.S. – a kindergarten student at the Drew School – remained on the school bus as petitioner drove toward the bus depot without realizing the child was still on board. Petitioner contended that she did not violate *N.J.S.A.* 18A:39-28 as she remained within the vicinity of the bus at all times, and that the customary understanding of the meaning of "the end of the route" is the return of the bus to the bus depot. The respondent filed a motion for summary decision, which was denied, and the matter was heard at the OAL on May 29, 2015.

The ALJ found, *inter alia*, that: the rules by which petitioner's conduct must be judged are ambiguous, as the statutes use various terms such as "the end of transportation route," "the end of the route," and "vicinity of the bus," which are not defined; petitioner credibly testified that the union custom requires a visual inspection at the bus depot before securing the bus, and that this is the industry's standard implementation of *N.J.S.A.* 18A:39-28; student transportation regulations provide that "[a] student is considered to have been left unattended on the school bus at the end of the route when the driver has left the vicinity of the bus." *N.J.A.C.* 6A:27-12.3(a)(1); respondent's argument that the law requires the visual inspection at "the end of the route" to be interpreted to mean "after each drop-off point" is inapplicable in the instant case, as petitioner herein never left the vicinity of the school bus; therefore, petitioner did not leave a student unattended on the school bus. The ALJ concluded that petitioner's actions did not violate *N.J.S.A.* 18A:39-28 and, accordingly, reversed respondent's decision to suspend petitioner's school bus endorsement.

Upon review, the Commissioner rejected the Initial Decision, concluding instead that petitioner did violate the Act by admittedly failing to visually inspect the school bus before leaving her final student drop-off point, which was the end of her transportation route. In so deciding, the Commissioner found, *inter alia*, that: the interpretation of specifically when the Act requires a school bus driver to visually inspect the bus has been addressed in *Klein v. New Jersey State Department of Education, Criminal History Review Unit,* Commissioner Decision No. 68-12, decided February 21, 2012, and – more recently – in *Vickery v. New Jersey State Department of Education, Criminal History Review Unit,* Commissioner Decision No. 234-15, decided July 9, 2015; and the ALJ improperly relied on *N.J.A.C.* 6A:27-12.3(a)(1) in excusing petitioner's failure to visually inspect the bus at the end of her route at the Drew School. Accordingly, respondent's decision to suspend petitioner's school bus endorsement for six months was affirmed, and the petition was dismissed. Respondent was directed to notify the Motor Vehicle Commission of the suspension of petitioner's school bus endorsement pursuant to *N.J.S.A.* 18A:39-28 et seq., and to notify petitioner's employer that she is ineligible for the period of suspension for continued employment as a school bus driver.

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

Issued 7/30/15

OAL DKT. NO. EDU 10473-14
AGENCY DKT. NO. 168-7/14

SUSAN J. HERMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,	:	DECISION
RESPONDENT.	:	

This matter concerns interpretation of the School Bus Safety Act (the Act), *N.J.S.A.* 18A:39-26 *et seq.*, and specifically when the Act requires a school bus driver to visually inspect the school bus to determine that no pupils remain on the bus. Having previously addressed this issue in *Klein v. New Jersey State Department of Education, Criminal History Review Unit,* Commissioner Decision No. 68-12, decided February 21, 2012, and more recently in *Vickery v. New Jersey State Department of Education, Criminal History Review Unit,* Commissioner Decision No. 234-15, decided July 9, 2015[1], the Commissioner rejects the recommended Initial Decision of the Office of Administrative Law and instead concludes that petitioner violated the Act by failing to visually inspect the school bus before leaving the Drew School – at the end of her transportation route – and prior to arrival at the bus depot.

The Act requires that a school bus driver "visually inspect the school bus to which he is assigned at the end of the transportation route to determine that no pupil has been left on the bus." *N.J.S.A.* 18A:39-28. In accordance with *N.J.S.A.* 18A:39-29, if "after notice and opportunity to be heard, a school bus driver is found to have left a pupil on the school bus at the

[1] The issuance of the Initial Decision in this matter preceded the Commissioner's final determination in *Vickery*.

end of his route, his school bus endorsement shall be: a) suspended for six months, for a first offense; or b) permanently revoked, for a second offense."

At the heart of this controversy are the parties' differing interpretations of the phrase "end of the transportation route" – which is not defined in the statute or the regulations. While petitioner maintains that the "end of the transportation route" is signified by arrival at the bus depot or bus yard, respondent cites the Commissioner's decision in *Klein* to support its contention that the "end of the transportation route" is "the point where all of the children in that group leave the bus to enter their school and the bus is empty of riders, and before the driver moves on to her next route. At that point, the driver shall inspect the bus for any remaining students." *Klein, supra,* at 2.

The facts are not in dispute. Petitioner is a school bus driver for the East Windsor School District, which operates a half-day kindergarten program at the Drew School. (Initial Decision at 2) Petitioner's mid-day bus route initially involves transporting the "AM" Kindergarten students from Drew School to their respective bus stops at the conclusion of the "AM" session. Next, petitioner transports the "PM" Kindergarten students from their respective bus stops to Drew School for the "PM" session. (Stipulation of Facts, ¶ 1)

On March 21, 2014, when petitioner arrived at O.S.'s bus stop following the "AM" session, no adult was present to meet him. (Stipulation of Facts, ¶ 2) As a result, petitioner contacted her dispatch and was advised to return O.S. to Drew School with the "PM" Kindergarten students. (Stipulation of Facts, ¶ 3) When petitioner returned to Drew School, the "PM" Kindergarten students departed the bus; evidently, O.S. remained on the bus. (Stipulation of Facts, ¶ 5) Next, without having visually inspected the bus to ensure that all students had departed, petitioner exited the bus to deliver a student's misplaced backpack to a teacher, and

returned to the bus shortly thereafter. (Initial Decision at 2) Petitioner admits that she did not visually inspect the bus while at the Drew school; instead, she subsequently drove toward the bus depot without realizing that O.S. was still on the bus. (Stipulation of Facts, ¶ 4) Once petitioner received a call from her dispatch inquiring about O.S., she then called out his name to confirm his presence on the bus and drove him back to the Drew School. (Stipulation of Facts, ¶ 5)

Respondent, the Department's Criminal History Review Unit ("CHRU"), issued a decision dated March 24, 2014 finding that a child was left on petitioner's school bus, "notwithstanding [petitioner's] obligation pursuant to *N.J.S.A.* 18A:39-28 *et seq.* to conduct a visual inspection at the end of your transportation route to assure that no pupil has been left on the bus." Because this incident was petitioner's first offense, CHRU's decision indicated that petitioner's "S" endorsement on her driver's license (which allows her to operate a school bus) was to be suspended for six months pursuant to the Act. Petitioner appealed CHRU's determination.

Following a hearing at the Office of Administrative Law on May 29, 2015[2], the Administrative Law Judge concluded that: 1) petitioner, at all times, remained in the vicinity of the school bus and therefore did not leave a pupil unattended on the bus; 2) "the custom of the industry" requires compliance with *N.J.S.A.* 18A:39-28 by a visual inspection at the bus depot when the bus driver leaves the vicinity of the school bus; 3) respondent's argument that the law requires "the end of the route" to be interpreted as after each dropoff is inapplicable to the current factual determination since petitioner did not leave the vicinity of the school bus; and 4) petitioner's actions did not violate *N.J.S.A.* 18A:39-28. (Initial Decision at 9)

Respondent filed exceptions with the Commissioner claiming that the ALJ misapplied the relevant statutes and case law to the factual record. In particular, respondent

[2] The hearing transcripts are not contained within the record, nor were they supplied to the Commissioner.

argues that whether petitioner remained within the vicinity of O.S. after having left him on the school bus at the end of the route is irrelevant because the Act does not require such an inquiry to be made. (Respondent's Exceptions at 6) Rather, the only relevant inquiry is whether "a school bus driver is found to have left a pupil on the school bus at the end of his route." *N.J.S.A.* 18A:39-29. In support of its contention, respondent cites to *Klein*, wherein the Commissioner defined "end of the transportation route" as "the point where all of the children in that group leave the bus to enter their school and the bus is empty of riders, and before the driver moves on to her next route. At that point, the driver shall inspect the bus for any remaining students." *Klein, supra,* at 2. As to the ALJ's reliance upon "the custom of the industry", respondent asserts that industry custom is irrelevant to a proper application of the Act and emphasizes that "a prevailing union custom or district policy for its bus drivers cannot supersede New Jersey statutes." (Respondent's Exceptions at 7)

In response, petitioner contends that the factual circumstances here are completely different than those described in *Klein* – where a child left unattended on the bus became distressed when the driver exited to visit the restroom – and that, therefore, the ALJ appropriately distinguished *Klein.* (Petitioner's Reply Exceptions at 1) Additionally, petitioner asserts that respondent's "rigid" interpretation of the Act would unfairly result in assessment of the same penalty to petitioner as that assessed in *Klein*, and other more egregious cases "when the child's interests and welfare were at significant risk." (*Id.* at 2) For these reasons, petitioner seeks to disregard *Klein* and its holding while maintaining that the "end of the transportation route" occurs when the bus is parked at the bus depot. Under this interpretation of the Act, petitioner argues that she was under no obligation to visually inspect the bus while at the Drew School, or at any time prior to arrival at the bus depot.

Upon review of the record, the Initial Decision, and the parties' submissions, the Commissioner concurs with the respondent and rejects the ALJ's recommended conclusions. Instead, the Commissioner concludes that petitioner violated the School Bus Safety Act when she admittedly failed to visually inspect the school bus at the end of her route – *i.e.*, following the departure of the "PM" Kindergarten students from the bus, and before returning to the depot. As a result of petitioner's failure to perform the required visual inspection, O.S. was left on the bus as petitioner departed the Drew School and traveled to the bus depot. Therefore, petitioner is subject to a mandatory six month suspension of her school bus ("S") endorsement, as per *N.J.S.A.* 18A:39-29.

The ALJ's analysis is flawed for a number of reasons. Initially, the ALJ improperly excused petitioner's failure to visually inspect the bus at the end of her route at the Drew School by finding that she remained in the "vicinity" of the bus at all times and, therefore, never left O.S. unattended. In excusing petitioner's failure to visually inspect the bus before leaving the Drew School, the ALJ cited *N.J.A.C.* 6A:27-12.3(a)1 which provides that "a student is considered to have been left unattended on the school bus at the end of the route when the driver has left the vicinity of the bus." Even if petitioner remained in the vicinity of the bus when she delivered the misplaced backpack to a teacher, that fact does not exempt petitioner from completing the required visual inspection before her departure to the bus depot. Notably, the Act itself does not require a finding that a student was left *unattended* on the bus in order to impose a penalty; rather, the stringent provisions of the Act and its mandatory penalties seek to prevent students from being left unattended and placed at risk of harm. *N.J.A.C.* 6A:27-12.3, which sets forth reporting requirements, should not be viewed as limiting the scope of the Act's plain language – especially when the stated purpose for the rules governing student

transportation "is to ensure the **safe and efficient** transportation of students to and from school and school-related activities." (emphasis added) *N.J.A.C.* 6A:27-1.2.

The Commissioner's recent decision in *Vickery* reinforces the Act's requirement that the visual inspection of the school bus should have occurred before departing the Drew School at the end of the transportation route – when all of the other children had exited the bus – and makes clear that the remaining pupil need not be left unattended by the driver in order for violation of the Act to occur. In *Vickery*, a sixteen-year-old foreign exchange student, who was returning home from school, fell asleep on the school bus and therefore failed to exit at his designated stop. Following his arrival at the last bus stop on the route, and after all of the other children had exited, Vickery failed to complete the required visual inspection. As a result, the sleeping student – who was never left unattended – remained on the bus as Vickery proceeded to the bus yard.

Vickery asserted – as does our petitioner – that he complied with the statute because he did not leave the student alone on the bus and he conducted a visual inspection at the bus yard. Nevertheless, the ALJ concluded that Vickery's failure to inspect the bus before returning to the bus yard and immediately following his last stop on the route violated *N.J.S.A.* 18A:39-28. As a result, the ALJ appropriately recognized that *N.J.S.A.* 18A:39-29 mandated a six-month suspension of Vickery's "S" endorsement.[3] *Vickery v. New Jersey State Department of Education, Criminal History Review Unit*, OAL Dkt. No EDU 83-15, Agency Dkt. No. 338-11/14, Initial Decision at 7, adopted, Commissioner Decision No. 234-15, decided

[3] "[U]nder the terms set by the Legislature, where the violation has been established, no consideration of the circumstances of the event or of the driver may be considered in determining the penalty. The mandatory nature of the sanction may fairly be read as an indication of the Legislature's strong reaction to any such act on the part of someone entrusted with the care and safety of students, who in many instances are of tender years." *Garner v. New Jersey State Department of Education, Criminal History Review Unit*, OAL Dkt. No. EDU 6655-08, Initial Decision at 3, adopted, Commissioner Decision No. 132-09, decided May 1, 2009.

July 9, 2015. In so doing, the ALJ aptly noted that *N.J.S.A.* 18A:39-29 "does not permit me to consider mitigating circumstances, or to consider the fact that, gratefully, this student was unharmed. The statute speaks in the imperative." (*Vickery, supra,* Initial Decision at 8) The Commissioner concurred with the ALJ in *Vickery* and upheld the six-month suspension.

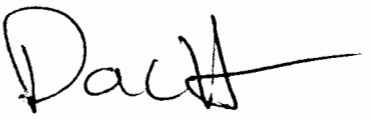
Furthermore, the ALJ's erroneous reliance upon *N.J.A.C.* 6A:27-12.3(a)1, coupled with irrelevant testimony concerning industry custom, was an inadequate basis upon which to adopt petitioner's definition of "end of the transportation route" and cast aside the well-reasoned definition provided by the Commissioner in *Klein.* It is the Commissioner, and not the school bus industry, who is tasked with the oversight of school bus transportation for hundreds of thousands of students. Any supposed industry custom in this context is neither controlling nor persuasive and simply cannot supersede New Jersey law.

Finally, the ALJ's rejection of the Commissioner's holding in *Klein* undermines the purpose and intent of the School Bus Safety Act. As the Commissioner stated in *Klein*, "Accepting petitioner's argument that the inspection did not have to take place until the bus returned to the depot at the end of the day defies reason and eviscerates the fundamental purpose of the statute – to protect our children and ensure their safety." *Klein, supra,* at 2. To hold otherwise would excuse – if not promote – inefficiency (by endorsing needless rides to the bus depot for our students) and place children at unnecessary risk of harm. It is nonsensical to delay visual inspection of the school bus until arrival at the bus depot when, in fact, any heightened safety risk to the children can be avoided altogether if they are discovered on the bus while still present on school grounds or prior to leaving the route. While it may be true that O.S. was never left unattended, and it is not known from the present record whether he suffered any harm or distress, the visual inspection required by *N.J.S.A.* 18A:39-28 should have occurred prior to

departing the Drew School at the end of the transportation route – when all of the other children had exited the bus.

Accordingly, the decision of the Criminal History Review Unit is hereby affirmed, and the petition is dismissed. Respondent is directed to notify the Motor Vehicle Commission of its obligation, pursuant to *N.J.S.A.* 18A:39-28 *et seq.*, to suspend petitioner's school bus "S" endorsement on her driver's license for six months and to notify petitioner's employer that she is ineligible – for the period of suspension – to continue employment as a school bus driver.

IT IS SO ORDERED.[4]



COMMISSIONER OF EDUCATION

Date of Decision: 7/30/15

Date of Mailing: 7/30/15

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10473-14
AGENCY DKT. NO. 168-7/14

SUSAN J. HERMAN,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,
Respondent.

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

Kyle Gruber, Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: May 29, 2015 Decided: June 23, 2015

BEFORE **JOSEPH A. ASCIONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Susan J. Herman (petitioner), appeals a decision by respondent State of New Jersey Department of Education (DOE), Criminal History Review Unit (CHRU), to suspend the "S" endorsement on her driver's license, which permits her to drive a

school bus. On March 24, 2014, the CHRU notified Herman that it intended to suspend her "S" endorsement to operate a school bus, pursuant to N.J.S.A. 18A:39-29(a). Herman filed an appeal with the Commissioner of Education, and on August 14, 2014, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The respondent moved for summary decision, and on September 19, 2014, the undersigned issued an Order denying the motion and directing a hearing on limited testimony. A hearing was held on May 29, 2015; the parties provided oral closing arguments; and the record closed on that date.

ISSUES TO BE RESOLVED

Petitioner challenges the proposed suspension of her "S" endorsement pursuant to N.J.S.A. 18A:39-29 for her alleged failure on March 21, 2014, to check her school bus at the end of her route, leaving a child on the bus. Petitioner denies any violation of the statute, as she remained within the vicinity of the bus at all times, and the customary understanding of the meaning of "the end of the route" means the return of the bus to the bus depot.

TESTIMONY AND FACTUAL DISCUSSION

The parties filed an executed stipulation of fact (J-1), which sets forth the underlying facts.

Petitioner testified to twelve years of contracted service with the East Windsor school district as a bus driver and to the events of March 21, 2014. She specifically testified that after dropping off the East Windsor afternoon-kindergarten students, she had discovered a backpack left on the bus. The backpack did not belong to O.S., but to one of the other kindergarten students. Petitioner said that she took the bus key out of the ignition, and went to deliver the backpack to an East Windsor school teacher. She was within twenty feet of the bus at all times, and was away from the bus for less than a minute. She then returned to the bus, and departed to the bus depot. The depot is about an eight-minute ride from the school. She received a call from dispatch when she

was about halfway to the depot inquiring whether O.S. was on the bus, and after she discovered O.S. on the bus, she turned the bus around, returned to the school, and dropped O.S. at the school, eventually returning to the bus depot.

Maureen Antoniello, petitioner's coworker, testified that on March 21, 2014, she was operating the school bus behind the petitioner's at the East Windsor dropoff. She remembered wanting to complete her dropoff promptly. When she noticed the petitioner walking away from the bus with the backpack, she contemplated where petitioner was going. However, no sooner had petitioner left the bus than she returned to it, and departed the school location. She estimated petitioner's time out of the bus as less than a minute. Antoniello testified that she saw the petitioner depart and return to the bus. Petitioner at all times was in the vicinity of the bus.

Carl Carabelli, the manager of the CHRU, testified to his employment for over twenty-seven years with the CHRU and his management of numerous investigators. This matter had an assigned investigator, who is still employed by the CHRU. That investigator did not testify at the hearing. Carabelli testified to the policy of the CHRU to seek to enforce N.J.S.A. 18A:39-28 as requiring a visual inspection at each dropoff of students at a school, not at the bus depot. He offered no factual testimony regarding the specific incident in question, or the recommendation of the initial investigator.

Petitioner also has stated that she followed the district policy regarding visual inspection of the bus. That policy was not provided, but petitioner maintains that the policy requires a visual inspection at the bus depot. Antoniello also testified that this is the understanding of both her and the union. Antoniello is a union representative, and she testified that the prevailing custom required a visual inspection at the bus depot.

Respondent's November 17, 2014, brief claims that petitioner entered the school to return the backpack that had been left on the bus. However, there is no factual certification for this assertion, nor did respondent present any evidence to support that position. This tribunal is required to accept petitioner's version of the facts, as respondent offered no testimony to contradict her or Antoniello's statements.

FACTUAL FINDINGS

For the purposes of this Initial Decision, I **FIND** as **FACT** the items set forth in J-1, the factual stipulation agreed to by the parties, and the testimony of the witnesses, all of whom were found to be credible. Additionally, the following factual findings from the previous motion were not disputed by the parties:

1. Petitioner possesses an "S" endorsement on her commercial driver's license that allows her to operate a school bus. She has operated a school bus for twelve years without incident.

2. On March 21, 2014, petitioner carried a student, O.S., on her school bus. Her intention was to return that student to his home dropoff after the student attended the morning kindergarten class.

3. Upon arriving at the stop to leave O.S., no parent or guardian appeared to receive O.S. Petitioner contacted dispatch. Dispatch advised petitioner to keep O.S. on the bus, pick up the afternoon kindergarten students, and return O.S. to the school.

4. When petitioner arrived at the school, upon the teacher's approval, petitioner turned off the bus engine, keeping the bus key in her hand. The afternoon kindergarten students departed the bus as their names were called, and were received by the teacher. Petitioner observed a backpack in the rear of the bus and retrieved it. Petitioner called out twice to determine if anyone still existed on the bus. The result, no answer.

5. Petitioner closed the door, secured the bus, and brought the backpack to the teacher, the delivery point within twenty feet of the school bus. Within less than a minute petitioner returned to the bus. At all times petitioner had view and remained in the vicinity of the bus. Petitioner did not enter the school building.

6. Petitioner departed the school and headed for the bus depot, when she received a call from dispatch inquiring as to the presence of O.S. on the bus. On petitioner's voice inquiry, O.S. responded on the third attempt. Dispatch directed petitioner to return O.S. to the school. Petitioner did this.

7. The union understands required compliance at the end of the route when at the bus depot.

LEGAL DISCUSSION

The School Bus Safety Act (2007), N.J.S.A. 18A:39-26 to -30, is designed to prevent the potential harm that could come to a child who is left unattended on a school bus. The paramount consideration is the safety of the child. There are few facts that must exist to form the basis for CHRU action under the statutes and regulations that control this matter, and the statute countenances limited defenses.

N.J.S.A. 18A:39-28 requires that "[a] school bus driver shall visually inspect the school bus at the end of the transportation route to determine that no pupil has been left on the bus. N.J.S.A. 18A:39-29 requires a six-month suspension of the "S" endorsement if "a school bus driver is found to have left a pupil on the school bus at the end of his route."

The implementing regulations provide:

> Where a school bus driver has been notified by the Department's Criminal History Review Unit that a determination has been made that suspension or revocation, as the case may be, of the driver's school bus endorsement is warranted pursuant to N.J.S.A. 18A:39-28 et seq. because a child was left on the school bus to which the driver was assigned notwithstanding the driver's obligation to conduct a visual inspection at the end of the transportation route to assure that no pupil is left on the bus, the driver may contest such determination through the filing of a petition of appeal according to the procedures set forth in N.J.A.C. 6A:3-1.
>
> [N.J.A.C. 6A:3-13.1(a).]

The following aspects of the Department's determination may be contested:

> 1. That a pupil was left on the bus at the end of the driver's route;
>
> 2. That the incident in question was the driver's second offense;
>
> 3. That the pupil was harmed as a result of foreseeable danger; and
>
> 4. That the driver acted with gross negligence.
>
> [N.J.A.C. 6A:3-13.1(b).]

Student-transportation regulations provide that "[a] student is considered to have been left unattended on the school bus at the end of the route when the driver has left the vicinity of the bus." N.J.A.C. 6A:27-12.3(a)(1).

The statutes and regulations use various terms such as "the end of the transportation route," "the end of the driver's route," "the end of the route," "the end of his route," and "vicinity of the bus," yet none of these terms is defined. Petitioner and Antoniello credibly testified that the union custom requires a visual inspection at the bus depot before securing the bus. That is the industry's implementation of N.J.S.A. 18A:39-28.

Respondent argues that the "end of the route" has to mean at every dropoff point, as the safety of the child is the underlying intent of the Act. To require a visual inspection only at the depot when the school bus is placed out of service places children at risk.

Respondent cites Laxo v. New Jersey Department of Education, Criminal History Review Unit, EDU 12143-10, Initial Decision (August 10, 2011), adopted, Comm'r (September 26, 2011), <http://njlaw.rutgers.edu/collections/oal/>. In that case, the bus stopped at another school before returning to the depot. The district in Laxo specifically

had directed that an inspection be done prior to a departure from the school in question. The facts are different here.

Respondent also cites Firman v. New Jersey Department of Education, Criminal History Review Unit, EDU 02278-09, Initial Decision (July 26, 2010), adopted, Comm'r (September 8, 2010), <http://njlaw.rutgers.edu/collections/oal/>. In that case, the judge granted summary decision. However, the facts were not disputed. The driver wanted the right to cross-examine the witnesses against him. In the instant case, neither petitioner's verified certification attached to the petition nor her subsequent certification provides sufficient evidence to find that she had an obligation to visually inspect the bus at a time prior to O.S.'s departure from the bus, or that her departure from the bus to turn over a backpack was out of the vicinity of the bus.

Respondent also cites McKenney v. New Jersey Department of Education, Criminal History Review Unit, EDU 09833-11, Initial Decision (December 28, 2012), adopted, Comm'r (February 5, 2013), <http://njlaw.rutgers.edu/collections/oal/>. In McKenney, the driver acknowledged leaving the child on the bus when he departed the depot. This case also is factually distinguished from the present matter. Here, petitioner denies that she violated the law, as she always remained in the vicinity of the bus and had not yet concluded her route.

Respondent cites Graham v. New Jersey Department of Education, Criminal History Review Unit, EDU 08439-11, Initial Decision (December 15, 2011), adopted, Comm'r (January 30, 2012), <http://njlaw.rutgers.edu/collections/oal/>. This case also is factually distinguished from the present matter. The driver in Graham acknowledged leaving the child on the bus when he departed the bus depot, and was looking for leniency for the unfortunate circumstances, blaming the incident on his aide, claiming he had performed a visual inspection. These are not acceptable defenses that warranted a hearing.

Of note, respondent cites Klein v. New Jersey Department of Education, Criminal History Review Unit, OAL Dkt. No. EDU 00852-11, Initial Decision (January 5, 2012), rejected, Comm'r (February 21, 2012), in support of its position that the Commissioner

has determined that an inspection at the "end of the route" means an inspection at the point where all of the children in a particular group leave the bus to enter their school and the driver moves on to her next route. In that case, the ALJ determined that the driver had not left the vicinity of the bus, despite locking the bus to go for a restroom visit in the school. On the driver's return to the bus, the driver found that a child was on the bus, in tears, locked in. The Commissioner reversed.

Factually, the Klein case is different from our case, where petitioner claims, and no credible contradictory evidence has been submitted, that she had visual contact with the bus at all times and was not more than twenty feet away. There has been no evidence that the child came to any harm or distress. In reality, the system worked. Within minutes of petitioner leaving the school grounds, the dispatcher had contacted petitioner regarding O.S.'s whereabouts. Petitioner thereafter informed the dispatcher that O.S. was on the bus and received direction to keep O.S. on the bus. Petitioner returned to the school, where O.S. was then dropped off. This must be weighed against N.J.A.C. 6A:27-12.3(a)(1), which provides, "[a] student is considered to have been left unattended on the school bus at the end of the route when the driver has left the vicinity of the bus." Klein is supported by the facts of that case. In Klein, the bus driver left the bus and went inside the school building to use the restroom. It is hard to accept that Klein stayed within the vicinity of the school bus without an expanded view of "vicinity." Here, though, petitioner constantly remained within what reasonably can be deemed the vicinity of the school bus and of O.S. She left the bus only to deliver a forgotten backpack to a teacher who was outside the school; she secured the bus; and she stayed within sight range of the bus and was back on the bus in less than a minute.

A reasonable bus driver under circumstances similar to those of this case should have the expectation that so long as he or she has not left the vicinity of the bus, the route has not ended, and the visual inspection will be performed at the point that the driver is preparing to depart the vicinity of the bus, in this case at the bus depot.

CONCLUSIONS

I **CONCLUDE** that at all times petitioner remained in the vicinity of the school bus and therefore did not leave a pupil unattended on the school bus.

I **CONCLUDE** that the custom of the industry required compliance with N.J.S.A. 18A:39-28 by a visual inspection at the bus depot when the bus driver leaves the vicinity of the school bus.

I **CONCLUDE** that respondent's argument that the law requires "the end of the route" to be interpreted as after each dropoff is inapplicable to the current factual determination, as petitioner did not leave the vicinity of the school bus.

I **CONCLUDE** that petitioner's actions did not violate N.J.S.A. 18A:39-28.

ORDER

It is **ORDERED** that the petition be **GRANTED** in all respects.

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

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

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

June 23, 2015
DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: June 23, 2015

Date Mailed to Parties: June 23, 2015

lam

APPENDIX

LIST OF WITNESSES

For Petitioner:

Susan J. Herman

Maureen Antoniello

For Respondent:

Carl Carabelli

LIST OF EXHIBITS

Joint:

J-1 Statement of Facts

249-15

OAL DKT. NO. EDU 1018-15
AGENCY DKT. NO. 374-12/14

E.D., ON BEHALF OF MINOR CHILD, J.D., PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY, RESPONDENT.	: : : : : :	COMMISSIONER OF EDUCATION DECISION

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

Upon review, it is noted that Paragraph 3 of the Settlement Agreement makes reference to actions intended to be taken on or before June 1, 2015 and July 1, 2015 – dates which precede the Commissioner's consideration of the Settlement Agreement. Therefore, the parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

Subject to the foregoing, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter – which is hereby dismissed subject to compliance with the terms of the settlement – provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of same.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/30/15

Date of Mailing: 7/30/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 01018-15
AGENCY REF. NO. 374-12/14

E.D. ON BEHALF OF MINOR CHILD, J.D.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent.

Maria I. Velez, Esq., for petitioner

Stephen J. Christlano, Esq., for respondent

Record Closed: June 2, 2015 Decided: July 7, 2015

BEFORE **RICHARD McGILL**, ALJ:

E.D. filed a petition with the Commissioner of Education challenging a residency determination by the Board of Education of the Township of West Orange (respondent) in regard to her son, J.D. The matter was transmitted to the Office of Administrative Law on January 21, 2015, for determination as a contested case.

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted a written Settlement Agreement. Respondent's certified resolution approving the settlement was submitted along with the Settlement Agreement.

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

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

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

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

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

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

July 7, 2015
DATE

RICHARD McGILL, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

ljb

BOARD OF EDUCATION
WEST ORANGE, NEW JERSEY 07052
TELEPHONE: 973-736-1636
FAX : 973-243-0505

STEPHEN J. CHRISTIANO
BOARD ATTORNEY

49 MOUNT PLEASANT AVENUE

June 2, 2015

Hon. Richard McGill, ALJ
State of New Jersey
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: E.D. o/b/o J.D. v. Board of Education of the Township of West Orange
OAL Docket No. EDU 1018-2015

Dear Judge McGill:

I enclose a fully-executed settlement agreement relative to the above school residency matter and a certified extract from the minutes of the Board's meeting of June 1, 2015, at which the Board approved the settlement.

Very truly yours,

Stephen J. Christiano
Board Attorney

Encs.

Cc: Maria I. Velez, Esq.

Stephen J. Christiano, Esq.
179 Eagle Rock Avenue
West Orange, NJ 07052
(973) 736-1636
Attorney for Respondent

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
AGENCY DOCKET NO. 374-12/14
OAL DOCKET NO. EDU 1018-2015

E.D., ON BEHALF OF MINOR CHILD, J.D.,
Petitioner,

v.

SETTLEMENT AGREEMENT

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent.

The parties hereby stipulate as follows:

1. The petition is withdrawn with prejudice.
2. J.D. shall be permitted to remain a student in respondent's district so long as he meets school residency requirements.
3. Petitioner agrees to pay tuition to respondent in the amount of $400. Payments of $200 shall be made on June 1 and July 1, 2015. Any payment not made within 10 days of its due date shall cause the petitioner to be held in default, which shall allow respondent to seek a tuition award of $2598 against petitioner, less payments made.
4. Checks or money orders for the tuition payments shall be payable to the West Orange Board of Education and mailed/delivered to Stephen J. Christiano, Esq.,

179 Eagle Rock Avenue, West Orange, NJ 07052.

5. This settlement resolves all claims petitioner may have against respondent.

Dated: 05/08/15

Edelmira Durand, Petitioner

BOARD OF EDUCATION OF THE
TOWNSHIP OF WEST ORANGE

Dated: 6-1-15

By: _____
President

EXTRACT FROM THE MINUTES OF A MEETING
OF THE WEST ORANGE PUBLIC SCHOOLS
BOARD OF EDUCATION, WEST ORANGE, ESSEX COUNTY, NJ
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the West Orange School District, West Orange, in the County of Essex, New Jersey, convened in Regular/Work session on June 1, 2015 at 6:21 P.M., at the Administration Building, 179 Eagle Rock Avenue, West Orange, NJ.

The following members of the Board of Education were present:
Mr. Charles, Mrs. Casalino, Mrs. Mordecai, Mr. Robertson

The following motion was offered by Mr. Robertson and seconded by Mrs. Mordecai and adopted by the Board of Education by the following roll call vote:

Recommend approval of settlement agreement in the matter of Student ID #1411003 v. the West Orange Board of Education. Petitioner agrees to pay District tuition in the amount of $400 for the period of non-residency.

ROLL CALL: Ayes: Mr. Charles, Mrs. Casalino, Mrs. Mordecai, Mr. Robertson

Abstain: None

CERTIFICATE

I, John Calavano, Board Secretary, of the West Orange Public Schools, West Orange, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on June 1, 2015, has been compared by me with the original minutes as officially recorded in my office in the minute book of said West Orange Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 2nd day of June 2015.

John Calavano, Board Secretary

251-15

OAL DKT. NO. EDU 16345-14
AGENCY DKT. NO. 350-12/14

B.B., ON BEHALF OF MINOR CHILD, M.B.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ESTELL MANOR, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that the Stipulation of Settlement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation. Furthermore, the file does not contain a copy of the Board's resolution approving the Stipulation of Settlement and designating the Superintendent to sign the agreement on its behalf – as required by *N.J.A.C.* 6A:3-1.13 under these circumstances – nor is the resolution attached to the Stipulation of Settlement itself. Without either the Board attorney's signature or the appropriate Board resolution and signature of its designee, the Commissioner cannot approve the within Stipulation of Settlement.

Accordingly, the Commissioner hereby remands this matter to the OAL for further action. If the parties are unwilling or unable to reach accord on a modified Stipulation of Settlement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/30/15

Date of Mailing: 7/30/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 16345-14
AGENCY DKT. NO. 350-12/14

B.B. ON BEHALF OF
MINOR CHILD, M.B.,
Petitioners,
v.
BOARD OF EDUCATION OF
THE CITY OF ESTELL MANOR,
ATLANTIC COUNTY,
Respondent.

Jerry L. Tanenbaum, Esq., for petitioner (Mattlemen, Weinroth & Miller, P.C., attorneys)

Brett Gorman, Esq., for respondent (Parket McCay, P.A., attorneys)

Record Closed: June 9, 2015 Decided: June 11, 2015

BEFORE **W. TODD MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 12, 2014, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties prepared and submitted a Settlement Agreement and General Release indicating the terms thereof.

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

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

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

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

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

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

June 12, 2015
DATE

W. TODD MILLER, ALJ

Date Received at Agency: 6-17-15

Date Mailed to Parties: 6-17-15

File No. 14743-0003
Law Offices
PARKER McCAY P.A.
9000 Midlantic Drive, Suite 300
P.O. Box 5054
Mount Laurel, New Jersey 08054
(856) 596-8900
Attorneys for Respondent, Estell Manor Board of Education

B.B. o/b/o M.B. Petitioners, v. ESTELL MANOR BOARD OF EDUCATION Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL Docket No.: EDU 16345-14 STIPULATION OF SETTLEMENT

This Settlement Agreement and General Release (the "Agreement") is entered into by and between B.B. o/b/o M.B. ("Petitioners") and the Estell Manor School District Board of Education (the "Board" or "District"), with its mailing office located at 128 Cape May Avenue, Estell Manor, New Jersey 08319, (the Board and Petitioners collectively referred to as the "Parties").

WHEREAS, M.B. is a student who attends the District; and

WHEREAS, a dispute arose regarding the findings of a Harassment, Intimidation, and Bullying investigation, pursuant to N.J.S.A. 18A:37-15; and

WHEREAS, the parties in good faith have negotiated concerning this matter and have a desire to settle this matter in an amicable way, hereby agree as follows:

1. Petitioners will withdraw the Petition of Appeal that was filed before the New Jersey Commissioner of Education on November 24, 2014 within fifteen (15) days of the date of this agreement.

2. The school counselor shall meet with M.B. once every other week, and the school counselor or administration shall be made available to M.B. at any time upon M.B.'s request. The school counselor shall discuss with M.B. how M.B. is doing at the school and whether or not other students are treating her appropriately. Any statements or reports by M.B. to the school counselor indicating that M.B. is being, or believes she is being, mistreated, harassed, intimidated or bullied by other students will be shared by the counselor in writing to both the school principal and M.B.'s parents within 24 hours of the counselor's receipt of such information.

3. In consideration of the terms herein, Petitioners hereby release the Board, its employees and agents from all possible claims they may have or have had against the Board relating to anything that has happened up until now, regardless of the forum in which such claims may have been pursuable. In addition, Petitioners voluntarily, willingly and expressly release and hold the Board and its officials, officers, employees, agents and attorneys (collectively the "Board") harmless from any and all claims and demands for compensatory, incidental and punitive damages, attorneys' fees, costs or any other damages that may arise under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 791 et seq. the Americans with Disabilities Act of 1990, 42 U.S.C. 2101 et seq. and any regulations promulgated under any aforementioned laws, 42 U.S.C. 1983, or any other State or Federal Law, statute, rule or regulation or common law, contract, policy or directive, relating to anything that has occurred through the date of this agreement.

4. The Parties agree that they will not communicate the terms of this agreement to any persons or entities other than their attorneys, accountants, tax advisors, agents and/or any other individuals necessary to effectuate this settlement, and, but only with the written agreement of the other party, others whom a party may desire to advise except any evaluators, medical providers, or treating professionals. The parties may, however, produce or disclose this agreement as required by operation of law or lawful subpoena or order of Court pursuant to official discovery proceedings. If the parties are required to produce or disclose this agreement it will first advise the other parties as soon as practical. Nothing in this paragraph shall limit a party from disclosing the terms of this agreement to any evaluators or medical providers.

5. Petitioners hereby state that they are signing this Agreement voluntarily of their own free will and not under duress or coercion of any kind.

6. This Agreement is subject to Petitioners continued domicile within the District.

7. Each party shall be responsible for their own attorney's fees and expert costs and no party shall be deemed a "prevailing party" as a result of this Agreement.

8. This Agreement shall be construed fairly according to the plain language of its terms and not for or against any party hereto.

9. All parties are bound by this Agreement and each of its provisions. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns are also bound. This agreement is made for the benefit of all parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, representatives, employees, agents, attorneys, successors or assigns.

10. This Agreement constitutes the full and complete agreement of the parties hereto with respect to its subject matter, it supersedes any prior or contemporaneous representations,

whether oral or written, and it may not be modified or amended except by a written instrument signed by all parties hereto.

11. This Agreement shall be governed by the laws of the State of New Jersey. The Parties agree that the courts of the State or District Court of New Jersey shall be the sole forum in which any legal action concerning or relating to this agreement shall be brought.

12. In the event that any provision of this contract is held to be void or unenforceable by any court or regulatory authority having jurisdiction thereof, such ruling will not affect the validity of this contract; the remaining provisions shall continue to be in full force and effect.

13. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof, and supersedes all prior written or oral and all contemporaneous oral agreements, understandings, and negotiations.

14. This Agreement may be executed in one or more original, emailed or telecopied counterparts, all of which together shall be one instrument, and all of which shall be considered duplicate originals.

15. This Agreement may only be amended in writing by way of a document signed by all Parties and counsel.

IN WITNESS HEREOF, the parties have set their hands this____ day of_____ 2015.

BY: Noelle Jaequelin DATED: 5-15-15
Noelle Jaequelin
Superintendent of Schools
Estell Manor School District

BY: Brenda Burns DATED: 5-11-15
B.B., Petitioners

252-15

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

IN THE MATTER OF THE TENURE PROCEEDING OF JOSEPH TRAWICK

and

Docket No 35-2/15
ABITRATOR'S AWARD IN
CONFIRMATION OF SETTLEMENT

THE SCHOOL DISTRICT OF IRVINGTON, ESSEX COUNTY

Before:
Edmund Gerber, Arbitrator

Appearances:

For the School District of Irvington
Hunt, Hamlin & Ridley
By:
Raymond L. Hamlin, Esq.

For Joseph Trawick
Caruso Smith Picini
By:
Nicholas Poberezhsky Esq.

The Irvington School District filed tenure charges against Joseph Trawick, Respondent, on February 23, 2015, alleging conduct unbecoming. I, Edmund Gerber, was appointed arbitrator in accordance with the procedures of the New Jersey Department of Education. An arbitration hearing was scheduled to for May 4, 5 and 6 2015. On May 1, 2015 Counsel for the Petitioner and Respondent jointly requested that the hearing be adjourned as the parties had entered into a tentative Settlement Agreement which was subsequently ratified by the School District on July 28, 2015. See Attachment.

The charges against the Respondent alleged that:

The Respondent holds the certification of a Teacher of Health and Physical Education.

On or about Friday, October 10, 2014 the mother of student C reported that her son was attacked by his classmates during gym class. Allegedly, Respondent had told his students to "get him" as C was running in circles around the gym. The students chased C, took his shoes and socks and one student bit him.

The District conducted an investigation into the complaint and ultimately filed the instant tenure charges.

CONSENT AWARD

Accordingly, in exchange for the mutual agreements, promises and covenants set forth herein and as contained in the attachment to this Award, the Tenure Charges brought by The School District of the Irvington, Essex County and issued against Respondent Joseph Trawick are hereby dismissed. I am satisfied that the settlement and dismissal of this matter complies with the public interest, including the welfare of the students of the Irvington School District. This Consent Award is final and binding upon the petitioner and Respondent.

Edmund Gerber, Arbitrator
Dated: July 29, 2015

SEPARATION OF SERVICE AGREEMENT

This Agreement is hereby made this 28 day of July, 2015, by and between JOSEPH TRAWICK (hereinafter "Mr. Trawick") and the IRVINGTON BOARD OF EDUCATION (hereinafter the "Board") (collectively the "Parties").

WHEREAS, the Board is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1, and is entrusted with maintaining and conducting the public schools of the Irvington Public Schools District (hereinafter "District"); and

WHEREAS, Mr. Trawick is employed by the Board as a tenured Physical Education; and

WHEREAS, Mr. Trawick has been on administrative leave since Feb 19 2015 and

WHEREAS, Mr. Trawick shall retire from employment with District effective December 31, 2015; and

WHEREAS, Mr. Trawick and the Board have engaged in good faith discussions concerning Mr. Trawick's future separation from employment with the Board and have reached an agreement, which they wish to memorialize herein; and

WHEREAS, Mr. Trawick and the Board wish to fully and finally resolve any and all claims, complaints, charges and actions of any kind whatsoever, whether known or unknown, which either party may have against them as provided herein; and

WHEREAS, Mr. Trawick has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of teaching certificates; and

NOW THEREFORE, Mr. Trawick and the Board, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the Parties, agree as follows:

1. RETIREMENT: Mr. Trawick agrees to sign and submit to the Board, simultaneously with this Separation of Service Agreement, an irrevocable letter of retirement from all employment with the Board effective December 31, 2015. The letter of retirement and this Agreement shall be subject to Mr. Trawick's right to rescind pursuant to the Older Workers Benefit Protection Act, 29 U.S.C. 626(F)(1)(G), within seven (7) calendar days after the signing of this Agreement. If Mr. Trawick does not rescind his letter of retirement and this Agreement within seven (7) calendar days of the signing of the Agreement, his retirement and this Agreement shall be binding and irrevocable. The Board shall accept Mr. Trawick's letter of retirement

simultaneously with the acceptance of this Agreement via resolution at a regular meeting of the Board.

2. CONTINGENCY: This Agreement is contingent upon immediate receipt by the Board of an irrevocable letter of resignation from Mr. Trawick effective December 31, 2015.

3. CONSIDERATION: In consideration of Mr. Trawick's retirement, the Board agrees to withdraw the tenure charges it filed against him and to take no disciplinary action against him as a result of the alleged conduct that gave rise to the tenure charges. Further, the Board agrees to provide Mr. Trawick with uninterrupted medical insurance coverage through the date of his retirement, effective December 31, 2015.

4. MEDICAL LEAVE OF ABSENCE: Upon execution of this Agreement, Mr. Trawick shall be placed on a medical leave of absence through the date of his retirement, effective December 31, 2015. During the leave period, Mr. Trawick will be compensated for any sick, vacation, and/or personal days he has accumulated as of the date of the execution of this Agreement. He will also be compensated for the sick, vacation, and/or personal days allocated to him at the start of the 2015/16 calendar school year. Once Mr. Trawick's sick, vacation, and/or personal days are exhausted, his medical leave of absence shall be "unpaid," although he will continue to receive medical benefits as specified in Paragraph 3 of this Agreement.

5. WAIVER: The Parties agree to waive any and all claims or demands which they now have or may have had against each other as of the date of the execution of this Agreement.

6. OLDER WORKER BENEFIT PROTECTION ACT OF 1990: To comply with the Older Workers Benefit Protection Act of 1990, this Agreement advises Mr. Trawick of the legal requirements of the Act, and fully incorporates the legal requirements by reference to this Agreement as follows:

   a. Mr. Trawick fully understands the terms and conditions of this Agreement;

   b. Mr. Trawick has been advised to consult with an attorney to review the Agreement;

   c. Mr. Trawick specifically waives his right to pursue any claims under the Age Discrimination in Employment Act;

   d. Mr. Trawick does not waive any rights or claims under the Age Discrimination in Employment Act that may arise after the date of the execution of this Agreement;

e. Mr. Trawick is receiving consideration above and beyond anything of value to which he is already entitled;

f. Mr. Trawick has been given at least twenty-one (21) calendar days within which to consider this Agreement; and

g. Mr. Trawick has seven (7) calendar days from the date of the execution of this Agreement to revoke it.

7. CONFIDENTIALITY: This Agreement shall remain confidential to the maximum extent permitted by law and neither party shall disclose the terms of this Agreement to third parties. However, Mr. Trawick may disclose the terms of this Agreement to his immediate family, union representatives, tax advisors and attorneys, and the Department of Education, the Division of Pension and Benefits, and the Department of Labor and Workforce Development of the State of New Jersey and any related government agencies.

8. EMPLOYEE PERSONNEL FILE: The Board agrees that a copy of this Agreement will not be kept in Mr. Trawick's employee personnel file. Moreover, the Board agrees that no documents, notes, or records will be kept in employee's personnel file that relate to the tenure charges filed against him, or the underlying allegations and circumstances that gave rise to the charges.

9. GOOD FAITH AND NONDISPARAGEMENT: The Parties expressly agree that they shall act in good faith to ensure implementation of this Agreement. The Parties mutually agree to refrain from making any derogatory comments, written or oral; retaliation or disparagement, in any manner, against the other party or their families, family members, agents, officials, administrators, representatives and employees.

   The Board agrees that in the event it receives any inquiries or reference requests for Mr. Trawick, its responsive comments shall be limited to an acknowledge of his position, length of employment, salary history, and effective resignation date.

10. ENTIRE AGREEMENT: This Agreement contains the entire agreement and understanding between the Parties and constitutes a full and final agreement in any and all issues relating to this matter, except that the Parties reserve their right to enforce this Agreement, if necessary.

11. CHOICE OF LAW: This Agreement shall be governed by the laws of the State of New Jersey.

12. SEVERABILITY: If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

13. BINDING EFFECT: The Parties shall be bound by the terms and conditions of this Agreement.

14. APPROVAL: The terms and conditions of this Agreement and Mr. Trawick's irrevocable letter of retirement are subject to ratification and approval by the Board.

15. VOLUNTARY AGREEMENT: The Parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement.

16. ADMISSION OF LIABILITY: The Parties' entry into this Agreement shall not constitute nor shall it be interpreted as an admission of wrongdoing or guilt, or liability in any manner on either of the Parties' party. Any such obligation or liability on either Party's part is expressly denied. The Parties have entered into this Agreement solely to compromise disputed claims.

17. OPPORTUNITY TO CONSULT WITH COUNSEL: The Parties acknowledge that each has been given the opportunity to consult with an attorney or a representative of their own choosing with respect to this Agreement and reviewed with their attorney or representative all the terms and conditions of this Agreement prior to executing this Agreement. Each Party signs this Agreement freely and voluntarily and without coercion or duress. The Parties further acknowledge that they fully understand the duties and obligations enumerated herein and have been informed of their legal rights and obligations.

18. BREACH: If either party breaches this Agreement, the breaching party shall bear the costs of the non-breaching party of any litigation or efforts to have such breach corrected or compensated for, including, but not limited to, reasonable attorneys' fees.

19. RATIFICATION: The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the Board to its terms.

20. COBRA: Nothing contained within this Agreement shall alter Mr. Trawick's rights to continuation of health insurance through federal law, i.e. the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA") upon separation from employment with the Board, which coincides with the date that the Board shall cease providing Mr. Trawick with health insurance coverage, December 31, 2015.

21. MODIFICATIONS: This Agreement may not be altered, amended or modified except in writing, signed and duly authorized by all Parties.

22. EXECUTION IN COUNTERPARTS AND FACSIMILE SIGNATURES: This Agreement may be executed in two (or more) counterparts, each of which, when

executed and delivered, shall be deemed to be an original, and of which counterparts, taken together, shall constitute one and the same agreement. An original signature transmitted by facsimile shall be deemed to be an original for purposes of this Agreement and for the accompanying letter of retirement.

IN WITNESS WHEREOF, the Parties hereunder set their hands and seals to this Agreement effective on this 1st day of June, 2015.

On Behalf of the Board:

JOSEPH TRAWICK

Patricia A. Stokes Trawick (wife)
WITNESS

Dated: June 1, 2015

Dated: July 28, 2015

254-15

Pursuant to Referral By the Commissioner of Education
State of New Jersey
Before Timothy J. Brown, Esquire

In the matter of:

The Tenure Hearing of Tony Motley	:	
State-Operated School District of the City of Newark,	:	**Agency Docket No. 46-3/15**
Essex County	:	

Decision (Approval of Settlement)

Appearances:

On behalf of the State Operated School District of the City of Newark:
Ramon Rivera, Esquire
Christina Michelson, Esquire
Scarinci Hollenbeck
1100 Valley Brook Ave.
P.O. Box 790
Lyndhurst, NJ 07071

On behalf of Tony Motley:
Dennis McKeever,
Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC
238 St. Paul Street
Westfield, NJ 07090

Introduction

This matter arises from tenure charges of inefficiency, conduct unbecoming and other just cause by the **State Operated School District of the City of Newark** (the District) and a May 11, 2015 referral of the tenure charges to the undersigned by the New

Jersey Department of Education, Bureau of Controversies and Disputes pursuant to *P.L. 2112, c. 26.*

The Tenure Charges

The Tenure Charges against Respondent contain two Charges: (1) Inefficiency and (2) Conduct unbecoming and other just cause.

In regard to the first charge, the District asserted that Respondent has:

a. Failed to implement curricular goals and objective(s).

b. Failed to design, monitor and implement systems to improve instruction.

c. Failed to evaluate teacher performance.

d. Failed to implement professional development plans for teachers.

e. Failed to effectively manage talent to improve instruction.

f. Failed to improve instructional practice through cycles of assessment and collaboration.

g. Failed to foster academic achievement.

h. Failed to create an environment of respect and rapport.

i. Failed to attain student achievement that meets or exceeds performance benchmarks or focus on achieving same.

j. Failed to contribute to the School and District.

k. Failed to grow and develop professionally.

l. Failed to demonstrate promptness and attendance.

m. Received a Partially Effective rating for the 2012-2013 School year in an annual evaluation.

n. Received an ineffective rating for the 2013-2014 School year in an annual evaluation.

In its second Charge the District restated the allegations contained in the first charge and further asserted that Respondent has demonstrated conduct unbecoming in the following manner:

a. failed to create an environment of respect and rapport within the school.

b. Failed to manage student behavior.

c. Failed to manage teaching staff employees.

d. Failed to establish and adhere to an attendance strategy for his school.

e. Was excessively absent from his school.

f. Failed to attend training sessions and professional development meetings scheduled by the District for all principals.

g. Failed to properly evaluate teaching staff employees as required by TEACHNJ, N.J.S.A. 18A:6-117, et seq., and the District's policies and procedures.

h. Failed to efficiently lead the operation of the school and complete necessary administrative tasks in a timely manner, or at all, i.e. budget, lesson plans and strategic plan.

i. Failed to establish a culture of learning and mastery of the common core standards.

j. Was insubordinate and failed to follow instructions and District' policies and procedures when reporting the injury of a student.

k. Failed to abide by the District's rules and regulations regarding the administering of school.

l. Violated the District's notion of good behavior and professional conduct as a school administrator.

m. Failed to act professionally in his role as an educator and administrator.

n. Has acted in a manner that demonstrated conduct unbecoming for an administrator.

Respondent Motley filed a timely answer to charges denying the District's two Tenure Charges.

Settlement

The hearing in this matter began on June 16, 2015 in Newark, New Jersey, at which time the parties notified the undersigned of their proposed settlement of the Charges, the terms of which settlement were stated on the record. The parties thereafter provided the undersigned a copy of their fully executed Settlement Agreement for my review and approval.

At the June 16, 2015 hearing the Respondent Tony Motley (the "Charged Party") testified under oath that he understood the terms of, and freely entered into, the Settlement Agreement. The Settlement Agreement (attached) settles all of the outstanding charges filed against Respondent by the District, the Agreement – executed by both parties - reflects that Respondent entered into the Agreement with a full understanding of his rights; and that each party consented to the Settlement. Additionally, the Settlement Agreement reflects the approval of the Settlement by the District as indicated by signature of the District's General Counsel.

Approval of the Settlement is in the public interest as the parties have voluntarily entered into the Settlement and its approval avoids the expenditure of limited public resources.

Based upon such considerations, I find that the Settlement meets the standards established by the State Board of Education in the matter of *In re Cardonick,* State Board Decision of April 6, 1983 *(1990 School Law Decisions (S.L.D.)* 842, 846).

Conclusion

The Settlement of the instant Tenure Charges is **Approved**.

Dated: July 31, 2015

Timothy J Brown, Esquire
Arbitrator

I, Timothy J Brown, affirm that I have executed this document as my Award in Agency Docket case No. 46-3/15 relating to tenure charges against Tony Motely on the 31st day of July, 2015.

Timothy J Brown

SCARINCI HOLLENBECK
ATTORNEYS AT LAW
1100 VALLEY BROOK AVENUE
P.O. BOX 790
LYNDHURST, NEW JERSEY 07071-0790
Telephone: (201) 896-4100
Attorneys for Newark State-Operated School District
Our File No. 11899.8800

In the Matter of	:	AGENCY DKT. NO. 46-3/15
TONY MOTLEY	:	**STIPULATION OF SETTLEMENT**
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, IN THE COUNTY OF ESSEX	:	

The State-Operated School District of the City of Newark (the "District"), whose principal office is located at 2 Cedar Street, Newark, New Jersey 07102, and its successors, assigns, officers, employees, agents and representatives (collectively, "School District"), and Tony Motley, residing at 1053 Bertram Terrace, Union, New Jersey 07083 ("Respondent") (collectively, the "Parties") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

WHEREAS, Respondent is a tenured Principal employed by the District as a Principal; and

WHEREAS, the State-District Superintendent of the School District ("State-Superintendent") certified tenure charges of conduct unbecoming to the Commissioner of Education of the State of New Jersey, captioned In the Matter of the Tenure Hearing of Tony Motley and the State-Operated School District of the City of Newark ("Tenure Charges"),

primarily based upon allegations that Respondent had engaged in conduct unbecoming and inefficiency, and such charges were assigned Docket No. 46-3/15; and Respondent filed an answer opposing the charges; and the Commissioner of Education, having reviewed the charges and Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation, and accordingly referred the matter to Arbitrator Timothy Brown ("Arbitrator") for a hearing; and

WHEREAS, the District is an *Abbot* District, with stringent budget limitations and due to the uncertainty of the outcome of arbitration as well as the expenditure of resources due to multiple days of hearings with numerous witnesses, and the concern that school personnel will be removed from their educational duties and responsibilities during that time, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

WHEREAS, the proposed Stipulation of Settlement is in the best interest of the Parties and the public because Respondent resigns from his employment without further litigation and it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

NOW, THEREFORE, subject to approval by the Arbitrator, in consideration for the premises and mutual covenants set forth herein, the Parties hereby agree as follows:

1. Concurrent with the execution of this Stipulation, Respondent shall submit an irrevocable letter of resignation to the District, which shall provide for his permanent resignation from his tenured position with the District effective December 31, 2015 ("Effective Date"). (See Exhibit A to the Stipulation, a copy of Respondent's signed letter of resignation).

2. Upon final approval of the signed Stipulation by the District, and its receipt and acceptance of the Respondent's irrevocable letter of resignation, the District shall and hereby does withdraw the instant Tenure Charges. The District agrees to not pursue the subject Tenure Charges against

Respondent as long as this Stipulation remains in effect and is not voided by any court or administrative agency of competent jurisdiction. In the event the Stipulation is voided, the District retains the right to file and consider for certification, tenure charges against Respondent, including those tenure charges which have been previously filed against him by the District, and Respondent reserves the right to defend same, except that Respondent is waiving any claims of statute of limitations.

3. Upon final approval by the Arbitrator of the signed Stipulation by the District and Respondent's irrevocable letter of resignation, Respondent will be restored to paid administrative leave effective March 4, 2015. Respondent will be paid all salary and benefits from March 4, 2015 through September 30, 2015, which shall include payment for the period of unpaid suspension (a maximum of 120 days' salary), minus all applicable taxes, withholdings and deductions.

4. The Respondent will then be placed on an unpaid leave from October 1, 2015 to December 31, 2015 and receive health benefits. On December 31, 2015, Respondent's resignation will become effective and his health benefits will cease. If at any time Respondent obtains employment with health benefits during this time, he will immediately notify the District. The District will pay Respondent all accumulated time (39 days, which is approximately $18,614.36) within 30 days of his resignation minus all applicable taxes, withholdings, deductions, and health benefit contributions.

5. This Stipulation is based upon the understanding that Respondent's separation from employment with the District, effective December 31, 2015, will be deemed a voluntary resignation in good standing. Upon inquiry from any third party to authorized employees or representatives of the District; those employees or representatives will provide no information

other than to confirm Respondent's employment, position, salary and dates of employment, and state that the reason for his separation from employment was his voluntary resignation.

6. Motley also agrees to dismiss with prejudice any and all claims, law suits and/or litigation that he is a party to against the District and the State-Superintendent that are still pending in any and all courts and/or before any and all administrative agencies, execution of this Stipulation of Agreement, including but not limited to the following matters: City Association of Supervisors & Administrators v. State Operated School District of City of Newark, Case No. 01-14-0002-2372, Grievance No. 1371; Motley et al. v. State-Operated School District for the City of Newark and Anderson, Docket No. 2:14-CV-00504; City Association of Supervisors & Administrators v. State Operated School District of City of Newark, Case No. 01-14-0002-2369; and In the Matter of Tony Motley v. Newark Public School – EEOC Charge No. 524-2014-00951. Motley also agrees to file a stipulation of dismissal with any court within 14 days of approval of this Agreement by the Arbitrator. This Settlement is intended to be the final resolution of all outstanding matters and/or litigations between the District and Motley and dismissals of all actions with prejudice is a material term of this Stipulation of Agreement. If Motley fails to comply, this Stipulation of Agreement will be void.

7. In accordance with N.J.A.C. 6A:9-17.4, et seq., Respondent has been advised that the District must refer this matter to the State Board of Examiners and that pursuant to N.J.A.C. 6A:3-5.6 this matter may be referred by the Commissioner to the State Board of Examiners. Respondent has also been advised that the District is legally required to participate in any proceedings therefrom and cooperate with the State Board of Examiners. Any referral by the District to the State Board of Examiners or any participation in proceedings therefrom will not be construed by Respondent to be a violation of the terms of this Agreement.

8. As of the Effective Date, all of Respondent's rights of employment with the District, including but not limited to accrued salary, benefits, tenure and seniority, will permanently end. This paragraph will not affect, limit or preclude the Respondent from seeking or receiving any accrued salary and/or pension benefits to which she is entitled or becomes entitled by the Effective Date.

9. Respondent shall not apply for reemployment with the District at any time. If Employee does apply for reemployment with the District and is approved for employment, the terms of this Agreement shall control and shall be grounds for immediate termination of Respondent's employment.

10. Except as noted above, Respondent waives all claims of any nature against the District with regard to his employment with and/or separation from the District including fees, or other monetary relief, with the exception of workers' compensation claims.

11. Respondent expressly warrants that he will cooperate with the District, the State-District Superintendent, and counsel for defendants in defense of the matter captioned Hawthorne v. State Operated School District of the City of Newark et al., Superior Court of New Jersey, Law Division, Essex County, Docket N. ESX-L-9150-13. The term "cooperate" in this paragraph means executing any document; providing any information, data, documents and/or testimony (deposition and/or trial) when requested by counsel; attending meetings with counsel upon request; and appearing at trial. Respondent acknowledges that the District is meeting its statutory obligation to indemnify him and provide him with a defense in the Hawthorne matter; that all defendants in that matter have a common interest in defeating the plaintiff's claims and obtaining dismissal of the action; that representation of all defendants by the same counsel serves his interests as well as those of his co-defendants; and that the waiver, release and discharge set forth

is paragraph 12 below specifically applies to any claim he may have against the Released Parties or any of them, including counsel, in connection with the Hawthorne matter.

12. In exchange for the consideration set forth in paragraph 3 above, the sufficiency of which is hereby acknowledged, Respondent hereby waives, releases and discharges any- and all claims or rights that he has or may have against the District, the State District Superintendent, its Advisory Board of Education and its Advisory Board members, and any and all other District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Respondent's employment with the District or separation from employment with the District. It specifically includes, without limitation, all claims which Respondent may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New

Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; tile New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on her employment by and/or termination of her employment with the District, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, wages, attorneys' fees, costs, and/or future wage loss, except for workers compensation claims,

13. Notwithstanding the terms of paragraph 9 or this Agreement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commissioner, or any other federal, state or local law agency. However, should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 9, Respondent agrees not to seek or accept any resulting relief whatsoever.

14. Notwithstanding the terms of paragraph 9 of this Stipulation, Respondent does not hereby waive any right he may have to workers compensation benefits or pension benefits.

15. To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises Respondent of the legal requirements of the Act and fully incorporates the

legal requirements by reference into this Stipulation of Settlement. Accordingly, by executing this Stipulation, Respondent acknowledges that he: (i) fully understands the terms and conditions of this Stipulation of Settlement; (ii) has consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Stipulation of Settlement; and (v) has 7 days from the date of the execution of this Stipulation of Settlement to revoke it. Respondent understands that he may rescind this Agreement within 7 calendar days of signing and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the 7 day period.

16. This agreement shall not constitute a precedent in any matters involving other District employees.

17. This Stipulation, and all of its terms, are and will remain confidential to the maximum extent permitted by law. Respondent is expressly forbidden from discussing this Stipulation with any person, other than his accountant, tax advisor and attorney ("permitted disclosures") and any other individual or entity as necessary to implement the Stipulation or to which it is legally obligated to respond ("legally-required disclosures"). In making any permitted disclosure, Respondent agrees that it will inform the person to whom it is making the permitted disclosure that the existence and substance of this Stipulation, the settlement giving rise to this Stipulation and the sum of money paid pursuant to this Stipulation are to be held strictly confidential to the fullest extent permitted by law. Respondent specifically agrees not to discuss the nature, terms, conditions of this Stipulation with others, any representative of the media, or any past, present, or prospective employee of the District, or its agents or attorneys. Respondent understands that

this provision is not a simple recital but is an important, integral part of this Stipulation. The District agrees that it will keep this Stipulation confidential to the extent permitted by law.

18. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

19. Motley agrees that he has been given a reasonable period of time of at least twenty-one (21) days within which to review and consider this Agreement prior to executing this Agreement, but Motley may waive this twenty-one (21) day period by signing the space provided at the end of this Agreement.

20. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

21. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Stipulation and that Respondent consents to both personal and subject matter jurisdiction in the aforementioned courts or before the Commissioner of Education.

22. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signature or signatures in

electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

23. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

24. Each party acknowledges that this is the entire agreement of the parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understanding or agreements directly or indirectly connected with this Stipulation.

25. Both parties agree that they will not make any statement that has, have or can be expected to have the effect of disparaging the District, the State-Superintendent, current or former District employees and the Respondent.

26. If any provision of this Stipulation is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

27. This Stipulation of Settlement is subject to the final approval of the State-District Superintendent of the State-Operated School District of the City of Newark and will only become effective upon the final approval of the Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue this matter.

28. This Stipulation is subject to approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and will become effective only upon approval by the Arbitrator. Counsel for the Parties shall request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

SIGNATURE PAGE

Dated: 7/23/15

TONY MOTLEY

Sworn and Subscribed to before me
this 23 day of July, 2015.

Notary Public
State of New Jersey

Dated: 7/23

By: CHARLOTTE HITCHCOCK, ESQ.
GENERAL COUNSEL, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):

Dated: 7/21/15

RAMON RIVERA, ESQ.
Attorney for State-Operated School District of the City of Newark

Dated: _____

TIMOTHY BROWN, Arbitrator

Dated: 7/23/15

DENNIS MCKEEVER, ESQ.
Attorney for Tony Motley

CERTIFICATION

I ACKNOWLEDGE THAT I HAVE CAREFULLY READ THIS SETTLEMENT AND RELEASE AND UNDERSTAND ALL OF ITS TERMS, INCLUDING THE FULL AND FINAL RELEASE AND WAIVER OF CLAIMS SET FORTH ABOVE. I FURTHER ACKNOWLEDGE THAT I HAVE KNOWLEDGE THAT I HAVE KNOWINGLY AND VOLUNTARILY ENTERED INTO THIS SETTLEMENT AGREEMENT AND RELEASE, AND THAT I HAVE NOT RELIED UPON ANY REPRESENTATION OR STATEMENT, WRITTEN OR ORAL, NOT SET FORTH IN THIS SETTLEMENT AGREEMENT AND RELEASE.

Dated: 7/23/15

TONY MOTLEY

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the 21 days period referred to in the 19th recital of this Agreement.

TONY MOTLEY

DATED: 7/23/15

Exhibit A

July , 2015

Chris Cerf, Superintendent
~~Newark Public Schools~~
~~2 Cedar Street~~
Newark, New Jersey 07102

Dear Superintendent Cerf:

I hereby resign from my tenured position as a Principal in the State-Operated School District of the City of Newark, effective December 31, 2015. I understand that my resignation is irrevocable, and that as of the Effective Date, all of my rights of employment with the District, including but not limited to accrued salary, benefits and seniority, will permanently end.

Dated: 7/23/15

TONY MOTLEY

256-15

STATE OF NEW JERSEY - DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of Tenure Hearing of Leon Mashore:

THE STATE OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN

Case No. 303-10/14

and

OPINION
and AWARD

LEON MASHORE

Before:
Edmund Gerber, Arbitrator

Appearances:
For the Camden City School District:
Louis R. Lessig, Esq.
Benjamin S. Teris, Esq.
Brown & Connery, LLP

For the Respondent:
Robert M. Schwartz, Esq.
Andrew L. Schwartz, Esq.
Schwartz Law Group, LLC

This matter was initially referred to me on November 7, 2015. On November 10, 2104 the Respondent Mashore filed a Motion to Dismiss. The motion was consolidated with three other matters and referred to Arbitrator Walt DeTreux. The consolidated motion was denied in an Opinion and Award of Arbitrator DeTreux, December 23, 2014 (Dkt no. 505/14). The

procedural history of this matter is set forth in that award; it is attached as Appendix A and is incorporated herein.

The matter was then referred back to me and arbitration hearings took place on June 4, 9 and 10, 2015. On July 18, 2015, both parties submitted briefs. In addition, the Respondent submitted the arbitration award of Arbitrator Scott Buchheitt, The State Operated School District and the City of Camden and Gay Brown, Agency Dkt. # 300-10/14 to me for my consideration and on July 20, 2015, the Petitioner, Camden City School District, filed a letter response urging that the Buchheitt award be disregarded by me.

FACTS

The Respondent, Leon Mashore, is a tenured Vice Principal employed by the Petitioner. His employment in the Camden School District began in September of 1992 as a seventh grade math teacher and in September of 1997 he became a Vice Principal assigned to Veterans Memorial Middle School. He remained there as a Vice Principal until August 1, 2010 when the Respondent was reassigned as a Vice Principal of the Hatch Middle School. He served as Vice Principal there through the 2010-2011 school year. In August 1, 2011, the Respondent was reassigned as Vice Principal of the Yorkship Elementary School for the upcoming school year, but ten days later he was reassigned to a Vice Principal position at the H.B. Wilson Family School and remained there for the duration of the 2011-2012 school year. Respondent was again transferred to serve as Vice Principal of Cream Elementary School for the 2012-2013 school year. In July of 2013, Respondent was once again transferred and was assigned to the Davis Elementary School and served as Vice Principal for the 2013-2014 school term effective August 2, 2013.

Prior to the Respondent's assignment to the Davis Elementary School, the State of New Jersey, pursuant to the State Intervention Statute, N.J.S.A. 18A:7A-45, assumed control of the Camden City School District effective June 25, 2013. Immediately prior to the State's assumption of control of the

school district, Peggy Nicolosi was appointed as the Interim Superintendent of Schools.

Beginning August 19 2013, the District conducted a convocation of principals and vice principals and on August 21, 2013, the District conducted a training session at which the Respondent was present. At this session, new evaluation rubrics used to evaluate teachers, principals and vice principals were discussed. The District presenters distributed a document describing the framework for the evaluation of principals and vice principals titled, "Attachment 1: Vice Principal Evaluation and Support in Camden City Schools 2013-2014" (Attachment 1). The document explained the new evaluation system that was to be used to evaluate principals and vice principals. It states in pertinent part:

> At the end of the school year, the Vice Principal's evaluator will review data collected during the course of the observations. The following are minimum requirements:
>
> Additional observations or walkthroughs may occur at any time.
>
> - All vice principals are required to have at least three observations a year;
> - Vice principals on corrective actions plans receive additional support and must have at least one additional observation per year;
>
> The document also states that:
>
> Any principal or vice principal who is rated ineffective or partially effective on the evaluation will receive additional support through a CAP (Correction Action Plan) with targeted areas of improvement and professional development for the subsequent year. Vice Principals identified as struggling at any time may be placed on a CAP. The CAP will include timelines for corrective plan and clearly delineate responsibilities of the vice principal versus the district in implementing the plan.

Further, under the heading "Summative Evaluation," Attachment 1 provides that all vice principals will receive individual professional development plans or corrective plans based upon their ratings.

Respondent testified that the presenters emphasized that if a vice principal was rated partially effective or ineffective at the end of three evaluations, he would receive a CAP.

The new evaluation instrument was approved by the Department of Education through its request for qualification process. The rubric for the evaluations had four domains: instructional leadership, internal leadership, organizational leadership and effectiveness of teacher evaluations. Each domain had sub-domains. For each sub-domain, a vice principal received one of four possible scores (ineffective, partially effective, effective or highly effective) followed by narratives entitled Evidence and Recommendations. The ratings for each sub-domain, which earn scores of 1 for ineffective to 4 for highly effective, had an overall score for each domain and ultimately an overall score for the entire evaluation. At the conclusion of the evaluation form was a section entitled Evaluator's Summary Comments.

Two former school administrators were assigned to evaluate the Respondent, Dr. Victor Gilson and Mr. Cleve Bryan. Both men had advanced educational degrees and had served as superintendents of school boards. Both men received training on how to conduct the evaluations and the specific evaluation rubric used by the District.

The Respondent's first evaluation was conducted by Gilson on January 14, 2014. Respondent's overall rating was 1.51 - Ineffective. Gilson had a post-evaluation conference with the Respondent at which Gilson stressed that the Respondent should focus his efforts on completing teacher evaluations with specific recommendations as to data utilization and the District's walkthrough form.

The Respondent's second evaluation was also conducted by Gilson and occurred on March 24, 2014. Respondent received a score of 2.24 - Partially Effective. The evaluation included summary comments as to how Respondent could be more effective and Gilson had a post-evaluation

conference with Respondent in which Gilson gave advice to the respondent as to how he could be more effective.

The Respondent's third evaluation was conducted by Bryan on June 12, 2014. The Respondent received a score of 2.36 - Partially Effective. Bryan and the Respondent had a post-evaluation conference on June 12, 2014 and a summative evaluation conference on June 24, 2014 in which the scores for the three evaluations were reviewed and both Dr. Gilson and Respondent signed the summative evaluation.

Although the Respondent was never evaluated higher than partially effective he never received a Corrective Action Plan or a fourth evaluation as per Attachment 1.

Nicolosi testified that the recommendations in the Respondent's three evaluations contained substantive advice as to how to become more effective and were effectively a CAP. However, Bryan testified that, at the evaluators meetings with the District's administrators, the evaluators were told that they could include recommendations for corrective action in their evaluations but were not to prepare Corrective Action Plans (CAPs). Although an ineffective or partially effective evaluation would warrant a CAP (T2, P419 L1-11) someone else was going to do the CAP (T2, P 417, L1-10 & T2, P 437, L1-13).

On July 31, 2014, the District served the Respondent with tenure charges for inefficiency pursuant to the State Intervention Law. On August 27, 2014, the Respondent submitted an answer to the charge. On October 21, 2014, the District certified the charges to the Commissioner of Education and on October 27, 2014, the Respondent submitted an answer to the certified charges.

ARGUMENTS

Position of the Petitioner

The Instrument and Process Used to Evaluate Respondent Produced Fair, Unbiased and Reliable Results. The instrument used to evaluate principals and vice principals in the school district was fair, unbiased,

reliable and had the tendency to produce actionable feedback. The Respondent offered no credible evidence to discredit the instrument and process used to evaluate vice principals during the 2013-2014 school year.

The inefficiency charges against Respondent were timely filed under the State Intervention Law. The assessment cycle did not conclude until the charges were certified to the Commissioner on October 8, 2014, 16 months after the cycle began on June 25, 2013.

N.J.S.A. 18A:7A-45(c) only requires a State District Superintendent to wait until after a 12 month assessment cycle to dismiss a tenured administrator for inefficiency. Pursuant to the unchallenged testimony of Dr. Fisicaro, in June 2013, immediately around the time of the State intervention, the school graded the office of evaluation which was a unit designated to assess principals and vice principals in the District. Accordingly, the Camden Office of Evaluation was the assessment unit referenced in N.J.S.A. 18A:7A-45(b). The creation of that assessment unit marked the commencement of the assessment cycle for principals and vice principals in the school district.

The State Operated School District evaluated the Respondent three times throughout the school year. Not until after those three evaluations as well as a summative evaluation did the Sate District Superintendent serve Respondent with inefficiency charges on July 21, 2014. The assessment cycle did not conclude until the State District Superintendent certified the charges to the Commissioner on October 13, 2014, 16 months after the commencement of the assessment cycle. Accepting Respondent's argument to the contrary regarding the extent of the assessment cycle would negate the intent of the State Intervention Law. The continuity of instruction for students would have been significantly disrupted if the school district had been forced to wait until sometime in the middle of the 2014-2015 school year to file inefficiency charges against the Respondent. The District would have been forced to keep an inefficient vice principal in a school for part of the school year and then find a new vice principal in the middle of the school year. The framers of the State Intervention Law could not have intended for such an absurdly harsh and detrimental interpretation of the time

requirements. There are no regulations presently in effect guiding the interpretation of the State Intervention Law, nor is there current pertinent case law that can be used as guidance. The only reasonable interpretation is that the assessment cycle commenced upon creation of the Camden Office of Evaluation and concluded upon certification of the charges against Respondent to the Commissioner of Education.

A formal corrective action plan was not required. The State Intervention statute is silent on the issue of Corrective Action Plans. Moreover, although the TEACHNJ procedural evaluation requirements do not apply to this matter, formal corrective Action Plans under TEACHNJ are required only for the staff member who will be employed the following school year. See N.J.A.C. 2A:10-2.5(a). An individual cannot be placed on a Corrective Action Plan for the next year if he is dismissed under the State Intervention Statute. In regards to the document entitled Vice Principal Evaluation and Support in Camden City Public Schools 2013-2014 (Attachment 1) which was distributed to the Respondent and other vice principals, it makes no mention that a formal Corrective Action Plan would be implemented during the 2013-2014 school year. The section entitled Corrective Action Plan specifically states:

> Any principal or vice principal who is rated ineffective or partially effective on the evaluation will receive additional support through a CAP with targeted areas for improvement and professional development for the subsequent year. VPs identified as struggling at any time may be placed on a CAP. The CAP will include timelines for corrective action and clearly delineate responsibilities of the VP versus the District in implementing the plan. If a Vice Principal is dismissed pursuant to the applicable State Intervention Law.

As Ms. Nicolosi indicated, obviously the Respondent could not be placed on a CAP for the subsequent year. Notwithstanding the foregoing, the recommendations contained in Respondent's evaluations equate anything that would have been in a formal Corrective Action Plan. Thus, a formal CAP would have been superfluous.

Respondent was provided with multiple recommendations which if implemented would have placed him in the effective or highly effective range by the time of his third evaluation. He simply chose to ignore them. The inefficiency charges against Respondent must be sustained as the school district has proven he is both unwilling and unable of being an effective vice principal. The law requires prompt removal of ineffective principals and vice principals. One of the goals of the State Intervention Statue was to allow the State District Superintendent to remove ineffective administrators and supervisors early in the process of rebuilding and revitalizing the failing school district. Respondent failed woefully in all categories of an effective vice principal. Respondent's inability and lack of effort as a vice principal were apparent from the start. Respondent's inefficiency warrants termination which is the only appropriate remedy. The State Intervention Statue provides that the State District Superintendent may dismiss any tenured building principal or vice principal for inefficiency, incapacity, unbecoming conduct or other just cause. N.J.S.A. 18A:7A-45(c). The policy behind the statue is to allow the efficient removal of incapable administrators to reform a failing school district. It does not contemplate any penalty short of dismissal.

Here, the Respondent knew or should have known the expectations for the 2013-2014 school year and failure to meet those expectations could result in termination. He was notified early in the process that he needed to do more to support teachers and implement data driven instruction but failed to do so. The Respondent has been a Vice Principal since 1997. At this point in his career, there is no reason he should be learning on the job. It is unacceptable to allow a barely partially effective vice principal to hold a school back from implementing the high level instructional practices the students of Camden so desperately need. A change in leadership is necessary. Respondent must be dismissed.

Respondent's Argument

The Petitioner failed to implement a CAP as required by its own process and by TEACH NJ and its implementing regulations. Arbitrator DeTreux set out the legal framework under which this matter must be

examined in his decision on the consolidate motions to dismiss. Arbitrator DeTreux concluded that the intervention statute N.J.S.A. 18A:7A-45 and TEACHNJ N.J.S.A. 18A:6-117, et. seq. both apply. They must be read in concert. If this were not a State Operated School District, under TEACHNJ the tenure dismissal proceedings could only have occurred upon the completion of an evaluation cycle encompassing two full school years. However, because the Petitioner is a State Operated School District, Arbitrator DeTreux concluded that tenure dismissal may occur after the completion of an evaluation cycle of not less than twelve months prior to the filing of any dismissal action on the grounds of inefficiency. As determined by Arbitrator DeTreux, the criteria referenced in the Intervention Statute are those found in TEACHNJ.

A former regulation in N.J.A.C. 6:7-1.1 which authorized a state District Superintendent to establish an assessment unit which shall conduct onsite evaluations. The regulation stated that members of the assessment unit were to carry out no less than three evaluations within an assessment cycle of not less than twelve months. The Respondent argues that the assessment unit is in place only when the assessors are in place as held in State Operated School District of the City of Newark v. Brownlee, 1998 WL 665, 967 decided January 7, 1998 OAL Dkt. # EDU3634-97.

The Respondent cites the language of the handout given to the Respondent in the summer of 2013 entitled Attachment 1: Vice Principal and Support in Camden City Public Schools, 2013-2014. The document expressly states that a corrective Action Plan (CAP) will be given to any principal or vice principal who is rated ineffective or partially effective and the CAP will include timelines for corrective action and clearly delineate responsibilities of the vice principal versus the district in implementing the plan. It further provides that vice principals or principals identified as struggling at any time may be placed on a CAP. The last paragraph of the document states: "the State District Superintendent, after completion of an evaluation period of not less than 12 months may dismiss any tenured principal or assistant principal for inefficiency, incapacity, unbecoming conduct or other just cause as defined by the criteria for principal and vice principal performance." The Petitioner has offered no explanation as to why

this last provision obviates the rest of the document which is what the Petitioner has contended. It has not offered any explanation as to why the corrective action component of Attachment 1 does not apply; why the requirement that principals and vice principals who received less than satisfactory evaluations not be given additional support as set forth in Attachment 1.

The Petitioner seeks to rewrite the history of the document. It wants to ignore the history of its own people who insist that the State take over authored the document with the purpose of advising principals and vice principals about the evaluation process during the State takeover. If the rest of the document is inapplicable as the Petitioner asserts, why was it distributed to the principals and vice principals at the completion of explaining the new evaluation process for the 2013-2014 school year, the first year of the takeover? Why not state clearly and unequivocally that neither the CAP, nor professional development on rubrics, nor additional evaluations matter?

The process that the Petitioner set out for itself in Attachment 1 comports with the process in TEACHNJ N.J.S.A. 18A:6-128. Part of TEACHNJ, speaks to the need to provide professional development, as well as corrective action plans, both of which are intended to foster better student achievement through better teaching practices. Subsection (b) of the statute provides that additional professional development is to be offered to any teaching staff member who "fails ... to meet the performance standards established by the Board, as documented in the teaching staff member's annual summative evaluation." The additional professional development is "designed to correct the needs identified in the annual summative evaluation." N.J.S.A. 18A:6-128(b). The statute mandates that when an employee is rated ineffective or partially effective, a corrective action plan be provided that includes "timelines for corrective action and responsibilities of the teaching staff member and the school district for implementation of the plan." N.J.S.A. 18A:6-128(b). N.J.A.C. 6A:10-2.5, part of the TEACHNJ regulations, also addresses the need for a CAP for teaching staff members rated ineffective or partially effective on their annual summative evaluation. The regulation states that a CAP shall be developed jointly by the teaching

staff member and his or her supervisor. The CAP can be implemented at any time, even after one evaluation.

The tenure charges are procedurally defective requiring dismissal. It is clear that for a teaching staff member to achieve tenure, he or she must meet the precise conditions set forth in the statute. If the precise conditions of the statute have to be met to achieve tenure, it follow that the same requirements must be met to remove tenure.

The charges must be dismissed because the Petitioner did not provide Respondent with a CAP or an additional evaluation or additional professional development or support as was required under its own framework of the evaluation process as set forth in Exhibit R-11.

Both Ms. Nicolosi and Dr. Gilson testified that the recommendations listed in the evaluations constituted the CAP. However, that argument does not comply with the requirements of Exhibit R-11, nor does it comply with N.J.S.A. 18A:6-128 or the regulations found in N.J.A.C. 6A:10-2.5. The burden is upon the District to provide a CAP. See The Tenure Hearing of La Rhonda Ragland and the State Operated School District of the City of Newark, Agency Dkt. # 285-9/14, February 2, 2013.

The Petitioner failed to provide an assessment of not less than 12 months before it filed the within charges.

N.J.S.A. 18A:7A-45 states in part that:

> Upon appointment, the State district superintendent may establish an assessment unit to conduct on-site evaluations of each building principal and vice-principal in accordance with the criteria established by the commissioner and render evaluation reports to the State district superintendent. No less than three evaluations shall be performed for each building principal and vice principal within 18 months following the establishment of the school district under full state intervention.

And that:

> Notwithstanding any other provision of law or contract, the State district superintendent, after completion of an assessment cycle of not less than 12 months, may dismiss any tenured building principal or vice principal for inefficiency ... N.J.S.A. 18A:7A-45

The statute provides State operated school districts up to 6 months from State takeover to establish an assessment unit comprised of assessment evaluators over an assessment cycle of not less than 12 months prior to the filing of tenure charges for inefficiency against a principal or vice principal. In State Operated School District of the City of Newark v. Brownlee, supra, the administrative law judge held that if an assessment unit was not in place for a minimum of twelve months, the statutory requirement could not be fulfilled. It was specifically held that the appointment of the first assessor evaluator triggered the start of the twelve month cycle.

Respondent argues that the State takeover occurred on June 25, 2013 but the district superintendent was not appointed until August 21, 2013 and the District did not hire Dr. Gilson, Respondent's lead and primary evaluator, until December 2013. The Respondent first was notified by an email on December 5, 2013 that Dr. Gilson would be his evaluator. An evaluation did not take place until January 14, 2014. The District served the Respondent with tenure charges of inefficiency and placed him on suspension on July 31, 2014. The District certified the tenure charges for inefficiency on October 9, 2014. Even assuming *arguendo* that the assessment cycle completed on the date that he District certified the charges, October 9, 2014, the District still did not provide the Respondent an assessment cycle of not less than twelve months. That cycle could not have begun until Dr. Gilson, his lead and primary evaluator was hired which did not occur until December 2013. Evening assuming the assessment cycle began with the hiring of Dr. Bryan. That hire did not occur until November 2013, so the District would still be out of compliance. Accordingly, the charges must be dismissed.

DISCUSSION

Although the Petitioner argues that since the District is subject to the state intervention statute, N.J.S.A. 18A:7A-45, the procedural requirements

of TEACHNJ do not apply in this matter, Arbitrator DeTreux ruled that the intervention statute 18A:7A-45 and TEACHNJ 18A:6-117, et. seq. both apply. It is the law of the case that they must be read in concert. Significantly, the State intervention statute makes no mention of procedures for evaluations but N.J.S.A.18A:6-17.2 which defines my authority as arbitrator makes specific reference to Corrective Action Plans.

N.J.S.A.18A:6-17.2. "Considerations for arbitrator in rendering a decision" provides in pertinent part:

> 23. a. In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:
>
> (1) the employee's evaluation failed to adhere to the evaluation process, including but not limited to providing a corrective action plan
>
> (4) the district's actions were arbitrary and capricious.
>
> b. In the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.

No distinction is made in 18A:6-17.2,23. a(1) as to whether the employee is in a state administered school district. By the statute's plain language, a district's failure to provide a CAP is a failure to adhere to the evaluation process and may be grounds to deny a charge of inefficiency.

A CAP was never provided to the respondent. Although Nicolosi testified that the recommendations and comments included in the Respondents three evaluations effectively constituted a CAP, the District's own evaluator, Cleve Bryan testified that the evaluators were told not to

prepare CAPs. Someone other than the evaluators were going to do CAPs for those vice principals who failed to attain an effective rating. The comments and recommendation contained in the evaluations were only to be used to help construct a CAP.

Further, the Board promulgated Attachment 1 which states several times that vice-principals who were rated as less than effective would be given a CAP and further, if necessary, those employees would be evaluated a fourth time. The Respondent was never afforded a fourth evaluation.

In the State's apparent haste to assume control of the school district, Attachment 1 was prepared with several inconsistencies; it drew from portions of Title 18 and the Department of Education's regulation which contemplate a two year cycle in which to bring tenure charges against vice principals, even though, as a State controlled District, the evaluation period is a twelve month cycle. It is evident that the District's own administrators did not understand what procedural rights are enjoyed by vice principals and what is required of administrators.

By both the terms of Section a (1) and the failure of the District to follow its own published procedures, the Petitioner failed to adhere to the evaluation process within the meaning of N.J.S.A. 18A:6-17.2. Section 23, a (1). I must therefore determine if this failure, "materially affected the outcome of the evaluation" as per N.J.S.A. 18A:6-17.2. Section 23, b.

I don't question the findings of the District's evaluators that the Respondent was not an efficient administrator, but I cannot say that, even if the respondent would have been provided with a CAP, such assistance would not have materially affected his performance to the extent that he would have been rated effective. Looking at his evaluations during the 2013,-2014 school year, the Respondent went from a ratings of 1.51 (ineffective) on January 14, 2014 to 2.36 (partially effective) on June 12, 2014, five months later. A score above 2.70 would have given the respondent an overall "effective" evaluation. The responded made demonstrable improvement in his performance during the evaluation period, so granting him additional guidance through a CAP might have enabled him to

sufficiently improve his performance to achieve an effective rating, but it is impossible to say with certainty. Nevertheless, the burden is upon the District to demonstrate that full adherence to the evaluation process would not have materially affected the outcome of the Respondent's final evaluation; the Petitioner failed to do so.

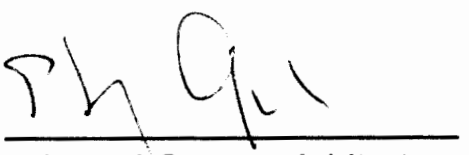
See also, The Matter of the State Operated School District and the City of Camden and Gay Brown, Agency Dkt. # 300-10/14, Arbitrator Scott Buchheitt failed to sustain tenure charges and found that this same Petitioner's failure to adhere to its own evaluation and support system (as set forth in Atachment1) prior to bringing tenure charges against Gay Brown was arbitrary and capricious.

It is also noted that, as argued by the Respondent, the strict accountability standards that are required of teachers, must be reciprocal. The District cannot promulgate rules and procedures and then simply choose to ignore them. Such action is arbitrary and capricious. There was clear confusion among the administrative staff as to the procedures for evaluations and the burden is upon the Employer to follow its own promulgated plan.

Based upon all of the foregoing, the Petitioner failed to prove its case. I will dismiss the tenure charges against the Respondent. I will also order that he be reinstated with all back pay and emoluments owed. [1]

AWARD

The tenure charges against the Respondent are dismissed. He will be reinstated with all back pay and emoluments owed.



Edmund Gerber, Arbitrator
August 4, 2015

[1] Having found that the Petitioner failed to prove its case, it is unnecessary to rule upon the balance of the e issues raised by the parties.

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearings of:

LEON MASHORE, EDWARD BROWN, GAY S. BROWN, BRIAN MEDLEY, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN

Agency Docket #303-10/14; 290-9/14; 300-10/14; 291-9/14

Walt De Treux, Esq., Arbitrator

Decision Date: 12/23/14

Appearances: For Respondents Mashore, E. Brown, G. Brown – Robert M. Schwartz, Esq.; Andrew W. Schwartz, Esq., *SCHWARTZ LAW GROUP LLC;*
For Respondent Medley – Wayne Oppito, Esq., *NJ PRINCIPALS AND SUPERVISORS ASSOCIATION*
For Petitioner School District – Louis R. Lessig, Esq.; Benjamin S. Teris, Esq.; Lauren E. Tedesco, Esq., *BROWN & CONNERY, LLP*

Introduction and Statement of Relevant Facts

On June 25, 2013, the State of New Jersey assumed operation of the Camden City School District pursuant to the State Intervention Statute, N.J.S.A. 18A:7A-45. As part of the takeover, the State District Superintendent directed an evaluation of each building principal and vice-principal during the 2013-14 school year. The State-appointed officials employed an evaluation instrument, approved by the New Jersey Commissioner of Education, that was intended to comply with the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ") evaluation criteria, N.J.S.A. 18A:6-123, and its related regulations, N.J.A.C. 6A:10-1.1 *et seq.*

The principals and vice-principals were evaluated in four domains – instructional leadership, cultural leadership, organizational leadership; and effectiveness of teacher evaluation. In each area, the administrators were scored "ineffective," "partially effective," "effective," or "highly effective." The ratings earned a score of 1 ("ineffective") to 4 ("highly effective"). The scores were averaged for a total score on the 1 to 4 scale with a corresponding rating.

During the 2013-14 school year, principals and vice-principals in the Camden City School District were evaluated three times. Respondents Mashore, E. Brown, G. Brown, and Medley received ratings of "ineffective" or "partially effective." After the conclusion of the school year, the State District Superintendent brought tenure charges against Respondents, seeking their removal for inefficiency. The Commissioner of Education found that the charges, if proven, are sufficient to warrant dismissal and referred the case of each Respondent to an Arbitrator for a tenure hearing.[1]

On November 7, 2014, prior to receipt of the Commissioner's assignment of the Mashore case to Arbitrator Edmund Gerber, Counsel for Respondent Mashore filed a Motion To Dismiss, arguing that the tenure charges "were defective and premature in that such charges were not based on a two-year evaluative cycle pursuant to N.J.S.A. 18A:6-17.3 and were not preceded by the issuance of a corrective action plan as required by N.J.A.C. 6A:10-2.5." In short, Respondent

[1] The tenure case of Brian Medley was referred to Arbitrator Joseph Licata; the case of Edward Brown to Arbitrator James Mastriani; the case of Leon Mashore to Arbitrator Edmund Gerber, and the case of Gay Brown to Arbitrator Walt De Treux.

asserted that the District did not comply with the legal requirements of TEACHNJ regarding evaluations.

The Commissioner's referral of the Mashore case to Arbitrator Gerber overlapped Respondent Mashore's motion. Counsel for Respondents Medley, E. Brown, and G. Brown indicated their intention to file similar motions in each Respondent's case, leading to several discussions between Counsel for Respondents and Petitioner, the four assigned Arbitrators, and the Commissioner's office.

For purposes of judicial economy and efficiency and to achieve uniformity regarding the resolution of what would be identical motions in four separate cases, Respondents and Petitioner agreed to treat the Mashore Motion To Dismiss as a consolidated motion, applicable to each of the four tenure cases, to be decided by one Arbitrator. The parties executed a consent order encompassing that agreement and submitted it to the Arbitrators and the Department of Education's Division of Disputes and Controversies.

The parties submitted written briefs in support and opposition to the Motion To Dismiss. Oral argument was heard on the motion on December 2, 2014, and Respondents filed a reply brief and Petitioner a sur-reply brief soon thereafter. The Motion was then submitted to the Arbitrator for a decision.

Issue

Should Respondent's Motion to Dismiss the tenure charges be granted or denied?

Analysis and Decision

Procedural Objection

In its Brief In Opposition to Respondents' Motion To Dismiss, Petitioner raised several procedural objections. First, it argues that the motion is untimely in that the Mashore motion was not "filed with the time allotted for the filing of an Answer." (citing N.J.A.C. 6A:3-5.3(a)(1)) Second, it contends that a motion to dismiss cannot be filed after the Commissioner has referred the charges to an Arbitrator. Finally, it asserts that the American Arbitration Association Labor Arbitration Rules do not allow for submission and consideration of dispositive motions.

The four cases present a novel legal argument and complex procedural concerns in that each of the four cases had been referred to a different Arbitrator. As identical motions would have been filed in each case, there was the likelihood of four different outcomes, beginning with the question of whether each individual arbitrator would have entertained a Motion To Dismiss or would have addressed Respondents' legal argument only after a hearing on the merits. Depending on the Arbitrators' rulings on the motion or on the ultimate issue of whether the tenure charge should be sustained, the parties would have been faced with the decision to appeal each case individually or to consolidate the cases for appeal. The possibility

of different motion and hearing procedures and of different outcomes hardly presented a model of judicial economy and efficiency.

For that reason, the parties wisely agreed to consolidate the Motion To Dismiss before one Arbitrator. And for that reason, Petitioner's procedural objections to the Motion are misplaced. If the Motion To Dismiss is denied for procedural reasons, Respondents still have the opportunity to raise the substantive challenges asserted in the Motion at the tenure hearings before each Arbitrator. Respondents would argue to the Arbitrators that the tenure charges "were defective and premature in that such charges were not based on a two-year evaluative cycle pursuant to N.J.S.A. 18A:6-17.3 and were not preceded by the issuance of a corrective action plan as required by N.J.A.C. 6A:10-2.5." The parties would once again be faced with the possibility of four separate outcomes related to a common issue in each of the four cases – the very result they were trying to avoid by consolidating the Motion before one Arbitrator.

For that reason alone, I find that the Consent Order waives any procedural argument to the Motion To Dismiss.

Moreover, the Petitioner's procedural objections are without merit. Respondent Mashore's Motion To Dismiss was, in effect, a motion for summary decision since he had already filed an Answer. N.J.S.A. 18A:6-16 provides that the Commissioner may decide a motion for summary decision prior to referral of the case to an Arbitrator. Respondent Mashore filed his Motion on November 7, 2014, three calendar days before receiving notice of the Commissioner's referral of the case to Arbitrator Gerber. The Motion and referral may have "crossed in the mail,"

but at least at the time Mashore filed the Motion, he had not been advised that his case had been referred to an Arbitrator. Accordingly, his motion was not untimely.

As Petitioner has agreed to consolidate the remaining three cases with the Mashore case for purposes of deciding identical motions that would have been filed in each case, it cannot now argue that the Motion is untimely in those three cases.

Finally, the AAA Labor Arbitration Rules may not specifically provide for dispositive motions; but it is within the Arbitrator's discretion to allow such motions. In the present tenure cases, the four Arbitrators acknowledged and, in effect, affirmed the parties' agreement to allow the Mashore Motion to Dismiss to be applicable to all four cases.

For these reasons, the Petitioner's procedural objections are without merit.

State Intervention Statute and TEACHNJ

The State Intervention Statute, N.J.S.A. 18A:7A-45, first effective January 1988, allows the state to essentially take over a school district that is not providing a "thorough and efficient" education for its students. The state-appointed officials are charged with making sweeping changes to reverse the failed course of the district. To that end, the State District Superintendent is authorized to remove administrators and supervisors after s/he has the opportunity to evaluate their effectiveness or lack thereof.

N.J.S.A. 18A:7A-45(b) requires principals and vice-principals to be evaluated a minimum of three times within the first 18 months after the state-operated school district has been established. N.J.S.A. 18A:7A-45(c) provides, in relevant part,

> "Notwithstanding any other provision of law or contract, the State district superintendent, after the completion of an assessment cycle of not less than 12 months, may dismiss any tenured building principal or vice-principal for inefficiency, incapacity, unbecoming conduct or other just cause as defined by the criteria for principal or vice-principal performance in districts under full State intervention established by subsection a. of this section...

Accordingly, principals and vice-principals in a state-operated school district can face tenure charges after a minimum of three evaluations in an assessment cycle of not less than 12 months. N.J.S.A. 18A:7A-45(a) requires that the evaluations be based on criteria adopted by the Commissioner of Education.

As Respondents note, neither the statute nor the current regulations provide defined criteria for the evaluation of principals and vice-principals in a state operated school district. In the present case, Timothy Matheney, Chief Intervention Officer for the New Jersey Department of Education, was tasked with approving an evaluation instrument and criteria for principals and vice-principals in the Camden City School District after it became subject to state intervention. The evaluation instrument developed under his supervision "was intended to comply" with the TEACHNJ evaluation criteria, i.e., the four cited domains – instructional leadership, cultural leadership, organizational leadership, and effectiveness of teacher evaluation – on a 1 to 4 scale from "ineffective" to "highly effective." The New Jersey Department of Education's Office of Evaluation approved the evaluation instrument and criteria.

Respondents seize upon the District's use of the TEACHNJ evaluation criteria to argue that evaluation of principals and vice-principals in a state-operated school district must be governed by TEACHNJ and its requirement for a two-year assessment cycle and a corrective action plan.

TEACHNJ, N.J.S.A. 18A:6-117, *et seq.*, effective August 2012, revised the process for removing ineffective teachers from the classroom. Under TEACHNJ, districts could file tenure charges against ineffective teachers after a two-year evaluation period and a corrective action plan. In the case of *I/M/O Tenure Charge of Inefficiency of Sandra Cheatham and the School District of the City of Newark,* Agency Dkt. #226-8/14, Arbitrator Bluth held that the TEACHNJ evaluation criteria set forth in N.J.A.C. 6A:10-2.1 applied to teachers in all districts, including state-operated school districts. Respondents contend that the TEACHNJ evaluation process must be extended to principals and vice-principals in state-operated school districts.

TEACHNJ does not specifically reference the State Intervention Statutes as it applies to the evaluation of principals and vice-principals in state-operated school districts. By its terms, it does not supersede the State Intervention Statute. Respondents nonetheless argue that TEACHNJ replaces the evaluation process outlined in the intervention statute for principals and vice-principals in state-operated school districts.

The State Intervention Statute requires three evaluations and an assessment cycle of not less than 12 months for principals and vice-principals in state-operated school districts, "notwithstanding any other provision of law or contract." The legislature chose not to specifically override that provision of N.J.S.A. 18A:7A-45 when it passed TEACHNJ. Accordingly, the State Intervention Statute and TEACHNJ have to be read in concert.

One of the goals of the State Intervention Statute was to allow the State District Superintendent to remove ineffective administrators and supervisors early in the process of rebuilding and revitalizing the failing district. Extending the assessment cycle for principals and vice-principals from "no less than 12 months" to 2 years would be a significant departure from the goal of the intervention statute. It is unlikely the legislature would enact such significant change without clearly stating so in the TEACHNJ statute.

Arbitrator Bluth found that the 2-year TEACHNJ evaluation period applied to teachers in state-operated school districts. The State Intervention Statute does not address the evaluation of teachers, so the Arbitrator's ruling was not an affirmation that TEACHNJ supersedes the intervention statute. Further, TEACHNJ dramatically revised teacher evaluations in a way that the new criteria allowed for more effective removal of ineffective teachers. Applying the 2-year assessment cycle to principals and vice-principals in state-operated school districts would result in an arguably less effective removal process than currently permitted by the State Intervention Statute. Again, if the legislature so intended, it would be expected to specifically reference such a significant change in the evaluation process.

Absent specific language in TEACHNJ superseding N.J.S.A. 18A:7A-45, one must conclude that the legislature did not intend to change the evaluation process for principals and vice-principals in state-operated school districts.

Petitioner's utilization of an evaluation instrument intended to comply with the TEACHNJ criteria to evaluate principals and vice-principals does not mandate that Petitioner adopt all aspects of the TEACHNJ evaluation process, such as the 2-

year assessment cycle. The intervention statute instructs that the Commissioner adopt the evaluation criteria. In the present cases, the Commissioner adopted the criteria from TEACHNJ. The adoption of criteria developed pursuant to another statute does not remove the evaluation of principals and vice-principals in state-operated school districts from the State Intervention Statute, particularly when the legislature has not expressly overridden the provisions of the intervention statute.

For these reasons, I find that Petitioner properly brought tenure charges against Respondents for inefficiency pursuant to the provisions of the State Intervention Statute as it relates to the number of evaluations and the length of the assessment cycle.

Corrective Action Plan and Alleged Non-Compliance with the 12-Month Assessment Cycle

Respondents also argue, either in their brief and/or reply brief, that Respondents were not trained in the evaluation rubrics as required by N.J.A.C. 6A:10-2.2 and were never given a correction action plan as required by N.J.A.C. 6A:10-2.5. Petitioner counters that Respondents had notice of the criteria by which they were to be evaluated as early as June 25, 2013 and were provided feedback and the opportunity to improve.

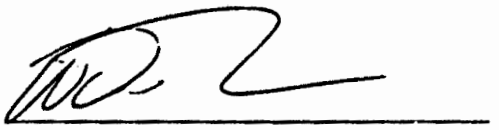
Additionally, at oral argument and in their reply brief, Respondents argue that Petitioner violated the requirement in N.J.S.A. 18A:7A-45 that tenure charges of inefficiency may only be filed after "not less that a 12 month assessment cycle." Respondents assert that Petitioner filed charges before the 12-month period had

lapsed. Petitioner first objects to Respondents raising this matter for the first time in their reply brief, and it counters the argument by asserting that it has complied with the 12-month assessment cycle requirement.

These issues – notice of the evaluation criteria, the imposition of a corrective action plan, if required, and/or the opportunity for feedback and improvement, and compliance with the timeline for filing tenure charges after an assessment period – raise genuine issues of material fact that can only be resolved through an arbitration hearing on the merits of the charges. As the parties dispute the facts giving rise to their arguments, the arguments cannot be disposed of through the present Motion To Dismiss.

Award

Respondents' Motion To Dismiss tenure charges is denied. The cases shall proceed to hearing before the assigned Arbitrators. Pursuant to the parties' Consent Order, the undersigned hereby withdraws from the Gay S. Brown case, and the Department shall appoint a new arbitrator to hear the matter.



WALT De TREUX

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearings of:

LEON MASHORE, EDWARD BROWN, GAY S. BROWN, BRIAN MEDLEY, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN	**Agency Docket #303-10/14; 290-9/14; 300-10/14; 291-9/14**

Affirmation

I, Walt De Treux, affirm that I am the individual who executed this Decision and Award.

WALT De TREUX

258-15LM

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

August 6, 2015

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Re: *Patricia Gallante, Jose Rodriguez, Christina Moreira and Maria Lorenz, individually v. Board of Education of the City of Elizabeth, Union County; Harold E. Kennedy, Jr., Board Secretary; Rafael J. Fajardo and Armenio "Tony" Monteiro, individually.*
OAL Dkt. No. EDU 3311-15, Agency Dkt. No. 48-3/15

Dear Counsel:

I have considered the papers filed in connection with the respondents' request for interlocutory review of Administrative Law Judge Joan Bedrin Murray's July 24, 2015 discovery order and July 27, 2015 denial of Respondents' motion for summary decision. Upon full consideration of all of the submitted materials, I have determined to grant the respondents' request for interlocutory review of ALJ Bedrin Murray's July 27, 2015 denial of respondents' motion to dismiss/motion for summary decision.

Please be further advised that I have determined not to grant interlocutory review of ALJ Bedrin Murray's July 24, 2015 discovery order, pursuant to my discretion under *N.J.A.C.* 1:1-14.10. Accordingly, the respondents' request for interlocutory review of the July 24, 2015 discovery order is hereby denied.* The discovery order shall remain stayed until a ruling on interlocutory review is issued.

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

Any party opposed to the grant of interlocutory review may, within three days of receipt of this notice, submit in writing arguments in favor of the order or ruling being reviewed. *N.J.A.C.* 1:1-14.10(d).

Thereafter, in accordance with *N.J.A.C.* 1:1-14.10(e), I will issue a ruling no later than 20 days from receiving the request for review.

Sincerely,

David C. Hespe
Commissioner

c: Joan Bedrin-Murray, Administrative Law Judge
Clerk, Office of Administrative Law
State Law Library

DCH/MKD/JKH

Via Facsimile and Regular Delivery

261-15

STATE OFNEW JERSEY
DEPARTMENT OF EDUCATION
TRENTON, NEW JERSEY

IN THE MATTER OF TENURE HEARING OF)
STATE-OPERATED SCHOOL DISTRICT OF THE)
CITY OF NEWARK, ESSEX COUNTY)
)
-against-) OPINION AND AWARD
)
NEIL THOMAS)
)
)
Docket No. 59-3/15)
)

Before: Robert T. Simmelkjaer, Esq.
ARBITRATOR

APPEARANCES

FOR THE BOARD

Brenda C. Liss, Esq., Riker Danzig Scherer Hyland Perritti, LLP

FOR THE RESPONDENT

Kathleen Naprstek Cerisano, Esq., Zazzali Fagella Nowak Kleinbaum & Friedman, PC

BACKGROUND

On November 19, 2014, the undersigned issued his decision I/M/O/ Tenure Charge Neil Thomas, State-Operated School District of the City of Newark ("District") (Agency Docket No. 244-9/14) dismissing a Charge of Inefficiency brought under Section 25 of TEACHNJ. On or about March 24, 2015, the School District filed an Amended Charge of Inefficiency with the Commissioner under Section 8 of TEACH NJ.

On April 8, 2015, the Respondent filed a Motion for Summary Judgment. On April 10, 2015, the District submitted its preliminary response to the motion. On April 13, 2015, the Commissioner referred the charge to the arbitrator "to handle as he deems appropriate."

Subsequently, on May 19, 2015, the District filed its Opposition to the Motion for Summary Judgment. At the same time, the District filed a motion with the Commissioner requesting a stay of this matter pending its appeal to the Superior Court of New Jersey, Appellate Division, challenging, *inter alia*, the assignment of the Amended Inefficiency Charge to arbitration. On May 28, 2015, the Respondent submitted his letter-brief in Opposition to the Motion for a Stay of the Commissioner's Decision to refer the instant matter to the undersigned arbitrator. On June 1, 2015, the District submitted a reply to the Respondent's letter- brief.

By letter dated June 4, 2015, the Commissioner determined that he "lacks jurisdiction to hear and decide petitioner's Motion for Stay Pending Appeal. This determination shall not preclude the parties from seeking the desired relief before the arbitrator pursuant to *N.J.A.C.* 6A:3-5.5(b)."

On June 15, 2015, the Respondent submitted his reply to the District's Opposition to Respondent's Motion for Summary Judgment.

On June 17, 2015, the District renewed its request that the arbitrator "hold this matter in abeyance pursuant to *N.J.A.C* 6A:3-5.5 (l)(b) until our appeal of the Commissioner's action, referring this matter to arbitration is resolved ..." On June 22, 2015, the Respondent submitted his Opposition to the District's request to stay the matter.

On July 2, 2015 the District advised the Arbitrator that it "hereby withdraws the tenure charge of inefficiency against Respondent Neil Thomas in its entirety." By letter dated July 8, 2015, the District was "advised that *N.J.A.C.* 6A:3-5.6 requires the approval of the arbitrator for withdrawal."

By letter dated August 3, 2015, the District requested the approval of the Arbitrator pursuant to *N.J.A.C.* 6A:3-5.6 to withdraw the tenure charge filed against Neil Thomas. (See attached.).

I have reviewed the District's request in accordance with *N.J.A.C.* 6A:3-5.6, Withdrawal, settlement or mooting of tenure charges, and the standards set forth in the matter entitled *In re Cardonick,* State Board decision of April 6, 1983 (1990) *School* Law *Decisions* (*S.L.D.*) 842, 846 and found that the District's request meets the statutory criteria.

The District has delineated the circumstances that have persuaded it that Respondent can effectively perform his duties as a teacher, having "received an annual summative evaluation rating of 'effective' for the 2014-2015 school year." Given this

rating, "the School District has determined that these circumstances justify withdrawal of the tenure charge, and that withdrawal of the tenure charge is in the public interest.

The District also has addressed additional criteria for the withdrawal of tenure charges to the satisfaction of the arbitrator. The District has affirmed that "the withdrawal is not the result of a settlement; the School District has neither sought or obtained any agreement by Respondent in exchange or withdrawal of the tenure charge against him; the withdrawal does not involve any terms that would restrict access to information or records deemed public by law or result is misrepresentation of the reason for Respondent's separation from service (no such separation will occur as a result of the proposed withdrawal."

Finally, the District notes that "the facts underlying the tenure charge of inefficiency against Respondent do not constitute grounds for disciplinary action or penalty imposed on Employee and do not give rise to any obligation on the part of the school District to notify the State Board of Examiners or Division of Pension. The School District does not intend to seek suspension or revocation of Employee's teaching certification."

Based on the foregoing representations of District Counsel and pursuant to the criteria for withdrawal of Tenure Charges set forth in *N.J.A.C.* 6A; 3-5.6, the District's Motion to withdraw the tenure charges filed against Neil Thomas is granted

Very truly yours,

Robert T. Simmelkjaer
Robert T. Simmelkjaer

NOW THEREFORE, as the duly selected Arbitrator, having heard the evidence presented, I hereby issue the following:

AWARD

The District's request to withdraw the Tenure Charge against Neil Thomas, Respondent and Tenured Teacher, pursuant to *N.J.A.C.* 6A:3-5.6 is granted.

Very truly yours,

Robert T. Simmelkjaer

STATE OF NEW JERSEY}
COUNTY OF BERGEN}

On the 5th day of August 2015 before me came Robert T. Simmelkjaer to me known as the person who executed the foregoing instrument which is his award.

Notary Public

William G. Deegan
Notary Public, State of New Jersey
No. 2233499
Qualified in Bergen County
Commission expires 12/21 20 19

262-15

262-15

J.J., on behalf of minor child, J.A.J.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner – a resident of the Township of Washington – filed a *pro se* residency appeal challenging the respondent Board's determination that she was not the legal guardian of J.A.J., and therefore J.A.J. was not entitled to a free public education in the Board's school district. Petitioner provided the Board with a sworn statement from her daughter, signed on January 5, 2014, which gave guardianship and care of J.A.J. to petitioner, who is J.A.J.'s maternal grandmother. In February 2014, the Board notified petitioner that she needed to file court/custody paperwork proving that she had legal custody of J.A.J. Petitioner contended that in order to gain legal custody of her granddaughter, she was required to travel to South Carolina to file the appropriate paperwork, and she made the trip to do so as soon as it was logistically possible – in June 2014, after school ended for the year. The Board asserted that J.A.J. was not legally domiciled in its district during the 2013-2014 school year, and filed a motion for summary decision.

The ALJ found, *inter alia,* that: there are no material facts at issue, and this matter is ripe for summary decision on the issue of domicile; the evidence shows that petitioner did not obtain a court order giving her custody of J.A.J. for the 2013-2014 school year until August 2014, and did not allege that J.A.J. came to live with her as a result of hardship; pursuant to *N.J.S.A.* 18A:38-1, the affidavit from J.A.J.'s mother did not give petitioner custody, though that was the intent; although petitioner made earlier efforts to obtain a custody order, she was unable to make the necessary trip to South Carolina until after school ended in June 2014; she did, however, make the trip immediately after the end of the school year, and did make a good-faith effort to obtain custody. The ALJ determined that the portion of the Board's motion for summary decision pertaining to domicile must be granted, but factual issues existed regarding the assessment of tuition, and therefore that portion of the motion was denied. Accordingly, the ALJ concluded that special circumstances warrant an equitable determination waiving the recovery of tuition from January to June 2014.

Upon review of the record and the Initial Decision, the Commissioner concurred with the ALJ's findings and conclusions. Accordingly, the Initial Decision was adopted as the final decision in this matter.

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

Issued 8/07/15

OAL DKT. NO. EDU 4708-14
AGENCY DKT. NO. 43-2/14

J.J., on behalf of minor child, J.A.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that J.A.J. was not domiciled in the district until her grandmother, J.J., obtained an Order of Temporary Custody from South Carolina in August 2014. The Commissioner, however, is also in accord with the ALJ's determination – for the reasons stated in the Initial Decision – that the special circumstances in this case warrant an equitable determination waiving the recovery of tuition from January through June 2014.

Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/07/15
Date of Mailing: 8/07/15

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4708-14
AGENCY DKT. NO. 43-2/14

J.J. ON BEHALF OF MINOR CHILD J.A.J.,
Petitioner,
v.
WASHINGTON TOWNSHIP BOARD OF EDUCATION, GLOUCESTER COUNTY,
Respondent.

J.J., petitioner, pro se

Daniel J. Rosenthal, Esq., for respondent (Capehart & Scatchard, attorneys)

Record Closed: November 12, 2014 Decided: June 24, 2015

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF THE CASE

Petitioner J.J., on behalf of minor child J.A.J., appeals the determination of the respondent Washington Township Board of Education (Board) that she was not the legal guardian of J.A.J. and therefore J.A.J. was not entitled to a free public education in the Washington Township School District.

PROCEDURAL HISTORY

On or about February 4, 2014, the Board notified petitioner that she needed to file court/custody paperwork proving that she had custody of her grandchild J.A.J. no later than February 25, 2014. Petitioner filed her appeal of the Board's notice with the Commissioner of Education on February 24, 2014. The Board filed an answer on April 21, 2014. The Board did not counterclaim for tuition owed for the time that J.A.J. attended school in the Washington Township School District when J.A.J. allegedly was not domiciled there. The case was transmitted to the Office of Administrative Law, where it was filed on April 21, 2014. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Pursuant to N.J.S.A. 18A:38-1, petitioner was entitled to an expedited hearing. On September 3, 2014, the Board filed a motion for summary decision. I gave petitioner until October 3, 2014, to respond. On October 29, 2014, I received petitioner's letter in opposition to the motion for summary decision. The letter was dated September 24, 2014, and had a fax date of October 1, 2014, to the office of Mr. Rosenthal, so I accepted it after the deadline. On October 7, 2014, the Board filed a reply to petitioner's opposition. I reserved decision on the motion. A hearing was scheduled for November 12, 2014. On that date, I heard the case and closed the record.

FINDINGS OF FACT

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I **FIND** the following:

On January 5, 2014, J.A.J.'s mother signed a sworn statement to give guardianship to petitioner, J.A.J.'s maternal grandmother. J.A.J. moved to New Jersey from South Carolina. Petitioner took the sworn statement to the Board's registration office on January 13, 2014, and attempted to enroll J.A.J. in the school district. J.A.J.'s biological mother lives in South Carolina and lived there at all times relevant to this petition. According to Janice Giel, student registration, data and information manager, and an email of that date (P-1), Barbara Lacca, another employee in the registration office, asked petitioner if there was a hardship that made J.A.J.'s mother send J.A.J. to live with the petitioner, and she said there was not. Petitioner confirmed that there was

no hardship or abuse, and J.A.J. wanted to leave South Carolina and live in New Jersey with her grandmother. Ms. Lacca told petitioner that they could not enroll J.A.J. in the District because her mother was not a resident of Washington Township.

As noted in the email, petitioner had spoken to Anna Ambrosio at the Department of Education, who had told her that she should be able to enroll J.A.J., as it would be against the law to deny her education. Ms. Lacca wrote the email to Deborah Sebastiani at the Department of Education to seek clarification. (P-1.)

Petitioner was informed by Ms. Lacca that her documentation was insufficient because she needed an order from a court granting her custody of the student in order for J.A.J. to be eligible to attend school within the District. Ms. Giel told her that she would have to go to the court in Woodbury to gain custody of J.A.J. Alternatively, J.A.J. could attend school in the District if petitioner showed that there was a hardship. Ms. Giel informed petitioner that if she did not provide sufficient documentation, J.A.J. would be deemed ineligible for attendance and J.J. would be responsible for tuition for the student's attendance during the period of ineligibility.

Petitioner called the Department of Education again and spoke to James McBee, who explained the law to her. Petitioner then went to Woodbury to file the application. However, a courthouse staff member told her that she had to go to South Carolina to obtain guardianship. Petitioner knew that she would have to take J.A.J. out of school to go to South Carolina, as she could not leave J.A.J. home alone. She informed Ms. Lacca that she would have to go to South Carolina, and that is when petitioner received an extension to file paperwork until February 25, 2014. The Board gave her a letter stating that if she did not provide the court/custody paperwork by February 25, 2014, then J.A.J. would be removed from the District rolls. The letter stated that the only way to keep J.A.J. in school was to file an appeal. (R-3.)

Petitioner called the courthouse in South Carolina and was told that she would have to physically present herself there and would need an attorney. She said she would have gone down during spring break, but the spring break was taken away due to snow days. As soon as school let out on June 25, 2014, petitioner headed to South

Carolina. She arrived in South Carolina on June 28, 2014. Petitioner acquired the Order of Custody from South Carolina on August 15, 2014, and provided the Order to the District on August 23, 2014.

Although the Board did not counterclaim for tuition in its answer, the Board submitted with its motion the certification of Janice Giel, which states that the daily rate at which tuition is assessed is $79.81. Both in the certification and in testimony, Ms. Giel said that the tuition owed for J.A.J.'s attendance during the 108 days in the 2013–2014 school year is $8,619.48.

LEGAL ANALYSIS

Motion for Summary Decision

Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). Additionally, if no response is filed within twenty days, summary decision, if appropriate, shall be entered. (Ibid.)

The New Jersey Supreme Court has modified and clarified the analysis required when considering a motion for summary decision or judgment. In Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), the Court adopted the summary-judgment standard utilized by federal courts:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." [Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202,

> 212 (1986).] . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. Liberty Lobby, supra, 477 U.S. at 250, 106 S. Ct. at 2511, 91 L. Ed. 2d at 213. The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214, the trial court should not hesitate to grant summary judgment.

The burden is on the moving party to exclude all reasonable doubt as to the existence of any genuine issue of material fact, and all inferences of doubt are drawn against the moving party and in favor of the non-moving party. Saldana v. DiMedio, 275 N.J. Super. 488, 494 (App. Div. 1994). The critical question therefore is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one-sided that one party must prevail as a matter of law." Brill, supra, 142 N.J. at 533 (citation omitted). If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998).

The present case is ripe for summary decision on the issue of domicile. Public schools are required to provide a free education to individuals between the ages of five and twenty years who are domiciled within the school district. N.J.S.A. 18A:38-1(a). A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district. N.J.A.C. 6A:22-3.1(a)(1). A child is also entitled to free attendance at a public school under the following circumstances:

> A non-parent or non-guardian domiciled in the school district signs a sworn statement that the child lives with her, she will support the child gratis as if he were her own child, and will assume all personal obligations for the child with respect to school requirements, and the parent signs a sworn statement that she "is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the

district." N.J.S.A. 18A:38-1(b); N.J.A.C. 6A:22-3.2(a). A child entitled to attend school under such circumstances is known as an "affidavit student."

The child is placed in the home of a resident of the school district by court order. N.J.S.A. 18A:38-2; N.J.A.C. 6A:22-3.2(e).

A school board may remove a child if, after a hearing, the board determines that the child is ineligible to attend school for free in the district. N.J.S.A. 18A:38-1(b)(2). However, the board's decision may be appealed to the Commissioner of Education. Ibid. If the evidence adduced at a hearing before the Commissioner or the Office of Administrative Law does not support a finding that the child is entitled to a free education in the district, the Commissioner "shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district." Ibid.; N.J.A.C. 6A:22-6.2. Yet, "[n]othing shall preclude a board from collecting tuition from the parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner." N.J.S.A. 18A:38-1(b)(2). Conversely, State regulations do not preclude "an equitable determination by the district board of education or the Commissioner that tuition shall not be assessed for all or part of any period of a student's ineligible attendance in the school district when the particular circumstances of a matter so warrant," including a situation in which "the ineligible attendance was due to a school district's error." N.J.A.C. 6A:22-6.3(b).[1]

In the present case, petitioner did not have a hearing before the Board. She filed an appeal based on the Board's letter saying that her granddaughter would be removed from the rolls if petitioner did not provide a court order of custody by February 25, 2014. Petitioner does not base her case on this procedural fact, however. Also, petitioner has

[1] The Department of Education recently amended N.J.A.C. 6A:22-6.3(b). 45 N.J.R. 1209(a) (May 20, 2013); 45 N.J.R. 2551(a) (December 16, 2013). In so doing, the Department declined to list specific examples under that provision, because "[t]he current rule is designed to provide maximum flexibility without being overly prescriptive." 45 N.J.R. 2551(a). However, the Department "add[ed] language that states neither a school district nor the Commissioner should assess tuition for a student found ineligible to attend a school if the ineligibility was due to school district error," in order to "ensure students are not penalized for a school district's misunderstanding of the student's circumstances or of applicable laws." 45 N.J.R. 1209(a).

never alleged that J.A.J. came to live with her as a result of a hardship. The fact that doing so would have been much easier, but it would not have been the truth, bolsters her credibility. The evidence shows that petitioner did not obtain a court order giving her custody of J.A.J. for the 2013–2014 school year until August 2014. The argument petitioner presented was that petitioner's daughter had given her custody on January 5, 2014, as evidenced by the daughter's signed affidavit. In addition, petitioner tried in good faith to get a court order from Woodbury, but was told that she had to obtain such an order from South Carolina. Petitioner obtained that court order when she was able to do so, as her granddaughter's attendance at school was paramount.

Pursuant to N.J.S.A. 18A:38-1, petitioner's daughter's affidavit did not give petitioner custody of J.A.J., although that was the intent. The Board gave petitioner until February 25, 2014, to obtain an order of custody from the court. In trying to comply, petitioner went to the Superior Court in Gloucester County to obtain the order, but was told that she would have to go to South Carolina, where the daughter resided. Petitioner was willing, but she could not do so until the end of the year without making J.A.J. miss school. Petitioner noted that there was no spring break that year due to all of the snow days in the district. I can take judicial notice of a very snowy winter 2014. The Board did not dispute that spring break was nonexistent that year. Petitioner went to South Carolina to obtain the Order of Temporary Custody as soon as the school year ended. As there is no factual dispute that petitioner was not J.A.J.'s legal guardian until she obtained the order in August 2014, I **CONCLUDE** that summary decision must be **GRANTED** on the issue of domicile. However, there is a factual issue as to whether equitable considerations exist such that a determination may be made by the Commissioner that tuition shall not be assessed for all or part of any period of a student's ineligible attendance in the school district. Thus, summary decision is **DENIED** on the issue of tuition.

Recovery of Tuition

The Commissioner has determined that the good faith of a parent is an appropriate consideration for reducing the amount of tuition owed for a student's period of ineligible attendance. For example, in S.Y. ex rel. E.Y. v. Board of Education of Wyckoff, EDU 9946-09, Initial Decision (October 28, 2014), adopted, Comm'r

(December 15, 2014), <http://njlaw.rutgers.edu/collections/oal/>, the Commissioner adopted Chief Administrative Law Judge Sanders' equitable determination that tuition should not be assessed for the first few months of the two-year period of an ineligible student's attendance at a public school because the parents had shown a "good-faith intent to move" to a new house in the school district at the start of the 2007–2008 school year. However, the parents experienced an unanticipated construction delay, and the school board did not notify the parents of their potential liability for tuition until February 2008.[2]

The Commissioner has also equitably determined that certain circumstances did not warrant the assessment of tuition before the date on which a caretaker was awarded custody of a theretofore ineligible student. In Board of Education of Absecon v. M.L.G. and L.G.-P. ex rel. B.G., EDU 10944-99, Initial Decision (April 18, 2000), reversed, Comm'r (July 13, 2000), <http://njlaw.rutgers.edu/collections/oal/>, the Commissioner held that not only was tuition not owed from the date the caretaker obtained custody of the child, but also that, "in light of the circumstances particular to this matter, an order for tuition from October 13, 1999, when [the resident aunt] sought to enroll [the child] in the Absecon school district, to December 2, 1999, the date upon which she acquired legal custody, is not warranted."[3] While it is not entirely clear to what circumstances the Commissioner was referring, the caretaker had argued in her exceptions to the ALJ's decision that

> [u]nder these circumstances, where there is no allegation that the child lives with the district resident solely to obtain an education in the district's schools; where the resident acted as the sole custodian and *de facto* guardian of the child for 21 months prior to obtaining legal custody; and where the resident obtained custody as soon as she understood the requirements of the school residency statute, it would be unfair and contrary to the purpose of the school residency statute to assess tuition against [the resident].

[2] However, the parents were assessed tuition from the time they received notice through the 2008–2009 school year.

[3] In a footnote, the Commissioner stated that "[t]he record reveals that [the aunt] applied to the Superior Court of New Jersey for custody of [the child] on November 17, 1999."

There are also instances in which a school board has equitably determined to not assess tuition for a portion of an ineligible student's school attendance. For example, in J.A. and M.C. ex rel. M.A. v. Board of Education of Belleville, EDU 5138-02, Initial Decision (February 21, 2003), adopted, Comm'r (April 11, 2003), <http://njlaw.rutgers.edu/collections/oal/>, the ALJ explained that

> although the student was not a legal resident of Belleville at the beginning of the 2001–2002 school year in September 2001, [the superintendent] determined in light of the family's financial situation not to request tuition reimbursement for any period prior to the end of November 2001 when the district first learned [the student] was not living in Belleville. Thus, tuition reimbursement is sought for 41 days only, five (5) school days in November, fifteen (15) school days in December, and twenty-one (21) school days in January 2002. As of February 2002, the child became a legal resident of Belleville when custody was granted to . . . her aunt.

Also, while the Commissioner has consistently held that "as of the date that a resident of a district takes *legal control* of a child, entitlement to attend school free of charge is no longer to be examined pursuant to N.J.S.A. 18A:38-1(b), the 'affidavit student' provision," and that instead, the question simply becomes whether the child and the guardian were domiciled in the district in accordance with N.J.S.A. 18A:38-1(a), it is also possible to obtain a retroactive custody order that would obviate the need for an "affidavit-student" analysis for the period before the date on which a custody order is actually obtained. L.D.M. ex rel. T.D. v. Bd. of Educ. of W. Orange, EDU 3590-00, reversed, Comm'r (May 11, 2001) (citing L.A. v. Bd. of Educ. of W. Orange, 97 N.J.A.R.2d (EDU) 266, aff'd, St. Bd., 97 N.J.A.R.2d (EDU) 554), <http://njlaw.rutgers.edu/collections/oal/>. Thus, in L.D.M., the Commissioner found that "[t]he record clearly demonstrates that on February 7, 2001, [the child's sister, who was a resident of the district,] was granted legal custody of [the child], *retroactive to January 27, 2000*," and that, "[c]onsequently, the ALJ's analysis of this matter under the affidavit student provision, N.J.S.A. 18A:38-1b(1), is inapplicable," and the school board was not entitled to the tuition it sought for the period from February 23, 2000, to February 7, 2001.

A final consideration in residency appeals is whether the school district misinformed a parent or caretaker with respect to residency requirements. Of course, regardless of whether a district misinformed a parent or caretaker, the petitioner still bears the burden of showing on appeal that a child was eligible for free attendance under N.J.S.A. 18A:38-1(a), N.J.S.A. 18A:38-1(b), or N.J.S.A. 18A:38-2, or under a combination of these provisions. There is no evidence that such a consideration applies in the present case, although petitioner may have misunderstood the Department of Education's representation to her that J.A.J. was entitled to be enrolled in the District to mean that she was entitled to attend free of tuition.

Similar to the case in S.Y. v. Wyckoff, supra, EDU 9946-09, Initial Decision (October 28, 2014), adopted, Comm'r (December 15, 2014), <http://njlaw.rutgers.edu/collections/oal/>, petitioner made a good-faith effort to obtain custody of J.A.J., first getting the affidavit from J.A.J.'s mother before she tried to enroll J.A.J. and then going to the court in Woodbury after being told the affidavit was insufficient and she had to obtain a court order. She then went to South Carolina as soon as she could do so without J.A.J. missing school. Similar to L.D.M. v. West Orange, supra, EDU 3590-00, reversed, Comm'r (May 11, 2001), <http://njlaw.rutgers.edu/collections/oal/>, petitioner probably could have obtained a retroactive order of custody if she had known to ask for one. Unfortunately, she would have no way of knowing of that possibility. Based on facts indicating petitioner's attempts to obtain guardianship prior to actually obtaining it, I **CONCLUDE** that special circumstances warrant an equitable determination waiving the recovery of tuition from January to June 2014.

ORDER

For the reasons cited above, the motion for summary decision as to domicile is **GRANTED**. As factual issues existed regarding whether an equitable determination could be made regarding the portion of the motion for summary decision related to the assessment of tuition, that portion of the motion is hereby **DENIED**. Upon consideration

of special circumstances demonstrating the good faith of petitioner, the request to recover 108 days of tuition at $79.81 per day from January to June 2014 is **DENIED**.

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

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

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

June 24, 2015
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 6/25/15

Date Mailed to Parties: 6/26/15

APPENDIX

WITNESSES

For Petitioner

J.J.

For Respondent

Janice Giel

EXHIBITS

For Petitioner

P-1 Email from Barbara Lacca to Deborah Sebastiani dated January 13, 2014

For Respondent

R-1 Notice of Defect in Application dated January 14, 2014

R-2 Affidavit of J.C. granting guardianship dated January 5, 2014

R-3 New Registrant Application Defect/Ineligibility Notice dated February 4, 2014

R-4 Letter to petitioner from Jan Giel dated April 22, 2014

R-5 Temporary Order of Judgment granting custody of minor child J.A.J. to maternal grandmother J.J., signed August 15, 2014, and filed August 18, 2014

263-15

263-15R

DESTINY JACKSON,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY, AND THOMAS FICARRA,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioner challenged the discipline imposed upon her by the respondent Board as a result of an altercation that she was involved in on school grounds. Specifically, petitioner sought an order reversing the discipline and allowing her to participate in her senior prom and graduation activities in June 2014. Her original petition for emergent relief was denied following a hearing at the Office of Administrative Law (OAL), and petitioner subsequently filed an amended petition which included, *inter alia*, a request to have her disciplinary record cleared. The Board filed a motion to dismiss, contending that the relief sought by petitioner could not be granted and that the discipline that had been imposed was appropriate because petitioner had been involved in a fight at school in January 2014, which behavior was contrary to the school's code of conduct. On September 11, 2014, the ALJ issued an Initial Decision which found that the relief petitioner sought is unavailable, that the issues are moot, and that petitioner is barred by collateral estoppel and res judicata; the ALJ granted the Board's motion to dismiss. Subsequently, in a decision dated November 20, 2014, the Commissioner rejected the ALJ's Initial Decision and remanded the matter to the OAL for consideration of the petitioner's request to have her disciplinary record cleared.

On remand, the ALJ considered the issue of whether the Board's decision to give petitioner a long-term suspension was arbitrary, capricious or unreasonable. The ALJ found, *inter alia*, that: petitioner misbehaved and exhibited inappropriate behavior multiple times from October 2013 through February 2014, acting as the perpetrator and/or aggressor in five separate incidents during that time period; the Board's decision to impose the long-term suspension was based on valid and reasonable concerns about petitioner's tendency to be aggressive and pugnacious, placing herself and others at risk of harm or serious injury; and the Board's determination to suspend petitioner was appropriate. The ALJ concluded that the Board's action was supported by evidence properly adduced and presented and was not arbitrary, capricious or unreasonable. Accordingly, the ALJ ordered that petitioner's claim be dismissed.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions. Accordingly the Initial Decision was adopted as the final decision in this matter.

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

August 7, 2015

OAL DKT. NO. EDU 16026-14
(EDU 5934-14 ON REMAND)
AGENCY DKT. NO. 116-5/14

DESTINY JACKSON,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY, AND THOMAS FICARRA,	:	
RESPONDENTS.	:	

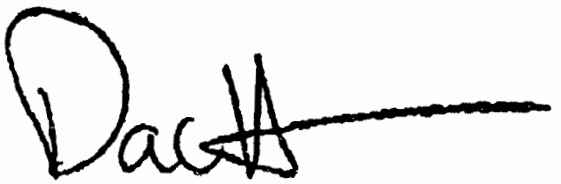
The record of this matter and the Initial Decision on Remand of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Destiny Jackson – a former student in respondent's school district – and the Board of Education's (Board) reply thereto. This matter was remanded to the OAL for a hearing to determine whether the Board's decision to give the petitioner a long-term suspension was arbitrary, capricious or unreasonable, and if her disciplinary record should be modified. After a hearing at the OAL, the Administrative Law Judge (ALJ) determined that the Board's decision to give her a long-term suspension was not arbitrary, capricious or unreasonable.

Upon review of the record, the Commissioner concurs – for the reasons stated in the Initial Decision – with the ALJ's determination that the Board's decision to give the petitioner a long term suspension was not arbitrary, capricious or unreasonable, and as a result the petitioner's disciplinary record should continue to reflect the long-term suspension. The record clearly demonstrates that the petitioner exhibited inappropriate behavior on various

occasions between October 2013 and February 2014, and that her aggressive tendencies placed herself and others at risk of harm or serious injury. Notwithstanding petitioner's contentions to the contrary, the Commissioner finds no basis in the record – which includes a transcript from the hearing held on May 11 and 12, 2015 – to reject either the ALJ's recitations of testimony or her factual findings. The ALJ had the opportunity to assess the credibility of the various witnesses who appeared before her and made findings of fact based upon their testimony and the evidence in the record.

Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 8/07/15

Date of Mailing: 8/07/15

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 16026-14
AGENCY DKT. NO. 116-5/14
(On Remand EDU 05934-14)

D.J.,

Petitioner,

v.

MORRIS SCHOOL DISTRICT
BOARD OF EDUCATION,

Respondent.

D.J., petitioner, pro se

Marie Laurence Fabian, Esq., for respondent (Porzio, Bromberg & Newman, attorneys)

BEFORE **CARIDAD F. RIGO**, ALJ:

Record Closed: June 1, 2015 Decided: June 23, 2015

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner D.J., a student, appeals her suspension by the respondent, the Morris School District Board of Education (Board).

On or about May 15, 2014, petitioner filed for emergent relief seeking an order reversing the imposition of a school suspension, participation in senior prom, and graduation ceremony in June 2014. The case was dismissed after petitioner's presentation of her arguments and subsequent to respondent's Motion to Dismiss.

On November 24, 2014, this matter was remanded back to the Office of Administrative Law (OAL) and this Administrative Law Judge (ALJ) pursuant to the Commissioner of Education Bureau of Controversies Final Decision.

In person and telephonic pre-hearing conferences were held on March 23 and April 8, 2015, a plenary hearing was held on May 11 and 12, 2015. Upon receipt of written closing arguments the record closed on June 1, 2015.

ISSUES

The issues on remand are: Was the respondent Board's decision of March 11, 2014 to give petitioner a long-term suspension arbitrary, capricious or unreasonable?

FACTUAL BACKGROUND

Petitioner was a senior at Morristown High School during the 2013–2014 school year. Petitioner was involved in verbal and physical altercations on October 3, 2013, and on January 15, 2014. Petitioner was warned by the school administration after the October 3, 2013, incident not to engage in physical altercations. As a result of the January 15, 2014, altercation the respondent school board on March 11, 2014, conducted a disciplinary hearing. As a result of that hearing the school board voted to suspend the petitioner from attending school and participating in all extra-curricular school and graduation activities for the remainder of the 2013-2014 school year.

Arguments of the Parties

Petitioner argues that the respondent Board's action was arbitrary, capricious and unreasonable by giving her such a long-term suspension. The long-term suspension was in effect excluded her from attending her senior prom, graduation ceremony, and all other senior activities. Petitioner further argues that she did not receive due process. Petitioner was subject to harassment, intimidation, and bullying (HIB) from other students but the respondent never did anything about it.

Respondent argues that its actions were not arbitrary, capricious or unreasonable because petitioner was involved in fights in violation of school regulations. Petitioner could not be calmed down once she began lashing out at students and school personnel. It presents that it had no choice but to remove petitioner from the school in order for it to maintain order, discipline, and safety.

Summary of the Testimony

Mark Manning

Mark Manning was called to testify by the petitioner. He is the principal of Morristown High School. He became the principal in December 2013.

Manning testified that there was an incident in October 2013 between D.J. and another student when D.J. became aggressive and had to be restrained. During this incident D.J.'s brother tried to restrain her from attacking the other student. This incident took place in the school cafeteria. Initially, the school staff thought D.J.'s brother was acting inappropriately and managed to separate the siblings. However, once unrestrained D.J. proceeded to climb on top of the cafeteria table and walk over to the student she was fighting with to confront her. Security guards had to physically separate her from the other student. As a result of this altercation both students were suspended for the remainder of the day.

Manning stated that he tries to have corrective measures before suspending or expelling any student. He had a re-entry meeting with D.J. and her mother when they discussed D.J.'s inability to control herself and keep her hands to herself. He said he suggested she receive counseling and also made himself available to her. The HIB officer and D.J.'s case manager were also present at this re-entry meeting.

Under cross-examination by counsel for respondent Manning defined the difference between a short-term and long-term suspension. He said a short-term suspension is less than ten days. Before the actual imposition of such a suspension the student is provided with due process in that they are provided with all investigation reports, the parents are called and notified about what happened. A long-term suspension can only come about after a disciplinary hearing before the board of education. In this situation the parents are informed in advance and in writing about the hearing. Formal notices are giving as to when, where, and what will occur at the hearing. The hearing is recorded and a transcript is provided to the student and parents. The student and the parents have an opportunity to request and provide discovery.

Manning explained that an HIB investigation was initiated because D.J. complained that she was a target. On or about February 21, 2014, a harassment, intimidation, and bullying (HIB) investigation took place. Manning said that after this HIB investigation it became clear to him that D.J. had little control of her emotions and outbursts. He said in altercations D.J. remained volatile and agitated.

Leonard Posey

Leonard Posey is the Morris School District School Board president. He was president from 2014-2015. He was called to testify by the petitioner.

Posey testified that he was involved in the recommendation to expel D.J. He said the Board meeting convened to hear D.J.'s case. The board meeting was attended by nine out of the ten Board members. He said the Board discussed D.J.'s case for thirty minutes.

Under cross-examination by respondent's counsel, Posey said the Board discussed D.J.'s removal because she had shown numerous violent tendencies.

Peter Gallerstein

Peter Gallerstein was called to testify by petitioner. He is a member of the Board and has been for the last thirteen to fourteen years. He was present at the Board meeting on March 24, 2014, when during a closed session the recommendations that came from the disciplinary hearing that was held March 11, 2014, were discussed. He said he listened to what the two Board members who were present at the disciplinary hearing had to say. The Board at that meeting voted to follow the recommendations of the members of the disciplinary hearing board. And, that recommendation was to suspend D.J. on a long-term basis.

Francine Rossoff

Francine Rossoff was called to testify by petitioner. She has been on the Board for three years. She is a registered nurse. She stated that during a closed session of a regular Board meeting D.J.'s case was discussed. She stated that the Board received a summary of the disciplinary hearing. She did not look at the investigation reports. She attended the actual disciplinary hearing on March 11, 2014. She heard the testimony of all that testified at the disciplinary hearing.

Under cross-examination by respondent's counsel Rossoff said the school's recommendation to suspend D.J. was discussed. She stated that D.J.'s lack of understanding of how inappropriate her actions were and why she was at a disciplinary hearing convinced her that keeping D.J. in school was unsafe and that the school's recommendation was reasonable. She said it was the school principal that made the recommendation to suspend D.J. She said the entire Board agreed with the recommendation that came out of the disciplinary hearing.

Debora Engelfried

Debora Engelfried is a supervisor at Central Office at the Morristown High School. She is the HIB district coordinator. She is responsible for making sure that the district follows HIB policy and procedures. She does not do any HIB investigations; they are done by someone in the school. In this case it was Dave Gelber who did the investigations for the Morris High School and then gave her the results. After receiving the results of the investigations she presented the information to the board that then decided if there was an HIB claim.

There had been multiple HIB claims filed by D.J.; however, in each case it was determined that D.J. was not a victim of HIB. Hence, her claims were unfounded. There were multiple HIB claims filed against D.J., where she was the perpetrator, and those claims were deemed to be substantiated resulting in D.J.'s suspensions. (See Exhibits R-5, R-8, R-13, R-14 and R-17.) She attended the disciplinary hearing but took no part in the hearing or in the decision or recommendation.

Michael Bruchac

Michael Bruchac is the vice principal at Morris High School and has been for eleven years. He was called to testify at the instant by D.J.

He knows D.J. because she was a student at the high school. They met in mid-September 2013 when a name-calling incident was reported to him and the incident involved D.J. D.J.'s mother brought the matter to his attention. He said all was well for about two to three weeks when D.J. returned to him complaining that the other girls started up again calling her names

Bruchac was involved in investigating an incident that occurred in the school cafeteria on October 3, 2013. During this incident D.J. had an argument with another female student that was about to turn physical and violent but for security personnel getting involved and separating them. Bruchac reported that it was reported to him that D.J. climbed over a cafeteria table in order to reach the other female. And that the

security guards had to physically separate D.J. from the other female student. He did not recall the specifics of that incident. However, he did recall speaking with D.J. and the other students and tried to mediate. The mediation meeting occurred with D.J., her mother, the other two students and their mothers', and Ms. Still, a student support counselor. He thought the meeting concluded in the positive. He asked Ms. Still to monitor the situation. He also said he explained to D.J. and her mother the HIB complaint process. He acknowledged that Exhibit R-5 is a written report about this incident. D.J. served a one-day suspension for this incident.

After an HIB investigation it was concluded that the HIB claims were unfounded.

On January 15, 2014, another incident took place in that D.J. had a fight with another student in the atrium of the high school. The security guards were again called. D.J. refused to calm down, was uncooperative, verbally abusive, and spit on the security guards. D.J. attempted to strike a security guard during this incident. Bruchac stressed that everyone was concerned over the fact that D.J. became uncontrollable, violent, and aggressive. After discussing this incident with the principal, Mr. Manning, he gave D.J. a four-day suspension.

On January 29, 2014, he suspended D.J. again because it was substantiated that D.J. had committed an act of HIB against a female student.

On February 21, 2014, he was told by his principal to suspend D.J. again because of HIB violations. He did not remember the specifics of why Mr. Manning told him to suspend D.J. that time. Essentially, D.J. was suspended numerous times because of the anger and aggression she displayed.

Thomas Ficarra, Ph.Ed.

Dr. Ficarra was called by the petitioner. Thomas Ficarra, Ph.Ed., is the school superintendant and had been for twelve years before he retired. He had thirty-nine years of experience in schools. Morris High School has 5,700 students. He gets involved with student discipline and disciplinary hearings upon the request or

recommendation from the school principal, Mark Manning. When getting involved he receives a packet of information about the student, grades, discipline record, and attendance. He also listens to what the principal has to say.

In this case he actually attended the disciplinary hearing on D.J. He was struck that during the hearing D.J. did not seem to take the situation seriously—D.J. was snickering. He said D.J. showed anger. He said D.J. showed no remorse. He heard the testimony of the security guards that related that D.J. could not be calmed down. He said that after hearing the testimony of five to six people who described D.J.'s behavior, aggression, and volatility, he came to his own conclusion that D.J. should be suspended.

He testified that he believed D.J. should have been suspended for the January and October incidents for safety reasons. He said the October 2 incident was a very dangerous situation that could have turned into something very bad.

He opined that D.J. showed a pattern of behavior over a period of time that was beyond the usual disruptions. The disruptions displayed by D.J. were too serious.

After attending the disciplinary hearing he scheduled a Board meeting to discuss the recommendation that D.J. be suspended. Board members Nancy Bangiola and Fran Rossoff were at the disciplinary hearing and they too relayed what they heard and saw at the hearing to the board members.

Suzanne Olimpio

Suzanne Olimpio was called to testify by the petitioner. She is the director of pupil services who oversees special education programs, the health programs and the child study team. She has been in this field for twenty years, a director for six years, and a supervisor for three years. She has been with Morris High School since February 2014. She has a Master's degree in school counseling and a certificate in school administration.

Ms. Olimpio explained that there was a Manifestation Determination meeting held on March 5, 2014, to determine whether D.J.'s behavior was or was not a manifestation of her disability. D.J. was classified with a specific learning disability (SLD). She said D.J., her mother, D.J.'s case manager, a special education teacher, a general education teacher, and herself attended the meeting. Olimpio testified that upon a review of D.J.'s file, assessments, evaluations, IEP, along with the interviews conducted, teacher observations, and the information provided by the parent the group determined that D.J.'s behavior was not a manifestation of her disability. (See Exhibit R-19.)

Nancy Bangiola

Nancy Bangiola is a Board member of the Morris School District and has been a member for ten years. She was called by the petitioner.

Ms. Bangiola stated she was asked by the Board members to attend D.J.'s disciplinary hearing. She did not know D.J. before the hearing. Prior to the hearing she received D.J.'s records. She acknowledged that Fran Rossoff also attended the disciplinary hearing as a representative of the school board. She said the hearing took about one hour. She heard the testimony of Mr. Manning, the three security guards, D.J. and her mother, and Mr. Ficarra, the superintendent who gave instructions on the hearing procedures. At the hearing she heard about the two fights. She describes the incident of October 2, 2013, and January 16, 2014, as fights.

Ms. Bangiola specifically recalled the testimony of the security guards, she said they stated how they had to restrain D.J. and get her off of another girl. She said she observed D.J. throughout the hearing and noted that D.J. smiled and laughed. D.J. showed no remorse. Bangiola said she concluded that D.J. did not recognize her inappropriate behavior. After hearing the statements of the people that testified at the hearing she was very much in favor of and supportive of Mr. Manning's recommendation to suspend D.J.

Bangiola furthered that the Board does not always go along with the recommendations of the administration. Bangiola said the Board discussed the discipline hearing and some of what happened at the hearing.

D.J.

D.J. testified on her own behalf. She is now nineteen years old, is employed, and wants to attend college.

As to the October 2, 2013, incident D.J. stated that it was not a fight, it was an argument. She said the other girl told her not to fight over "penis." She defines a fight as physical. She defines an argument as talking loud. She acknowledged that the security guard(s) separated her from the other girl but it was because they were loudly arguing.

D.J. further described the incident of October 2, 2013, by stating that she was standing at one end of a long rectangular table in the cafeteria, with the other person was at the opposite end and other students were sitting in between. The other girl said let's fight, so she got on the table and walked towards her, while other students were sitting at the table. The security guards came and took her away to the principal's office.

D.J. described what occurred at the incident of October 29, 2013. During this incident, D.J. said she was in English class she had her phone on her desk when a text came in. The teacher asked her for the phone and she refused to give it to her.

D.J. also stated what happened on January 16, 2014. D.J. said she was in class with a substitute teacher when she asked to leave the classroom to see another teacher when a security guard caught her on the stairs talking to another student.

Also on January 16, 2014, in an OSA class, she did not get along with the girls in this class. One girl said to her "stop twurking" when her boyfriend went to talk with

another girl who was twurking. The same girl told her "you are supposed to fight me." D.J. stated she went to fight the girl but a security guard broke it up.

D.J. further testified that on January 29, 2014, she was again disciplined for no reason. She said she was accused of calling another student "rachet" but she had not.

Under cross-examination D.J. admitted that during the incident in the cafeteria her brother tried to stop her from fighting and told her not to do it.

D.J. acknowledges that she received a letter from the school dated March 3, 2014, providing her with the details of the disciplinary hearing. (See Exhibit R-17.) She agreed that she chose not to bring anyone to testify on her behalf.

D.J. agreed that it was inappropriate to climb on the lunch table and walk towards another student. D.J. acknowledged that on January 29, 2014, the "rachet" incident occurred and she was disciplined with a suspension.

D.J. acknowledged that on February 21, 2014, she was involved in an altercation in the stairway with another student. She was heard calling a student "fucking idiot."

D.J. acknowledged that she was suspended for ten days in the 2010-2011 school year for assaulting another student.

REVIEW OF DOCUMENTARY EVIDENCE

I reviewed the transcript of the disciplinary hearing held on March 11, 2014. The transcript starts out with an outline to everyone present on how the hearing would take place. Everyone was advised that the witnesses will be sworn that D.J. and/or her mother C.W. will be able to ask questions of everyone that testified. Everyone was told that it was a disciplinary hearing and that at the end of the hearing a recommendation was going to be made to the Board of Education as to D.J.'s suspension or continued attendance at the high school.

The transcript contained the testimony of the security guards that witnessed and or were involved in the fights that D.J. was in. All of the security guards testified as to D.J.'s pugnacious behavior and attitude. One security guard testified that D.J. struck and spit on him. He stated that D.J. did not intend to spit on him but on the other student she was fighting with but the projectile of her spit hit him and another guard. All of the guards testified as to how difficult it was to calm or control D.J. even long after the heat of the moment.

It also contained a summary of a series of incidents and/or events that involved D.J.'s violations of the school's rules of conduct. The transcript contained testimony referencing incidents or events occurring on October 2, 2013, October 16 and 15, 2013, October 29, 2013, January 29, 2014, and February 21, 2014; all of these incidents or events constituted some violation of a school rule or policy. It was based on this record that the hearing committee accepted the principal's recommendation to suspend D.J. on a long term basis.

LEGAL DISCUSSION AND ANALYSIS

The issue to be determined is whether or not the respondent school board acted arbitrarily, capricious and unreasonable. It is widely recognized that local school boards have been charged by the Legislature with the orderly conduct of public schools and are vested with broad discretion in matters involving pupil discipline. K.O.H. ex rel. R.H. v. Edison Twp. Bd. of Educ., 95 N.J.A.R.2d (EDU) 275, 276. When a local board has acted within its authority, its actions carry a presumption of validity and will not generally be disturbed absent an affirmative showing that its judgment was arbitrary, capricious or unreasonable. When a local board has acted within its authority, its actions carry a presumption of validity and will not generally be disturbed absent an affirmative showing that its judgment was arbitrary, capricious or unreasonable. Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581 (1966). In matters involving the exercise of a local board of education's discretion, the scope of the Commissioner's review is not to substitute his/her judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for making the conclusions and decisions they made.

With the above as a basis I **FIND** that respondent's determination to suspend D.J. was appropriate. I **FIND** D.J. misbehaved and exhibited inappropriate behavior multiple times from October 2013 through February 2014. Specifically, she was the perpetrator and/or the aggressor on or about October 2, 2013, October 29, 2013, January 16, 2014, January 29, 2014, and February 21, 2014. I **FIND** that respondent provided D.J. with counseling, mediation, and re-entry counseling all in an effort to help D.J. have a positive experience in high school. I **FIND** the school administrators investigated each of D.J.'s HIB complaints against others and determined that they were unfounded. I **FIND** that one HIB claim was substantiated against D.J. I **FIND** that D.J. was repeatedly disciplined or admonished and she did not pay any heed. I **FIND** that respondent provided D.J. with appropriate and timely notice with respect to the disciplinary hearing of March 11, 2014. I **FIND** that the school provided D.J. with all of the paperwork it was going to use at the disciplinary hearing. I **FIND** that D.J. was provided the opportunity to present witnesses and documents at the disciplinary hearing. I **FIND** D.J. was provided the opportunity to cross examine all of the witnesses that testified at the disciplinary hearing.

Based on my reading of the transcript of the disciplinary hearing that took place on March 11, 2014, I **FIND** that the respondent Board did not act in a manner that was arbitrary, capricious or unreasonable.

I **FIND** the respondent Board's decision to impose the suspension as one that was based upon valid and reasonable concerns about D.J.'s tendencies to be aggressive and pugnacious placing herself and others at risk of harm or serious injury. I **FIND** poignant the description of the witnesses on how lengthy and difficult it was to get D.J. to calm down and de-escalate.

Therefore based upon all of the foregoing, I **CONCLUDE** that the respondent Board's action was supported by evidence properly adduced and presented and was not arbitrary, capricious or unreasonable.

ORDER

It is hereby **ORDERED** that petitioner's claim be and hereby is **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

June 23, 2015
DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency: June 23, 2015

Date Mailed to Parties: JUN 24 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

APPENDIX

WITNESSES

For petitioner:

Mark Manning
Leonard Posey
Peter Gallerstein
Francine Rossoff
Debora Engelfried
Michael Bruchac
Thomas Ficarra, Ph., Ed.
Suzanne Olimpio
Nancy Bangiola
D.J.

For Respondent:

None

EXHIBITS

For Petitioner

Exhibit B	Morristown High School Incident Report for 10/3/13 incident
Exhibit D	Chain of emails between Mark Manning and Carmen Williams
Exhibit K	Audio transcript of Disciplinary Hearing dated March 11, 2014
Exhibit E	Board of Education closed session meeting of March 24, 2014
Exhibit O	Chain of emails between Mark Manning and Carmen Williams
Exhibit H	Letter from Board of Education dated March 3, 2014
Exhibit A	October 3, 2013 HIB Complaint
Exhibit N	Disciplinary Hearing Letter dated March 12, 2014
Exhibit Q	Witness statement and security guard statement re: Jan. 15, 2014
Exhibit C	Morris School District HIB Report

For Respondent:

R-2	D.J.'s IEP dated 5/04/2011
R-4	Morris School Incident Report dated October 4, 2013
R-5	HIB Report dated November 12, 2013
R-6	Email correspondence between Williams and Engelfried
R-7	Email correspondence between Williams Engelfried
R-8	HIB report and correspondence dated January 7, 2014
R-11	January 2, 2014 evaluation and determination plan
R-12	Incident report dated January 17, 2014 and statements
R-13	HIB report dated February 7 and 11, 2014
R-14	HIB report dated February 25, 2014
R-16	Letter from Michael Bruchac dated February 27, 2014
R-17	Letter from Mark Manning dated March 3, 2014
R-18	March 5, 2014 Eligibility Conference Summary
R-19	March 5, 2014 Manifestation Determination
R-21	Audio Transcription of Disciplinary Hearing dated March 11, 2014
R-22	Letter from Board to C.W. dated March 12, 2014
R-23	Minutes of the closed session dated March 24, 2014

A.H., ON BEHALF OF MINOR CHILD, B.H.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the respondent Board's determination that her child, B.H.G., was not entitled to a free public education in the Township of West Orange schools during the second half of the 2014-2015 school year. Petitioner asserted that although she had recently signed a residential lease in another school district, her family had owned property and paid taxes in West Orange for twenty years; B.H.G. had attended West Orange schools for seven years, and was a graduating senior; therefore, in the interest of fairness, B.H.G should be allowed to graduate and finish the year with her friends and teachers. The Board contended that the results of a residency investigation showed that petitioner was not domiciled in West Orange, and that she was therefore liable for tuition reimbursement for the period from January 16 through June 19, 2015.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1(a), public schools are required to provide a free education to individuals aged 5 to 20 years who are domiciled within the school district; the domicile of an unemancipated child is that of her parent or guardian; although there is a so-called "senior rule" whereby a parent of a graduating senior could petition the Superintendent for a waiver to remain in the district through graduation, the Board's residency investigator testified that B.H.G. was classified as a detained junior; A.H. testified that she had moved to an apartment in Newark in January 2015 due to family issues, but asserted that B.H.G. remained at A.H.'s mother's home in West Orange except on weekends until March 2015, when she moved to Newark with A.H. full-time; L.H. – A.H.'s mother – testified that B.H.G. had lived with her mother at L.H.'s house in West Orange until A.H. moved to Newark, and occasionally stayed with L.H. in West Orange after January 2015. As it is uncontested that A.H. moved to Newark in January 2015, the ALJ concluded that the determination of the Board that A.H. was not domiciled in West Orange during a portion of the 2014-2015 school year should be upheld and the petition should be dismissed pursuant to *N.J.A.C.* 1:1-14.4. Further, the Board is entitled to reimbursement for tuition for the period of A.H.'s ineligible attendance in the amount of $10,366.72.

Upon review of the record and the Initial Decision, the Commissioner found that petitioner failed to sustain her burden of establishing that she was a domiciliary of West Orange during the period in question. Accordingly, the Initial Decision was adopted as the final decision in this matter and the petitioner was dismissed. Petitioner was directed to reimburse the Board in the amount of $10,366.72.

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

Issued 8/11/15

OAL DKT. NO. EDU 6653-15
AGENCY DKT. NO. 100-5/15

A.H., ON BEHALF OF MINOR CHILD, B.H.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter[1] and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner finds that petitioner failed to sustain her burden of establishing that she was a domiciliary of West Orange Township between January 16, 2015 and June 19, 2015. In fact, A.H. testified that she moved to Newark as of January 2015 "due to an influx of family issues." (Initial Decision at 2) Although A.H. further testified that B.H.G. remained in West Orange during the week – at A.H.'s mother's home – until March 2015, A.H.'s mother testified that B.H.G. only stayed with her "occasionally" after A.H. moved out. (Initial Decision at 3) As a result, B.H.G. was not eligible to receive a free public education in West Orange during the time period in question. Therefore, the Board is entitled to tuition reimbursement in the amount of $10,366.72 ($92.56 per day for 112 days) – pursuant to *N.J.S.A.* 18A:38-1b – as detailed in the Initial Decision.

[1] The record did not include transcripts from the hearing,which occurred at the OAL on June 29, 2015.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The petition of appeal is hereby dismissed. Petitioner is directed to reimburse the Board in the amount of $10,366.72 for tuition costs incurred during the time period that B.H.G. was ineligible to attend school in West Orange.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 8/11/15

Date of Mailing: 8/11/15

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 06653-15
AGENCY DKT. NO. 100-8/15

A.H. ON BEHALF OF MINOR CHILD B.H.G.,
Petitioner,
v.
TOWNSHIP OF WEST ORANGE
BOARD OF EDUCATION, ESSEX COUNTY,
Respondent.

A.H., petitioner, pro se

Stephen J. Christiano, Esq., for respondent (West Orange Board of Education, attorney)

Record Closed: June 29, 2015 Decided: July 10, 2015

BEFORE **TIFFANY M. WILLIAMS**, ALJ:

STATEMENT OF THE CASE AND FACTUAL DISCUSSION

Petitioner, A.H., appeals the determination by the Respondent, West Orange Board of Education (Board), that she is not domiciled in its district. The Board counterclaims for tuition reimbursement.

Petitioner filed an appeal with the Department of Education on May 1, 2015. The Board filed an Answer on May 7, 2015, and the contested case was transmitted to the Office of Administrative Law (OAL), where it was filed on May 8, 2015. A hearing was scheduled for June 10, 2015. On June 9, 2015, A.H. requested an adjournment due to the unavailability of her primary witness. A hearing was conducted on June 29, 2015, and the record closed at the conclusion of the testimony.

FINDINGS OF FACTS

At the hearing, the Board offered testimony of its residency investigator, Gerard Drappi, in support of its claim for tuition reimbursement. Based on the documentary and testimonial evidence presented to me, I find the following **FACTS**:

Mr. Drappi has served as a residency investigator for the West Orange Board of Education for the past four years. Prior to his employment with the Board, Mr. Drappi served as a police officer for thirty years. He retired as lieutenant of the Investigations Unit for the West Orange Police Department.

On or about January 12, 2015, Mr. Drappi received information from the security division of the West Orange High School that student, B.H.-G., did not reside in West Orange – but rather resided in Newark. On or about January 16, 2015, Mr. Drappi commenced an investigation, which began with surveillance of the home address listed for the student – 9 Whitman Street, West Orange.

Mr. Drappi performed surveillance on approximately twenty occasions and never saw the student or her mother, A.H., enter or exit the property. On at least two occasions Mr. Drappi monitored New Jersey Transit bus route #71, which originated in Newark and stopped across the street from the high school. Mr. Drappi observed B.H.-G. alight from the bus prior to school hours. Mr. Drappi confirmed that 12 Whitman Street is located approximately a half mile from the high school and is not on a school bus route.

During his investigation, Mr. Drappi also discovered a social media profile and professional biography noting that A.H. was a resident of Newark. At the conclusion of his investigation, Mr. Drappi authored a report summarizing his investigation. (R-3.) Mr. Drappi calculated corresponding tuition costs from January 16, 2015, through June 19, 2015, to include $10,366.22, based on per diem rate of $92.56. Mr. Drappi advised the Board of his findings and drafted correspondence that the Board later finalized and sent to A.H., notifying her of its determination.

Mr. Drappi was also familiar with the so-called "senior rule" whereby a parent of a graduating senior could petition the Superintendant for a waiver to remain in the district through graduation. Based on his investigation, he was aware that B.H.-G. was classified as a detained junior and had no communications from the Superintendant's office that a waiver had been requested or granted.

A.H. testified and admitted that she had moved out of the district into an apartment in Newark as of January 2015, due to an influx of family issues. She testified that her daughter remained at her mother's home at 9 Whitman Street in West Orange, except on weekends until March 2015 when her daughter moved to Newark full-time with A.H. A.H.'s mom, L.H., testified that she was the owner of 9 Whitman Street. She confirmed that A.H. had always lived there until she moved to Newark. However, she indicated that B.H.-G. was not staying at her house nightly after January, but occasionally. L.H. testified that although she maintained guardianship of her grandson, she did not monitor or provide guardianship over B.H.-G.

LEGAL DISCUSSION AND CONCLUSION OF LAW

Public schools are required to provide a free education to individuals between the ages of five and twenty years who are domiciled within the school district. N.J.S.A. 18A:38-1(a). Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is that of her parent, custodian or guardian. P.B.K.

ex rel minor child E.Y. v. Bd. of Educ. of Tenafly, 343 N.J. Super. 419, 427 (App. Div. 2001).

Where a local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal to the parents as follows:

> The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection.

Here, it is uncontested that A.H. moved to Newark in January 2015. Regardless of whether her daughter spent the night at her grandmother's West Orange home, her daughter's domicile is that of her mother's – and there is no dispute that A.H. moved to and remained in Newark during the school year. Therefore, I **CONCLUDE** that the determination of the Board that A.H. was not domiciled in West Orange during a portion of the 2014-2015 school year should be upheld and the petition of appeal should be dismissed pursuant to N.J.A.C. 1:1-14.4.[1]

The Board asserts that it is entitled to be reimbursed for tuition for the period of A.H.'s ineligible enrollment in its schools. Where, as here, the evidence does not support the claims of the resident, the Commissioner of Education is authorized to assess tuition pursuant to N.J.A.C. 6A:22-6.2(a), which provides as follows:

> If an appeal to the Commissioner is filed, where the appellant does not sustain the burden of demonstrating entitlement to attend the schools of the district, or abandons the appeal through withdrawal, failure to prosecute or any means other than settlement agreeing to waive or reduce tuition, the Commissioner may order assessment of tuition for any period of a student's ineligible attendance in a school district, including the 21-day period for filing of an appeal and the period during which the hearing and decision on appeal were pending.

[1] Additionally, A.H. argued that as a student classified as requiring special education, she kept B.H.-G. in West Orange to assist with her educational needs. However, the regulation governing residency requirements fail to distinguish between regular and special education students.

N.J.S.A. 18A:38-1(b) requires that tuition be calculated on the basis of 1/180 of the total annual per-pupil cost to the district multiplied by the number of days of ineligible attendance.

The Board's proofs are convincing and its calculations are consistent with the requirements of N.J.S.A. 18A:38-1(b) and N.J.A.C. 6A:22-6.2(a). Therefore, I **CONCLUDE** that the Board has demonstrated an entitlement to tuition reimbursement in the amount of $10,366.72. (R-5.)

ORDER

Based on the foregoing, I **ORDER** that the petition of appeal be **DISMISSED WITH PREJUDICE**. I further **ORDER** that the Board's application for tuition reimbursement is **GRANTED** in the amount of $10,366.72.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

July 10, 2015
DATE

Tiffany M. Williams
TIFFANY M. WILLIAMS, ALJ

Date Received at Agency:

July 10, 2015
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 13 2015

Date Mailed to Parties:

rr

APPENDIX

Witnesses

For Petitioner:

None

For Respondent:

Gerard Drappi

Exhibits

For Petitioner:

None

For Respondent:

R-1 Letter to A.H. from West Orange Public Schools dated April 1, 2015

R-2 Letter to A.H. from West Orange Public Schools dated April 14, 2015

R-3 Investigation Report from Gerard Drappi dated April 13, 2015

R-4 A.H. Social Media Profile

R-5 Tuition Breakdown for 2014-2015 High School

R-6 B.H.-G. Student Information

264-15R

264-13

OAL DKT. NO. EDU 9052-15
(EDU 10085-13, EDU 10092-13 (CONSOLIDATED) ON REMAND)
AGENCY DKT. NOS. 129-6/13, 130-6/13

VINELAND EDUCATION ASSOCIATION, ON BEHALF OF FELICIA GONZALEZ,	:	
PETITIONER,	:	
AND	:	
VINELAND EDUCATION ASSOCIATION, ON BEHALF OF BARBARA DEAN,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the parties' revised settlement agreement, and the Initial Decision on Remand of the Office of Administrative Law (OAL), have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. On June 19, 2015, the Commissioner remanded this matter to OAL based upon a determination that the prior settlement agreement recommended for adoption by the Administrative Law Judge ("ALJ") did not include a copy of Exhibit A, which was referenced in Paragraph 4 of the Settlement Agreement.

Upon review of the revised agreement and the record on remand, the Commissioner finds that the deficiency identified in the prior agreement has been corrected. Accordingly, the settlement is hereby approved and the petition of appeal is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/12/15
Date of Mailing: 8/13/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

OAL DKT. NO. EDU 9052-15
(ON REMAND EDU 10085-13 AND EDU 10092-13 CONSOLIDATED)
AGENCY DKT. NOS. 130/6-13 AND 129/6/13

VINELAND EDUCATION ASSOCIATION, ON BEHALF OF FELICIA GONZALEZ AND BARBARA DEAN
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,
Respondent,
and
VINELAND EDUCATION ASSOCIATION, ON BEHALF OF FELICIA GONZALEZ AND BARBARA DEAN,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,
Respondent.

PERC DKT. NO. TI-2013-004
PERC DKT. NO. TI-2013-005

Matthew B. Wieliczko, Esq., for petitioner Vineland Education Association o/b/o Felicia Gonzalez (Zeller & Wieliczko, attorneys)

Ned P. Rogovoy, Esq., for petitioner Vineland Education Association o/b/o Barbara Dean

Robert DeSanto, Esq., for respondent Vineland City Board of Education
(Gruccio, Pepper, DeSanto & Ruth, P.A., attorneys)

Record Closed: July 2, 2015 Decided: July 14, 2015

BEFORE **W. TODD MILLER**, ALJ:

These consolidated matters were transmitted to the Office of Administrative Law on June 19, 2015, as a remand, for inclusion of Exhibit A of settlement agreement and for determination pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties prepared and submitted a Settlement Agreement and General Release and Resolution from the Vineland Board of Education indicating the terms thereof, which is attached and fully incorporated herein.

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

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

2. The settlement fully disposes of all issues in controversy filed with Commissioner of the Department Of Education and the Public Employment Relations Commission and is consistent with the law.

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

I **ORDER** that in compliance with the Joint Order on Consolidation and Determination of Predominant Interest dated November 26, 2013, this Initial Decision Settlement is to be filed simultaneously in both agencies.

I hereby **FILE** my Initial Decision Settlement with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** and the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** for consideration.

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

July 14, 2015
DATE

W. TODD MILLER, ALJ

Date Received at Agency: mailed 7/22/15

Date Mailed to Parties: 7/22/15

/jb

ZELLER & WIELICZKO, LLP
ATTORNEYS AT LAW

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ZELLER & WIELICZKO, LLP
Attorneys for Petitioner,
Vineland Education Association
individually and on behalf of
Felicia Gonzalez

120 Haddontowne Court
Cherry Hill, New Jersey 08034
Phone: (856) 428-6600

BEFORE THE COMMISSIONER OF
EDUCATION OF NEW JERSEY/
OFFICE OF ADMINISTRATIVE LAW
OAL Docket Nos: EDU 10085-13
(GONZALEZ) & EDU 10092-13 (DEAN)

VINELAND EDUCATION ASSOCIATION
INDIVIDUALLY AND ON BEHALF OF
FELICIA GONZALEZ AND
BARBARA DEAN,

Petitioners,

vs.

VINELAND BOARD OF
EDUCATION,

Respondent.

STIPULATION OF SETTLEMENT AND RELEASE

The parties in the above-captioned matter hereby agree to settle this controversy upon the following terms and conditions:

1. The respondent Vineland Board of Education has removed all references to the Harassment, Intimidation, and Bullying (hereinafter "HIB") investigation and determination resulting from the February 14, 2013 report of alleged acts of harassment, intimidation and/or bullying as to student T.H., contained in the

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F 856.428.6314

ZELLER & WIELICZKO, LLP
ATTORNEYS AT LAW

personnel files of Petitioner Felicia Gonzalez and Petitioner Barbara Dean.

2. The letters of reprimand dated March 15, 2013 directed to Petitioner Felicia Gonzalez and Petitioner Barbara Dean have been removed from their respective personnel files.

3. Within ninety (90) days of the full execution of the Stipulation of Settlement and Release, Respondent Vineland Board of Education agrees to amend Board Policy 5512 ("Harassment, Intimidation and Bullying") and Regulation 5512 ("Harassment, Intimidation, or Bullying Investigation Procedure") to afford accused staff offenders of HIB allegations the same rights afforded under the current policies to student offenders and parents of individual student offenders and targets/victims. The proposed revised versions of Vineland Board of Education Board Policy 5512 and Regulation 5512 are attached hereto as Exhibit "A" and are incorporated as part of the within Stipulation of Settlement and Release.

4. Each party hereby releases the other from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial or quasi-judicial proceedings of any kind whatsoever, which have been or could have been brought, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the actions giving rise to the within controversy, except as may be necessary to enforce the terms of this Stipulation.

20 Haddontowne Court
Cherry Hill, NJ 08034
856.428.6600
856.428.6314

ZELLER & WIELICZKO, LLP
ATTORNEYS AT LAW

5. This Stipulation shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose. Each party shall be responsible for her or its own attorney fees.

6. This Stipulation of Settlement and Release contains the entire agreement between the parties, and all terms of this Stipulation are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

7. Petitioners, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of these matters hereby agree to a dismissal, with prejudice, of their Petitions of Appeal in this matter.

8. Petitioners, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of these matters hereby agree to dismiss, with prejudice, their Petitions for Contested Transfer Determination, filed with the Public Employment Relations Commission (PERC), Docket Nos. TI-2013-004 and TI-2013-005.

9. This Agreement shall be incorporated into an Initial Decision by the Honorable William T. Miller, ALJ, which shall be subject to approval and adoption by the Commissioner of Education.

10. The parties to this Settlement Agreement agree not to file Exceptions.

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Cherry Hill, NJ 08034
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ZELLER & WIESCZEK, LLC
ATTORNEYS AT LAW

IN WITNESS WHEREOF, the parties have executed this Stipulation on the dates set forth below.

VINELAND EDUCATION ASSOCIATION

BY: [signature]

WITNESS:

[signature]

DATED: 4/2/15

BOARD OF EDUCATION OF THE VINELAND SCHOOL DISTRICT

BY: _____

ATTEST:

BY: _____

DATED:

PETITIONER

[signature]
FELICIA GONZALEZ

WITNESS:

[signature]

DATED: 4-1-15

PETITIONER

_____
BARBARA DEAN

WITNESS:

_____

DATED:

120 Haddonstowne Court
Cherry Hill, NJ 08034
P 856.428.6600
F 856.428.6434

ZELLER & WIELICZKO, LLP
ATTORNEYS AT LAW

IN WITNESS WHEREOF, the parties have executed this Stipulation on the dates set forth below.

VINELAND EDUCATION ASSOCIATION

BY: _____

WITNESS:

_____

DATED:

BOARD OF EDUCATION OF THE VINELAND SCHOOL DISTRICT

BY: Scott English
Scott English, Pres.

ATTEST:

BY: Robert A. DeCo

DATED: 4-15-15

PETITIONER

Felicia Gonzalez
FELICIA GONZALEZ

WITNESS:

[signature]

DATED: 4-1-15

PETITIONER

Barbara Dean
BARBARA DEAN
4-1-15

WITNESS:

Ufid Rogovoi

DATED:
4-1-15

120 Haddontowne Court
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establish training programs to reduce harassment, intimidation, or bullying and enhance school climate, **impose discipline,** or take or recommend other appropriate action, as necessary.

The Superintendent shall report the results of each investigation to the Board of Education no later than the date of the regularly scheduled Board of Education meeting following the completion of the investigation. The Superintendent's report shall include information on any consequences imposed under the Code of **Student** Conduct, **any** services provided, training established, or other action taken or recommended by the Superintendent.

~~Parents of involved~~Accused staff offenders or parents of accused **student offenders and targets/victims** shall be provided with information about the investigation, in accordance with Federal and State law and regulation. The information to be provided to accused staff offenders or to parents shall include the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, **and** whether consequences were imposed or services provided to address the incident of harassment, intimidation, or bullying. This information shall be provided in writing within five school days after the results of the investigation are reported to the Board of Education.

~~A~~An accused staff offender or a parent may request a hearing before the Board of Education after receiving the information **about the investigation.** The hearing shall be held within ten school days of the request. The Board of Education shall conduct the hearing in executive session, pursuant to the Open Public Meetings Act (N.J.S.A. 10:4-1 et seq.), to protect the confidentiality of the **students.** At the hearing, unless otherwise privileged or confidential, the Board may hear testimony from and consider information provided by the school Anti-Bullying Specialist and others, as appropriate, regarding the incident, the findings from the investigation of the incident, recommendations for consequences or services, and any programs instituted to reduce such incidents, prior to rendering a determination.

At the regularly scheduled Board of Education meeting following its receipt of the **Superintendent's** report **on the results of the investigations to the Board** or following a hearing in executive session, the Board shall issue a decision, in writing, to affirm, reject, or modify the Superintendent's decision. The Board's decision may be appealed to the Commissioner of Education, in accordance with N.J.A.C. 6A:3, Controversies and Disputes, no later than ninety days after issuance of the Board of Education's decision.

parent, **student** or ~~organization~~staff member may file a complaint with the Division on Civil Rights within one hundred eighty days of the occurrence of any incident of harassment, intimidation, or bullying based on membership in a protected group as enumerated in the "Law Against Discrimination," P.L.1945, c.169 (C.10:5- et seq.).

Range of Responses to an Incident of Harassment, Intimidation, or Bullying
Board **shall establish a range of responses to harassment, intimidation, and bullying incidents and** the cipal **and** the Anti-Bullying Specialist **shall appropriately apply these responses** once an incident of ssment, intimidation, or bullying is confirmed**. The** Superintendent shall respond to confirmed harassment, idation, and bullying, according to the parameters described in this Policy. The range of ways in which l staff will respond shall include an appropriate combination of counseling, support services, intervention

REG 5512 Harassment, Intimidation, or Bullying Investigation Procedure

M

The Board of Education authorizes a prompt investigation of reports and violations and complaints of harassment, intimidation, **or** bullying in accordance with the provisions of N.J.S.A. 18A:37-15(b)6.

The following investigation procedure shall be used for all allegations of harassment, intimidation, or bullying:

1. An investigation shall be initiated by the Principal or the Principal's designee within one school day of the **verbal** report of the incident and shall be conducted by a school's Anti-Bullying Specialist**, in coordination with the Principal**.

a. The Principal may appoint additional personnel who are not school Anti-Bullying Specialists to assist in the investigation.

2. The investigation shall be completed as soon as possible, but not later than ten school days from the date of the written report of the incident of harassment, intimidation, or bullying.

a. In the event that there is information relative to the investigation that is anticipated but not yet received by the end of the ten-day period, the school Anti-Bullying Specialist may amend the original report of the results of the investigation to reflect the information.

3. The results of the investigation shall be reported to the Superintendent of Schools within two school days of the completion of the investigation, and in accordance with regulations promulgated by the State Board of Education pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.).

4. The Superintendent of Schools may decide to provide intervention services, establish training programs to reduce harassment, intimidation, or bullying and enhance school climate, impose discipline, order counselin as a result of the findings of the investigation, or take or recommend other appropriate action.

5. The results of each investigation shall be reported to the Board of Education no later than the date of t next Board of Education Meeting following the completion of the investigation, along with information on ar services provided, training established, discipline imposed, or other action taken or recommended by the Superintendent.

~~6. Parents~~6. Accused staff offenders or parents of **individual student offenders and targets/victi** shall be entitled to receive information about the investigation, in accordance with Federal and State law an regulation, including the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, or whether discipline was imposed or services provided to address the incident of harassment, intimidation, or bullying. This information shall be provided in writing within five school day after the results of the investigation are reported to the Board of Education.

~~7. A~~7. An accused staff offender or a parent may request a hearing before the Board of Education after receiving the information.

a. This hearing shall be held within ten **school** days of the request;

b. The Board shall meet in executive session for the hearing to protect the confidentiality of the **students**; and

c. At the hearing, unless otherwise privileged or confidential, the Board may hear from the school Anti-Bullying Specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents.

8. At the next **regularly scheduled** Board of Education meeting following its receipt of the **Superintendent's** report **on the results of each investigation to the Board or following a hearing in executive session**, the Board shall issue a decision, in writing, to affirm, reject, or modify the Superintendent's decision. The Board's decision may be appealed to the Commissioner of Education, in accordance with the procedures set forth in law and regulation, no later than ninety days after the issuance of the Board's decision.

9. A parent, **student** or ~~organization~~staff member may file a complaint with the Division on Civil Rights within one hundred eighty days of the occurrence of any incident of harassment, intimidation, or bullying based on membership in a protected group as enumerated in the "Law Against Discrimination," P.L.1945, c.169 (C.10:5-1 et seq.).

ssued: 09 June 2010
evised: 13 Sept 2013

ENGLISH	RIOS	ACOSTA	CODISPOTI	DEWINNE	DIGIORGIO	JENNINGS	MORELLO	PAGANO	ACTION
RECOMMENDATIONS									
It is recommended that:									
PERSONNEL (1.1-1.2)									
1.1 The Board approve the personnel items in accordance with the lists provided and on file with the Secretary of the Board: a. Retirements, Resignations, Terminations, Leaves of Absence, Employment, Transfers b. Students c. Substitutes d. Extracurricular Activities Volunteers e. Volunteers			2				1		All Members voted "yes." (7-0-0)
1.2 The Board approve the settlement of an administrative appeal by two teachers whose names are on file with the Board Secretary.			2				1		All Members voted "yes" except Ms. Rios who voted "no." (6-1-0)

Vineland Public Schools

625 PLUM STREET · VINELAND, NJ 08360-3708 · (856) 794-6700 · FAX (856) 794-9464

SECRETARY'S CERTIFICATE

I, **Helen G. Haley**, Board Secretary of the Board of Education of the City of Vineland in the County of Cumberland and State of New Jersey, I hereby certify this to be a true copy of the minutes duly adopted at the Board of Education meeting held on Wednesday, April 15, 2015, which is on file and of record approving the settlement of an administrative appeal by two teachers whose names are on file with the Board Secretary

IN WITNESS THEREOF, I hereby set my hand this 30th day of April 2015.

(SEAL)

Helen G. Haley
Board Secretary

Board agenda item for 4/15/15

1.2 Felicia Gonzalez

Barbara Dean

2615

OAL DKT. NO. EDU 11339-14
AGENCY DKT. NO. 175-7/14

P.F. AND C.F., on behalf of minor child, A.F.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF NUTLEY, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms to the extent they are within his jurisdiction,* and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/11/15
Date of Mailing: 8/11/15

* The parties also settled a related special education case.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11339-14
AGENCY DKT. NO. 175-7/14

P.F. AND C.F. ON BEHALF OF MINOR CHILD, A.F.,
Petitioners,

v.

TOWNSHIP OF NUTLEY
BOARD OF EDUCATION, ESSEX COUNTY
Respondent.

Julie Warshaw, Esq. for petitioners (Warshaw Law Firm, attorney)

Joanne Butler, Esq. for respondent (Schenck, Price, Smith and King, attorneys)

Record Closed: June 29, 2015 Decided: June 29, 2015

BEFORE **ELLEN S. BASS**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 8, 2014 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A related case, bearing docket number EDS 17206-14 was transmitted to the OAL on December 30, 2014. Although not formally consolidated, the two matters were conferenced together.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

A separate order dated June 29, 2015, approves this settlement relative to EDS 17206-14 and has been filed with the Office of Special Education Programs (OSEP).

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

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

June 29, 2015
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 7-1-15

Mailed to Parties: JUL - 1 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

SCHENCK, PRICE, SMITH & KING, LLP
220 Park Avenue
P.O. Box 991
Florham Park, New Jersey 07932
(973) 539-1000
Attorneys for Respondent Nutley Board of Education

C.F. and P.F. o/b/o A.F., **Petitioners,** **v.** **Nutley Board of Education,** **Respondent.**	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DKT. No. EDU 11339-2014N** **OAL DKT. No. EDS 17206-2014N** **Agency Ref. No. 175-7/14** **Agency Ref. No. 2015-22053** **SETTLEMENT AGREEMENT AND RELEASE**

This matter having come before the Department of Education and the Office of Administrative Law on the two petitions filed by the Petitioners Chi Fu and Ping Fu (hereinafter referred to as "Petitioners" or "C.F. and P.F."), on behalf of their minor son, A.F. (DOB August 13, 2008), against the Respondent, Nutley Board of Education (hereinafter referred to as "Respondent" or "Board"), seeking, *inter alia,* relief under the New Jersey HIB statutes and the federal IDEA, the parties herein state as follows:

WHEREAS, Petitioners filed a Petition challenging the Respondent's determination of a substantiated HIB violation; and

WHEREAS, Petitioners filed a Due Process Petition challenging the Respondent's earlier decision to declassify A.F. under the IDEA, the provision of FAPE in-District, prospective program and placement, as well as reimbursement for evaluations and therapies, compensatory education, attorneys fees, consultant costs, etc.; and

WHEREAS, the Respondent Board maintains that the HIB finding was appropriate and the IDEA claims are unfounded; and

WHEREAS, both matters have been assigned to the Honorable Ellen Bass, and while only one hearing will be conducted, separate decisions for each proceeding will be issued as their avenues for review and appeal differ; and

WHEREAS, the Parties, without alleging or admitting any liability and without waiving any position either party has in litigation, have since agreed to amicably resolve the pending

actions bearing OAL DKT. NOS. EDU 11339-2014N and EDS 17206-2014N, and Agency Reference Numbers 175-7/2014 and 2015-22053.

WHEREFORE, THE PARTIES HEREBY AGREE THAT:

1. A.F.'s educational placement will remain in-District schools pursuant to his most recent IEP for the 2014-2015 school year.

2. Reference to and all documentation regarding the Respondent's HIB investigation and findings will be deleted from A.F.'s student records. The Superintendent will notify Petitioners in writing confirming that the HIB records have been deleted from A.F.'s student records.

3. Respondent will reimburse Petitioners a portion of the amounts expended for evaluations, attorneys fees, consultant fees, related service therapies, and the like, in the amount of Twenty Four Thousand Dollars ($24,000.00). Payment will be issued to the Attorney Trust Account of the Warshaw Law Firm within sixty (60) days of the approval of this Settlement Agreement and Release into a Final Decision as set forth in Paragraph 11 below.

4. This settlement is the compromise of disputed claims and does not constitute an admission of liability or wrongdoing by either party, and neither party shall be deemed a prevailing party for any purpose.

5. On behalf of themselves and A.F., Petitioners waive and release any and all claims they may have against the Board, its employees and agents, arising out of or relating to A.F.'s education which were or could have been raised in any petition, complaint, or other filing related to A.F.'s education through the 2014-2015 school year. Petitioners specifically waive any and all claims under State and federal education laws, anti-discrimination laws, civil rights laws, and the like, including but not limited to under the IDEA, Section 504 of the Rehabilitation Act of 1973, the Americans With Disabilities Act, the Civil Rights Act, the New Jersey Law Against Discrimination; and this waiver and release shall apply to all claims including, but not limited to, claims for damages, compensatory education, expert/consultant fees, and attorneys fees (except as set forth in Paragraph 3 above).

6. This Settlement Agreement and Release constitutes the entire agreement of the Parties with respect to all claims and supersedes all prior written or oral and all contemporaneous oral agreements, understandings, and negotiations related to the two petitions specifically identified above.

7. Petitioners represent that they have reviewed the terms of this Agreement with counsel and that they understand the terms contained in each of the paragraphs of this Settlement Agreement and Release. Petitioners represent that they are satisfied with the services of counsel.

8. This Settlement Agreement and Release may be executed in two (2) counterparts, each of which shall be an original but of which, taken together, shall constitute one and the same instrument. This Settlement Agreement and Release cannot be modified or amended except in writing signed by both parties.

9. The parties and their attorneys agree that the terms and the existence of this Settlement Agreement and Release are confidential, and that neither the parties nor their attorneys may disclose the terms contained herein, or the existence of this Settlement Agreement, to any person except as may be required by a Court of law, by a State or federal agency, or by the party or attorney's tax preparer or auditor. In response to any inquiry, the parties may only state that "the matter has been resolved."

10. This Settlement Agreement and Release is subject to the approval of the Nutley Board of Education.

11. This Settlement Agreement and Release will be incorporated into a Final Decision of the Honorable Ellen Bass.

THE UNDERSIGNED HEREBY AGREE WITH THE ABOVE TERMS:

PETITIONERS:

_____

Chi Fu Date:

_____

Ping Fu Date:

NUTLEY BOARD OF EDUCATION:

Karen A. Yeamans 6-9-15

BY: Karen A. Yeamans Date:

8. This Settlement Agreement and Release may be executed in two (2) counterparts, each of which shall be an original but of which, taken together, shall constitute one and the same instrument. This Settlement Agreement and Release cannot be modified or amended except in writing signed by both parties.

9. The parties and their attorneys agree that the terms and the existence of this Settlement Agreement and Release are confidential, and that neither the parties nor their attorneys may disclose the terms contained herein, or the existence of this Settlement Agreement, to any person except as may be required by a Court of law, by a State or federal agency, or by the party or attorney's tax preparer or auditor.

10. This Settlement Agreement and Release is subject to the approval of the Nutley Board of Education.

11. This Settlement Agreement and Release will be incorporated into a Final Decision of the Honorable Ellen Bass.

THE UNDERSIGNED HEREBY AGREE WITH THE ABOVE TERMS:

PETITIONERS:

6/5/15

Chi Fu Date:

6/5/15

Ping Fu Date:

NUTLEY BOARD OF EDUCATION:

_____

BY: Date:

Nutley Public Schools

Karen Yeamans, Business Administrator
315 Franklin Avenue
Nutley, New Jersey 07110

RESOLUTION

JUN 1 5 2015

APPROVAL OF SETTLEMENT AGREEMENT

WHEREAS, the parents of Student No. 28524 and the Board of Education are parties to two pending administrative litigation matters bearing OAL Docket Numbers EDU 11339-2014N and EDS 17206-2014N and Agency Reference Numbers 175-7/14 and 2015-22053; and

WHEREAS, the parties have determined to resolve the actions, and the Administration recommends such resolution to the Board in accordance with the terms of the Settlement Agreement and Release presented to the Board for approval.

NOW, THEREFORE, BE IT RESOLVED THAT the Board of Education agrees to resolve the controversies in accordance with such terms; and

BE IT FURTHER RESOLVED THAT all action required to effectuate this settlement is authorized.

I hereby certify that the above resolution is a true copy taken from the Board Minutes of June 8, 2015.

Sincerely,

Karen A. Yeamans
Business Administrator/
Board Secretary

Nutley, New Jersey
June 9, 2015

Z 67-15

KEVIN GARIFINE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – who was employed in the respondent Board's buildings and grounds department from 1999 to 2012 as a plumber – contended that the Board violated his tenure rights under *N.J.S.A.* 18A:17-3 when it did not renew his contract for the 2012-2013 school year. Petitioner argued that tenure status was conferred upon him in 2007 when the Board entered into a Collectively Negotiated Agreement (CNA) wherein it was agreed that all maintenance and grounds employees who had completed three consecutive years of employment in the district would be entitled to tenure protections pursuant to *N.J.S.A.* 18A:17-3; accordingly, the Board's termination of his employment was improper. The Board asserted that petitioner was employed as a plumber and not entitled to the tenure protection conferred by the CNA upon custodial/maintenance and grounds employees.

The ALJ found, *inter alia,* that: the primary issue in this matter is whether petitioner's position as plumber fell within the category of custodial/maintenance and grounds employees; an examination of the Board's job descriptions reveals that a "plumber" is a custodial employee who may obtain tenure under *N.J.S.A.* 18A:17-3; once statutory tenure has been achieved, it cannot be waived; the waiver of tenure in the 2010-13 CNA had consequences for those in the bargaining unit who had not yet attained it, but petitioner had achieved tenure and could not be removed unless in a manner sanctioned by the tenure statute. Accordingly, the ALJ granted petitioner's appeal.

The Commissioner determined that the ALJ appropriately granted the petition, but found, *inter alia*, that: the Initial Decision does not address the consequences of declaring petitioner a tenured employee – such as his entitlement to immediate reinstatement in the district – and outstanding issues concerning back pay and emoluments; and these issues must be determined in order to fully resolve the controversy. Accordingly, the Commissioner remanded the matter to the OAL for further proceedings.

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

Issued 8/12/15

OAL DKT. NO. EDU 10839-12
AGENCY DKT. NO. 205-7/12

KEVIN GARIFINE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

This dispute concerns whether petitioner obtained statutory tenure protection under the terms of a collective negotiation agreement (CNA) during the course of his employment as a plumber in respondent's district and, if so, whether his tenure rights were violated when the district decided not to renew his employment for the 2012-2013 school year.

The record of this matter[1], along with the Initial Decision of the Office of Administrative Law (OAL), have been reviewed. Additionally, respondent's exceptions and petitioner's reply thereto – submitted in accordance with *N.J.A.C.* 1:1-18.4 – were also considered by the Commissioner. While reflecting its obvious disagreement with the findings and conclusions contained within the Initial Decision, respondent's exceptions are unpersuasive and, essentially, recast and reiterate the arguments made below – which were adequately addressed by the Administrative Law Judge (ALJ).

Upon full and independent review of the record, the Commissioner concurs with the ALJ's comprehensive findings, legal analysis and well-reasoned conclusion that petitioner – a buildings and grounds department employee – gained statutory tenure protection pursuant to Article X of the 2007-2010 agreement[2], which provides: "[a]ll custodial/maintenance and grounds employees who have

[1] The record did not contain the hearing transcripts.

[2] At the time of the agreement, petitioner had been employed at the district for eight consecutive years. (Initial Decision at 6)

completed three consecutive years of employment in the school district shall be entitled to tenure protection offered by *N.J.S.A.* 18A:17-3." (Initial Decision at 2) Noting that tenure rights cannot be waived once established, the ALJ further concluded that the subsequent 2010-2013 CNA – which sought to remove the tenure protections awarded by Article X – could not strip petitioner of tenure rights he already possessed, although the new agreement would impact those who had not yet attained tenure. (Initial Decision at 10) Due to petitioner's status as a tenured employee, the district can only lawfully terminate his employment through the means provided by *N.J.S.A.* 18A:17-3 – a reduction in force, or the filing of tenure charges against him. Neither scenario has occurred here.

Although the Commissioner finds that the ALJ appropriately granted the petition, the Initial Decision does not address the consequences of declaring petitioner a tenured employee – particularly in light of the district's *ultra vires* decision not to renew his employment for the 2012-2013 school year – such as his entitlement to immediate reinstatement in the district, and outstanding issues concerning back pay and emoluments.[3] These determinations are required in order to fully resolve this controversy.

Accordingly, the matter is remanded to the OAL for further proceedings.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 8/12/15
Date of Mailing: 8/12/15

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[3] Adding to the complexity of this matter are respondent's undisputed assertions that petitioner's salary exceeded CNA guidelines, and that petitioner contributed less than other members of the bargaining unit toward his medical benefits.

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10839-12

AGENCY DKT. NO. 205-7/12

KEVIN GARIFINE,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,

Respondent.

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

J. Peter Sokol, Esq., for respondent (McOmber & McOmber, attorneys)

Record Closed: August 21, 2014 Decided: June 30, 2015

BEFORE **PATRICIA M. KERINS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter petitioner Kevin Garifine (Garifine) contends that the respondent Board of Education of the City of Long Branch (Long Branch) violated his tenure rights under N.J.S.A. 18A:17-3 when it did not renew his contract for the 2012-2013 school year.

Petitioner filed his appeal of Long Branch's decision not to renew his contract with the Office of Controversies and Disputes of the New Jersey Department of Education on July 25, 2012, and on August 13, 2012, the matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case. The parties submitted cross motions for summary decision, and on October 23, 2013, the motions were denied. The matter was heard on June 2, 2014, and the record remained open for post hearing submissions. The record closed on August 21, 2014, and the time was extended for the filing of the Initial Decision.

FACTUAL DISCUSSION

General Facts

Garifine had been employed as a plumber by Long Branch from March 1, 1999 to June 30, 2012. Throughout his employment, Garifine worked under successive one-year contracts as a member of the Building and Grounds Department. According to the job description for "plumber," his responsibilities include ensuring "the safe condition of pipes, drains, and plumbing fixtures" and "[i]nstruct[ing] custodians and maintenance workers on proper methods of procedure and proper use of tools and equipment in plumbing repair work and such other duties as he may be assigned." During each year of his employment, Garifine received a salary increase on a list of "non-affiliated" staff members prepared by the Board. In July 2007, the Board and the Long Branch School Employees Association (LBSEA) entered a collective negotiation agreement (2007-2010 CNA), which was effective until June 30, 2010. According to Article X of the 2007-2010 CNA, "[a]ll custodial/maintenance and grounds employees who have completed three consecutive years of employment in the school district shall be entitled to tenure protection offered by N.J.S.A. 18A:17-3." Ibid.

At the end of the 2007-2010 CNA, the Board and Association entered another CNA for 2010-2013 (2010-2013 CNA). According to Article X of the 2010-2013 CNA, "[c]ustodians, matrons, maintenance and grounds employees shall not be entitled to receive or obtain tenure pursuant to this Agreement. Custodians, matrons,

maintenance and grounds employees waive any previously obtained tenure status pursuant to the collective bargaining agreement and its predecessor agreements." Ibid.

On March 1, 2012, Garifine was making repairs in the boys' bathroom at Gregory Elementary School. Certain boys reported that Garifine and another Board employee taped the boys' mouths shut and hands together. The Long Branch Police Department, Monmouth County Prosecutor's Office, and the Division of Child Protection and Permanency conducted investigations, but declined to bring charges against Garifine. However, after the incident, the Board decided not to offer Garifine a new contract for the 2012-2013 school year. Therefore, Garifine's employment with the Board ended on June 30, 2012. The Board did not file tenure charges against Garifine, and his loss of employment was not the result of a reduction-in-force.

Testimony

In support of his case, petitioner testified, along with Brian Furey, a representative of the New Jersey Education Association (NJEA). Garifine also placed Exhibits P-1 through 5 in evidence. Petitioner first presented the testimony of Furey. From his review of NJEA membership records, he found Garifine to be a full member of the Long Branch School Employees Association (LBSEA) (P-1 and 2).

Garifine testified that he started work in Long Branch in 1999 as a plumber. He was evaluated by and reported to the Building and Grounds Manager and was listed under Maintenance on the district's internet site (P-4). He stated that his duties did not include just plumbing. At the start of his work day he would check his mailbox for the day's work orders which could include snow plowing and shoveling, masonry work and work on the heating and air conditioning systems. His duties also included making and setting up props for the school plays and repair work on auditorium seats. Additionally, if custodians were not available he did custodial work as directed. He testified that he received a base salary as Building and Grounds staff member with a stipend for plumbing.

On cross examination, Garifine was questioned regarding his job description (R-1). He did not disagree that his job title was that of "plumber," but did not waiver in his assertion that his job duties included other work assigned to him on a regular basis by his building and grounds supervisor. He agreed that he had never been part of the tenure recognition ceremonies at Board meetings, but said he was unaware that such ceremonies occurred. He acknowledged that his pay schedule differed from that of other buildings and grounds employees.

Respondent presented the testimony of Janet Dudick, Long Branch's Administrator for Human Resources. She reviewed respondent's job descriptions for Plumber, Maintenance Worker and Custodian (R-1, 2 and 3), as well as the Resolution non renewing Garifine's contract in 2012 (R-4). Dudick identified petitioner's annual contracts with Long Branch and noted that he was denominated in each as a "non-certificated" staff member (R-5), and that custodial and maintenance staff were compensated on a "step" basis as set forth in a custodians' salary guide (R-16). She presented examples of board minutes wherein tenure certificates were awarded noting that Garifine was not one of them. Positing that Garifine was" non affiliated staff" (R-8), she did admit that at times his salary increases were in line with "affiliated" staff.

With regard to the tenure provision at issue here, she reviewed the waiver of tenure in the 2010 agreement between Long Branch and LBSEA. Under cross examination, she agreed that the 2007-10 CNA granted tenure to custodian, matrons, and maintenance and grounds employees. Dudick defined "non-affiliated" employees as those not recognized in the bargaining agreements, acknowledging that plumber was not excluded from the bargaining agreements.

A review of the record and testimony in this matter shows that Garifine was a full member of the LBSEA. Both he and Furey were credible in their testimony that petitioner was a full member of the association. Garifine also was credible in his description of his daily job duties as a member of the Buildings and Maintenance Department at Long Branch. His duties were broader than those of just a plumber and

he performed maintenance related functions on a regular basis as directed by his supervisor.

LEGAL DISCUSSION

The ultimate issue in this matter is whether Garifine obtained tenure under the 2007-2010 CNA such that the Board violated his tenure rights by terminating his employment through a resolution to non-renew his employment contract. If Garifine was not covered by the 2007-2010 CNA, the Board could not have conferred tenure on him under N.J.S.A. 18A:17-3 and, thus, the Board could have properly resolved to non-renew his contract for the 2012-2013 school year. However, if Garifine was covered by the 2007-2010 CNA, and he was a custodial employee, then he would have obtained tenure in 2007 pursuant to N.J.S.A. 18A:17-3. However, whether the Board then violated his tenure rights by non-renewing his contract is complicated by the fact that the tenure conveyed by the 2007 agreement was then explicitly waived in the ensuing 2010 contract.

Before determining these issues, however, it must be acknowledged that the Department of Education, in transmitting this matter to the OAL, noted a "[p]ossible jurisdictional issue, as petitioner relies on a Memorandum of Agreement for his tenure claim." While the Commissioner of Education has jurisdiction over all matters arising under the school laws, N.J.S.A. 18A:6-9, such jurisdiction does not extend to disputes that are purely contractual in nature. Archway Programs, Inc. v. Pemberton Twp. Bd. of Educ., 352 N.J. Super. 420, 424-25 (App. Div. 2002) (citations omitted). However, the Commissioner has incidental jurisdiction to interpret a contract if necessary to resolve a dispute arising under the school laws, New Jersey Educ. Ass'n v. Trenton Bd. of Educ., 92 N.J.A.R.2d (EDU) 481, and this school law claim requires an incidental interpretation of the CNA to determine whether Garifine obtained tenure.

Turning to the issues arising out of Garifine's claim to N.J.S.A. 18A:17-3, "Tenure of janitorial employees," provides:

> Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense and only in the manner prescribed by [the Tenure Employees Hearing Law.]

Under the 2007-2010 CNA, the Board and Association agreed that "[a]ll custodial/maintenance and grounds employees who have completed three consecutive years of employment in the school district shall be entitled to tenure protections offered by N.J.S.A. 18A:17-3." At the time of the agreement, Garifine had been employed for eight consecutive years. Thus, the question becomes whether Garifine, a plumber, was a "custodial/maintenance and grounds employee" who could gain tenure under N.J.S.A. 18A:17-3.

While Board documents show Garifine as a non affiliated employee, he was clearly a full member of the LBSEA, as well as a staff member of the Buildings and Grounds department. "All custodians, matrons, maintenance men and groundsmen" employed in that department were part of the LBSEA bargaining unit. As he was not specifically excluded from the unit, it is necessary to determine if his position comes within the purview of custodians, matrons, maintenance men or groundsmen.

It is, of course, true that "[t]he duties performed rather than the title of the position must be controlling in determining whether a position is protected by tenure." Barnes v. Bd. of Educ. of the City of Jersey City, 1963 S.L.D. 240, 247, State Bd. of Educ. (December 4, 1963) (quotation omitted), aff'd, 85 N.J. Super. 42 (App. Div. 1964), certif. denied, 43 N.J. 450 (1964). Here, the Board argues that its job description for "plumber" is so different from that for "custodian" that Garifine, a plumber, was not granted tenure under the 2007-2010 CNA because a plumber is not within the purview of N.J.S.A. 18A:17-3. However, an examination of the Board's job descriptions reveals that a "plumber" is a custodial employee who may obtain tenure under N.J.S.A. 18A:17-3.

The Board utilizes separate titles for custodians, maintenance workers, and plumbers. The essential function of a custodian is "custodial work involving independent activity to keep the school clean, sanitary, and in orderly condition[.]" A maintenance worker "[p]erforms inspections, maintenance, and general repairs to ensure that all students, staff and the community are provided a safe, attractive and clean, and healthy environment for learning and work." And, a plumber must "maintain the physical school plant in a condition of operating excellence[.]" A plumber "[d]etermines which repair jobs may be performed by plumbers, custodians, and maintenance workers on the staff[,]" and "instructs custodians and maintenance workers on proper methods of procedure and proper use of tools and equipment in plumbing repair work."

Thus, while different titles are used for custodians, maintenance workers, and plumbers, and these employees do not perform all of the same tasks, each is generally responsible for custodial work necessary to keep a school in orderly condition. Indeed, these three categories of workers must work together at times as a plumber "instructs custodians and maintenance workers on proper methods of procedure and proper use of tools and equipment in plumbing repair work."

While there are separate titles for custodians, maintenance workers, and plumbers, the Board, in effect, acknowledged in the 2010-2013 CNA that it considers all of those positions to fall under the general category of "custodians," as that term, when used in the CNA, refers "to all matrons, custodians, maintenance men and groundsmen[.]" Even though "plumber" is not specifically listed, the type of work performed by a "plumber" certainly qualifies Garifine as maintenance personnel, and thus a "custodian" as that term is defined in the CNA.

The conclusion that a "plumber" may obtain tenure under N.J.S.A. 18A:17-3 is supported by both judicial and administrative decisions. In Barnes, the Appellate Division noted that R.S. 18:5-66.1 and 18:5-67, the precursors to N.J.S.A. 18A:17-3 and 17-4, "extend tenure to any janitor, janitor-engineer, custodian or janitorial employee," and held that "[o]ur consideration of the statutes in light of the principle of liberal

construction satisfies us that the Legislature used the terms janitor, custodian, etc., in a generic sense with the intent to include all janitorial and custodial employees."[1] Barnes, supra, 85 N.J. Super. at 45-46.

In Keaney v. Bd. of Educ. of the Twp. of Bloomfield, EDU 5881-03, 2005 N.J. AGEN LEXIS 415, Initial Decision (July 28, 2005), adopted, Comm'r (August 31, 2005), ALJ Springer found that a "carpenter" qualified for tenure protection as a janitorial employee under N.J.S.A. 18A:17-3. In that case, the judge noted that the school board "organize[d] its building support staff into two subdivisions: custodians (who clean buildings and do routine janitorial tasks) and maintenance/trade workers (who perform more skilled types of labor. Trade workers are further divided into various specialized categories, namely carpenters, electricians, plumbers, and painters." Id. at 3.

According to ALJ Springer, "[c]ourts broadly construe the term 'janitor' [under N.J.S.A. 18A:17-3] to extend to all school employees generally engaged in cleaning, upkeep or repair functions." Id. at 17-18 (citing Barnes, supra, 85 N.J. Super. 42). The judge also noted that "the Commissioner has uniformly treated the current janitorial tenure statute as affording tenure rights to a wide range of janitorial-type job titles, such as maintenance man." Id. at 18 (citing Lauffer v. Bd. of Educ. of Leonia, 1984 S.L.D. 1290; Atlantic City Educ. Ass'n v. Bd. of Educ. of Atlantic City, EDU 10335-98, Initial Decision (Aug. 19, 1999), adopted, Comm'r (Oct. 7, 1999), aff'd, St. Bd. (March 1, 2000); Reinersten v. Bd. of Educ. of East Brunswick, EDU 10328-97, Comm'r (July 8, 1998); Brunner v. Bd. of Educ. of Camden, 1960 S.L.D. 155). As such, the judge concluded that the carpenter, Keaney, "was eligible for tenure in a janitorial or custodial

[1] N.J.S.A. 18A:17-4 provides,

> No board of education shall reduce the number of janitors, janitor engineers, custodians or janitorial employees in any district by reason of residence, age, sex, race, religion or political affiliation and when any janitor, janitor engineer, custodian or janitorial employee under tenure is dismissed by reason of reduction in the number of such employees, the one having the least number of years to his credit shall be dismissed in preference to any other having a longer term of service and the person so dismissed shall be and remain upon a preferred eligibility list, in the order of years of service, for reemployment whenever vacancies occur and shall be reemployed by the board in such order and upon reemployment shall be given full recognition for previous years of service in his respective positions and employments.

position." Id. at 18-19. The Commissioner adopted ALJ Springer's decision as the final decision, stating that "the ALJ provided an accurate and comprehensive presentation of existing law in reaching each of his conclusions, with which the Commissioner fully concurs." Thus, under the reasoning of Keaney, if a tradesman such as a carpenter may qualify for protection under N.J.S.A. 18A:17-3, the same is true of a plumber.

Contrary to the Board's assertion, it was possible for Garifine to attain tenure pursuant to the 2007-2010 CNA despite the fact that he worked under successive fixed term contracts. While the Board correctly points out that N.J.S.A. 18A:17-3 provides tenure for janitorial employees who are hired for an indefinite period, and not fixed terms, the Appellate Division and Supreme Court decisions in Wright v. Bd. of Educ. of the City of East Orange, 194 N.J. Super. 181 (App. Div. 1983), aff'd, 99 N.J. 112 (1985), recognized another method by which a school board could grant tenure to a janitorial employee. In Wright, a janitor had worked for a school board for seven years under successive one-year contracts when the school board and his union entered a collective bargaining agreement in which it was agreed that "[a]ll members of the bargaining unit shall receive tenure after three years of employment." Wright, supra, 194 N.J. Super. at 183-84. A year after the CNA went into effect, the school board terminated the janitor's contract. Id. at 183. The school board argued that the CNA provision was in violation of N.J.S.A. 18A:17-3, because under the statute a janitor cannot obtain tenure if he is employed for fixed terms. Id. at 184. The Appellate Division disagreed, holding that,

> [B]ecause N.J.S.A. 18A:17-3 clearly affords a school district the option of deciding whether it wishes to grant tenure to a janitor, we do not accept respondent's contention that the collective bargaining agreement is in derogation of that statute. The manner in which a school district may grant tenure under the statute is by appointing a janitor for an indefinite term. Therefore, the provision in the contract that "[a]ll members of the bargaining unit shall receive tenure after three years of employment" obligated respondent to appoint Wright for an indefinite term after he had completed three years of employment.
>
> [Id. at 184-85.]

The Supreme Court affirmed, explaining that under N.J.S.A. 18A:17-3, "a janitor employed without a fixed term contract will gain tenure immediately upon beginning employment" and that, "[o]n the other hand, the statute allows an employment board to deny tenure to all custodians, as an appointment for a fixed term is an appointment without statutory-mandated tenure." Wright, supra, 99 N.J. at 119. But, the Court held that school boards have "flexibility" to choose an alternative between these two extremes, stating that the CNA provision in question, "which grant[ed] tenure after three years of employment, is but one example of a clause that falls between N.J.S.A. 18A:17-3's outer limits without derogating the statute's intent." Id. at 119-20.

Of particular note is the Court's acknowledgement that "[e]ven the acquisition of tenure under a negotiated labor agreement is not a promise of continued employment. N.J.S.A. 18A:17-3 still safeguards the boards' right to dismiss custodians because of a reduction in force or due to misconduct, inefficiency, and other good cause." Id. at 122. Thus, a school board may grant statutory tenure to janitorial employees through a CNA, but once granted, the school board may only dismiss a tenured janitorial employee through the means provided by N.J.S.A. 18A:17-3, which provides that a tenured janitorial employee can be dismissed through a reduction-in-force or in accordance with the Tenure Employees Hearing Law.

Here, like in Wright, the Board chose to grant tenure to janitorial employees, like Garifine, who had served for three years. And, like in Wright, once Garifine obtained tenure under N.J.S.A. 18A:17-3, the Board could only remove him pursuant to the Tenure Employees Hearing Law or a reduction-in-force. While, the tenure granted in the 2007-2010 CNA was waived in the subsequent 2010-2013 CNA, the tenure originally granted specifically referenced the statutory tenure countenanced by N.J.S.A. 18A:17-3. As conceded by respondent in its post hearing submission, once statutory tenure has been achieved, it cannot be waived. While the the waiver of tenure in the 2010-13 CNA had consequences for those in the bargaining unit who had not yet attained it, Garifine had achieved tenure and therefore could not be removed unless in a manner sanctioned by the statute. Plumbers & Steamfitters Local 270 v. Woodbridge

Board of Education, 159 N.J. Super. 83 (A.D. 1978); Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982).

ORDER

Based on the above, petitioner's appeal of the action of respondent Long Branch Board of Education is **GRANTED**.

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

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

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

June 30, 2015
DATE

PATRICIA M. KERINS, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

cmo

WITNESSES

For Petitioner:

Brian Fusey
Kevin Garifine

For Respondent:

Janet Lynn Dudick

EXHIBITS

For Petitioner:

P-1 NJEA Person/Member Detailed Information Reports
P-2 Categorized Definition Analysis
P-3 Email
P-4 Buildings and Grounds' list of employees
P-5 Agreement between Long Branch Board of Education and Long Branch School Employees Association, 2007 - 2010

For Respondent:

R-1 Position Description for Plumber
R-2 Position Description for Maintenance Worker
R-3 Position Description for Custodian – 10 or 12 month
R-4 Resolution
R-5 Board Minutes
R-6 Agreement between Long Branch Board of Education and Long Branch School Employees Association, 2010 - 2013
R-7 Schedule C, Salary Guide Movement
R-8 Non-Affiliated Personnel Salaries, 2010-2013

R-9 Job Title Summaries (5 pages)

R-10 Resolution and Memorandum of Agreement, revised August 18, 2010

R-11 Letter from Ivette Ricigliano to Janet Lynn Dudick, dated October 1, 2009

R-12 Letter from Ivette Ricigliano to Members, dated June 14, 2010

R-13 Meeting Minutes

R-14 Meeting Minutes

R-15 Board Agenda Items

R-16 Letter from Joseph M. Ferraina to Nathan Accoo, dated May 12, 1999

268-15

K.I., ON BEHALF OF MINOR CHILD, A.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the respondent Board's determination that her child, A.M., was not entitled to a free public education in the Township of West Orange schools during the 2014-2015 school year. Petitioner asserted that her legal domicile is with her parents in West Orange, but that for security reasons she was temporarily living with her boyfriend in Orange. Petitioner contended, however, that A.M. stayed with her grandparents in West Orange during the week. The respondent Board argued that a residency investigation had revealed that K.I. and A.M. were not domiciled in West Orange, but instead lived in Orange. The Board sought reimbursement for tuition from the beginning of the residency investigation on February 26, 2015, through the date of notification to petitioner on April 20, 2015 that the Board had voted to remove A.M. from its schools, as well as for the balance of the 2014-2015 school year. A hearing in the matter was held at the Office of Administrative Law (OAL) on July 2, 2015.

The ALJ found, *inter alia*, that: during the respondent's residency investigation, repeated surveillance at petitioner's purported West Orange address failed to detect petitioner or A.M. leaving the residence to go to A.M.'s school, which is around the corner from the house in question; petitioner and A.M. were observed multiple times leaving an address in Orange in the early morning hours; a residency hearing was conducted by the respondent Board on April 13, 2015; K.I. credibly testified that she had been staying in Orange with her boyfriend during the period of the residency investigation because of a restraining order against A.M.'s father; no further investigation was conducted subsequent to the April residency hearing; and following that hearing, A.M. resided with her parents for the rest of the school year. The ALJ concluded that petitioner did not live in West Orange from February to April 2015, but did reside in the district after the April residency hearing, since the Board submitted no proof to find otherwise. Accordingly, the ALJ determined that the Board is entitled to recover tuition for the thirty-two school days A.M. attended school in West Orange from February to April 2015, and ordered petitioner to pay the Board the amount of $2,738.24. The petition was dismissed.

Upon review of the record and the Initial Decision, the Commissioner concurred with the ALJ's findings and conclusions. Accordingly, the Initial Decision was adopted as the final decision in this matter.

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

OAL DKT. NO. EDU 7076-15
AGENCY DKT. NO. 106-5/15

K.I., ON BEHALF OF MINOR CHILD, A.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter[1] and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner finds that petitioner failed to sustain her burden of establishing that she was a domiciliary of West Orange Township between February 26, 2015 and April 20, 2015. In fact, petitioner testified that she and her daughter left the West Orange residence (where petitioner's parents reside) and were residing in Orange, New Jersey throughout the time period in question. (Initial Decision at 2) As a result, A.M. was not eligible to receive a free public education in West Orange during this time.[2] Therefore, the Board is entitled to tuition reimbursement in the amount of $2,738.24 ($85.57/day for 32 days) – pursuant to *N.J.S.A.* 18A:38-1b – as detailed in the Initial Decision.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The petition of appeal is hereby dismissed. Petitioner is directed to reimburse the

[1] The record did not include transcripts from the hearing which occurred at the OAL on July 2, 2015.

[2] Although the Board sought tuition reimbursement through the end of the 2014-2015 school year, the Initial Decision suggests that petitioner and her child returned to West Orange after April 20, 2015 for the remainder of the school year and further indicates that the Board did not submit any proofs in support of its claim for tuition costs incurred between April 21, 2015 and June 19, 2015. (Initial Decision at 2-3)

Board in the amount of $2,738.24 for tuition costs incurred during the time period that A.M. was ineligible to attend school in West Orange.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 8/12/15

Date of Mailing: 8/12/15

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 07076-15
AGENCY DKT. NO. 106-5/15

K.I., o/b/o MINOR CHILD, A.M.,
Petitioner,
v.
TOWNSHIP OF WEST ORANGE BOARD OF EDUCATION, ESSEX COUNTY,
Respondent.

K.I., petitioner, pro se

Stephen J. Christiano, Esq, for respondent

Record Closed: July 2, 2015 Decided: July 9, 2015

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

PROCEDURAL HISTORY

On May 8, 2015, petitioner, K.I., filed a residency appeal on behalf of her child, A.M., a kindergartener at the Redwood school. On May 15, 2015, the Township of West Orange Board of Education (BOE or respondent) filed an Answer with the State Department of Education (DOE) seeking reimbursement from petitioner for the costs of tuition incurred by the attendance of her minor child in the BOE's school district from the

beginning of the investigation on February 26, 2015, through the date of respondent's vote on April 20, 2015, at a cost of $2,738.24 and for the remainder of the school year until June 19, 2015, at a total cost of $ 6, 503.32. The matter was transmitted to the Office of Administrative Law (OAL) on May 18, 2015, for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13. The parties appeared and were heard on July 2, 2015, on which date the record closed.

Gerard Drappi, a retired West Orange Police Department lieutenant and respondent's investigator for the past four years, testified on behalf of respondent. Drappi submitted a report of the investigation commencing February 26, 2015, and ending on or about April 8, 2015, to which I **FIND** as uncontroverted **FACT**. (R-3.)

In the morning hours of February 26, February 27, and March 2, 2015, Drappi conducted surveillance at 39 Woodland Avenue, West Orange, and did not observe petitioner or her daughter, A.M., leave this residence to go to school, which is around the corner. Drappi observed petitioner and her daughter drive to the West Orange address after school on March 4, 2015. K.I. parked in the driveway with emergency flashers on and Drappi left the area at 5:00 p.m. On March 9, 2015, at 7:50 a.m., Drappi observed petitioner, her daughter, and an adult male enter her vehicle at a residence on Lincoln Avenue in Orange. On March 10, 11, 13, 16, 17, 18 (A.M. was absent from school), 19, 20, 23, 24, 26 (A.M. was absent from school), 27, 30, and 31, 2015, Drappi observed petitioner and her daughter leaving the Orange residence between the hours of 7:45 and 8:20 a.m. The vehicle was also observed at the Orange address during Spring break. No other investigation was conducted. A residency hearing was conducted by the respondent on April 13, 2015.

K.I. credibly testified that she had been staying in Orange with her boyfriend during that time because of a restraining order against the father of her child and she was afraid. She had moved out of her Lodi residence and moved in with her parents in West Orange. Petitioner provided her driver's license, court document, Capitol One Auto Finance statement, Geico insurance card, 2014 W-2, and student loan statement, all with the West Orange address dating back to 2014. There was no investigation

conducted after the April residency meeting and A.M. resided with her parents for the rest of the school year.

I therefore also **FIND** that A.M. did not reside in West Orange from February to April 2015 as indicated by Investigator Drappi but resided in West Orange after the April meeting with K.I and respondent, since there is no proof submitted by respondent to find otherwise.

The individual cost to the BOE for the period of time for K.I. from February 26, 2015, through April 20, 2015 (thirty-two days), is $2738.24. (R-4.) This was calculated upon the daily cost for one student at the rate of $85.57. These costs are undisputed.

BOE has sustained its burden of proof with respect to its counterclaim for tuition as to K.I. for the thirty-two days of attendance at the public schools of BOE. They did not prove, however, eligibility for tuition cost after April 20, 2015. There are no proofs submitted to prove non-residency after that date.

LEGAL ANALYSIS AND CONCLUSION

The issue in this appeal is whether A.M. was a domiciled student during the thirty-two days she attended school in West Orange.

Public schools are required to provide a free education to individuals between the ages of five and twenty years in certain circumstances, including individuals who are domiciled within the school district. N.J.S.A. 18A:38-1(a). Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is the domicile of the parent, custodian or guardian. P.B.K. o/b/o minor child E.Y. v. Bd. of Educ. of Tenafly, 343 N.J. Super. 419, 427 (App. Div. 2001). Thus, a child would routinely attend school in the district where his or her parents live.

Based upon the facts adduced, I **CONCLUDE** that A.M. was not domiciled in West Orange during the thirty-two school days she attended school in West Orange.

The Board is entitled to recover tuition from a parent or guardian of a child found ineligible to attend a school in its district. N.J.S.A. 18A:38-1(b)(2). "Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance . . . ." Ibid. Drappi testified that the per diem rate is $85.57 per day. A.M. was ineligible to attend school in West Orange during part of the 2014-2015 school year and she has accumulated thirty-two days of ineligible attendance.

BOE's proofs as to ineligibility for attendance and as to the tuition rate are convincing and satisfy its burden of proof for the counterclaim from February 26, 2015, through April 20, 2015. Therefore, I **CONCLUDE** that K.I. must pay BOE tuition calculated at the rates previously referenced for her child as to her attendance at BOE's public school during their ineligibility period. Accordingly, I **CONCLUDE** that the total due the Board as is $2,738.24.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that the petition of petitioner, K.I., be and is hereby **DISMISSED WITH PREJUDICE**. It is further **ORDERED** that K.I. reimburse respondent the total sum of $2,738.24 for tuition costs associated with the attendance of her child A.M. in West Orange from February 26, 2015, through April 20, 2015.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

July 9, 2015
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency:

Date Mailed to Parties: JUL 10 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

APPENDIX

WITNESSES

For Petitioner:

K.I.

For Respondent:

Gerard Drappi

EXHIBITS

For Petitioner:

P-1 Packet

For Respondent:

R-1 Superintendent letter dated April 1, 2015

R-2 Board meeting letter dated April 20, 2015

R-3 Residency investigation report dated April 13, 2015

R-4 Tuition costs for 2014-2015

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

33 Washington Street
Newark, NJ 07102
(973) 648-6008

A copy of the administrative law judge's decision is enclosed.

This decision was mailed to the parties on JUL 10 2015

269-15

CITY ASSOCIATION OF SUPERVISORS AND ADMINISTRATORS,

PETITIONER,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, the City Association of Supervisors and Administrators (Association), asserted that the respondent District violated the tenure rights of seven Association members by transferring them to positions at the District's central office. The Association sought the reinstatement of its members to positions as building principals, together with reimbursement for lost benefits and emoluments of employment. The respondent contended that the positions to which these principals were transferred are within the scope of their certifications and that, accordingly, their tenure rights were not violated. In an Initial Decision dated August 27, 2014, the ALJ agreed with the Association that its members' rights under *N.J.S.A.* 18A:28-5 had been violated, and ordered the District to restore them to positions as building principals in accordance with their tenure entitlements. In a decision dated January 12, 2015, the Commissioner remanded the matter to the Office of Administrative Law (OAL) for a more fully developed record relative to the District's arguments that its actions should be upheld pursuant to its authority under *N.J.S.A.* 18A:7F-6(b)(2) and *N.J.A.C.* 6A:33-1.1(b)2.

On remand, the ALJ found, *inter alia*, that: since the issuance of the OAL's August 2014 Initial Decision, only two of the administrators on whose behalf the Association had filed its claims – Zakiyya Razzaq and Gerald Samuels – remain employed by the District; for the five administrators no longer working in the district, this matter is moot; this case was returned to the ALJ for further consideration regarding the District's obligations to "turn around" failing schools under No Child Left Behind (NCLB), and whether those obligations include a concomitant right to remove the principal of a failing building, without concern for the principal's tenure rights; at no time did the District contend that Gerald Samuels was transferred to the central office as part of a larger plan to rehabilitate failing schools, but rather his transfer was an executive decision made to replace Samuels as the leader of his school building; regarding Zakiyya Razzaq, *N.J.S.A.* 18A:7F-6(b) grants the Commissioner the authority to direct staff reassignments in failing schools, but contains no language that would permit such reassignments to violate employee tenure rights; and the law remains clear that "all teaching staff members and other employees of a district under full State intervention shall retain and continue to acquire all rights and privileges acquired pursuant to Title 18A of the New Jersey Statutes," *N.J.S.A.* 18A:7A-40(b). The ALJ concluded that the actions of the District in assigning Samuels and Razzaq to central office positions violated their rights under *N.J.S.A.* 18A:28-5. Accordingly, the ALJ ordered the District to restore Samuels and Razzaq to positions as building principals in accordance with their tenure entitlements.

The Commissioner adopted the Initial Decision of the OAL as the final decision in this matter. In so doing, the Commissioner noted that only Gerald Samuels continues to be employed by the District, which was accordingly directed to restore Samuels to a building principal position in accordance with his tenure entitlement.

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

Issued 8/13/15

OAL DKT. NO. EDU 788-15
(EDU 849-13 ON REMAND)
AGENCY DKT. NO. 318-11/12

CITY ASSOCIATION OF SUPERVISORS AND ADMINISTRATORS,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,	:	
RESPONDENT.	:	

The record, the Initial Decision issued August 27, 2014 by the Office of Administrative Law (OAL), and the subsequent Initial Decision issued July 13, 2015 (in response to the Commissioner's January 12, 2015 remand) have been reviewed. The District's exceptions – submitted in accordance with *N.J.A.C.* 1:1-18.4 – and petitioner's reply thereto were also considered by the Commissioner.

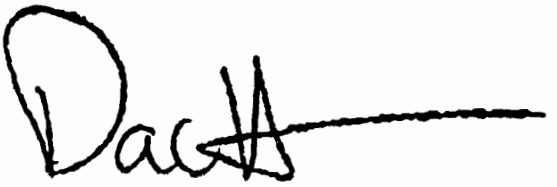
Having now fully considered all outstanding issues, the Commissioner adopts the ALJ's findings and conclusions expressed within both Initial Decisions – for the reasons collectively stated therein – as the final determination in this matter.

All but one of the aggrieved principals represented by petitioner in this matter have resigned or retired from the District.[1] Accordingly, the District is directed to restore the only remaining employee – Gerald Samuels – to a building principal position in accordance with

[1] Respondent's July 27, 2015 exceptions indicate that Zakiyya Razzaq, one of two remaining employees identified in the July 13, 2015 Initial Decision, retired effective June 30, 2015.

his tenure entitlement,[2] and the claims on behalf of James Carlo, JoAnn Gilmore, Donna Marable[3], Lavonne Pack, Zakiyya Razzaq, and Roy Wilson are dismissed as moot.

IT IS SO ORDERED.[4]



COMMISSIONER OF EDUCATION

Issued: 8/13/15

Mailed: 8/17/15

[2] The Commissioner agrees with the ALJ's determination that Samuels is not entitled to back pay or other compensation, including reimbursement for parking expenses.

[3] The Commissioner is also in accord with the ALJ's determination – for the reasons outlined in the August 27, 2014 Initial Decision – that Ms. Marable's claims were not untimely under the 90-day rule.

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00788-15
AGENCY DKT. NO. 318-11/12
(ON REMAND)
OAL DKT. NO. EDU 09217-10

CITY ASSOCIATION OF SUPERVISORS AND ADMINISTRATORS,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,

Respondent.

Dennis McKeever, Esq., for petitioner (Sciarrillo, Cornell, Merlino, McKeever and Osborne, attorneys)

Brenda Liss, Esq., for respondent (Riker, Danzig, Scherer, Hyland and Perretti, attorneys)

Record Closed: June 16, 2015 Decided: July 13, 2015

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

The City Association of Supervisors and Administrators (CASA) contends that the State-Operated School District of the City of Newark (the District) improperly transferred seven of its members to positions at the District's central office. In an Initial Decision dated August 27, 2014, I agreed with CASA that its members' rights under N.J.S.A. 18A:28-5 had been violated. This matter comes before the Office of

Administrative Law (OAL) by way of remand by the Commissioner of Education (the Commissioner). In a decision dated January 12, 2015, the Commissioner asked for a more fully developed record relative to the District's arguments that its actions should be upheld pursuant to its authority under N.J.S.A. 18A:7F-6(b)(2) and N.J.A.C. 6A:33-1.1(b)(2).

PROCEDURAL HISTORY

CASA filed its appeal with the Commissioner of Education (the Commissioner) on November 2, 2012. An answer was filed on behalf of the District on January 16, 2013, and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case on January 17, 2013. Hearings were conducted on March 26, 2014, April 30, 2014, and May 15, 2014. At the close of petitioner's case, the District made several motions to dismiss. A motion to dismiss the petition in its entirety was denied on the record. I reserved decision on a motion to dismiss the petition as to Donna Marable on timeliness grounds, and invited counsel to more fully brief this issue post-hearing. A motion to dismiss the petition as to Lavonne Pack was granted on the record, as she had retired from the district, did not appear at the hearing, or present any proofs in support of her claims.

Upon remand, the matter was returned to the OAL on January 13, 2015. The District supplemented the record with certifications and briefs on May 15, 2015, and CASA replied on June 16, 2015, at which time the record closed.

ISSUE PRESENTED

The Commissioner has presented the issue on remand as follows:

> . . . the Commissioner is not persuaded that the district's position with respect to the authority granted to him pursuant to N.J.S.A. 18A:7F-6(b)(2) and N.J.A.C. 6A:33-1.1(b)(2) was fully explored and considered. Accordingly, he hereby remands this matter to the OAL for further development of the record and recommendations with respect to the arguments raised by the District [in this regard].

FINDINGS OF FACT

The facts which gave rise to this dispute are as set forth in the Initial Decision, (C-1.) Since the issuance of that decision, only two of the administrators on whose behalf CASA had filed its claims remain employed by the District: Zakiyya Razzaq and Gerald Samuels.

Razzaq was moved from her position as a building principal at Cleveland School and reassigned to the central office in the aftermath of an extensive initiative by District administration to reorganize failing schools. Cleveland School was designated a "renew school" at the time of Razzaq's transfer. By contrast, Samuels was removed from Speedway School; but, per the testimony of Assistant Superintendent Roger Leon, this transfer was based upon an "executive decision" to change principals at Speedway.

A certification submitted by Leon in support of the District's position on remand amplifies the factual record with additional details regarding the "action taken by the School District with respect to schools 'in need of improvement'." Under the No Child Left Behind Act (NCLB), 20 U.S.C.A. §§ 6301 et seq., these are schools that have repeatedly failed to make adequate yearly progress in meeting state academic standards. In Newark, these failing schools were designated "renew schools." Leon urged that this designation was "an educational policy decision made in light of the urgent need perceived by the State District Superintendent for drastic change in those schools to improve student achievement." The school from which Samuels was removed ultimately was designated a "renew school" as well, but not until 2014.

Leon reviewed the measures that the District took to attempt to improve instruction at these failing schools. He notes that the "renew school" model was taken from guidance provided to school districts by the Department of Education in connection with School Improvement Grants (SIG) available for use in schools eligible for Federal Title I funds. Interestingly though, Leon nowhere advises that Newark either applied for such a grant, or was the recipient of such a grant. Schools that did receive an SIG were required to implement one of four school intervention models. In Newark, "renew schools" implemented the "turnaround model" described in the Notice of Grant

Opportunity (NGO). Leon stresses that, under the "turnaround model," the NGO requires that a district

> Replace the principal and grant the new principal sufficient operational flexibility (including in staffing, calendars/time, and budgeting) to implement fully a comprehensive approach in order to substantially improve student achievement outcomes and increase high school graduation rates.
>
> [Exhibit A to Leon certification (emphasis supplied).]

But it bears reiteration that Leon did not indicate that Newark received an SIG or thus was specifically bound by any provisions of the NGO.

CONCLUSIONS OF LAW

As to five of the principals whose rights were analyzed in my first Initial Decision, I **CONCLUDE** that this matter is moot, to include Joann Gilmore, James Carlo, Roy Wilson, Donna Marable, and Lavonne Pack. An action is moot when it no longer presents a justiciable controversy because the issues raised have become academic. For reasons of judicial economy and restraint it is appropriate to refrain from decision-making when an issue presented is hypothetical, judgment cannot grant effective relief, or the parties do not have a concrete adversity of interest. Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976); Fox v. Twp. of E. Brunswick Bd. of Educ., EDU 10067-98, Initial Decision (March 19, 1999), aff'd, Comm'r (May 3, 1999), <http://njlaw.rutgers.edu/collections/oal/>; S.J. v. Bd. of Educ. of Mountain Lakes, EDU 07081-03, Initial Decision (October 7, 2003), aff'd, Comm'r (Nov. 17, 2003), aff'd, St. Bd. (Feb. 3, 2004), <http://njlaw.rutgers.edu/collections/oal/>.

My earlier decision in this matter determined that, notwithstanding the violation of the rights of the transferred principals, there was no salary, nor any benefits or emoluments of employment, to which they were entitled. My order directed only that the petitioning principals be transferred back to positions of employment that fell within the scope of their tenure protections. But having resigned from the District, there would

now be no relief available to these former building principals. Any decision that I would render in regard to the rights of the principals who resigned would be purely academic.

The concern that brought this matter back before me for further consideration centers on the District's obligations to "turn around" failing schools under NCLB, and whether those obligations include a concomitant right to remove the principal of a failing building, without concern for his or her tenure rights. Relative to Samuels, my earlier determination is thus unaffected whatsoever by the issues raised by this remand. At no time did the District contend that Samuels was transferred to central office as part of a greater plan to rehabilitate failing schools, which included closing schools and creating "renew schools." Rather, an administrative determination was made to replace Samuels as the leader of his school building. While the District may surely exercise its discretion in this fashion, it may not do so without regard to Samuels's tenure rights. Accordingly, for the reasons expressed in my Initial Decision, I **CONCLUDE** that the action of the District in transferring Samuels to a central office position violated his tenure rights under N.J.S.A. 18A:28-5.

The Commissioner's remand decision thus requires only that I further analyze the District's actions as they pertain to Zakiyya Razzaq. I remain unpersuaded that the District's obligations to rehabilitate failing schools allow it to abrogate Razzaq's tenure rights. The District unsuccessfully renews it arguments that NCLB mandates a different result. It points out that the United States Department of Education has viewed changes in leadership as vital in turning around academic achievement. 74 Fed. Reg. 59776 (Nov. 18, 2009). Under NCLB, the corrective action needed to rehabilitate a failing school may include "restructuring," and the implementation of "alternative governance arrangements." See 20 U.S.C.A. § 6316(b)(8)(B). These arrangements may include "replacing all or most of the school staff (which may include the principal) who are relevant to the failure to make adequate yearly progress." 20 U.S.C.A. §6316(b)(8)(ii) and (v). Consistent with Federal mandates, recent New Jersey regulations include "staff retraining or reassignment" among the appropriate responses if school improvement efforts fail. See N.J.A.C. 6A:33-2.5(b)(2)(ii).

But the fact that both state and federal law require drastic measures to improve failing schools, to include the possible removal of the building principal, begs the question of what rights the principal retains once she is so removed from her position of employment. Neither the federal nor the state statutory schemes for school improvement expressly abrogate statutory tenure rights. N.J.S.A. 18A:7F-6(b), grants the Commissioner the authority to direct staff reassignments in failing schools, but contains no language that would permit such reassignments to violate employee tenure rights. The District points to comments offered during the regulatory adoption process that question if a local district would be compelled to file tenure charges against the principal of a failing school. The District notes that the Department of Education assured the public that tenure charges would not be needed because nothing in the rule requires the dismissal of a principal, rather than reassignment. See 45 N.J.R. 1637(a), comment 19 and response. But a review of that agency response nonetheless indicates quite clearly that, "the Commissioner has the flexibility to reassign the removed principal to another position within the school district, consistent with applicable State law and regulation." Ibid. (emphasis supplied).

Petitioners point out, correctly so, that N.J.S.A. 18A:7F-6(b) grants the Commissioner broad powers to take the steps needed to repair failing schools, to include restructuring curriculum or programs, directing staff training or retaining; and, "notwithstanding any provisions of [N.J.S.A. 34:13A-1 et seq.] to the contrary, reviewing the terms of future collective bargaining agreements." Thus, they urge, quite persuasively, that if the legislature had intended to allow the Commissioner to remove a principal from a failing school "notwithstanding his or her rights under N.J.S.A. 18A:28-5," it would have expressly said so.

Leon's certification amplifies the challenges facing a district with failing schools, and indeed, it is those very failures that resulted, years ago, in a takeover of the Newark schools by the Department of Education. Nonetheless, the law remains clear that "all teaching staff members and other employees of a district under full State intervention shall retain and continue to acquire all rights and privileges acquired pursuant to Title 18A of the New Jersey Statutes." N.J.S.A. 18A:7A-40(b); see also N.J.S.A. 18A:7A-43.

Federal law and regulation likewise do not specifically abrogate state tenure entitlements, and like the New Jersey Department of Education, the federal education agency noted during commentary on the regulations implementing NCLB as follows:

> Finally we wish to clarify that the requirements for the turnaround model do not require "blanket firings" of staff. The Department agrees that staff should be carefully evaluated before any replacement decisions are made and has added new language requiring LEAs to use "locally adopted competencies to measure the effectiveness of staff who can work within the turnaround environment to meet the needs of students." If required by State laws or union contracts, principals and staff may have to be reassigned to other schools as necessary.
>
> [74 Fed. Reg. 59776 (November 8, 2009) (emphasis supplied).]

Accordingly, for the reasons expressed herein, and expressed in my earlier decision bearing docket number EDU 09217-10, I **CONCLUDE** that the action of the District, in assigning Razzaq to a central office position, violated her rights under N.J.S.A. 18A: 28-5.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the District restore CASA members Samuels and Razzaq to positions as building principals in accordance with their tenure entitlements. As to the remaining principals represented by CASA, their claims are **DISMISSED** as moot.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

July 13, 2015

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: July 13, 2015

Date Mailed to Parties: JUL 14 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Judge's Exhibits

C-1 Initial Decision, dated August 27, 2014

C-2 Final Decision, dated January 12, 2015

270-15LM

270-15

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

August 17, 2015

Stephen J. Edelstein, Esq.
Schwartz Simon Edelstein & Celso, LLC
100 South Jefferson Road, Suite 200
Whippany, New Jersey 07981

Vito A. Gagliardi, Jr., Esq.
Porzio Bromberg & Newman, P.C.
100 Southgate Parkway
Morristown, New Jersey 07962-1997

Re: *Patricia Gallante, Jose Rodriguez, Christina Moreira and Maria Lorenz, individually v. Board of Education of the City of Elizabeth, Union County; Harold E. Kennedy, Jr., Board Secretary; Rafael J. Fajardo and Armenio "Tony" Monteiro, individually.*
OAL Dkt. No. EDU 3311-15, Agency Dkt. No. 48-3/15

Dear Counsel:

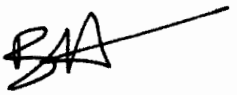
I have reviewed the submissions filed in connection with Administrative Law Judge Joan Bedrin Murray's oral denial of Respondents' motion to dismiss.[1]

Upon full consideration of all of the submitted materials, I have determined that because the decision was made orally without any explanation, I cannot determine from the record whether the ALJ properly denied the respondents' motion to dismiss. It appears from the parties submissions that there were certain procedural arguments raised by the respondents – including whether the action is barred by the entire controversy doctrine – that should be decided prior to the continuation of this matter.

[1] The respondents contend that their motion to dismiss should have been converted by the ALJ into a motion for summary decision. The petitioner maintains that no motion for summary decision has been placed under consideration because the ALJ did not appear to determine to treat the respondents' papers as a motion for summary decision, nor do the papers submitted by the respondents independently satisfy the requirements for same.

Accordingly, the ALJ is directed to issue a decision on the respondents' motion to dismiss that addresses the procedural arguments advanced by the respondents.[2] The discovery order shall remain stayed until a ruling on the motion to dismiss is issued.[3]

Sincerely,



William Haldeman
Acting Commissioner

c: Joan Bedrin-Murray, Administrative Law Judge
Clerk, Office of Administrative Law
State Law Library

DCH/MKD/JKH

Via Facsimile and Regular Delivery

[2] It remains at the discretion of the ALJ as to whether the respondents' motion to dismiss should be converted to a motion for summary decision. Once the motion to dismiss is decided by the ALJ, the parties may again seek interlocutory review.

[3] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

271-15

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
TRENTON, NEW JERSEY

Docket 96-4/15

In the Matter of Tenure Charges Against Arnold Anderson, Respondent

Filed By

THE CI TY OF NEW BRUNSWICK SCHOOL DISTRICT, MIDDLESEX COUNTY

For the City of New Brunswick School District, Middlesex County:
Mr. George F. Hendricks, Esq.

For Mr. Arnold Anderson, Respondent:
Mr. Edward Cridge, Esq,

Arbitrator David L. Gregory

The Dorothy Day Professor of Law and
The Executive Director of the Center for Labor and Employment Law
St. John's University School of Law
8000 Utopia Parkway
Jamaica, Queens, New York 11439
gregoryd@stjohns.edu; 718 990 6019

August 17, 2015: Date of Arbitrator's Receipt of Parties' Post-Hearing Briefs

August 19, 2015: Date of Arbitrator's Decision

Arbitrator's Decision

By the May 21, 2015 appointment letter from the Department of Education of the State of New Jersey, I was appointed Arbitrator in the Matter of the Tenure Hearing of Arnold Anderson, School District of the City of New Brunswick, Middlesex County, Agency Docket No. 96-4/15.

Following extensive interlocutory briefing and argument by the parties, I granted Respondent's Motion to dismiss the inefficiency charges. My Decision is incorporated herein by reference.

The balance of this proceeding involves Respondent's chronic tardiness as conduct unbecoming. The Roosevelt School Principal meticulously tracked Respondent's cascades of tardiness, none of which is plausibly explained by Respondent. At most, Respondent uses micro-quibbles of a few unpersuasive explanations, with a macro-default position that even when he is late he nevertheless delivers a superb educational experience to his grateful students. In a recent period of chronic tardiness in the 2013—2014 academic year, Respondent was late "49 times after 8:40 a.m. and 16 late punch-in times of five or more minutes".... "for the 2014---2015 school year 40 times after 8:40 a.m. and six additional late punch in times of 5 or more minutes as of March 20, 2015."
(Tr. At 8, July 8, 2015)

I find that the parties' extreme positions are untenable, going forward. There is no doubt that the District has proven conduct unbecoming chronic tardiness. Assuming arguendo that Respondent is "all business" once he arrives, his self-serving inflated characterization of his substantive abilities misses the essential point. His students are fully entitled to receive Respondent's very best efforts for the entire period, and not merely for that remaining portion of the period following Respondent's chronically late arrivals.

I am intrigued by Respondent's innovative legal argument that Respondent's notorious tardiness record does not somehow warrant a severe sanction. Ultimately, however, abstract theory does not carry the day for Respondent. He offers no credible explanations for his proven tardiness record. Withholding increment increases does not seem to have captured Respondent's attention sufficient to dramatically improve his punctuality. Nevertheless, Respondent is entitled to due process and fundamental fairness. Due process is best understood as that which is due under the circumstances. With a decade and a half of service, progressive discipline and due process sufficiently militate against summary discharge in this case. Once charges are so well proven, I believe that the Employer

is usually entitled to the imposition of the penalty sought. This is the established Elkouri principle. This case presents the rare exception to the general rule, and is also in full accord with the Elkouri principle.

DECISION

RESPONDENT SHALL RETURN TO WORK IN FULL PAY STATUS ON THE FIRST DAY OF SCHEDULED CLASSES FOLLOWING JANUARY 1, 2016.

He shall be in a no-pay disciplinary status for the proven conduct unbecoming of chronic tardiness, until he returns to full pay status as set forth above.

So Ordered,

David L. Gregory

I, David L. Gregory, affirm that I have executed this document as my Decision as Arbitrator in this matter on this 19th Day of August, 2015.

David L. Gregory

2-73-15

OAL DKT. NO. EDU 09888-15
AGENCY DKT. NO. 157-7/15

TATBIT COMPANY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
MIDDLESEX REGIONAL EDUCATIONAL SERVICES COMMISSION, MIDDLESEX COUNTY; MTBE ELECTRIC, LLC; AND REDMANN ELECTRIC CO., INC.,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENTS.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.[1] Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.[2]

---

[1] The exceptions submitted by the petitioner were not considered because there is no regulation that provides for exceptions on emergent relief.

[2] On August 6, 2015, the ALJ submitted an "Amended Order" on Emergent Relief wherein she indicated that the petitioner only sought emergent relief and that there were no further issues left to be determined. However, there is no indication in the record that the parties have agreed that there are no further issues to be determined.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/20/15

Date of Mailing: 8/21/15

Additionally, a matter cannot be closed out by an Order on Emergent Relief unless the ALJ recites that the judge and the parties agree there are no further issues for determination, in which case the Commissioner will request that the Clerk return the file pursuant to *N.J.A.C.* 1:1-3.3. Otherwise, an initial decision is necessary for OAL to close and return the file.

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 09888-15
AGENCY DKT. NO. 157-7/15

TATBIT COMPANY,

Petitioner,

v.

MIDDLESEX REGIONAL EDUCATIONAL SERVICES COMMISSION; MIDDLESEX COUNTY; MTB ELECTRIC, LLC; & REDMANN ELECTRIC CO., INC.,

Respondents.

Stephen Bialkowski, Esq., and **Alexandra Litvin**, Esq., for petitioner

Anthony B. Vignuolo, Esq., for respondent Middlesex Regional Educational Services Commission (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, attorneys)

Gerald Salerno, Esq., for respondent Redmann Electric Co., Inc. (Aaronsohn Weiner Salerno Bremer & Kaufman, attorneys)

BEFORE **EVELYN J. MAROSE**, ALJ:

In this request for emergent relief, petitioner Tatbit Company (hereinafter "Tatbit") seeks an order enjoining respondent the Middlesex Regional Educational Services Commission (hereinafter the "Commission") from awarding bids to respondent MTB Electric, Inc. (hereinafter "MTB") and respondent Redmann Electric Co., Inc. (hereinafter "Redmann"), and/or in the alternative invaliding the bid awards to MTB and Redmann. Respondents Commission and Redmann assert that Tatbit has not satisfied the requirements necessary to obtain emergent relief.[1]

Tatbit, an electrical contractor, was a bidder to the Commission, which operates as a lead agency of a cooperative purchasing system. The Commission solicits bids for various goods and services on behalf of its members, which include in excess of 920 New Jersey public entities. On June 23, 2015, the Commission accepted multiple bids from potential vendors for electrical services.

The Commission awarded the bid for eight counties (Bergen, Essex, Hudson, Morris, Passaic, Somerset, Sussex and Union) to MTB, and for one county (Middlesex) to Redmann. Though Tatbit submitted bids in all nine of these counties, the Commission did not award Tatbit any of its bids. By letter dated June 26, 2015, Tatbit was advised that its bid response was found to be non-responsive.[2]

Tatbit disputes the determination of the Commission, denies that it was a non-responsible bidder and asserts, as the lowest bidder, that it should have been awarded the eight bids awarded to MTB and the one bid awarded to Redmann. Tatbit further asserts that the Commission failed to comply with public bid law. As detailed above, Tatbit seeks to enjoin and restrain the Commission from awarding the bids for the nine counties to MTB and Redmann or, in the alternative, to invalidate the award for the nine counties to MTB and Redmann. Further, Tatbit seeks to compel the Commission to award the contract for the nine counties to Tatbit, as the lowest responsible bidder. Tatbit also seek counsel fees, interest and costs of suit.

[1] MTB, who was served with the emergent petition, did not make an appearance.
[2] "Responsive" is defined to mean conforming in all material respects to the terms and conditions, specifications, legal requirements, and other provisions of the request. N.J.A.C. 5:34-1.2.

In opposing emergent relief, the Commission argues that Tatbit's motion for emergent relief is moot since the nine contracts at issue were already awarded to MTB and Redmann on June 23, 2015. The Commission further argues that there is no basis upon which to allow a recovery for damages for lost profits arising out of an alleged bidding violation. In the alternative, the Commission states that its decision was not "arbitrary and capricious."

The Commission sought bids on behalf of its approximately 920 members located throughout the state. The Commission did not represent or guarantee that any of its individual members would in fact enter into a contract with the successful bidder. Individual co-op members make contract decisions independently. As expressly stated in the bid document, the Commission reserved the right to reject any or all bids in whole or in part, to waive any formalities or irregularities in any bids, and to accept the bids which, in its discretion, within state law, are for the best interest of the Commission.

Among other things, the bid document requested that bidders provide hourly rates for electrical journeymen, foremen and apprentices. The bid documents specifically identified the obligations on the part of all bidders to adhere to New Jersey prevailing wage law. The proposal submitted by Tatbit provided a rate of $21.99 for journeymen, a rate of $98 for a foreman and a rate of $.01 for an apprentice (whose wages should be a percentage of a journeyman rate, adjusted for experience). Tatbit was not a successful bidder in any of the counties where it placed a bid.

Every contract for the provision or performance of any goods or services, the cost of which in the aggregate exceeds the bid threshold, shall be awarded only by resolution of the board of education to the lowest responsible bidder after public advertising for bids and bidding therefor, except as is provided otherwise in this chapter or specifically by any other law.[3] The board may disqualify a bidder who would otherwise be determined to be the lowest responsible bidder if the board of education finds that any board or, in the case of a contract for a school facilities project, the New

[3] "Lowest price" is defined to mean the least possible amount that meets all requirements of the request of a contracting agent. N.J.A.C. 5:34-1.2.

Jersey Economic Development Authority, has properly reported that it had prior negative experience with the bidder within the past ten years. N.J.S.A. 18A:18A-4(a).[4]

Prior negative experience can be defined in a number of ways, including the following:

> (1) the bidder has been found, through either court adjudication, arbitration, mediation, or other contractually stipulated alternate dispute resolution mechanism, to have: failed to provide or perform goods or services; or failed to complete the contract in a timely manner; or otherwise performed unsatisfactorily under a prior contract with a board of education or, in the case of a school facilities project, with the New Jersey Economic Development Authority;
>
> (2) the bidder defaulted on a contract, thereby requiring a board of education or, in the case of a school facilities project, the New Jersey Economic Development Authority, to utilize the services of another contractor to provide the goods or perform the services or to correct or complete the contract;
>
> (3) the bidder defaulted on a contract, thereby requiring a board of education or, in the case of a school facilities project, the New Jersey Economic Development Authority, to look to the bidder's surety for completion of the contract or tender of the costs of completion; or
>
> (4) the bidder is debarred or suspended from contracting with any of the agencies or departments of the executive branch of the State of New Jersey at the time of the contract award, whether or not the action was based on experience with a board of education or, in the case of a school facilities project, with the New Jersey Economic Development Authority.
>
> [N.J.S.A.18A:18A-4(b).]

If a bidder is being considered for disqualification, the bidder shall be furnished with a written notice (a) stating that a disqualification is being considered; (b) setting

[4] "Responsible" is defined to mean able to complete the contract in accordance with its requirements, including but not limited to requirements pertaining to experience, moral integrity, operating capacity, financial capacity, credit, and workforce, equipment, and facilities availability. N.J.A.C. 5:34-1.2.

forth the reason for the disqualification; and (c) indicating that the bidder shall be accorded an opportunity for a hearing before the board of education if the bidder so requests within a stated period of time. At the hearing, the bidder shall show good cause why the bidder should not be disqualified by presenting documents and testimony. If the board of education determines that good cause has not been shown by the bidder, it may vote to find the bidder lacking in responsibility and, thus, disqualified. N.J.S.A. 18A:18A-4(c)(3).

The purpose of requiring contracts for the performance of public work to be let upon competitive bidding is to secure competition and to guard against favoritism, improvidence, extravagance, and corruption. Statutes directed toward these ends are for the benefit of the taxpayers and not the bidders; they should be construed with sole reference to the public good. Bokey, Inc. v. Bd. of Educ., 93 N.J.A.R.2d (EDU) 118; Hillside Twp. v. Sternin, 25 N.J. 317, 322 (1957). It is well settled that a bidder claiming to be entitled to the award of a contract for public work has sufficient standing to challenge the rejection of the bid or letting of the contract to another bidder, and to compel the award of the contract to him. But such standing was granted simply and solely in order that the public interest might be served by compelling the lax or erring public official to properly perform his public trust. It was not intended to create or establish in the bidder entitled to the award of the contract a right which, if violated, would render the public agency liable in damages to the bidder. Bokey, supra, 93 N.J.A.R.2d (EDU) 118; M.A. Stephen Const. Co. v. Borough of Rumson, 125 N.J. Super. 67, 74 (App. Div. 1973). Further, it is expressly noted that "[n]o action for damages shall lie against the State board, any State official, or any board of education or any of its officers because of any action taken" pursuant to N.J.S.A. 18A:18A-1 to -59, including for any bid rejection, even a bid rejection that was in violation of the Public School Contract Law. N.J.S.A. 18A:18A-46; Bokey, supra, 93 N.J.A.R.2d (EDU) 118; M.A. Stephen Const. Co., supra, 125 N.J. Super. 67.

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has the likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

Emergent relief should not be granted except "when necessary to prevent irreparable harm." Crowe, supra, 90 N.J. at 132. The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. "The requisite for injunctive relief has been characterized as a 'clear showing of immediate irreparable injury,' or a 'presently existing actual threat; [emergent relief] may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by the common law.'" Cont'l Group v. Amoco Chems. Corp., 614 F.2d 351, 359 (D.N.J. 1980) (citations omitted).

After hearing the arguments of petitioner and respondents and considering all documents submitted, I make the following conclusions:

The Commission has already awarded the nine bids at issue to MTB and Redmann. Since it is impossible to enjoin what has already occurred, I **CONCLUDE** that Tatbit's request to enjoin the Commission from awarding the nine bids at issue is moot.

In addition, I further **CONCLUDE** that Tatbit has not met all three of the four prongs necessary for any alternate emergent relief.

I **CONCLUDE** that Tatbit has not presented any credible evidence that it will suffer any irreparable harm if the requested relief is not granted. Neither MTB nor Redmann was awarded any specific jobs as a result of being the successful bidder in a county or counties. Each of the 920 members is free to contract with any company, including Tatbit, regarding work below the bid threshold and to put their jobs, if any, above the bid threshold out to bid, where Tatbit can be the successful bidder. While members may prefer to contract with the entity that the Commission determined, in its discretion, presented the lowest bid within State law, each member is free to contract with any company, including Tatbit, which was the former successful bidder in numerous counties for several years.

While Tatbit acknowledges that it can seek work from any of the 920 members, for work above or below the bid threshold, Tatbit asserts that many of the 920 entities will prefer to deal only with the company to whom the Commission awarded the bid. Further, Tatbit states that the Commission placed Tatbit in a negative light by noting on the Commission's website that the reason for the rejection of the bid from Tatbit was that Tatbit was not a responsible bidder. However, at best, I **CONCLUDE** that Tatbit has asserted a possible future injury, not a present existing threat sufficient for emergent relief.

I **CONCLUDE** that Tatbit has not proven the likelihood that it will prevail of the merits of its claim. There are numerous facts in dispute, and the parties' arguments of application of the law to their facts lead to conflicting conclusions. To cite a few examples, the Commission argues that Tatbit's bids, wherein Tatbit provided a $.01 wage for an apprentice, were not responsive to the details required in a bid. The Commission notes that an apprentice had to be paid a percentage of a journeyman's wage, adjusted for experience. Tatbit argues that it is not obligated to provide a wage for an apprentice, since it had not used in past years, nor did it intend to use in the future, apprentices on its bidded work. Tatbit further argued that as long as it pays its employees in accordance with prevailing State wages, Tatbit could detail any amount as an employee rate on the bid. Tatbit also argues that the Commission awarded bids to entities whose bids did not provide wages compliant with New Jersey prevailing wages. Redmann, one of the successful bidders at issue, asserts that its bid was compliant with New

Jersey prevailing wages, and, accordingly, such an argument is not on point to their bid. The Commission argues that Tatbit's bid was not rejected because the company was not a "responsible bidder," and thus the law cited by Tatbit regarding a factual basis for determination of a "responsible bidder" is not on point. In essence, at this time Tatbit cannot meet this prong.

In addition, I **CONCLUDE** that when the interests and the equities of the parties are balanced, Tatbit will not suffer greater harm than the respondents will suffer. First, Tatbit had the opportunity to avoid any harm. Tatbit was the successful bidder in the past. The bid documents specifically identified the obligation of the bidder to adhere to New Jersey prevailing wage law. If Tatbit wanted to indicate that it would not have any apprentices on the job, it had the ability to so indicate on its bid rather than indicate a wage of $.01, which certainly is not reasonable as an hourly rate. Further, as noted above, Tatbit has not suffered irreparable harm or even a specific injury. Tatbit can bid in the future, without prejudice, and can presently solicit work from any of the Commission's 920 members. On the other hand, the 920 Commission members on whose behalf the Commission sought bids would be prejudiced by any ambiguity as to the identity of the awarded bidder.

Finally, in order to provide the alternate relief requested by Tatbit, that is, to revoke the awarded bids and award the bid to Tatbit, a determination of the merits of the claim and as to the Commission's right to reject any bid, in whole or part, would have to be made. Such relief is not properly the subject of emergent relief.

Based on the foregoing, I **CONCLUDE** that petitioner has failed to meet the requirements set forth in N.J.A.C. 6A:3-1.6(b) and is not entitled to emergent relief.

ORDER

I hereby **ORDER** that the Tatbit's request for emergent relief is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

July 24, 2015
DATE

EVELYN J. MAROSE, ALJ

277-15

NEW JERSEY DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Hearing of Margaret M. Leonard:

SCHOOL DISTRICT OF THE CITY OF PLAINFIELD

"Petitioner,"

- and -

MARGARET M. LEONARD

"Respondent."

Agency Docket No. 114-5/15

DECISION APPROVING
SETTLEMENT AGREEMENT

Before
Joyce M. Klein
Arbitrator

Appearances:

For the Petitioner:
Lisa M. Fittipaldi, Esq.
DeFranceso, Bateman, Coley, Yospin,
Kunzman, Davis, Lehrer & Flaum, P.C.

For the Respondent:
Nicholas Poberezhsky, Esq.
Caruso, Smith, Picini, PC

On July 8, 2015, representatives of the School District of the City of Plainfield [the "Petitioner"] and Margaret M. Leonard [the "Respondent"] met to commence hearing on the tenure charges served on Respondent. At that hearing, the parties reached an agreement in principle to resolve the tenure charges filed by the Petitioner with the State of New Jersey, Department of

Education on April 28, 2015. The terms of settlement were approved by Petitioner on August 4, 2015 and by Respondent on August 7, 2015.

Under N.J.A.C. 6A:3-5.6, the arbitrator is required to issue a brief decision approving the settlement of tenure charges and explaining why the arbitrator is approving the terms of settlement. I have approved these terms for the following reasons.

I am persuaded that the issues that were raised in the Statement of Tenure Charges and Specifications filed by the Petitioner and the Answer to Tenure Charges filed by the Respondent have been fully reviewed and discussed by all parties and that the issues raised therein have been satisfactorily addressed by the terms of settlement. The terms of settlement reflect an appropriate resolution of the charges leveled against the Respondent. The settlement will allow both parties to move forward without using valuable educational time as well as the avoidance of protracted and costly proceedings at the public's expense. The Respondent's determination to tender her resignation in exchange for a monetary settlement will allow the Board to continue to provide a thorough and efficient education to the Board's students. The Respondent has been advised and understands that by accepting this settlement and tendering her resignation the Commissioner of Education has a duty to refer tenure determinations resulting in a loss of position to the State Board of Examiners for possible suspension or revocation of certificate. I believe that the settlement terms properly balance all of the parties' interests and provide a satisfactory basis for the resolution of any concerns that were raised by the Statement of, and the Answer to, the Tenure Charges that were set forth in the record of this proceeding. A copy of the Settlement Agreement is attached.

Accordingly, and based upon all of the above, this will serve as the arbitrator's approval of the parties' settlement agreement.

Dated: August 24, 2015
Ocean Grove, New Jersey

Joyce M. Klein

State of New Jersey }
County of Monmouth } ss:

On this 24th day of August, 2015, before me personally came and appeared Joyce M. Klein to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

CAROLINE E. GLYNN
NOTARY PUBLIC OF NEW JERSEY
I.D. # 2291875
My Commission Expires 10/1/2017

SEPARATION OF SERVICE AGREEMENT

This Separation of Service Agreement (hereinafter "Agreement") is hereby made on this ___ day of _____, 2015, by and between MARGARET LEONARD (hereinafter "Ms. Leonard") and the SCHOOL DISTRICT OF THE CITY OF PLAINFIELD, UNION COUNTY (hereinafter the "District") (collectively referred to as the "Parties").

WHEREAS, the District is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1, and is entrusted with maintaining and conducting the public schools of the District; and

WHEREAS, Ms. Leonard is employed by the District as a tenured Nurse; and

WHEREAS, Ms. Leonard has been on administrative leave with pay since September 26, 2014; and

WHEREAS, Ms. Leonard shall resign from employment with the District effective September 1, 2015; and

WHEREAS, Ms. Leonard and the District have engaged in good faith discussions concerning Ms. Leonard's future separation from employment with the District and have reached an agreement, which they wish to memorialize herein; and

WHEREAS, Ms. Leonard and the District wish to fully and finally resolve any and all claims, complaints, charges and actions of any kind whatsoever, whether known or unknown, which either party may have against them as provided herein; and

WHEREAS, Ms. Leonard has been advised of the Commissioner of Education's duty to refer tenure determinations resulting in loss of position, including by way of resignation, to the State Board of Examiners for possible suspension or revocation of certificates; and

NOW THEREFORE, Ms. Leonard and the District, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the Parties, agree as follows:

1. RESIGNATION: Ms. Leonard agrees to sign and submit to the District, simultaneously with this Separation of Service Agreement, an irrevocable letter of resignation from all employment with the District effective September 1, 2015. The letter of resignation and this Agreement shall be subject to Ms. Leonard's right to rescind pursuant to the Older Workers Benefit Protection Act, 29 U.S.C. 626(F)(1)(G), within seven (7) calendar days after the signing of this Agreement. If Ms. Leonard does not rescind her letter of retirement and this Agreement within seven (7) calendar days of the signing of the Agreement, her resignation and this Agreement shall be binding and irrevocable. The District shall accept Ms. Leonard's

letter of resignation simultaneously with the acceptance of this Agreement via resolution at a regular meeting of the District.

2. CONTINGENCY: This Agreement is contingent upon immediate receipt by the District of an irrevocable letter of resignation from Ms. Leonard effective September 1, 2015.

3. WITHDRAWAL OF CHARGES: In consideration of Ms. Leonard's resignation, the District agrees to withdraw the tenure charges it filed against her (Agency Dkt. No.: 114-5/15) and to take no other disciplinary action against her as a result of the alleged conduct that gave rise to the tenure charges.

4. SEPARATION PAY AND BENEFITS: By or before September 1, 2015, Ms. Leonard shall receive a lump sum severance payment of $34,400, equivalent to four (4) months' salary payment, less the required deductions provided by law, in consideration of her years of service as a District employee. This severance payment does not include Ms. Leonard's deferred summer salary, which she is entitled to receive during the summer of 2015, irrespective of this Agreement.

   Ms. Leonard shall continue to receive health benefits from the District until October 31, 2015, but she will be required to continue making contributions towards the cost of her health benefits in accordance with P.L. 2011, Ch. 78. However, if Ms. Leonard obtains new employment and receives health benefits from her new employer prior to October 31, 2015, she will notify the District of same within ten (10) calendar days of her receipt of such benefits, at which time the District may discontinue providing her with health benefits.

5. UNEMPLOYMENT INSURANCE: As further consideration for Ms. Leonard's resignation, the District agrees not to challenge or dispute any claims she may have for unemployment benefits through the Department of Workforce Development, Division of Labor.

6. WAIVER: The Parties agree to waive any and all claims or demands which they now have or may have had against each other as of the date of the execution of this Agreement.

7. OLDER WORKER BENEFIT PROTECTION ACT OF 1990: To comply with the Older Workers Benefit Protection Act of 1990, this Agreement advises Ms. Leonard of the legal requirements of the Act, and fully incorporates the legal requirements by reference to this Agreement as follows:

   a. Ms. Leonard fully understands the terms and conditions of this Agreement;

   b. Ms. Leonard has been advised to consult with an attorney to review the Agreement;

c. Ms. Leonard specifically waives her right to pursue any claims under the Age Discrimination in Employment Act;

d. Ms. Leonard does not waive any rights or claims under the Age Discrimination in Employment Act that may arise after the date of the execution of this Agreement;

e. Ms. Leonard is receiving consideration above and beyond anything of value to which she is already entitled;

f. Ms. Leonard has been given at least twenty-one (21) calendar days within which to consider this Agreement; and

g. Ms. Leonard has seven (7) calendar days from the date of the execution of this Agreement to revoke it.

8. CONFIDENTIALITY: This Agreement shall remain confidential to the maximum extent permitted by law and neither party shall disclose the terms of this Agreement to third parties. However, Ms. Leonard may disclose the terms of this Agreement to her immediate family, union representatives, tax advisors and attorneys, and the Department of Education, the Division of Pension and Benefits, and the Department of Labor and Workforce Development of the State of New Jersey and any related government agencies.

9. GOOD FAITH AND NONDISPARAGEMENT: The Parties expressly agree that they shall act in good faith to ensure implementation of this Agreement. The Parties mutually agree to refrain from making any derogatory comments, written or oral, retaliation or disparagement, in any manner, against the other party or their families, family members, agents, officials, administrators, representatives and employees.

10. EMPLOYMENT REFERENCES: Responses to any inquiries as to Ms. Leonard's employment with the District, whether verbal or written, including but not limited to job reference inquiries, shall be limited to an acknowledgement of her position, length of employment with the District, salary history, and effective resignation date. The provisions of this section of the Agreement shall not apply in the event that Ms. Leonard provides the District with a signed statement authorizing the release of information protected by this provision. Ms. Leonard agrees not to seek re employment with the district in the future

11. ENTIRE AGREEMENT: This Agreement contains the entire agreement and understanding between the Parties and constitutes a full and final agreement in any and all issues relating to this matter, except that the Parties reserve their right to enforce this Agreement, if necessary.

12. CHOICE OF LAW: This Agreement shall be governed by the laws of the State of New Jersey.

13. SEVERABILITY: If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

14. BINDING EFFECT: The Parties shall be bound by the terms and conditions of this Agreement.

15. APPROVAL: The terms and conditions of this Agreement and Ms. Leonard's irrevocable letter of resignation are subject to ratification and approval by the District.

16. VOLUNTARY AGREEMENT: The Parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement.

17. ADMISSION OF LIABILITY: The Parties' entry into this Agreement shall not constitute nor shall it be interpreted as an admission of wrongdoing or guilt, or liability in any manner on either of the Parties' part. Any such obligation or liability for either Party is expressly denied. The Parties have entered into this Agreement solely to compromise disputed claims.

18. OPPORTUNITY TO CONSULT WITH COUNSEL: The Parties acknowledge that each has been given the opportunity to consult with an attorney or a representative of their own choosing with respect to this Agreement and reviewed with their attorney or representative all the terms and conditions of this Agreement prior to executing this Agreement. Each Party signs this Agreement freely and voluntarily and without coercion or duress. The Parties further acknowledge that they fully understand the duties and obligations enumerated herein and have been informed of their legal rights and obligations.

19. BREACH: If either party breaches this Agreement, the breaching party shall bear the costs of the non-breaching party of any litigation or efforts to have such breach corrected or compensated for, including, but not limited to, reasonable attorneys' fees.

20. RATIFICATION: The undersigned representatives of the District hereby acknowledge that they have been duly authorized by the District to sign this Agreement and bind the District to its terms.

21. COBRA: Nothing contained within this Agreement shall alter Ms. Leonard's rights to continuation of health insurance through federal law, i.e. the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA") upon separation from employment with the District, which, for the purposes of this section of the Agreement, coincides

with the date that the District shall cease providing her with health insurance coverage, October 31, 2015.

22. MODIFICATIONS: This Agreement may not be altered, amended or modified except in writing, signed and duly authorized by all Parties.

23. EXECUTION IN COUNTERPARTS AND FACSIMILE SIGNATURES: This Agreement may be executed in two (or more) counterparts, each of which, when executed and delivered, shall be deemed to be an original, and of which counterparts, taken together, shall constitute one and the same agreement. An original signature transmitted by facsimile shall be deemed to be an original for purposes of this Agreement and for the accompanying letter of retirement.

IN WITNESS WHEREOF, the Parties hereunder set their hands and seals to this Agreement effective on this _____ day of _____, 2015.

On Behalf of the District:

_____
MARGARET LEONARD

_____
WITNESS

Dated: _____, 2015

Dated: August 4, 2015

with the date that the District shall cease providing her with health insurance coverage, October 31, 2015.

22. MODIFICATIONS: This Agreement may not be altered, amended or modified except in writing, signed and duly authorized by all Parties.

23. EXECUTION IN COUNTERPARTS AND FACSIMILE SIGNATURES: This Agreement may be executed in two (or more) counterparts, each of which, when executed and delivered, shall be deemed to be an original, and of which counterparts, taken together, shall constitute one and the same agreement. An original signature transmitted by facsimile shall be deemed to be an original for purposes of this Agreement and for the accompanying letter of retirement.

IN WITNESS WHEREOF, the Parties hereunder set their hands and seals to this Agreement effective on this 7th day of August, 2015.

On Behalf of the District:

Margaret M Leonard
MARGARET LEONARD

_____

_____
WITNESS

_____

Dated: AUG. 7, 2015

Dated: _____, 2015

278-15

STATE OF NEW JERSEY COMMISSIONER OF EDUCATION

IN THE MATTER OF THE ARBITRATION OF THE TENURE CHARGE	AGENCY DOCKET NO. 53-3/15
between	**OPINION & AWARD**
STATE-OPERATED SCHOOL DISTRICT, CITY OF NEWARK,	**ON**
Petitioner,	**MOTION TO DISMISS**
-and-	
LINDA KELLY-GAMBLE,	
Respondent	

BEFORE: MICHAEL J. PECKLERS, ESQ., ARBITRATOR

DATE OF ORAL ARGUMENT: June 8, 2015

DATE OF AWARD: August 24, 2015

APPEARANCES:

For the Petitioner:

Ramon E. Rivera, Esq., (Of Counsel & On the Brief(s))
Shana T. Don, Esq., (On the 6/8/15 Oral Argument)

For the Respondent:

Robert T. Pickett, Esq., PICKETT & CRAIG, ESQS.

I. BACKGROUND CONSIDERATIONS

Linda Kelly-Gamble is a tenured instructor with the State-Operated School

District City of Newark ("the Newark School District"). On August 22, 2014, Principal Maria Ortiz executed a NOTICE OF INEFFICIENCY CHARGES against the instructor. Paragraph 2 indicated that the tenure charges were being filed pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1. CHARGE ONE: INEFFICIENCY submitted that "[d]uring the period from December 21, 2012 to the present, Respondent has demonstrated an inability to completely and responsibly execute her duties as a teacher in the following ways: a. the Respondent was rated as 'ineffective' and/or 'partially effective' in 2 consecutive annual evaluations...."

The STATEMENT OF EVIDENCE identified Respondent's perceived inability to satisfactorily perform her instructional duties and responsibilities from December 21, 2012 to the point of the filing, and additionally referenced in part: "¶ 3. The Formal Observation Form dated December 21, 2012, wherein Respondent was rated 'Partially Effective;' ¶ 9. An Evaluation Summary Form dated February 20, 2013 wherein Respondent was rated 'Partially Effective;' ¶ 11. The Formal Observation Form dated April 15, 2013, wherein Respondent received an 'Ineffective' rating; ¶13. An Observation Form dated April 16, 2013, wherein Respondent was rated as 'Ineffective' in Tailored Instruction; ¶ 17. An Annual Evaluation Summary Form dated June 7, 2013, wherein Respondent was rated 'Partially Effective;' ¶27. Corrective Action Plan ('CAP') prepared by Respondent in collaboration with Maria J. Ortiz, Principal, dated November 25, 2013; ¶ 29. A Short Observation Summary Form dated December 6, 2013,

wherein Respondent was rated as 'Ineffective;' ¶ 45. A Long Observation Summary Form, dated May 9, 2014, wherein Respondent was rated 'Ineffective;' ¶ 47. A Short Observation Summary Form, dated May 15, 2014, wherein Respondent was rated 'Ineffective;' ¶ 49. An Annual Evaluation Summary Form dated May 15, 2014, wherein Respondent was rated 'Ineffective.'

On September 18, 2014, then-State District Superintendent Cami Anderson issued a CERTIFICATE OF DETERMINATION, with the tenure charges and accompanying documentation filed with David C. Hespe, Acting Commissioner of Education on September 19, 2014. These were received by DOE on September 22, 2014. On September 23, 2014, the Agency acknowledged receipt of the certified tenure charges in a letter to the parties.

Upon referral of the tenure charge to me for hearing, Petitioner thereafter filed a motion for a default judgment which was premised upon the belief that Respondent had filed an Answer to the tenure charge out of time. This application was denied by ORDER dated November 24, 2015, which substantially found that: the tenure charges were forwarded to the undersigned designated Arbitrator by the DOE, following review and assessment; Petitioner's case law was inapposite and factually distinguishable; it is well settled that our tenure laws were originally enacted and designed to establish a competent and efficient school system, and to protect teaching and other staff members from dismissal for unfounded, flimsy or political reasons, and that the statutory status of a tenured individual should accordingly not be lightly removed. *Citing*,

Viemeister v. Prospect Park Board of Education, 5 N.J. Super. 215, 218 (App. Div. 1949); Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1989). *See,* I/M/O/ Tenure Charges between State-Operated School District, City of Newark, v. Linda Kelly-Gamble, DOE Docket No. 266-9/14 (Pecklers, 2014 at pp. 6-7).

On December 4, 2015 Respondent filed a MOTION TO DISMISS, with a December 19, 2014 REPLY. Petitioner submitted a brief IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS on December 12, 2014, and a SUR-REPLY on December 31, 2014. Oral argument on the motion was conducted on January 5, 2015, with an AWARD dismissing the tenure charges subsequently issued on January 30, 2015.

In doing so, I found *inter alia* that: full implementation of the new inefficiency standard governing teacher evaluations came into existence during 2013-2014; the comprehensive guidance published by the Department of Education itself severely undercuts the position of the Petitioner Newark School District; adopting Petitioner's position would require that I ignore the guidance from the very agency tasked with implementation as well as other critical components of TEACHNJ, such as N.J.S.A. 18A:6-17.3(d), which mandates that "[t]he only evaluation which may be used for purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L.2012 C.26 (18A:6-117 *et al.*); it would also eviscerate the remedial safeguards of the Act such as the School Improvement Panel, that are designed to assist an educator whose evaluations

have been less than stellar; the 2011-2012 Pilot Program in which the District participated preceded the August 6, 2012 adoption of TEACHNJ, with the regulatory guidance of Title 6A only coming into effect in 2013; how then can the instant tenure charge encompass the period from December 21, 2012 forward, because 2012-2013 was designed to be a pilot year within the State of New Jersey and the Newark School District; Petitioner's consideration of the same in connection with the subject tenure charge renders it infirm. *Citing*, I/M/O Tenure Charge of Inefficiency of Sandra Cheatham and School District of the City of Newark, Agency Docket No. 226-8/14 (Bluth, 2014). *See,* Kelly-Gamble Award, *supra*, at 47-53. On those bases, the tenure charges were dismissed with prejudice, with Ms. Kelly-Gamble immediately reinstated to her teaching position with full back pay and seniority and made whole for the loss of any contractual or statutory benefits during the interim period. *Id.* at 60.

On January 14, 2015, Principal Ortiz initiated an AMENDED NOTICE OF INEFFICIENCY CHARGES ("Amended Notice") against Ms. Kelly-Gamble. This indicated that the charges were based upon inefficiency pursuant to N.J.S.A. 18A:6-10; N.J.S.A. 18A:6-11; N.J.S.A. 18A:6-16; N.J.S.A. 18A:6-17.1; N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1. The Amended Notice went on to include the solitary charge of inefficiency and provided:

> During the period from August 6, 2012, to the present, Respondent has demonstrated an inability to completely and responsibly execute her duties as a teacher in the following manner:
>
> a. The Respondent has failed to implement curricular goals and objective(s).

b. The Respondent has failed to design coherent instruction.

c. The Respondent has failed to assess student learning.

d. The Respondent has failed to create an environment of respect and rapport.

e. The Respondent has failed to manage student behavior.

f. The Respondent has failed to manage classroom procedures.

g. The Respondent has failed to establish a culture of learning.

h. The Respondent has failed to communicate clearly and accurately.

i. The Respondent has failed to use questioning and discussion techniques with flexibility and responsiveness.

j. The Respondent has failed to engage students in learning.

k. The Respondent has failed to provide feedback to students.

l. The Respondent has failed to attain student achievement that meets or exceeds performance benchmarks.

m. The Respondent has failed to reflect on teaching.

n. The Respondent has failed to contribute to the School and District.

o. The Respondent has failed to grow and develop professionally.

p. The Respondent has failed to demonstrate promptness and attendance.

q. The Respondent has received a partially effective rating for the 2012-2013 School Year in an annual summative evaluation.

r. The Respondent has received an ineffective rating for the 2013-2014 School Year in an annual summative evaluation.

The above charge is supported by the Statement of Evidence previously submitted under oath by Maria J. Ortiz dated August 22, 2014, and filed with the Commissioner of Education on or about September 22, 2014.

On January 15, 2015, Superintendent Anderson sent a correspondence to Ms. Kelly-Gamble, which informed Respondent that Charges of Inefficiency

previously filed against her had been amended to include N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-16, N.J.S.A. 18A:6-17.1, N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1, and that the amended tenure charges were based upon the STATEMENT OF EVIDENCE previously filed with the Commissioner of Education on September 22, 2014. Respondent was further advised that pursuant to N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1, she was granted the opportunity to submit a written Statement of Evidence under oath in opposition to the charges within 15 days of the date of receipt. Following the filing of Ms. Kelly-Gamble's response and Statement of Evidence, on March 17, 2015, Superintendent Anderson executed the CERTIFICATE OF DETERMINATION.

On March 19, 2015, the tenure charges were preferred to the Commissioner of Education. Respondent eventually answered the same after receiving extensions until April 15, 2015. Ms. Kelly-Gamble concomitantly filed a NOTICE OF MOTION TO DISMISS TENURE PROCEEDINGS, which was received by the DOE Controversies & Disputes on April 16, 2015. On April 22, 2015, Director Duncan responded to Petitioner's April 21st request for a default judgment which was denied, notifying the parties that the amended tenure charge including Respondent's motion were being referred to me. That same date, I was notified of my appointment by Ms. Duncan under separate cover, with an additional correspondence to the parties confirming that the captioned tenure charges had been docketed as new charges, which were being processed with respect to Section 8 inefficiency charges only.

Following a briefing schedule that was contained in my initial April 27, 2015 letter to the parties which was modified during a May 14, 2015 conference call, Petitioner timely filed a letter brief in opposition to Respondent's MOTION TO DISMISS. Reply and Sur-reply briefs were later filed, with oral argument on both the motion and the merits conducted on June 8, 2015. The latter satisfied the initial 45 day requirement under the Act. In a letter that same date, I advised that the AWARD on Respondent's motion was due on or before July 23, 2015. On July 15, 2015, Director Duncan wrote to counsel by way of clarification of her April 22, 2015 letter, stating *inter alia* that "[t]he arbitrator shall review those charges – which are not dismissed as a result of a motion – under the preponderance of the evidence standard."

On June 19, 2015, Petitioner filed a NOTICE OF MOTION FOR EMERGENT RELIEF with supporting letter brief with the Commissioner of Education. This sought an Order staying the arbitration before me, pending the District's appellate appeal filed on June 12, 2015. This application argued that: "[t]he Commissioner of Education transferred the tenure hearing to the same Arbitrator who heard the parties' previous tenure charge, in violation of N.J.S.A. 18A:6-17.1; the Commissioner of Education transferred this matter to arbitration without addressing the legal sufficiency of the tenure charges in violation of N.J.S.A. 18A:6-16." In a June 23, 2015 correspondence, Director Duncan acknowledged the receipt of Petitioner's motion on the 22nd, and fixed a schedule for Respondent's response to the motion, if any, along with Petitioner's reply.

On June 29, 2015 Respondent Kelly-Gamble submitted a response in opposition to Petitioner's motion with accompanying letter memorandum. This substantially argued that: it appears Petitioner has filed its motion under the wrong regulation in that there was never any "Petition of Appeal" filed with the Division of Controversies and Disputes; the *Crowe* factors have not been established on the District's emergent motion, and the granting of a stay or preliminary injunction would be improper; the Commissioner has previously ruled on Petitioner's "emergent relief" or "stay request" in both the *Thomas* and *Cheatham-Powell* matters on June 4, 2015 and June 9, 2015 respectively, that he lacked the jurisdiction to hear and decide Petitioner's motion for an emergent stay pending appeal before the Appellate Division.

Petitioner's July 7, 2015 letter brief in reply reiterated the District's position that: the Notice of Appeal with the Appellate Division questions the assignment of the Arbitrator before whom the matter is currently pending; this particular appeal is one of approximately nine which involve the same issue and are pending before the Appellate Division; at this time there is a MOTION TO DISMISS pending before Arbitrator Michael J. Pecklers, which raises legal rather than factual challenges to the inefficiency charges; it seems that Respondent's motion is premised in part, upon the lack of clear direction from the Commissioner's Bureau of Controversies and Disputes, which should have instructed the randomly assigned Arbitrator to review the facts under specific standards; the June 15, 2015 correspondence from Director Duncan does not appear to have

clarified the initial instructions transferring this matter to Arbitrator Pecklers to "handle as he deems appropriate;" the District is not seeking a stay of the Commissioner's decision pursuant to N.J.A.C. 6A:3-1.15 but as clearly stated in its moving papers per N.J.A.C. 6A:3-1.6; the Commissioner's decisions in I/M/O the Tenure Hearing of Sandra Cheatham-Powell, State-Operated School District of the City of Newark, Essex County, Agency Docket No. 68-3/15 and I/M/O the Tenure Hearing of Neil Thomas, State-Operated School District of the City of Newark, Essex County, Agency Docket No. 59-3/15, finding that the Commissioner lacked authority to hold an arbitration in abeyance, rather than citing N.J.A.C. 6A:3-5.5(b) is too narrow a reading of that administrative provision; allowing the Arbitrator here to decide a procedural matter was not contemplated by N.J.S.A. 18A:6-16 as amended by P.L. 1998, c.42 (the TEACHNJ Act).

In a July 14, 2015 letter to the parties, Commissioner Hespe denied Petitioner's application for emergent relief. In material part, the Commissioner determined that:

> [u]pon review of the parties' submissions, relevant sections of Title 18A, and the corresponding regulations, it is apparent that the Commissioner lacks jurisdiction to hear and decide petitioner's Motion for Emergent Relief requesting an order staying the arbitration pending appeal to the Appellate Division since the matter is presently before an arbitrator for final determination. Under these circumstances, and in accordance with *N.J.A.C.* 6A:3-5.5(b), the parties are free to direct requests to hold the matter in abeyance to the assigned arbitrator.

* * *

> Once a tenure matter is before an arbitrator for final determination, the Commissioner lacks jurisdiction to determine whether a stay should be granted. In this instance, the Commissioner referred the matter to an arbitrator via letter dated April 22, 2015. Subsequently, petitioner's Motion for Emergent Relief requesting a stay of the arbitration was filed with the Bureau of Controversies and Disputes on June 19, 2015.
>
> In its reply, petitioner insists that its request for relief is made pursuant to *N.J.A.C.* 6A:3-1.6 and not *N.J.A.C.* 6A:3-5.5 – although its Notice of Motion for Emergent Relief clearly requests 'an Order staying the arbitration.' *N.J.A.C.* 6A:3-1.6(a) provides, in relevant part, that 'where the subject matter of the controversy is a particular course of action by a district board of education or any other party *subject to the jurisdiction of the Commissioner,'* a petitioner can move for emergent relief *'pending the Commissioner's final decision in the contested case,'* [*emphasis added in original*]. Because *N.J.S.A.* 18A:6-9 grants an arbitrator – not the Commissioner – jurisdiction to 'hear and make a final determination' on controversies and disputes arising under the tenure laws, *N.J.A.C.* 6A:3-1.6 is inapplicable here.
>
> For the foregoing reasons, the Commissioner lacks jurisdiction to hear and decide petitioner's Motion for Emergent Relief. This determination shall not preclude the parties from seeking the desired relief before the arbitrator pursuant to *N.J.A.C.* 6A:3-5.5(b).

Notice is taken that no such application was made by the Petitioner to me, and that motion is therefore deemed abandoned. Upon receipt of the correspondence from the Commissioner, on July 17, 2015, Director Duncan was contacted and advised that a request was being made for an extension of time until August 24, 2015 pursuant to N.J.S.A. 18A:6-17.1g, based upon the delay caused by the filing of Petitioner's motion on June 19th, as well as pending vacation plans. This was memorialized in a July 20, 2015 letter to the director. The request was granted by Ms. Duncan in a July 22, 2015 letter. The instant AWARD on Respondent's MOTION TO DISMISS is accordingly issued within the

prescribed time period.

II. RELEVANT STATUTORY & REGULATORY LANGUAGE

NEW JERSEY STATUTES ANNOTATED TITLE 18A

18A:6-10 Dismissal and reduction in compensation of persons under tenure in public school system. No person shall be dismissed or reduced in compensation,

(a) If he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state or

(b) If he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner, except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

* * *

18A:6-16 Proceedings before commissioner; written response; determination

* * *

If, following receipt of the written response to the charges, the commissioner is of the opinion that they are not sufficient to warrant dismissal or reduction in salary of the person charged, he shall dismiss the same and notify said person accordingly. If, however, he shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section 22 of P.L. 2012 Ch. 26 (C.18A:6-17.1) for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for

purposes of deciding the motion.

* * *

18A:6-17.1 Panel of arbitrators

* * *

b. The following provisions shall apply to a hearing conducted by an arbitrator pursuant to N.J.S. 18A:6-16, except as otherwise provided pursuant to P.L. 2012, c. 26 (C.18A:6-117 et al.):

(1) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case;

* * *

(3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely, including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.

Discovery shall not include depositions, and interrogatories shall be limited to 25 without subparts.

c. The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

d. Notwithstanding the provisions of N.J.S. 18A:6-25 or any other section of law to the contrary, the arbitrator shall render a written decision within 45 days of the start of the hearing.

e. The arbitrator's determination shall be final and binding and may not be appealable to the commissioner or the State Board of Education. The

determination shall be subject to judicial review and enforcement as provided pursuant to N.J.S. 2A:24-7 through N.J.S. 2A:24-10.

f. Timelines set forth herein shall be strictly followed; the arbitrator or any involved party shall inform the commissioner of any timeline that is not adhered to.

g. An arbitrator may not extend the timeline of holding a hearing beyond 45 days of the assignment of the arbitrator to the case without approval from the commissioner. An arbitrator may not extend the timeline for rendering a written decision within 45 days of the start of the hearing without approval of the commissioner. Extension requests shall occur before the 41st day of the respective timelines set forth herein. The commissioner shall approve or disapprove extension requests within five days of receipt.

* * *

18A:6-17.2 Consideration for arbitrator in rendering decision. a. In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:

(1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;

(2) there is a mistake of fact in the evaluation;

(3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law; or other conduct prohibited by State or federal law;

(4) the district's actions were arbitrary and capricious.

(b) In the event that the employee is able to demonstrate that any of the provisions of paragraph (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.

(c) The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review.

(d) The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.

(e) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case. The arbitrator shall render a decision within 45 days of the start of the hearing.

18A:6-17.3. Evaluation process, determination of charges. a. Notwithstanding the provisions of N.J.S. 18A:6-11 or any other section of the law to the contrary, in the case of a teacher, principal, assistant principal, and vice principal:

(1) The superintendent shall promptly file with the secretary of the board of education a charge of inefficiency whenever the employee is rated ineffective or partially effective in an annual summative evaluation and the following year is rated ineffective in the annual summative evaluation;

(2) If the employee is rated partially effective in two consecutive annual summative evaluations or is rated ineffective in an annual summative evaluation and the following year is rated partially effective in the annual summative evaluation, the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency, except that the superintendent upon a written finding of exceptional circumstances may defer the filing of tenure charges until after the next summative evaluation. If the employee is not rated effective or highly effective on this annual summative evaluation, the superintendent shall promptly file a charge of inefficiency.

* * *

b. Within 30 days of the filing, the board of education shall forward a written charge to the commissioner, unless the board determines that the evaluation process has not been followed.

c. Notwithstanding the provisions of N.J.S. 18A:6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a. of this section, the commissioner shall examine the charge. The individual against whom the charges are filed shall have 10 days to submit a written response to the charges to the commissioner. The commissioner shall within five days immediately following the period provided for a written response to the charges, refer the case to an arbitrator and appoint an arbitrator to hear the case, unless he determines that the evaluation process has not been followed,

d. The only evaluations which may be used for purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L.2012, c.26 (C. 18A:6-117 et al.)

* * *

18A:6-120 School improvement panel. A. In order to ensure the effectiveness of its teachers, each school shall convene a school improvement panel. A panel shall include the principal, or his designee, an assistant or vice-principal, and a teacher. The principal's designee shall be an individual employed in the district in a supervisory role and capacity who possesses a school administrator certificate, principal certificate, or supervisor certificate. The teacher shall be a person with a demonstrated record of success in the classroom who shall be selected in consultation with the majority representative. An individual teacher shall not serve more than three consecutive years on any one school improvement panel, In the event that an assistant or vice-principal is not available to serve on the panel, the principal shall appoint an additional member to the panel, who is employed in the district in a supervisory role and capacity and who possesses a school administrator certificate, principal certificate, or supervisor certificate.

Nothing in this section shall prevent a district that has entered a shared services agreement for the functions of the school improvement panel from providing services under that shared services agreement.

b. The panel shall oversee the mentoring of teachers and conduct evaluations of teachers, including an annual summative evaluation, provided that the teacher on the school improvement panel shall not be included in the evaluation process except in those instances in which the majority representative has agreed to the contrary. The panel shall also identify professional development opportunities for all instructional staff members that are tailored to meet the unique needs of the students and staff of the school.

c. The panel shall conduct a mid-year evaluation of any employee in the position of teacher who is evaluated as ineffective or partially effective in his most recent annual summative evaluation, provided that the teacher on the school improvement panel shall not be included in the mid-year evaluation process, except in those instances in which the majority representative has agreed to the contrary.

d. Information related to the evaluation of a particular employee shall be maintained by the school district, shall be confidential, and shall not be accessible to the public pursuant to P.L. 1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented.

* * *

18A:6-122 Annual submission of evaluation rubrics. a. A school district shall annually submit to the Commissioner of Education, for review and approval, the evaluation rubrics that the district will use to assess the effectiveness of teachers, principals, assistant principals, and vice-principals and all other teaching staff

members. The board shall ensure that an approved rubric meets the minimum standards established by the State Board of Education.

b. Notwithstanding the provisions of subsection a. of this section, a school district may choose to use the model evaluation rubric established by the commissioner pursuant to subsection f. of section 17 of P.L. 2012, c.26 (C.18A:6-123) to assess the effectiveness of its teachers, principals, assistant principals, and vice-principals and all other teaching staff members. In the case in which the district fails to submit a rubric for review and approval, the model rubric shall be used by the district to assess the effectiveness of its teachers, principals, assistant principals, and vice-principals and all other teaching staff members.

18A:6-123. Review, approval of evaluation rubrics. a. The Commissioner of Education shall review and approve evaluation rubrics submitted by school districts pursuant to section 16 of P.L. 2012, c. 26 (C.18A:6-122). The board of education shall adopt a rubric approved by the commissioner.

b. The State Board of Education shall promulgate regulations pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C.52:14B-1 et seq.) to set standards for the approval of evaluation rubrics for teachers, principals, assistant principals, and vice-principals. The standards at a minimum shall include:

* * *

c. A board of education shall adopt a rubric approved by the commissioner by December 31, 2012.

d. Beginning no later than January 31, 2013, a board of education shall implement a pilot program to test and refine the evaluation rubric.

e. Beginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved adopted evaluation rubric for all educators in all elementary, middle and high schools in the district. Results of evaluations shall be used to identify and provide professional development to teaching staff members. Results of evaluations shall be provided to the commissioner, as requested, on a regular basis.

f. The commissioner shall establish a model evaluation rubric that may be utilized by a school district to assess the effectiveness of its teaching staff members.

* * *

NEW JERSEY ADMINISTRATIVE CODE, TITLE 6A EDUCATION

* * *

6A:3-1.5 Filing and service of answer

* * *

(g) Nothing in this section precludes the filing of a motion to dismiss in lieu of an answer to a petition, provided that such motion is filed within the time allotted for the filing of an answer. Briefing on such motions shall be in the manner and within the time fixed by the Commissioner, or by the ALJ if the motion is to be briefed following transmittal to the OAL.

* * *

6A:3-5.1 Filing of written charges and certificate of determination

* * *

(c) If the tenure charges are charges of inefficiency pursuant to N.J.S.A. 18A:6-17.3, except in the case of building principals and vice principals in school districts under full State intervention, where procedures are governed by the provisions of N.J.S.A. 18A:7A-45 and such rules as may be promulgated to implement it, the following timelines and procedures shall be observed:

* * *

5. Upon receipt of the charge, the Commissioner or his designee shall examine the charge. The charge shall be served upon the employee at the same time it is forwarded to the Commissioner and proof of service shall be included with the filed charge. The individual against whom the charge is filed shall have 10 days to submit to the Commissioner a written response to the charge.

* * *

6A:3-5.3 Filing and service of answer to written charges

(a) Except as specified in N.J.A.C. 6A:3-5.1(c)(5), an individual against whom tenure charges are certified shall have 15 days from the date such charges are filed with the Commissioner to file a written response to the charges. Except as to time for filing, the answer shall conform to the requirements of N.J.A.C. 6A:3-1.5(a) through (d).

1. Consistent with N.J.A.C. 6A:3-1.5(g), nothing in this subsection precludes the filing of a motion to dismiss in lieu of an answer to the charges, provided the motion is filed within the time frame allotted for the filing of an answer. Briefing on the motions shall be in the manner and within the time fixed by the Commissioner, or by the arbitrator if the motion is to be briefed following

transmittal to an arbitrator.

6A:3-5.5 Determination of sufficiency and transmittal for hearing

(a) Except as specified in N.J.A.C. 6A:3-5.1 (c) within 10 days of receipt of the charged party's answer or expiration of the time for its filing, the Commissioner shall determine whether such charge(s) are sufficient, if true, to warrant dismissal or reduction in salary. Where the charges are determined insufficient, they shall be dismissed and the parties shall be notified accordingly. If the charges are determined sufficient, the matter shall be transmitted immediately to an arbitrator for further proceedings, unless the Commissioner retains the matter pursuant to N.J.A.C. 6A:3-1.12.

* * *

III. CONTENTIONS OF THE PARTIES

Respondent Linda Kelly-Gamble

The Petitioner School District in its opposition to Respondent's MOTION TO DISMISS has attempted to erect illusory arguments to defeat the Motion. However, on closer review and assessment, the arguments fail miserably and are contradicted by Petitioner School District's prior assertions in this proceeding with the Respondent Kelly-Gamble. On the issue of the "timeliness" of the filing of the "Amended Tenure Charges", the Respondent's assessment is based on two assumptions: (1) That there is no record or admission by the Petitioner that it had "filed" Section 8 inefficiency charges against the Respondent simultaneously with the filing of the Section 25 charges; and (2) That Section 8 inefficiency charges were filed by the Petitioner simultaneously with the Section 25 tenure charges in the prior proceeding.

The three-month time period within which the District could have moved to vacate your Arbitration Opinion and Award – but did not – expired on or about

April 30, 2015. What did the District do following the dismissal of the charges against Respondent Kelly-Gamble? For nearly three (3) months – it did nothing. And now, long after the timeframes set forth by applicable statute and regulations governing the filing of tenure charges have expired, and long after its timeframe to move to vacate your decision has expired, the District simply seeks a "do-over" of the case and served notice of what it, disingenuously, refers to as "new" charges on Respondent Kelly-Gamble. Of course, the charges are not "new" (if that word is to have any meaning at all). Rather, they rehash the same charges of "inefficiency," previously dismissed by you, as the Arbitrator, complete with the same STATEMENT OF EVIDENCE and exhibits.

Whether the instant charges are brought pursuant to Section 25 of *TEACHNJ*, Section 8 of that statute, or both, is of no moment. It is simply too late for the charges to be brought at all. The District is now far beyond the time periods contemplated by law for either the certification of tenure charges, or the amendment of same (if such an amendment were even possible, seeing as how there is no procedure for amended tenure charges set forth in *TEACHNJ*, nor does the District cite to one in its opposition to the MOTION TO DISMISS.

In its submission in opposition to Respondent's Motion To Dismiss, the Petitioner School District continues to insist that the Amended (Section 8) Charges filed with the Commissioner of Education on March 18, 2015, were filed in a timely manner consistent with N.J.S.A. 18A:6-13 without ever addressing Respondent's contention that (1) the amended Section 8 Charges were filed "late" in that it, again

assuming that it could be filed with the implementation of *TEACHNJ Act*, should have been filed at the same time the Section 25 tenure charges were filed with the Commissioner in September 2014, especially since the Section 8 Charges are exactly the same as the advanced Section 25 Charges; and (2) with the dismissal of the prior inefficiency charges, both Section 25 and Section 8 charges as pled by the Petitioner, the Petitioner cannot now resurrect those same charges as "amended charges" in light of your dismissal in the prior proceeding in contravention of the principles of *doctrine of the law of the case*, *collateral estoppel and res judicata*.

What the Petitioner has ignored in echoing that it has filed the Amended Tenure Charges in a timely fashion is that it knew, again assuming that it was appropriate under the *TEACHNJ ACT*, that Section 8 charges were available to it in the alternative at the same time it had filed Section 25 Charges against the Respondent. The Respondent's argument on the issue of timeliness is quite simple: The Petitioner should have filed the Section 8 Charges at the same time it filed the Section 25 Charges on or about September 24, 2014 and having failed to explicitly do that it is now too late to file those same charges as amended charges some six (6) months later on March 18, 2015. As we noted in our prior submission, assuming no simultaneous Section 8 filing with the Section 25 filing, N.J.S.A. 18A:6-13 is very exacting in its time requirements for filing of tenure charges. Filing essentially the same tenure charges it filed under Section 25 in the prior proceeding at this "late" stage is fatal to the Petitioner's efforts to resurrect, if you will, charges that were deemed "dismissed" by you in your earlier arbitration ruling in this proceeding.

Likewise, if the Section 8 inefficiency charges were joined and pled in the prior proceeding with Section 25 inefficiency charges, those charges must now also be deemed "dismissed."

Specifically, under Section 25, N.J.S.A. 18A:6-17.3, the District was required to file charges against Respondent Kelly-Gamble with the Commissioner of Education within 30 days of filing with the State District Superintendent. See also N.J.A.C. 6A:3-5.1. In this case, the District certified the charges in September 2014. The charges filed were based on the identical series of facts and allegations as the instant amended charges, and thus the District was under an obligation to file the tenure charges against Respondent Kelly-Gamble within 30 days thereof. Clearly, the current charges are filed well outside that time period, and thus the charges are untimely under TEACHNJ and must be dismissed.

Alternatively, if the charges are deemed to be filed pursuant to Section 8, N.J.S.A. 18A:6-16, the charges are still untimely. Once charges were filed with the State District Superintendent, Respondent Kelly-Gamble could submit a statement of position and a written statement of evidence under oath within 15 days of receipt of the charges. N.J.A.C. 6A:3-5.1. Upon receipt of the position statement or expiration of the 15 days, the State District Superintendent had 45 days to decide on whether to certify the charges to the Commissioner of Education. *Id.;* N.J.S.A. 18A:6-13. It had 15 days to file written charges with the Commissioner after making a decision. N.J.A.C. 6A:3-5.1. Once again, in this

case, the District filed the original inefficiency charges with the State District Superintendent in September 2014. The charges filed were based on the identical series of facts and allegations as the instant amended charges, and thus the District was under an obligation to vote on whether to file charges under Section 8 within 45 days of receiving Respondent Kelly-Gamble's response to the charges, and then was required to file the charges with the Commissioner within 15 days of making its decision. Clearly it did not do so, and the charges were filed outside the applicable timeframe. Thus, they are untimely filed under *TEACHNJ* and must be dismissed.

The statutory and regulatory time frames set forth above exist for a reason – to protect the due process rights of educators subject to tenure revocation charges. The District's conduct in belatedly amending its prior charges makes a mockery of due process. Under the District's theory, it is unbridled by any time constraints at all when faced with the dismissal of its inefficiency charges, rendering the strict procedural time-frames set forth above a nullity. File a charge, lose on the merits, refuse to seek vacation of the award, and simply file again under a new theory – an amendment to the original inefficiency charges. Perhaps if the instant amended charges are dismissed (and they should be), the District will simply file another amended charges again . . . this time under some new meritless theory. Such an indefinite and arbitrary approach runs directly contrary to the applicable statutory and regulatory guidelines for the commencement of tenure charges against educators set forth in *TEACHNJ* and

its implementing regulations, as well as Respondent's right to due process.

The Petitioner throughout its arguments against the earlier motion to dismiss in the prior proceeding constantly asserted that it had filed Section 8 charges simultaneously along with the Section 25 charges. We note the following statements taken from the Petitioner's submission in opposition to Respondent's earlier Motion To Dismiss in the prior proceeding:

- "I hereby file charges based upon inefficiency pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1." (See Exhibit A at Certification of Shana T. Don, Esq., hereinafter "Don Cert."). **These charges were filed based upon both the "new" inefficiency standard of TEACHNJ's N.J.S.A. 18A:6-17.3, encompassing two consecutive annual evaluations for poor performance and the "old" inefficiency of N.J.S.A. 18A:6-16. Id.**" At pages 1-2 from Petitioner's Memorandum of Law in Opposition to Motion To Dismiss in prior proceeding (Docket No. 266-9/14) and at page 36 of the Arbitration Award of Respondent Kelly-Gamble. [*Emphasis Added*].

- "Additionally, the documents listed below were described in, and appended to the Statement of Evidence **in support of the Inefficiency charges, both "old" and "new" in support of Respondent's inefficient teaching performance:**" At page 10 from Petitioner's Memorandum of Law in opposition to Motion To Dismiss in prior proceeding (Docket No. 266-9/14) [*Emphasis Added*].

- While N.J.S.A. 18A:6-17.3 provides for mandatory charges brought on the basis of two consecutive annual ratings of ineffective or partially effecting; N.J.S.A. 18A:6-16 provides for charges when those specific conditions have not been met but dismissal is nonetheless warranted on the basis of inefficiency or any of the other grounds specified in the statute, see N.J.S.A. 18A:6-10. **Here, the District pled tenure**

> **charges under both statutes, N.J.S.A. 18A:6-10 and 17.3.** At page 25 from Petitioner's Memorandum of Law in Opposition to Motion To Dismiss in prior proceeding (Docket No. 266-9/14) [*Emphasis Added*].
>
> - Accordingly, even if the Arbitrator here concludes, notwithstanding the facts and argument presented herein, that the requirements for inefficiency tenure charges under N.J.S.A. 18A:6-17.3 have not been met, the inefficiency charge against Respondent should not be dismissed. **Instead, the charge must be evaluated under NJ.S.A. 18A:6-16, as initially pled, and the case must proceed to hearing.** At page 29 from Petitioner's Memorandum of Law in Opposition to Motion To Dismiss in prior proceeding (Docket No. 266-9/14), and at page 43 of the Arbitration Award of Respondent Kelly-Gamble. [*Emphasis Added*]. (*See,* Exhibit C attached to submitted Memorandum of Law in Support of Motion).

As noted by you in your arbitration award in the prior proceeding in this matter:

> *Petitioner's contention that it has pled an alternative statutory basis under N.J.S.A. 18A:6-16 to entitle a hearing on the sufficiency of the inefficiency charges under the "old" [Section 8] tenure law also is unpersuasive.* ***Rather, a cursory reference in a pleading does not obviate the fact that the solitary tenure charge of INEFFICIENCY and the accompanying STATEMENT OF EVIDENCE make it abundantly clear the instant charges were brought under N.J.S.A. 18A:6-17.3.*** At page 55 of the Arbitration Award of Respondent Kelly-Gamble. [*Emphasis Added*]. (*See,* Exhibit C)

If we are to accept the Petitioner's admissions in its pleadings and submissions in the prior proceeding that it had "pled" the Section 8 inefficiency charges, then the dismissal of the tenure inefficiency charges (both Section 25 and Section 8), by you in the prior proceeding now precludes the Petitioner from resurrecting amended inefficiency tenure charges in a new tenure revocation proceeding that

were previously dismissed along with the Section 25 charges by you in your arbitration ruling on January 30, 2015.

Accordingly, for the foregoing reasons, it is respectfully submitted that the instant tenure charges – whether construed as amended or new, are simply out of time and should be dismissed. The dismissal of the tenure charges against Respondent Kelly-Gamble is now the "law of this case," and the District's amendment of those charges is constrained Respondent believes by that doctrine. Specifically, the amended inefficiency charges rely on the exact same facts and the exact same evidence as presented in the initial charges. Further action by the District herein seeking to amend tenure charges that have already been dismissed is, frankly, absurd, fundamentally unfair, in clear violation of Respondent Kelly-Gamble's due process rights, and should not be permitted to proceed in clear defiance of your Arbitration Award and Ruling.

The Law of the Case doctrine "[r]equires judges to respect unreversed decisions made during the trial by the same court or a higher court regarding questions of law." Sisler v. Gannett Co., 222 N.J. Super. 153 (App. Div. 1987) (citing State v. Reldan, 100 N.J. 187, 203 (1985). The policy behind the doctrine is that "[o]nce an issue is litigated and decided in a suit, re-litigation of that issue should be avoided if possible." Id. (citing State v. Hale, 127 N.J. Super 407, 410, 317 A.2d 731 (App. Div.1974)).

Thus, because this issue has already been decided in this case in a prior

arbitration proceeding with a definitive award and ruling by you, as the Arbitrator, the amended charges are bound by the law of the case in that regard. Specifically, it is undisputed that the initial charges filed against Respondent Kelly-Gamble were unequivocally dismissed by you in your January 30, 2015, Opinion and Award granting Respondent Kelly-Gamble's motion for dismissal of the tenure revocation proceeding. In opposition to Respondent Kelly-Gamble's motion to dismiss the original inefficiency tenure charges, the District specifically sought to proceed under Section 8 of the *TEACHNJ Act*. Your assessment in your arbitration award and ruling on the Petitioner School District's Section 8 effort echoed the same sentiment as articulated by Arbitrator Bluth In the Matter of Sandra Cheatham. That request was unequivocally rejected by Arbitrator Bluth. In doing so, Arbitrator Bluth held as follows:

> Finally, **I reject the District's contention that if a teacher is exonerated under Section 25, that does not preclude a similar procedure under Section 8 by which a teacher may be dismissed under the conditions that are delineated under that Section**. The District insists if I find Respondent not culpable of the charges against her in Section 25, I should treat the charges as if they had been filed under Section 8. **I reject this notion completely**. The fact is the District chose to file under Section 25. It now asks if it loses in that forum I should convert it to a Section 8 matter. **To acquiesce to that request would give the District the proverbial "two bites at the apple." The District made a choice. That choice was Section 25. The fact it has been unsuccessful in achieving its goal does not give it a sound basis to ask for a "do-over."** For all of the reasons delineated herein, I find the District erred when it discharged Respondent when it used 2012-13 as one of the two evaluation years. Accordingly, I determine the appropriate remedy is reinstatement

with full back pay and benefit. It is so ordered.

(*See,* Exhibit "F") (*Emphasis Added*).

To be candid, the *Law of the Case Doctrine* should put an end to this proceeding. Although the District's untimely effort to amend the charge is meritless and, indeed, frivolous for a plethora of other reasons discussed above, the mere fact that the District's theory has already been rejected in this case and not appealed via petition to vacate is, respectfully, enough to end this legal dance and charade. Accordingly, for the forgoing reasons, as well as those that follow, the amended charges against Respondent Kelly-Gamble should be dismissed.

If we assume that Petitioner School District could under the *TEACHNJ Act* file Section 8 inefficiency charges simultaneously with Section 25 inefficiency charges, as it apparently did, then we must assess the impact of your arbitration dismissal order on those same charges as of January 30, 2015, the date of the dismissal, on any effort to amend the same charges anew under the Section 8 inefficiency umbrella in this current proceeding. It is Respondent's posture that the Petitioner can no longer assert the so-called amended inefficiency charges in light of your dismissal of all charges filed in the prior proceeding by you. As a result of that dismissal by you, the Petitioner can no longer assert those same charges as "amended" charges in an amended proceeding based on the concepts of "law of the case doctrine", "entire controversy doctrine", "*collateral estoppel*" and "*res judicata*" as fully set forth in Respondent's memorandum of law in support of this Motion.

Even if the charges are treated as "new" charges —— which they obviously are not —— the "new" charges are, nonetheless, barred as a matter of law pursuant to the doctrine of *Res Judicata*. *Res Judicata is "[a]n ancient* judicial doctrine which contemplates that when a controversy between parties is once fairly litigated and determined it is no longer open to re-litigation." Lubliner v. Board of Alcoholic Beverage Control for the City of Paterson 33 N.J. 428 (1960). *Res Judicata and Collateral Estoppel* rest upon policy considerations which seek to guard the individual against vexatious repetitious litigation and the public against the serious burdens which such litigation imposes on the community." *Id*.

As Respondent noted in her earlier submission, *Res Judicata* is a mandatory doctrine that a tribunal must apply to bar a party from re-litigating in a new case an issue already fully disposed of. For *Res Judicata* to bar the re-litigation of a claim, the following three elements must be met:

> (1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one.

Therefore, regardless of whether or not the instant inefficiency charge is properly characterized as "amended" or "new" charges, the result is the same since the very issues the District seeks to litigate in its amended filed charges has already been litigated, the parties are the same and the amended charges

arise out of the same transaction and/or occurrence as the dismissed inefficiency charges.

Thus, the doctrine of *Res Judicata* compels, in Respondent Kelly-Gamble's view, dismissal. The doctrine of *Res Judicata* applies to arbitration awards. See Chattin v. Cape May Green, Inc. 216 N.J. Super 618 (App. Div. 1987); Nogue by Nogue v. Estate of Santiago, 224 N.J. Super. 383 (App. Div. 1988). Not only do our courts recognize the binding and preclusive effect of arbitration awards, but arbitrators, when appropriate, will apply the doctrines of *Res Judicata*, as well as the related concepts of *Collateral Estoppel*, *Stare Decisis*, etc., where appropriate to bar re-litigation through arbitration of a prior arbitration award. See *Elkouri & Elkouri, How Arbitration Works,* p. 578- 579 (6th Ed. 2003).

Therefore, regardless of whether or not the instant inefficiency charges are properly characterized as "amended" charges or as "new" charges, the result is the same since the very issue the Petitioner School District seeks to litigate in its amended/new charges has already been litigated — the parties are the same, and the amended charges arise out of the same transaction and/or occurrence as the dismissed inefficiency charges. Thus, even if the *Law of the Case Doctrine* somehow does not bar re-litigation of the issue and the charge, the Doctrine of *Res Judicata* compels dismissal. Accordingly, for the forgoing reasons, as well as those that follow, it is respectfully submitted that the amended charge against Respondent Kelly-Gamble should be dismissed. Bondi v. Citigroup,

423 N.J. Super. 377 (App. Div. 2011). *See also,* Brunetti v. Borough of New Milford, 68 N.J. 576 (1975).

Assuming that somehow the District can overcome the doctrines of Law of the Case and *Res Judicata*, the untimeliness of its amended charge, and the entire controversy doctrine, its amended charge nevertheless remains substantively subject to dismissal because Section 25 of TEACHNJ is the exclusive means through which a district can bring charges of inefficiency. A brief review of the history underlying the passage of TEACHNJ and its implementing regulations, the statutory and regulatory language itself, as well as arbitral precedent, makes clear that charges of "inefficiency" are now defined by and required to proceed pursuant to Section 25, and only pursuant to Section 25, of the *TEACHNJ Act*.

As we noted in our earlier submission, the Petitioner School District was well aware that the new Section 25 under the *TEACHNJ Act* now defined "inefficiency", as confirmed by the terms of the statute itself as well as Department of Education regulations and authoritative guidance (See Exhibit D attached hereto). Section 8 clearly remains available for other charges such as "incapacity" or "conduct unbecoming." However, Section 8, for purposes of charges of inefficiency, is now a hollow tenure charge option and relic as Section 25 now defines that charge.

As you noted in rendering your ruling, Arbitrator Pecklers, you specifically

and unequivocally rejected the Petitioner School District's arguments by quoting Arbitrator Simmelkjaer In The Matter of The Tenure Charge of Inefficiency Against Neil Thomas, *Agency Docket. No. 244-9/14* (Exhibit Q) approvingly on his conclusion on the issue:

> [I]n the Arbitrator's [Simmelkjaer's] opinion, had the legislature intended that a teacher charged with inefficiency for two consecutive years of ineffective or partially effective ratings on their annual summative ratings be evaluated utilizing two different and asymmetric evaluation procedures – one consistent with Section 25 of *TEACHNJ* and the other consistent with Section 8. N.J.S.A. 18A:6-16 – it had the wherewithal to provide the appropriate statutory language. **In the absence of such language, the Arbitrator is compelled to dismiss the charges.**
>
> *(Emphasis added) See Arbitrator Pecklers' Award and Ruling attached as Exhibit C, at pages 55-56.*

Indeed, the Petitioner School District affirmed that it had filed in the prior proceeding under both Section 25 and Section 8 as you noted in your Award and Ruling when citing the "arguments" of the Petitioner District on Section 8 inefficiency charges in which the Petitioner School District argued that:

> Importantly, as a distinction in the Thomas case, this matter was initially [pled] under both sections of the Tenure Law - the old and the new. (The Arbitrator in *Thomas* provided '[s]ince the District's Inefficiency charge was not pleaded in the alternative, but rather based on *TEACHNJ*, it cannot amend its pleading at this juncture." While N.J.S.A. 18A:6-17.3 provides for mandatory charges brought on the basis of two consecutive annual ratings of ineffective or partially effective, N.J.S.A. 18A:6-16 provides for charges when those specific conditions have not been met but dismissal is nonetheless warranted on the basis of inefficiency or any other grounds specified by statute. *See*, N.J.S.A. 18A:6-10. ***Therefore, because the District pled***

> ***tenure charges under both statutes and the Arbitrator has jurisdiction to decide this matter of inefficiency under either N.J.S.A. 18A:6-16 or N.J.S.A. 18A:6-17.3 of the TEACHNJ Act this case should proceed to hearing.*** [*Emphasis Added*]
>
> (*See,* Arbitrator Pecklers' Award and Ruling at page 41 as Exhibit C attached hereto).

In Ursula Whitehurst and the State-Operated School District of the City of Newark, Agency Docket No. 282-9/14, Arbitrator Robert T. Simmelkjaer determined unequivocally that this District could not pursue an inefficiency charge under Section 8 despite the District's claims that it could pursue such a charge if it was not successful under Section 25. Arbitrator Simmelkjaer concluded as follows:

> The Arbitrator is not convinced that having dismissed the inefficiency charge against Ms. Whitehurst based on the District's non-compliance with N.J.S.A. 18A:6-17.3, through its utilization of the Respondent's annual summative evaluation for the 2012-2013 school year, he can now proceed to a hearing under N.J.S.A. 18A:6-16.
>
> ***
>
> Since the one charge of Inefficiency filed with the Commissioner alleges that over a two year period "from September 2012 to the present..." encompasses the two consecutive years of ineffective or partially effective annual summative ratings under section 25 and the Statement of Evidence reinforces the charge, the District is bound by the procedural requirements of section 25.

Id. at 48. (See Exhibit "M").

Additionally, Arbitrator Simmelkjaer unequivocally held that:

> [i]t is undisputed that the District may proceed against the Respondent on statutory grounds other than Inefficiency by filing such charges in accordance with the requirements of section 8. **However, the District can not file inefficiency charges on alternative grounds or once its filing under section 25 has been found deficient rehabilitate these insufficient charges under section 8 and then proceed to arbitration of this basis. Clearly had the Legislature in enacting TEACHNJ intended this outcome, it would have written the appropriate language.**
>
> ***
>
> In the Arbitrator's opinion, had the Legislature intended that a teacher charged with inefficiency for two consecutive years, with ineffective or partially effective ratings on their annual summative ratings, be evaluated utilizing two different and asymmetrical evaluation procedures — one consistent with section 25 of TEACHNJ and the other consistent with section 8, N.J.S.A 18A:6-16— it had the wherewithal to provide the appropriate statutory language. In the absence of such language, the Arbitrator is compelled to dismiss the charge.

Id. at 50 [*Emphasis Added*] (See Exhibit "M").

Similarly, In the Matter of the Tenure Charge of Inefficiency of Neil Thomas, State-Operated School District of the City of Newark, Agency Docket. No.: 244-9/14, Arbitrator Simmelkjaer addressed this issue again against this same District, concluding that inefficiency tenure charges could not be brought under Section 8:

> [T]he Respondent logically argues that the District, having brought the charges pursuant to Section 25, is bound by the procedures in that section of the statute . . . less "[f]ailure to adhere to these requirements [ ]

result in the tenure charge being dismissed."

Moreover, on this point, **the District cannot rehabilitate charges found to be deficient under Section 25 by proposing that they be reconsidered under Section 8 as a default position.** As the Respondent reasonably argues:

> The District cited absolutely no language in Section 25 of the Act - - any other authority - - which would indicate that the Legislature intended for deficient inefficiency charges to simply proceed to arbitration via Section 8 of the Act. Indeed, if the District's flawed and unsupported argument is adopted, it would render the language in Section 25 superfluous.

Id. at 47 [*Emphasis Added*]. (*See* Exhibit "Q").

Further, Arbitrator Simmelkjaer concluded that:

> [h]ad the Legislature intended that a teacher charged with inefficiency for two consecutive years of ineffective or partially ineffective ratings on their annual summative ratings be evaluated utilizing two different and asymmetric evaluation procedures - - one consistent with Section 25 of TEACH NJ and the other consistent with Section 8, N.J.S.A. 18A:6-16 - - it had the wherewithal to provide the appropriate statutory language. In the absence of such language, the Arbitrator is compelled to dismiss the charges.

Id. at 51. (See Exhibit "Q").

And likewise, in In the Matter of Tenure Charges Against Elena Brady, State-Operated School District for the City of Newark, Docket. No. 270-9/14, Arbitrator Joyce M. Klein addressed this issue brought on behalf of the same District:

The notice of "charges based upon inefficiency

> **pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1" against the Respondent charge her with inefficiency under Section 25 N.J.S.A. 18A:6-17 rather than under Section 8 N.J.S.A. 18A:6-16 which covers tenure charges other than those of inefficiency under the provisions of TEACHNJ.** The District's efforts to proceed under Section 8 are limited by the charges themselves, which include N.J.S.A. 18A:6-17.3 and not N.J.S.A. 18A:6-16 at this juncture. **As there is no basis for proceeding under N.J.S.A. 18A:6-16, I do not address whether such a proceeding would be warranted based upon the record in this case.**

Id. at 25. [*Emphasis Added*] (*See*, Exhibit "G").

In a decision only recently issued and after the District filed amended charges against a teacher pursuant to Section 8 of TEACHNJ, in In the Matter of Tenure Charges Against Rinita Williams, State Operated School District of the City of Newark, Docket Nos. 241-8/14 & 17-1/15, Arbitrator Tia Schneider Denenberg, citing to the arbitration decisions in *Whitehurst* and *Thomas*, flatly rejected the District's pursuit of charges of inefficiency under Section 8 as well. (*See* Exhibit "M").

Lastly, in the prior arbitration proceeding In the Matter of Tenure Charges Against Linda Kelly-Gamble, State Operated School District of the City of Newark, Docket No. 266-9/14, you, as the assigned Arbitrator, specifically concluded that Section 25 was the exclusive avenue for pursuit of charges of inefficiency:

> As argued by the Respondent, the new inefficiency standard of N.J.S.A. 18A:6-17.3 with attendant regulations represented wholesale changes to

> inefficiency cases heard under N.J.S.A. 18A:6-10, among them the elimination of the 90 day improvement period. N.J.S.A. 18A:6-17.2 limited the discretion of the arbitrator when considering an inefficiency charge. **Nothing convinces me that the Legislature intended inefficiency cases filed during and after the 2013-14 School Year to be heard under both**.

Id. at n. 5, p. 56. [*Emphasis Added*] (See Exhibit "C").

The District apparently believes that through Section 8 it does not need two years of ineffective or partially ineffective ratings to bring charges. If the Legislature had intended for deficient Section 25 inefficiency charges to proceed to arbitration via Section 8, it would have so stated. Instead, as discussed above, it specifically and clearly revamped the entire process of bringing inefficiency tenure charges against a teacher, removing them from the general framework of Section 8 and creating an entirely new and specific process under Section 25. Section 25 separated out inefficiency from all other charges with its own statutorily and regulatory provisions concerning unique timeframes, procedures and requirements, all of which are different from the requirements set forth in Section 8, which involve charges brought on grounds other than inefficiency. It is a well-settled tenet of statutory construction, that "where one statute deals specifically with a subject and another statute deals with that subject only generally or inferentially, the specific statute is controlling." City of East Orange v. Essex County Register of Deeds and Mortgages, 362 N.J. Super. 440, 444 (App. Div. 2003) (citing Wilson v. Unsatisfied Claim & Judgment Fund Board, 109 N.J. 271, 278 (1988)).

If the District wished to proceed against Respondent Kelly-Gamble on statutory grounds other than "inefficiency" – such as "incapacity," "unbecoming conduct," or "other just cause" – it was free to do so last fall by filing such charges against her in accordance with the requirements of Section 8 of the Act when it filed the original charges. It chose not to do so. What it cannot do is file Section 25 charges and lose, and then attempt to re-file the exact same charges under Section 8. *TEACHNJ Act* clearly dictates that all inefficiency charges must be filed, if at all, pursuant to the requirements set forth in Section 25. There is no "alternate" filing method for inefficiency charges. If the Legislature had intended for deficient inefficiency tenure charges to proceed to arbitration via Section 8, it would have so provided. It did not. That being the case, the amended charges filed by the Petitioner School District must be dismissed consistent with your prior arbitration Award and ruling on January 30, 2015.

The Petitioner School District has raised one last issue that needs to be addressed briefly. The Petitioner has complained to you, as the Arbitrator in this proceeding, that the Respondent's Motion To Dismiss is "untimely". As you know, the Commissioner of Education has the authority to address any "defects" in the tenure revocation proceeding, including failure of responding party to file an appropriate answer in tenure proceedings. Respondent admits that she was given an extension of time to file her formal answer in this proceeding by April 15, 2015. But for a shipping error in the Fed Ex delivery to the Division of Controversies and Disputes in the Commissioner of Education's Office in the

Department of Education, the Answer would have been filed in a timely manner. Respondent, through counsel, advised the Division of the shipping error and the "excuse" was accepted with the Motion following the next day on April 16, 2015.

It is apparent that the Commissioner accepted the Respondent's Answer and Motion by the transfer and assignment of the tenure revocation proceeding along with the MOTION TO DISMISS. I am attaching a copy of the transmittal letter from the Hon. Kathleen Duncan, the Director of the Division within the Commissioner's Office. As a result, there is no dispute regarding the filed Answer and Motion. Again, this is another example of the Petitioner School District creating an issue where there is none. *See,* Letter from the Division Of Controversies and Disputes transmitting the tenure revocation proceeding to you as the assigned Arbitrator.

Petitioner State Operated School District City of Newark

At the outset, it should be clear that the District Certified and filed the Amended Tenure Charges of Inefficiency with the Commissioner of Education on or about March 17, 2015. These Tenure Charges expressly address the "old" or "Section 8" inefficiency charges of N.J.S.A. 18A:6-16. The underlying Arbitration Award dismissed Tenure Charges filed against the Respondent pursuant to N.J.S.A. 18:6-17.3, brought pursuant to the "new" provisions of Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), N.J.S.A. 18A:6-16, *et seq.*, as adopted August 6, 2012. Following

the Arbitrator's decision and directive the District Amended the Tenure Charges to include the "old" or "pre-Act" inefficiency standard as set forth in N.J.S.A. 18A:6-10 and N.J.S.A. 18A:6-16. A new docket number was assigned by the Commissioner of Education, who noted that these charges were to be considered only under this section.

Further, it is of no moment that the District has not moved to vacate this Arbitrator's Award of January 30, 2015. Here, the Respondent has likewise not filed any action to confirm the Award in accordance with N.J.S.A. 18A:6-17.1, which provides that "[t]he arbitrator's determination shall be final and binding and may not be appealable to the Commissioner of Education or the State Board of Education. The determination shall be subject to judicial review and enforcement as provided pursuant to N.J.S.A. 2A:24-7 through N.J.S.A. 2A:24-10." N.J.S.A. 18A:6-17.1 expressly refers to the mechanism of enforcement of arbitration awards through the process set forth in N.J.S.A. 2A:24-7. Therefore, the Award is binding as per TEACHNJ, unless and until it is confirmed, modified or vacated in superior court via summary action pursuant to R. 4:67-2. *Id.*

Tenure arbitrations are individual matters, each addressing a unique set of circumstances. Each must be adjudicated separately and on their own merits. TEACHNJ was implemented in order to address the individuality of these matters providing for arbitration rather than an administrative law hearing, which focuses on the facts of the case rather than a body of case law. Here, the underlying matter was dismissed and no final decision on the merits was reached. For the

reasons discussed further below, once a matter is transmitted to arbitration by the Commissioner, the arbitrator must proceed to a hearing on the merits. As such, this matter should proceed to a hearing on the merits of the tenure charges against the Respondent.

These Amended Tenure Charges were filed subsequent to the decision In the Matter of the Tenure Hearing of Linda Kelly-Gamble, State-Operated School District of the City of Newark, Agency Docket No. 266-9/14 (Pecklers, January 2015). Following the dismissal, the District submitted the instant Amended Tenure Charges, adding a charge of inefficiency pursuant to Section 8 of TEACHNJ (the "old" statute) to that previously alleged pursuant to Section 25 of TEACHNJ. Simply put, the evaluations for Respondent during the 2012-2013 school year were poor, and should not be ignored. Respondent should not get a "free pass" for her performance during this time period. However, this is precisely the result which will be achieved should the instant matter be dismissed because the District will be unable to pursue tenure charges for Respondent during this time period under either Section 8 or Section 25 of TEACHNJ.

The Amended Tenure Charges of Inefficiency were brought against the Respondent based on her consistent lack of improvement and receipt of poor evaluation ratings of "ineffective" and "partially effective." Based upon this performance, the District filed Amended Tenure Charges for Inefficiency against Respondent, a tenured teacher within the District, pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-16, N.J.S.A. 18A:6-17.1, N.J.S.A. 18A:6-17.3

and N.J.A.C. 6A:3-5.1(b) with the Commissioner of Education. The Amended Tenure Charges must proceed to a substantive hearing to determine the question of whether they are sufficient to warrant the Respondent's dismissal or reduction in her salary by a preponderance of the evidence, which, as discussed more fully below, is an entirely different standard from that delineated under the "new" TEACHNJ Act. The Amended Tenure Charges must therefore be evaluated under the "preponderance of the evidence" standard, rather than as argued by the Respondent under the evaluation criteria of the new Act.

Respondent here is seeking to have her cake and eat it. She alleges in her Motion to Dismiss that the inefficiency charge pursuant to Section 25 of TEACHNJ, should be dismissed because the charges were premature. Specifically, Respondent alleges that the evaluations for the 2012 - 2013 school year should not "count" for tenure decisions. Respondent further asserts that the inefficiency charges can only be brought pursuant to Section 25 rather than Section 8 of TEACHNJ and therefore the District's amended charges must be dismissed. Here, the Respondent is arguing that the tenure charges of inefficiency are both too early and too late. The former argument entirely ignoring the legislative history and effective date of TEACHNJ, the latter holding the District to an impossible standard of predicting the future. As explained in more detail below, the Arbitrator has jurisdiction to determine the inefficiency charge under either N.J.S.A. 18A:6-10, implemented by Section 8, N.J.S.A. 18A:6-16, as well as Section 25, N.J.S.A. 18A:6-17.3. As in this case, the

Arbitrator has dismissed the charges under Section 25, they must now proceed and be evaluated under Section 8.

In addition, the Amended Tenure Charges were filed timely as required by N.J.S.A. 18A:6-13 and N.J.A.C. 6A:3-5.1. Here, the Amended Tenure Charges were initially served on the Respondent after their being submitted to the State-District Superintendent on or about January 15, 2015. (*See,* Exhibit C). As the Amended Tenure Charges addressed Section 8 charges, the Respondent was afforded the statutorily mandated time period of fifteen (15) days rather than the ten (10) day response time as prescribed for charges brought under Section 25. (Cf. N.J.A.C. 6A:3-5.1(b)(3) and N.J.A.C. 6A:3-5.1(c)(3). The Respondent filed a written response to the Amended Tenure Charges with the District on January 31, 2015. Thus, the District had 45 days from January 31, 2015, to make a determination as to the probable cause in the amended tenure charges pursuant to N.J.A.C. 6A:3-5.1(b)(4). In accordance with this regulation, the District did determine that there was probable cause to the amended charges and the State-Appointed District Superintendent completed the Certification of Determination on the 45th day, March 17, 2015. (*See*, Exhibit D).

This matter was subsequently received by the Commissioner of Education, who acknowledged receipt of the tenure charges for which an Answer was to be timely filed pursuant to N.J.A.C. 6A:5-5.3 noting that, "the tenure charges will not be evaluated under N.J.S.A. 18A:6-17.13 because a decision pursuant to that section has already been reached." (*See,* Exhibit E). As such, the amended

tenure charges were properly brought pursuant to Section 8 of TEACHNJ alleging Inefficiency. The Respondent is clearly seeking a free pass from the tenure law and this explicitly was not provided by the Legislature when TEACHNJ was enacted. For the reasons set forth more fully below, the Motion to Dismiss should be denied and the matter should move forward towards a hearing on the merits of the Section 8 Tenure Charges.

The question under Section 8 inefficiency charges is whether the District has met its burden under the long-established preponderance of credible evidence standard. See I/M/O Owen Newson and the State-Operated School District of the City of Newark, Docket. No. 276-9/12 (Pecklers, 2013) (evaluating a tenure charge filed after the effective date of TEACHNJ, but relying on evaluations performed before the effective date under the "preponderance of the evidence" standard.). Pursuant to the older standard, the burden is on the District to prove the tenure charges by a preponderance of the credible evidence. In Re Polk, 90 N.J. 550 (1982). This requires that the District offer evidence that would lead a reasonably prudent person to conclude that the Respondent is an ineffective educator. I/M/O Zinznewski, School District of Twp. of Edison, Middlesex County, OAL Docket No. EDU 4727-08 (May 5, 2010).

This standard is separate and apart from that as statutorily defined for Section 25 charges. Under the rubric of N.J.S.A. 18A:6-17.2, governing Section 25 charges, the question is whether the Respondent has rebutted the presumption set forth by the Commissioner that the District has followed the

Evaluation Process pursuant to N.J.S.A. 18A:6-17.1 based on tenure charges, having been determined by the Commissioner to be sufficient, the arbitrator's authority is confined to determine based on the evidence presented at a hearing whether or not:

> (1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
>
> (2) there is a mistake of fact in the evaluation;
>
> (3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or
>
> (4) the district's actions were arbitrary and capricious.

N.J.S.A. 18A:6-17.2.

For the charges preceded above regarding inefficiency under Section 25, the Arbitrator can only make a determination on the above-listed four elements. Contrary to the Section 25 standard, pursuant to N.J.S.A. 18A:6-16, the issue before the arbitrator here is whether the evidence in the record presented supports the charge of inefficiency. See I/M/O Tenure Hearing of Lawrence E. Hawkins, State-Operated School District of the City of Newark, Docket. No. 243-10/13 (March 10, 2014) *39-43; I/M/O Tenure Hearing of Gerald Carter, State-Operated School District of the City of Camden, Docket. No. 269-12/12, (July 18, 2013) *24-27; and I/M/O Tenure Hearing of Felicia Pugliese, State-Operated

School District of the City of Newark, Docket. No. 272-9/12 (February 15, 2013) *8-10. The only issue for the arbitrator is whether the record supports a finding that the charges are true. *See,* Chavez, *supra,* *11-12. Without developing the record at a hearing and considering the District's evidence, which goes beyond the summary Statement of Evidence, it is impossible to make this determination.

In keeping with the Arbitrator's prior determination, the evaluations conducted during the 2012–2013 school year are not the sole basis for the inefficacy charges. Nor was there a "free" year without evaluation. These evaluations and the relevant testimony that will be adduced should be considered along with the remainder of the evidence to be presented in assessing the totality of the circumstances. TEACHNJ was enacted on August 6, 2012, by the New Jersey Legislature and went into effect prior to the start of the 2012-13 school year. P.L. 2012, c. 26, §28. N.J.S.A. 18A:6-117. The effective date of adoption of TEACHNJ is provided below N.J.S.A. 18A:6-117 and states the following regarding the effective date: "Adopted L. 2012, c.26, §1, approved August 6, 2012, in the 2012-2013 school year." Each statute provided thereafter, N.J.S.A. 18A:6-118 through 129 provides that it was adopted "August 6, 2012, in the 2012-2013 school year." In addition, the statutes that established the procedure for adjudicating tenure charges, N.J.S.A. 18A:6-16 through 17.5 also cite that same was approved "August 6, 2012, in the 2012-2013 school year."

The District piloted a new teacher evaluation system in the 2011-2012

school year, not 2012-2013 as asserted without support by Respondent. Thus, evaluations conducted in the 2011-2012 pilot did not "count" for official purposes, but the experience of that pilot program informed the development of the teacher evaluation process adopted, approved and implemented in subsequent school year 2012-2013. It is indisputable that the Legislature purposefully adopted and approved TEACHNJ "August 6, 2012, in the 2012-2013 school year." As such, there is no question that the evaluations in the 2012-2013 school year were to be used towards determining if tenure charges were warranted, if not as the sole basis.

TEACHNJ required school districts to institute pilot programs to test their new evaluation rubrics by, January 31, 2013, at the latest. N.J.S.A. 18A:6-123(d) ("Beginning no later than January 31, 2013, a board of education shall implement a pilot program..."). [*Emphasis Added].* It also required school districts to implement their evaluation rubrics by the beginning of the 2013-2014 school year at the latest. *See,* N.J.S.A. 18A:6-123(e) ("[b]eginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric"). [*Emphasis Added*]. Neither the Legislature nor the Department of Education required school districts to wait a year to implement their evaluation rubrics if the rubrics had been adopted and approved earlier. Further neither entity would require New Jersey school districts to treat the 2012-2013 school year, and only 2012-2013, as a "pilot" year. The cited provisions provided the latest dates by which districts were required to test and implement

their new rubrics; they did not prohibit implementation of approved rubrics earlier than the stated deadline. Nothing in TEACHNJ or any regulations provides that evaluations performed in 2012-2013 in accordance with an adopted, approved rubric are to be treated differently from those performed in 2013-2014, for purposes of triggering tenure charges under N.J.S.A. 18A:6-17.3.

Moreover, the Commissioner of Education has upheld tenure charges for inefficiency under N.J.S.A. 18A:6-17.3 based upon annual summative ratings for the consecutive years of 2012-2013 and 2013-2014. I/M/O Tenure Hearing of Renee Pulliam-Newell, State-Operated School District of the City of Newark, Agency Docket. No. 276-9/14, where the Commissioner entered default judgment for charges under TEACHNJ Act based upon evaluations conducted during the 2012-2013 and 2013-2014 school years, for inefficiency.

Furthermore, in the recent decision of I/M/O LaRhonda Ragland and the State-Operated School District of the City of Newark, Docket No. 258-9/14 (Arbitrator Timothy Brown, Esq.) (February 2, 2015), the Arbitrator concluded that he had the authority to review the tenure charge pursuant to N.J.S.A. 18A:6-17.3 (new inefficiency law) and that once the Commissioner transferred the matter, the Arbitrator was required to hear the merits of the case. The Arbitrator concluded that the "the Commissioner's referral of this matter to me was specifically pursuant to TEACHNJ Section 25 (N.J.S.A. 18A:6-17.3(c)) and no other Section of the Act, and grants me the narrow authority to determine the case under the provisions of Section 23 and no other."

Similarly, In the Matter of the Tenure Hearing of Edward Newton, State-Operated School District of the City of Newark, Agency Docket No. 276-9/14 (Arbitrator Timothy Brown, Esq.) (March 23, 2015), the Arbitrator concluded that the District met its burden to warrant dismissal under Section 25 of the Act pursuant to the tenure charge of inefficiency. For all of these reasons, the teacher evaluations conducted within the District in 2012-2013 were valid, effective, and "counted" for all purposes, including: to support tenure charges such as this one. Respondent's contention to the contrary should be rejected.

Respondent argues that the instant charges must be dismissed because the parties are barred from re-litigating in a new case an issue already disposed of. However, this is a mischaracterization of the facts here. A party asserting the defense of collateral estoppel has the burden of demonstrating that the issue was litigated in a prior proceeding. State v. Kelly, 201 N.J. 471, 488 (2010). The merits of the Amended Tenure charges against there were never adjudicated, and as such, the defense does not apply.

The District previously filed an inefficiency tenure charge against Respondent (Docket No. 266-9/14) under Section 25 of TEACHNJ, N.J.S.A. 18A:6-17.3. In response to Respondent's claim that the charge asserted there was defective because of the inapplicability of Section 25 (because evaluation ratings obtained in 2012-13 did not "count" toward the two years' ratings required under that provision), the School District requested that the Arbitrator consider the charge under both Section 25 and Section 8 of TEACHNJ, N.J.S.A. 18A:6-

16, to avoid the necessity of filing a Section 8 charge later, in a separate proceeding. The Arbitrator denied the School District's request and dismissed the charge on the basis of Respondent's contention pertaining to Section 25 (the inapplicability of the 2012-13 evaluation rating). See, In the Matter of the Tenure Hearing of Linda Kelly-Gamble, State-Operated School District of the City of Newark, *supra*, Therein, this Arbitrator did not reach the merits of the charge under Section 8 – *i.e.* he never addressed whether the School District had met its burden of proving inefficiency. As such, the Section 8 charge was not adjudicated. Therefore, even if the School District is "bound by" the Arbitrator's decision in the previous matter, it is not precluded by that decision from bring the instant charge, as the Arbitrator's decision did not address the charge now presented pursuant to Section 8.

As stated above, Respondent cannot meet the burden of demonstrating that the issue was litigated in a prior proceeding. While the two charges of inefficiency against her have been predicated on the same facts, if viewed only from the position of the statement of evidence, they are supported by different statutory authority, as Respondent acknowledges. Moreover, the decision dismissing the previous charge was based on statutory grounds inapplicable to the instant charge, specifically the requirements of N.J.S.A. 18A:6-123(d), which are applicable only to charges brought pursuant to Section 25. *See,* N.J.S.A. 18A:6-17.3(d). As the Section 8 charge was not addressed in the previous case and the only issue decided there was inapplicable to the Section 8 charge, the

issue of Respondent's inefficiency has not been decided, and the Section 8 charge against her is not precluded by res judicata.

In the instant matter, the law of case doctrine is clearly inapplicable. In the first instance, the initial tenure charges for Respondent were dismissed on a procedural issue regarding Section 25 of TEACHNJ. Here, the Arbitrator did not review any evidence in support of the charges in coming to his determination, nor did he analyze the legal sufficiency of the District's position. Therefore, the issue regarding the substance of the District's underlying charges was never litigated, and no legal determination was made in this regard. Should this matter proceed to a hearing and heard on the merits, it will be the first time the parties have an opportunity to argue their positions with regard to the substance of the allegations against the Respondent. This issue has yet to be argued -- let alone re-litigated.

The law of the case doctrine sets forth that unreversed decisions made during the trial by the same court regarding questions of law should not be disturbed. State v. Reldan, 100 N.J. 187, 203 (1985). The policy for such a doctrine is that "once an issue is litigated and decided in a suit, re-litigation of that issue should be avoided if possible." State v. Hale, 127 N.J. Super. 407, 410 (App.Div.1974). However, the law of the case doctrine is discretionary. State v. Reldan, *supra,* 100 N.J. at 205.

Additionally, the application of this doctrine is discretionary, and "should be

applied flexibly to serve the interests of justice." State v. Reldan, *supra*, 100 N.J. at 205. Here, the interests of justice would not be served by a procedural dismissal. As stated above, if the evaluations for the 2012-2013 school year do not "count" for purposes of tenure charges under Section 25, and the District's request to charge Respondent under Section 8 was denied, Respondent simply gets a free pass for his poor performance during this time period. This was clearly not the intent of the drafters of TEACHNJ. Essentially, the District would be unable to pursue any charges against any teachers for their poor evaluations in the 2012-2013 school year. The interests of justice would be served by permitting this matter to proceed to a hearing on the merits. Consequently, the law of the case doctrine is inappropriate in the instant matter. Therefore, this is not a "second bite at the apple" as Respondent asserts, and this matter must proceed to a hearing for a determination on the merits of the inefficiency charge under Section 8.

Codifying the entire controversy doctrine, New Jersey Court Rule 4:30A requires all claims against all potential defendants be brought in one encompassing litigation. The threefold objectives behind the doctrine are (1) to encourage the comprehensive and conclusive determination of a legal controversy; (2) to achieve party fairness, including both parties before the court as well as prospective parties; and (3) to promote judicial economy and efficiency by avoiding fragmented, multiple and duplicative litigation. Cogdell v. Hospital Ctr. at Orange, 116 N.J. 7 (1989).

Respondent asserts that the District is re-litigating the tenure charges against her because these charges have already been brought before an arbitrator and the District lost. However, that decision was not based upon Respondents evaluations or the merits of the District's case demonstrating the Respondent's inefficiency based on a preponderance of the evidence at a hearing. The Arbitrator dismissed the previous charges against Respondent based on his interpretation of TEACHNJ which he determined does not allow for evaluations from the 2012-2013 school year to be considered in tenure charge matters. This is not a conclusive determination of the legal controversy presented between the parties. Further, a dismissal of the instant charges would not achieve an equitable result because the District would essentially be unable to bring tenure charges against any teachers based upon their poor evaluations from the 2012-2013 school years. Lastly, the instant tenure charges do not constitute a duplicative litigation because the merits of the charges have yet to be heard. This is not a case where the District lost on the merits of the previous tenure charges and now wishes to re-file. Accordingly, in recognition of the underlying principles of the enforcement of the entire controversy doctrine, the District's tenure charges against Respondent should proceed to a hearing and determination on the merits.

The Arbitrator has jurisdiction to determine the inefficiency charge under either N.J.S.A. 18A:6-10, implemented by Section 8, N.J.S.A. 18A:6-16, as well as Section 25, N.J.S.A. 18A:6-17.3. *See,* Chavez, *supra.* The contention that an

inefficiency charge cannot proceed on any basis other than N.J.S.A 18A:6-17.3, and that a charge cannot proceed on that basis either until all applicable requirements are met – essentially, that the Legislature intended to hand poorly performing teachers a "free pass" for two years after the Act's effective date – has been rejected by TEACHNJ arbitrators. In I/M/O Tenure Hearing of Henchey, Agency Docket No. 8-15 (January 3, 2015), for example, the arbitrator stated the following:

> I am not convinced ... that there was a moratorium on filing a Section 8 tenure charge alleging inefficiency insofar as the 2012-13 school year is concerned.

Id. at pg. 24.

Henchy concluded that since the effective date of TEACHNJ, "the applicable statutory provisions serving as vehicles for processing tenure charges" have included both Section 8 and Section 25. *Id.* at p. 26. *See also,* I/M/O Tenure Hearing of Henchey, Agency Docket No. 9-15 (Jan. 6, 2015) at p. 4. Similarly, the Arbitrator in I/M/O Tenure Hearing of Pugliese, Agency Docket. No. 272-9/12 (February 15, 2013), confirmed, Superior Court of New Jersey, Chancery Division, Essex County, Docket. No. C84-13 (Sept. 16, 2013), appeal pending, Docket. No. A-000857-13, stated that "[t]o hold otherwise would be to usurp the power of the legislature." *Id.* at pg. 8-9.

Arbitrators in several cases in which Section 25 charges have been dismissed have suggested that dismissal might not have been required if the

charges had been pled, in the alternative, on the basis of Section 8 as well as Section 25. *See,* I/M/O Tenure Hearing of Yarborough, Agency Docket No. 509-14 (December 29, 2014); I/M/O Tenure Hearing of Williams, Agency Docket No. 501-14 (December 20, 2014); I/M/O Tenure Hearing of Brady, Agency Docket No. 478-14 (Dec. 7, 2014). Thus, these Arbitrators have read TEACHNJ to allow inefficiency charges to proceed on grounds other than Section 25, contrary to Respondent's contention here.

The statements in Pugliese, Henchey, Yarborough, Williams, and Brady also represent a sensible reading of TEACHNJ that is consistent with the legislative intent. In cases such as this, where Section 25 of TEACHNJ is inapplicable because it was held that a charge cannot be based on two years of "ineffective" or "partially effective" ratings, a school district must nevertheless be permitted to proceed with an inefficiency charge in an appropriate case. More importantly, N.J.S.A. 18A:6-16 provides the statutory basis to do so.

As discussed *supra*, N.J.S.A. 18A:6-10 requires that once a matter is transmitted to arbitration by the Commissioner, the arbitrator must proceed to a hearing on the merits. Under N.J.S.A. 18A:6-16, the question before the arbitrator is whether the evidence in the record presented supports the charge of inefficiency. *See,* Hawkins, *supra,* *39-43; Carter, *supra,* *24-27; Pugliese, *supra,* *8-10. The only issue for the arbitrator is whether the record supports a finding that the charges are true. *See,* Chavez, *supra*, *11-12.

On or about March 27, 2015, the Respondent's counsel requested an extension of time to "file a written response." (*See,* Exhibit H). An extension of time from April 2, 2015, until April 12, 2015, was granted. (*Id., see,* NJ DOE Controversies and Disputes Extension noted on Correspondence). Subsequently, on April 13, 2015, the day after the extended time to answer, the Respondent's counsel again requested an additional extension, until April 15, 2015, this time to file an "Answer and Motion." (*See,* Exhibit I). An additional extension of time, until April 15, 2015, was granted by the Division. (*Id., see,* NJ DOE Controversies and Disputes Extension noted on Correspondence). The Division expressly noted that "**No further extensions will be granted**". *Id.* [*Emphasis Added*].

Despite the two extensions, the Respondent did not file an Answer on April 15, 2015. Moreover, the Respondent unilaterally announced an additional extension of time to file a Motion by April 16, 2015, an additional two days after the extended deadline. (*See,* Exhibit J). In accordance with N.J.A.C. 6A:3-5.3 and N.J.A.C. 6A:3-5.3, any request for an extension of time to answer can only be granted by the Commissioner. Further, N.J.A.C. 6A:3-5.3(1) permits "**the filing of a motion to dismiss in lieu of an answer provided the motion is filed within the time allotted for the filing of an answer.**" *Id.* [*Emphasis Added*]. Even assuming that the Division could accept an answer filed outside the extended deadline, the Respondent's Motion to Dismiss, filed in addition to rather than in lieu of an Answer, submitted a further two days after the twice

extended deadline should be rejected.

Respondent recasts three (3) arguments in support of her reply. Her primary, averment is that the Arbitrator's dismissal of the District's prior tenure charges based on Section 25 constitutes an adjudication on the merits, triggering the various equitable doctrines she cites. Respondent additionally asserts that because, as she would have it, Section 25 is now the only mechanism by which tenure charges can be brought and it was previously found that Section 25 omits the 2012-2013 evaluations, the skipping of an entire academic year for purposes of tenure decisions is appropriate and even legislatively condoned. Finally, Respondent reiterates her position that the District's Amended Tenure Charges were untimely. None of these arguments are meritorious.

Contrary to the Respondent's allegations, the tenure charges at issue in this proceeding were timely filed. The Respondent, in a series of confusing arguments claims that the tenure charges should be dismissed as untimely because the District has made some kind of "assessment" based upon two flawed "assumptions". *See,* Respondent's Letter Brief in Reply to the District's Opposition to Respondent's Motion to Dismiss, dated May 22, 2015, at *2. In this connection, it must be noted that both assumptions are entirely without merit and wholly fabricated by the Respondent and ascribed to the District without any legal or factual basis. The Respondent alleges that the District is assuming: "(1) that there is no record or admission by the Petitioner that it had 'filed' Section 8 inefficiency charges against the Respondent simultaneously with the filing of the

Section 25 charges; and (2) that section 8 inefficiency charges were filed by the Petitioner simultaneously with the Section 25 tenure charges in the prior proceeding." *Id.* The District made no such assumptions and has not made any argument that would lead to the conclusion that the District had not previously contended that the tenure charges, initially filed in August 2014, were and did comprise N.J.S.A. 18A:6-16, or "Section 8 inefficiency charges."

In making such allegation, the Respondent overlooks the Arbitrator's prior decision I/M/O the Tenure Charge of Linda Kelly-Gamble and the State-Operated School District of the City of Newark, Essex County, Docket No. 266-9/14 (January 30, 2015), and the record in this case. This argument is somewhat undercut by her alternate argument that these tenure charges must be dismissed under the inapplicable "law of the case doctrine" – where the Respondent argues that the Arbitrator's prior decision dismissing the Section 25 charges only and to proceed based upon the perfection of new charges under Section 8. *See,* Respondent's Brief at *7.

Here, the initial tenure charges, were brought pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:17.3 and N.J.A.C. 6A:3-5.1. During the prior proceeding this Arbitrator clearly determined that the initial tenure charges had been filed "pursuant to Section 25 of ...TEACH NJ... N.J.S.A. 18A:6-17.3(a)(2)", addressed only those charges and dismissed that charge of inefficiency with prejudice. This was made clear in Arbitrator Pecklers' direct rejection of the District's contention that it had plead an alternate statutory basis under N.J.S.A.

18A:6-16, holding that the Initial Tenure Charges had been plead, and were to be considered, under N.J.S.A. 18A:6-17.3. I/M/O the Tenure Charge of Linda Kelly-Gamble and the State-Operated School District of the City of Newark, Essex County, Docket. No. 266-9/14 (Pecklers, January 2015). The Arbitrator ruled that the initial tenure charges failed under N.J.S.A. 18A:6-17.3, and therefore "**if Petitioner [the District] wishes to proceed against Respondent on an alternative statutory basis, it must do so via the perfection of new tenure Charges before the Commissioner of Education**." *Id.,* at 56. [*Emphasis Added*] This is exactly what the District has done.

The Tenure Charges at issue in this proceeding, the Amended Tenure Charges, were submitted to the State-Appointed Superintendent by Principal Maria Ortiz on or about January 14, 2015. The Amended Tenure Charges, which added the citation to the relevant statutes N.J.S.A. 18A:6-16, were filed in accordance with the procedure and timelines set forth in N.J.A.C. 6A:3-5.3. These tenure charges were subsequently served on the Respondent, who submitted an answer to the District on January 31, 2015. These Tenure Charges were then reviewed and Certified by the State-Appointed District Superintendent and filed with the Department of Education for on March 17, 2015. The Department of Education then reviewed the Tenure Charges after receiving the Respondent's own untimely Answer and transmitted the tenure charges to Arbitrator Pecklers as new tenure charges. In transmitting the tenure charges to an Arbitration proceeding the Department of Education clearly stated that:

> Please be advised that, following receipt of respondent's answer on April 15, 2015, the above-captioned tenure charges which have been docketed **as new charges and which are being processed with respect to Section 8 inefficiency charges only,** are being referred to Arbitrator Michael J. Pecklers as he deems appropriate.

See, correspondence from M. Kathleen Duncan, Director, Bureau of Controversies and Disputes, dated April 22, 2015. [*Emphasis Added*].

Also in regard to Respondent's position that the District's filing of the Amended Tenure Charge was untimely, the District again refers the Arbitrator to the opinion recently issued in I/M/O Tenure Hearing of Marie Ebert, Agency Docket No. 49-3/15, dated May 21, 2015. There, addressing the same issue Arbitrator Denenberg stated that:

> A review of the applicable statutes and regulations, along with the court's decision in Cowan [224 N.J. Super. 737 (App. Div. 1988)], demonstrates that: (1) once tenure charges are filed with the district, the tenured employee has 15 days to submit a written statement of position and evidence; and (2) upon receipt of the employee's statement of position and evidence, or upon expiration of the allotted 15-day time period, the district superintendent shall determine within 45 days whether there is probable cause to credit the evidence in support of the charges and whether such charges are sufficient to warrant a dismissal or reduction in salary. Here, the record demonstrates that the determination of probable cause was made within 45 days of the respondent's response to the amended tenure charges. Accordingly, **I reject the respondent's claim and find that the filing of amended tenure charges was timely.**

See, Exhibit 1 to the Supplemental Certification of Shana T. Don Esq., the Opinion issued by Arbitrator Tia Schneider Denenberg I/M/O Tenure Hearing of Marie Ebert, Agency Docket No. 49-3/15, dated May 21, 2015, at *2 [*Emphasis*

Added].

The District urges the Arbitrator in this matter to reach the same and proper conclusion. As to this issue, the District also wholly disagrees with the Respondent's implication that, because the time periods under the law were "designed to protect the due process rights of educators subject to tenure revocation charges", *see* Respondent's brief at *5, her own due process rights have somehow been violated in any manner in this process. Respondent has now been aware of the charge and the evidence supporting the charge for many, many months. To suggest that Respondent's (unarticulated) due process rights were violated, or even that she has been in any manner prejudiced by the timing of the service of the tenure charges levied against her, is without basis in fact.

Further, pursuant to N.J.S.A. 18A:6-17.3, the Commissioner of Education ("Commissioner") is solely authorized to determine legal challenges to tenure charges. Pugliese v. State-Operated School District of the City of Newark, Docket. No. A-0857-13T2 and Chavez v. State-Operated School District of the City of Newark., Docket. No. A-1012-13T2 (App. Div. May 19, 2015). N.J.S.A. 18A:6-16, which governs this proceeding provides that the Commissioner has **the authority** to determine the sufficiency of a tenure charge "to warrant dismissal or reduction in salary of the person charged" and is required to refer the case to an arbitrator for further proceeding, if such a finding is made. *Id.* Further, the Commissioner is only prohibited from referring a matter to an arbitrator "when a motion for summary decision has been made prior to that time,

the commissioner may retain the matter for purposes of deciding the motion." *Id.*

The Commissioner determined that the charge was sufficient to warrant a penalty and transmitted it to the Arbitrator for a hearing. This vested authority has been recognized by arbitrators in tenure hearings under TEACHNJ. *See,* I/M/O the Tenure Hearing of Edward Newton, State Operated School District of the City of Newark, Essex County, Docket. No. 276-9/14 (March 2015) (An arbitrator recognized the Commissioner statutory authority and provided that "[b]ecause the charges have been deemed sufficient by the Commissioner, I find I need not determine whether or not the District complied with claimed controlling procedures and process, or whether the District was required to comply with a tiered evaluation system or other issue…").

Moreover, the role of an arbitrator in a tenure proceeding is set forth in N.J.S.A. 18A:6-17.1. Under TEACHNJ, tenure charges were no longer transmitted to the Office of Administrative Law and instead the charges are submitted to an arbitrator under strict time lines. *See,* Exhibit 2 to the Supplemental Certification of Shana T. Don Esq., Pugliese v. State-Operated School District of the City of Newark, Docket. No. A-0857-13T2 and Chavez v. State-Operated School District of the City of Newark, Docket. No. A-1012-13T2 (App. Div. May 19, 2015). Once a tenure charge is transmitted to an arbitrator pursuant to N.J.S.A. 18A:6-17.1 based on tenure charges alleging that the employee was inefficient an arbitrator is required to make a determination of fact. Here, the Respondent did not file a Motion for Summary Decision with the

Commissioner. Thus, the Respondent's Motion to Dismiss is not properly before the Arbitrator and this matter must proceed to a hearing.

With respect to the bringing of charges pursuant to Section 8, versus Section 25, for tenure charges based in part on evaluations in the 2012-2013 school year, the District draws to the Arbitrator's attention the conclusion on this issue by an arbitrator in another tenure matter:

> In this instance, however, the tenure dispute arose during the transition to Section 25 as the designated procedure for resolving a charge of inefficiency, and the charge was originally based on both Section 25 and Section 8. **Although a charge involving 2012-2013 evaluations may not be brought under Section 25, no similar impediment prevents the district from seeking removal according to the requirements of Section 8.**

See, Exhibit 1 to the Supplemental Certification of Shana T. Don Esq., the Opinion issued by Arbitrator Tia Schneider Denenberg I/M/O Tenure Hearing of Marie Ebert, Agency Docket No. 49-3/15, dated May 21, 2015, at *3. [*Emphasis Added].*

Here, as in the Ebert matter, the tenure dispute arose during the transition to Section 25 and the District's initial tenure charge was based on both Section 25 and Section 8. Simply because Section 25 may have been found to be procedurally unavailable as the vehicle in which to analyze 2012-2013 evaluations, there is no impediment to the District seeking removal of the Respondent under the legislative scheme of Section 8.

In light of the accelerating trend of Arbitration Decisions under the TEACHNJ Act, the District anticipated that the tenure charges in the prior

proceeding would be dismissed, and began proceeding to amend the tenure charges to cure the defect ultimately cited by the Arbitrator in dismissing the charges in his January 30, 2015 Opinion and Award. Further, in accordance with the Arbitrator's instruction, Amended Tenure Charges were perfected before the Department of Education adding the comprehensive and preexisting charge of "inefficiency" to be assessed on a "preponderance of the evidence" standard rather than the more limited two annual evaluations of the TEACHNJ Act.

For all of the foregoing reasons, the State-Operated School District for the City of Newark respectfully requests that the Respondent's Motion to Dismiss be denied in its entirety and the matter proceed to hearing on the merits.

IV. STATEMENT OF THE CASE

Petitioner preliminarily urges that the instant motion is procedurally defective, as Respondent filed the same late after failing to perfect Ms. Kelly-Gamble's answer to the amended tenure charges in timely fashion. This argument was previously raised before the commissioner in an April 21, 2015 MOTION FOR DEFAULT JUDGMENT and denied in an April 22, 2015 correspondence from Director Duncan indicating that she was forwarding the file including the motion to me for resolution. On this basis, a finding is made that the motion is properly before me.

As the moving party and the proponent of this affirmative defense which as a practical matter operates as a threshold consideration, Respondent Kelly-

Gamble assumes the burden of making a *prima facie* showing by a preponderance of the credible evidence. If that is satisfied, the burden of persuasion shifts to the Petitioner to attempt to rebut this prefatory showing through its affirmative defenses. Following a careful analysis of the respective positions and case citation, and with any facts in dispute viewed in a light most favorable to the non-moving party District, I find that the subject amended tenure charge of inefficiency must be **DISMISSED WITH PREJUDICE,** as the District has been unable to rebut Respondent's *prima facie* presentation.

I note at the outset that as Respondent has correctly submitted there is no procedure set forth in TEACHNJ or the enabling regulations that were subsequently promulgated that provides for the amendment of tenure charges. Petitioner has in fact failed to cite any authority for this legal fiction, and relies upon the identical STATEMENT OF EVIDENCE and exhibits which Principal Ortiz proffered in support of the District's prior N.J.S.A. 6:17.3 charge of inefficiency, which was dismissed with prejudice on January 30, 2015.

The District initially advances an equitable argument, insisting that if the amended tenure charge is not permitted to proceed on the merits, it would be unable to bring tenure charges against Ms. Kelly-Gamble or any other instructors for that matter, based upon their poor evaluations for the 2012–2013 School Year. Such a suggestion of course, ignores the fact that Petitioner was fully able to plead and proceed under alternative Section 8 grounds when the initial tenure charges were filed. *See e.g.,* I/M/O Tenure Hearing of Yarborough, Agency

Docket No. 509-14 (Gerber, December 2014); I/M/O/ Tenure Hearing of Williams, Agency Docket No. 501-14 (Gregory, December 2014); I/M/O/ Tenure Hearing of Brady, Agency Docket No. 478-14 (Klein, December 2014); I/M/O/ Tenure Hearing of Henchey, Agency Docket No. 9-15 (Licata, January 2015); I/M/O/ Tenure Hearing of Pugliese, Agency Docket No. 272-9/12, confirmed, Superior Court of New Jersey, Chancery Division, Essex County, Docket No. C84-13 (September 16, 2013), appeal pending, Docket No. A-000857-13. While the District staunchly maintained that it had pled both inefficiency statutes in the first case, I discounted that claim at page 55 of my AWARD, finding that:

> Petitioner's contention that it has pled an alternative statutory basis under N.J.S.A. 18A:6-16 to entitle a hearing on the sufficiency of the inefficiency charges under the 'old' tenure law is also unpersuasive. Rather, a cursory reference in a pleading does not obviate the fact that the solitary tenure charge of INEFFICIENCY and the accompanying STATEMENT OF EVIDENCE make it abundantly clear the instant charges were brought under N.J.S.A. 18A:6-17.3.

And while Petitioner has seized upon my stray comment regarding the filing of new tenure charges, this was taken out of context and referred to those that were non-efficiency based. It must also be seen that Principal Ortiz's filing of the purported "amended tenure charge" preceded my AWARD by roughly two (2) weeks. It is then not possible that the District was merely relying upon my directive when it filed this charge.

These facts undercut any notion that ineffective teachers have been afforded a "free pass" for 2012 – 2013 substandard evaluations, as the District

posits. Moreover, Section 8 inefficiency charges based upon evaluations conducted before the effective date of TEACHNJ may be heard under the *preponderance of the evidence* standard. *See generally*, I/M/O the Tenure Charge between State-Operated School District, City of Newark and Owen Newson, Agency Docket No. 276-12 (Pecklers, 2013). Subsequent inefficiency charges based upon evaluations performed in accordance with a rubric adopted by a board and approved by the commissioner per N.J.S.A. 18A:6-17.3(d) arising during the 2013–2014 School Year when the TEACHNJ Act was fully implemented and thereafter, are then heard under N.J.S.A. 18A:17.3, with the arbitral considerations of N.J.S.A. 18A:17.2 applied.

In so finding, I categorically reject for a second time the District's repackaged argument that nothing in TEACHNJ or any regulation provides that evaluations performed in 2012–2013 in accordance with an adopted, approved rubric are to be treated differently from those performed in 2013–2014, for purposes of triggering tenure charges under N.J.S.A. 18A:6-17.3. Rather, and without repeating all my prior findings on this issue, such a conclusion overlooks the clear guidance provided by DOE itself (which indicated *inter alia* that all teaching staff members must be trained on the district's evaluation rubric by July 1, 2013) and ignores the procedural and other due process safeguards guaranteed under the Act, *e.g.* the School Improvement Panel, which was not in place during the 2012 – 2013 School Year.

From my perspective, what clearly may not happen therefore, is for

Petitioner to have its premature N.J.S.A. 18A:6-17.3 inefficiency charges dismissed with prejudice, then turn around and "amend" the original inefficiency charges to include the statutory cause of action that should have been brought in the first place, in an attempt to "cure" this fatal defect. In so finding, I do not believe that it is a material consideration that the DOE docketed this under a new number, or that Director Duncan counseled in her July 15, 2015 clarification correspondence that any charges not dismissed were to be heard under the preponderance of the evidence standard.

Nor has the Petitioner provided any evidence based upon the legislative history of the TEACHNJ Act or its plain language, for its position that once a matter is transmitted to an arbitrator by the commissioner, that arbitrator must proceed to a hearing on the merits of the charge. Rather, such a notion is at odds with the avalanche of awards by Panel arbitrators dismissing inefficiency charges filed by this District under N.J.S.A. 18A:6-17.3, which relied in part upon summative evaluations conducted during the 2012–2013 School Year.

Parenthetically, I credit the position of my colleague Arbitrator Tia Schneider Denenberg, that "[n]othing in the relevant statutory provisions limits an arbitrator's ability to resolve motions before holding a hearing. Indeed, demanding a full evidentiary hearing before ruling on potentially dispositive motions could unnecessarily prolong tenure disputes, ignoring the express desire of the Legislature to expedite them." *See,* I/M/O the Tenure Hearing of Marie Ebert, State-Operated School District of the City of Newark, Essex County,

Agency Docket No. 267-9/14 (January, 2015).

In so finding, I respectfully but firmly disagree with the contrary ruling of my colleague Arbitrator Brown in I/M/O/ the Tenure Hearing of Edward Newton, State-Operated School District of the City of Newark, Essex County, Agency Docket No.276-9/14 (Brown, March 2015) which Petitioner has cited, as it relies upon an unduly narrow interpretation of N.J.S.A. 18A:6-17.2 & N.J.S.A. 18A:6-17.3; *see also*, I/M/O the Tenure Hearing of LaRhonda Ragland, State-Operated School District of the City of Newark, Essex County, Agency Docket No. 285-9/14 (Brown, February 2015).

It is also simply not true as the District argues, that the commissioner has upheld N.J.S.A. 18A:6-17.3 inefficiency tenure charges based on evaluations conducted during the 2012–2013 School Year. Instead, that case was disposed of by a default judgment after respondent failed to file an answer in opposition to the tenure charge and not on the merits. *See,* I/M/O the Tenure Hearing of Renee Pulliman-Newell, State-Operated School District of the City of Newark, Agency Docket No. 276-9/14.

In conclusion, the foregoing considerations stand for the cumulative proposition that all inefficiency charges filed against New Jersey educators as a result of evaluations performed during the 2013–2014 School Year and beyond must be brought under N.J.S.A. 18A:6-17.3, which operates as the exclusive means of doing so and not concurrently under N.J.S.A. 18A:6-16. At page 55 of

my previous Kelly-Gamble Award, I stated:

> [i]nstead, as Arbitrator Simmelkjaer reasoned at page 51 of his Award in I.M.O. the Tenure Charge of Inefficiency against Neil Thomas, *supra* Agency Docket No. 244-9/14:
>
> > [i]n the Arbitrator's opinion, had the legislature intended that a teacher charged with inefficiency for two consecutive years of ineffective or partially effective ratings on their annual summative ratings be evaluated utilizing two different and asymmetric evaluation procedures – one consistent with Section 25 of TEACHNJ and the other consistent with Section 8, N.J.S.A, 18A:6-16 – it had the wherewithal to provide the appropriate statutory language. In the absence of such language, the Arbitrator is compelled to dismiss the charges.

See also, I/M/O the Tenure Charge of Inefficiency against Ursula Whitehurst filed by State-Operated School District of the City of Newark, Agency Docket No. 282-9/14 (Simmelkjaer, January, 2015); I/M/O the Tenure Charge of Jodi Thompson, Agency Docket No. 240-8/14 (Brent, June 2015).

Accordingly, based upon the totality of the foregoing considerations, Respondent has presented an un-rebutted *prima facie case* that the subject amended inefficiency tenure charge should be **DISMISSED WITH PREJUDICE**. IT IS SO ORDERED. In light of this finding, Respondent's arguments related to the law of the case, collateral estoppel and res judicata need not be reached.

V. CONCLUSION

Respondent Kelly-Gamble has demonstrated by a preponderance of the credible evidence that the instant MOTION TO DISMISS must be granted.

AWARD

THE INSTANT AMENDED TENURE CHARGE IS DISMISSED WITH PREJUDICE. MS. KELLY-GAMBLE SHALL BE IMMEDIATELY REINSTATED TO HER TEACHING POSITION WITH FULL BACK PAY AND SENIORITY, MINUS INTERIM EARNINGS AND OTHER APPROPRIATE OFFSETS, AND MADE WHOLE FOR THE LOSS OF ANY CONTRACTUAL OR STATUTORY BENEFITS DURING THE INTERVENING PERIOD.

Dated: August 24, 2015
NORTH BERGEN, N.J.

MICHAEL J. PECKLERS, ESQ.
ARBITRATOR

STATE OF NEW JERSEY
SS}
COUNTY OF HUDSON

ON THIS 24TH DAY OF AUGUST, 2015, BEFORE ME PERSONALLY CAME AND APPEARED **MICHAEL J. PECKLERS, ESQ.**, TO BE KNOWN TO ME TO BE THE INDIVIDUAL DESCRIBED HEREIN AND WHO EXECUTED THE FOREGOING INSTRUMENT, AND HE DULY ACKNOWLEDGED TO ME THAT HE EXECUTED THE SAME.

NOTARY PUBLIC

CARMEN J. GONZALEZ
Notary Public of New Jersey
ID. No. 29319
Commission Expires: Oct 7, 17

2 79-15

IN THE MATTER OF THE APPLICATION :

OF LORRAINE GEORGE-BITTINGS, :

NEW JERSEY STATE BOARD OF EXAMINERS:

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Pro-se petitioner contended that the respondent State Board of Examiners (SBE) improperly denied her application for a standard educational services certificate with a school counselor endorsement. Petitioner acknowledged that she lacked the required credits in a supervised counseling practice, but requested that her 15 years of experience as a school clerk, her six month practicum as a mental health counselor/educator, and her six months internship as a mental health counselor be accepted as alternative experience or education in lieu of the required six credits in a supervised counseling practice in a preschool through grade twelve school setting. The SBE asserted that petitioner lacked the required six semester-hour graduate credit supervised practicum in a preschool through grade 12 setting, and failed to establish a one-to-one correspondence between the licensure deficiency and her experience and education. The SBE filed a motion for summary decision.

The ALJ found, *inter alia*, that: there is no genuine issue as to material fact, and the matter is ripe for summary decision; the SBE appropriately determined that petitioner failed to meet her burden of proving that the SBE improperly denied her application; petitioner has not proved that the SBE's determination to deny her application was inconsistent with the statutory and regulatory provisions for issuance of a school counselor certificate; and that the SBE's refusal to accept her education and work experience in lieu of six credits in supervised counseling was consistent with statutory and regulatory provisions and within its discretion. Accordingly, the ALJ granted the SBE's motion for summary decision.

Upon review, the Commissioner concurred with the findings of the ALJ and adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

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

Issued 8/26/15

OAL DKT. NO. EDU 1448-15
AGENCY DKT. NO. 365-12/14

IN THE MATTER OF THE APPLICATION	:	COMMISSIONEROF EDUCATION
OF LORRAINE GEORGE-BITTINGS,	:	DECISION
NEW JERSEY STATE BOARD OF EXAMINERS	:	

This matter concerns petitioner's request for issuance of a standard educational services certificate with a school counselor endorsement[1] from respondent, New Jersey State Board of Examiners ("Board"), which would authorize her to perform school counseling services in grades preschool through 12. *N.J.A.C.* 6A:9B-12.8. The record, along with the Initial Decision of the Office of Administrative Law, have been reviewed. No exceptions were filed with the Commissioner under *N.J.A.C.* 1:1-18.4.

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination, for the reasons expressed within the Initial Decision. Petitioner lacks the required six credits for a school counselor endorsement, which must be earned through a "supervised counseling practicum in a preschool through grade 12 school setting." *N.J.A.C.* 6A:9B-12.8(b)(2)(vi). Although petitioner requested substitution of her experience as a school clerk, along with her practicum and internship as a mental health counselor – pursuant to *N.J.A.C.* 6A:9B-4.13 – in place of the six credits she admittedly lacks, the Board reasoned that petitioner "did not provide compelling and cogent evidence of a one-to-one correspondence between the licensure deficiency, *i.e.*, a school counseling practicum in a school setting, and her

[1] Although the certificate and endorsement in question are referred to as a "school counselor certificate" throughout the record, a certificate and an endorsement are not synonymous. *See Howley v. Ewing Twp. Bd. of Ed.*, 1982 *S.L.D.* 1328.

experience and education."[2] (Board of Examiners Decision, at 3) In conclusion, the Commissioner finds that the sufficient, credible evidence in the record adequately supports the Board's determination that petitioner has not satisfied the requirements for issuance of a standard educational services certificate with school counselor endorsement, and further finds that the Board's determination is consistent with relevant statutory and regulatory provisions.

Accordingly, the Initial Decision is adopted as the final decision in this matter for the reasons stated therein. Respondent's motion for summary decision is granted and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/26/15

Date of Mailing: 8/26/15

[2] The Board cannot waive statutory requirements, but does have discretion to accept alternate education or experience in place of a requirement if the proffered education or experience is equivalent to the area of deficiency. *N.J.A.C.* 6A:9B-4.13(a).

[3] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 01448-15

IN THE MATTER OF THE APPLICATION
OF LORRAINE GEORGE-BITTINGS,
NEW JERSEY STATE BOARD OF EXAMINERS.

Lorraine George-Bittings, pro se

Lauren A. Jensen, Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: June 29, 2015 Decided: July 22, 2015

BEFORE **EVELYN J. MAROSE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Lorraine George-Bittings, challenges the denial of her application for a school counselor certification by respondent, the New Jersey Department of Education State Board of Examiners (Board).

This matter was transmitted to the Office of Administrative Law (OAL) pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, on January 30, 2015. Pursuant to the deadlines detailed in the Prehearing Order of February 25, 2015, the pending

Motion for Summary Decision was received on February 27, 2015. Opposition was received on May 12, 2015. Reply papers received on June 8, 2015. Oral argument was heard on June 22, 2015. Supplemental submissions were received on June 29, 2015, at which time the record closed.

STANDARD FOR SUMMARY DECISION

Summary Decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issues to the trier of fact. R. 4:46-2:

The standard for granting Summary Judgment (decision) is found in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995). In Brill, the Supreme Court adopted a standard that "requires the motion judge to engage in an analytical process essentially "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Id. at 533 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 251-252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214). To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed worthless and will serve no useful purpose." Brill, supra, 142 N.J. at 541.

The Court stated that the motion judge is to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 540 (quoting Liberty Lobby, supra, 477 U.S. at 251-252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214).

FACTUAL DISCUSSION AND FINDINGS

A review of the factual assertions submitted by the parties indicates that the following material facts are not in dispute:

1.) Petitioner applied for a school counselor certificate on March 6, 2014.

2.) On April 3, 2014, petitioner was advised that an evaluation of her credentials was completed and that she had not met all the certification requirements. The Board noted that petitioner had not satisfied the requirement that she receive a minimum of six credits in a supervised counseling practice in a preschool through grade twelve school setting. The Board advised petitioner when she completed this requirement she needed to submit, along with her official transcript an original letter from the school counseling department Chairperson at the college or university that supervised her practicum in a school setting. The Board advised petitioner that a practicum in a clinical setting would not meet the certificate requirement.

3.) On April 24, 2014, petitioner appealed the denial of her application.

4.) The Office of Licensure and Credentials provided her with the procedures to appeal an adverse credentials evaluation to the Board and how to request a review of alternative education and/or experience to complete the requirements for a school counselor certificate. Petitioner was advised that the Board does not waive requirements but rather would determine if the applicant's alternate experience would demonstrate the required one-to-one relationship.

5.) On May 30, 2014, petitioner submitted her appeal papers, with supporting documentation. Petitioner acknowledged that she satisfied all of the necessary requirements to obtain a school counselor certificate except to obtain the minimum credits in a supervised counseling practice. She requested that her fifteen years experience as a school clerk in the Jersey City School District, that her six months practicum as a mental health counselor/educator and that her six months internship as a mental health counselor be accepted as alternative experience or education in lieu of six credits in a supervised counseling practice

in a preschool through grade twelve school setting. She submitted documentation that indicated how she was able to develop meaningful relationships with students while employed as a school clerk, how she assisted with guidance department tasks and how she wanted to "sustain the qualities of an effective school counselor." Petitioner also submitted numerous letters of recommendation from various school administrators praising her job performance, stating that she was "more than a school clerk," and opining that she "would be excellent counselor." She further submitted certificates recognizing her scholastic and professional excellent.

6.) The Board determined that the alternate education and experience detailed by petitioner did not provide compelling and cogent evidence of a one-to-one correspondence as to the licensure deficiency. The Board noted that "petitioner did not demonstrate a relationship between her roles and responsibilities as a school clerk and those of a school counselor, and did not proffer a detailed-one to-one correspondence between the practicum/internship experiences and the licensure deficiency." The Board noted that the adverse determination did not involve a question of character but rather a licensure deficiency or non-compliance with regulation.

7.) The Board further stated that the practicum experience in a school setting serves as a culminating experience for potential school counselors who are completing professional preparation to meet the demands of a school or district. Its purposeful content and orientation to the school's culture, including, but not limited to testing, scheduling, academic advisement, child and adolescent counseling enhances the knowledge and skills of the school counselor in his/her professional growth and development. For these reasons, the Board finds that Ms. Bittings would benefit from this structure and suggests that she seek to fulfill this requirement to familiarize herself with the breadth of roles, responsibilities, and age groups in order to serve the public school children of New Jersey.

8.) The Board again denied petitioner's request for issuance of a school counselor certificate, without her completion of a minimum of six credits in a supervised counseling practice in a preschool through grade twelve school setting.

9.) The Board decision was mailed to petitioner on September 25, 2014.

10.) Petitioner filed the present petition to appeal on December 12, 2014.

11.) In lieu of filing an answer to petition, on January 28, 2015, the Board filed a Motion to Dismiss.

12.) On February 25, 2015, a prehearing conference was conducted. The Motion to Dismiss was converted to a Motion for Summary Decision. Dates for the filing of opposition and reply papers were scheduled.

13.) During Oral Argument, counsel for the Board adamantly stated that the Board had not accepted any of petitioner's offered alternate education in lieu of six credits in a supervised counseling practicum experience in a preschool through grade twelve school setting. In contrast, petitioner noted her belief that she had received documentation from the Board in which the Board accepted part of her offered alternate education—giving her three credits toward the required six credits.

14.) The parties were permitted to submit supplemental documentation on point.

15.) The only documentation submitted by petitioner was a letter from Walden University confirming that, as part of the school's master's program in mental health counseling, petitioner completed a three-credit practicum at Hoboken University Medical Center, which provides direct services to school districts in school settings. Petitioner submitted no documentation in which the Board stated that it was giving petitioner some credit for her offered alternate education.

16.) In contrast, the Board submitted the Certification of Dr. Robert R. Higgins, Secretary for the State Board of Examiners and the Director of Certification and Induction within the New Jersey Department of Education. Dr. Higgins detailed the review of petitioner's application and her request for credit for alternate experience. He affirmed that the Board had not accepted any of petitioner's offered alternate credit toward the mandatory six credits in a supervised counseling practicum in a school setting. He expressly noted that the three-credit practicum offered by petitioner was as a mental health counselor, not a school counselor, and, thus, was not evaluated to be a "one to one" equivalent. The Board also provided its letter to petitioner dated April 3, 2015, where it was

noted that petitioner had not completed six credits in a supervised counseling practicum in a school setting and that a clinical setting would not be accepted. Further, it provided its Decision of July 15, 2014, wherein it affirmed that, in order to qualify for a school counselor certificate, petitioner needed to complete a six-credit supervised counseling practicum in a preschool through grade twelve school setting and that after careful consideration, it did not find that the alternate experience offered by petitioner was "one on one" to the required counseling practicum needed for a school counselor certificate.

LEGAL ANALYSIS AND CONCLUSIONS

The legislature has designated the Board as the body responsible for the issuance and revocation of appropriate certificates to teach or to administer, as well as the direction or supervision of the teaching, instruction or education guidance of students in public schools. N.J.S.A. 18A:6-38. A decision of the Board denying a request for the issuance of a certificate will not be disturbed as long as the decision "is consistent with the applicable statutory and regulatory provisions." Walder v. N.J. State Bd. of Exam'rs, EDU 08530-14 Initial Decision (Nov. 10, 2014), http://njlaw.rutgers.edu/collections/oal/. A petitioner bears the burden of showing, by a preponderance of the evidence that the Board improperly denied her application.

An applicant, who receives an evaluation, identifying areas of deficiency, may provide the Board with evidence of alternate education or experience. The Board has the discretion to discretion to accept the alternate education or experience if it determines that the experience establishes a one to one correspondence with the statutory requirements. The Board cannot waive statutory requirements. Farrar v. State Bd. of Exam'rs, EDU 13763-08, Initial Decision (Sept. 9, 2009), adopted, Bd. of Exam'rs (July 26, 2010), http://njlaw.rutgers.edu/collections/oal/.

Pursuant to N.J.A.C. 6A:9B-12.8,[1] to be eligible for the standard educational services certificate with a school counselor's endorsement, a candidate must hold a

[1] This regulation, prior to a re-codification, was referred to as N.J.A.C. 6A:9-13.8.

master's degree or higher degree from a regionally accredited college or university and successfully complete one of the following:

1.) A Departmental-approved graduate program in school counseling; or

2.) A minimum of forty-eight graduate semester-hour credits in the following areas:

i. Counseling: minimum of eighteen semester-hour credits that must include study in theory and procedures or individual and group counseling, counseling and interviewing techniques, and career counseling;

ii. Testing and evaluation: minimum of three semester hours;

iii. Psychology: minimum of six semester hours in study related to child and adolescent psychology, psychology of exceptional children and psychology of learning;

iv. Sociological foundations, minimum of six semester-hours that must include study in community agencies, organizations and resources and multicultural counseling;

v. Statistics and research methods: a minimum of three semester-hour credits;

vi. Supervised counseling practicum in a preschool through grade twelve school setting: minimum six credits; and

vii. The remaining six semester hours of study may be chosen from among the topics listed in (b)(2)(i) through (vi) above or education.

As detailed above, by regulation, one of the requirements to obtain a school counselor certificate is a minimum of six credits in supervised counseling practicum in a preschool through grade twelve school setting. Petitioner applied for a school counselor certificate. After the Board reviewed her application and noted that she did not have six credits in a supervised counseling practicum, it declined to provide her with a school counselor certificate until she obtained six credits in supervised counseling.

Petitioner requested that the Board accept her education and work experience in lieu of the six credits in supervised counseling. The Board's refusal to do was consistent with statutory and regulatory provisions and within its discretion as the entity designated by the legislature as the body responsible for the issuance and revocation of appropriate certificates to teach or to administer, as well as the direction or supervision of the teaching, instruction or education guidance of students in public schools.

I **CONCLUDE** that petitioner has not proved, by a preponderance of the credible evidence, that the Board improperly denied her application.

I **CONCLUDE** that petitioner has not proved, by a preponderance of the credible evidence, that the Board's determination to deny her application was inconsistent with the statutory and regulatory provisions for issuance of a school counselor's certification.

Under the circumstances, there is no basis for a rational fact-finder to resolve the disputed issue in favor of petitioner. Therefore an evidentiary hearing is not warranted as the Board is entitled to summary decision in its favor.

ORDER

It is hereby **ORDERED** that respondent's Motion for Summary Decision be **GRANTED**; and

It is further **ORDERED** that the respondent's determination that petitioner has not satisfied all requirements to qualify for a school counselor certification is **AFFIRMED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

July 22, 2015
DATE

EVELYN J. MAROSE, ALJ

Date Received at Agency:

Date Mailed to Parties: JUL 28 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

kep

OAL DKT. NO. EDU 4301-14
AGENCY DKT. NO. 42-2/14

PHILIP JOHNSON, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner approves the parties' Stipulation of Settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/26/15

Date of Mailing: 8/26/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 04301-14
AGENCY DKT. NO. 42-2/1

PHILIP JOHNSON, JR.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,
Respondent.

Nancy I. Oxfeld, Esq., for petitioner (Oxfeld Cohen, P.C., attorneys)

Scott Zucker, Esq., for respondent (Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC, attorneys)

Record Closed: July 20, 2015 Decided: July 21, 2015

BEFORE **LELAND S. MCGEE**, ALJ:

On April 9, 2014, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. The matter was scheduled for settlement conference on June 30, 2015, but the date was adjourned because the parties agreed to settle the matter. A signed

copy of the Settlement Agreement and General Release indicating the terms of settlement was forwarded to the undersigned July 20, 2015 and is attached hereto.

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

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

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

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

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

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

July 21, 2015
DATE

LELAND S. McGEE, ALJ

Date Received at Agency:

7-24-15
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: JUL 24 2015

lr

SCIARRILLO, CORNELL, MERLINO, MCKEEVER & OSBORNE, LLC
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(908) 481-5000
Attorneys for Livingston Board of Education

PHILIP A. JOHNSON, JR. Petitioner, v. LIVINGSTON BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY Agency Ref No.: 42-2/1 OAL Docket No. EDU-04301-2014N **STIPULATION OF SETTLEMENT**

The parties involved herein have voluntarily resolved all disputed matters and enter into the following Settlement Agreement (the "Settlement") that fully disposes of all issues in controversy between Philip Johnson ("Johnson") and the Livingston Board of Education (the "District"):

WHEREAS, Johnson is a non-tenured ~~custodian~~ maintenance employed by the District; and P.J. 6/23/15

WHEREAS, on or about April 1, 2011, Johnson was purportedly injured in a work-related accident; and

WHEREAS, Johnson missed time from work after the purported April 1, 2011 work-related accident; and

WHEREAS, Johnson claims he was charged 47 sick days for time missed from work as a result of the purported April 1, 2011 work-related accident; and

WHEREAS, the District disputed whether Johnson missed those 47 days from work as a result of his purported work-related injury; and

WHEREAS, Johnson filed a petition with the Division of Workers' Compensation, seeking compensation for his work-related injuries, under Claim Petition No. 2011-14932; and

WHEREAS, on or about November 25, 2013, the Division of Workers' Compensation entered an Order Approving Settlement with Dismissal, pursuant to N.J.S.A. 34:15-20; and

WHEREAS, Johnson subsequently filed the instant petition of appeal seeking that he be credited for the 47 sick days that he was charged for time missed from work after April 1, 2011; and

WHEREAS, the parties engaged in settlement discussions regarding this issue and seek to amicably resolve this matter.

NOW THEREFORE, the parties hereby stipulate and agree as follows:

1. The District agrees to credit Johnson with thirty (30) accumulated sick leave days.

2. This Settlement shall not constitute a precedent in any matters involving other employees.

3. Johnson waives all claims of any nature against the District with regard to this matter, including fees, or other monetary relief, with the exception of workers' compensation.

4. In exchange for the good consideration set forth in Paragraph 1 above, the sufficiency of which is hereby acknowledged by the parties, Johnson releases and discharges the District, Board of Education, and its Superintendent and any and all other officers, employees, agents, representatives, successors and assigns of the District (the "Released Parties") with respect to all claims or rights that he may have against the District and the Released Parties relating to his employment with the District up to this point in time. This includes, without limitation the waiver of any and all claims, charges, or demands, known or unknown, that have arisen or that may arise relating to Johnson's employment with the District up to this point in time, including but not limited to any and all rights or claims he may have regarding discrimination on any basis, or any federal or state civil rights law, or any alleged violation under Title VII of the Civil Rights Act of 1964, as amended; the Age Discrimination in Employment Act; the Older Workers Benefit Protection Act; the Americans with Disabilities Act; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Employment Retirement Income Security Act of 1974, as amended; the New Jersey Law Against Discrimination; the Conscientious Employee Protection Act; the Fair Labor Standards Act; the National Labor Relations Act; the Family

Leave Act or Family Medical Leave Act; the New Jersey Wage and Hour Law; the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other federal, state, or local statute or common law relating to employment, wages, hours, or any other terms and conditions of employment as well as any other alleged violations of any federal, state or local law, regulation or ordinance, and/or contract or implied contract or collective bargaining/contractual claim or tort law or public policy or whistleblower claim, having any bearing whatsoever on his employment with the District up to this point in time, including but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys' fees, costs and/or future wage loss, except for workers compensation claims. Johnson agrees to hold harmless and indemnify the District and the Released Parties for any costs or expenses associated with the enforcement of this Settlement Agreement and the covenants and representations contained therein should enforcement of this Settlement Agreement become necessary.

5. Notwithstanding Paragraph 9 of this Settlement Agreement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 4 for any act which may have occurred up to this point in time, Johnson agrees not to seek or accept any resulting relief whatsoever.

6. The parties respectively acknowledge that counsel has advised them regarding this Settlement and that each is signing this Settlement freely and voluntarily, without duress, coercion or pressure from the other party.

7. This Settlement constitutes the full agreement the parties, and shall be construed and enforced in accordance with New Jersey law.

8. If any provision or portion of a provision of this Settlement Agreement is held by a court of competent jurisdiction, or determined under applicable federal or state law to be invalid, void, or unenforceable, the remaining provisions or portions of the provision will continue and remain in full force and effect.

9. This Agreement shall remain confidential to the maximum extent permitted by law.

10. This Agreement and General Release and Waiver contain the entire Agreement and understanding between the Parties and constitutes a full and final agreement in any and all issues relating to this matter, except that the Parties reserve their right to enforce this Agreement, if necessary.

11. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

12. The Parties' entry into this Agreement shall not constitute nor shall it be interpreted as an admission of wrongdoing or guilt, or liability in any manner on either of the Parties' part. Any such obligation or liability on either Party's part is expressly denied. The Parties have entered into this Agreement solely to compromise disputed claims.

13. This Agreement may not be altered, amended or modified except in writing, signed and duly authorized by all Parties.

14. This Settlement Agreement is subject to ratification by Livingston Board of Education and will only become effective and binding on the District upon the approval of the Livingston Board of Education.

Dated: 6/23/15

Philip Johnson

LIVINGSTON BOARD OF EDUCATION

Dated: 9/15/15

CERTIFICATION

I, PHILIP A. JOHNSON, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my representative questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: 6/23/15

PHILIP JOHNSON

LIVINGSTON BOARD OF EDUCATION
Livingston, New Jersey

The following was approved by the Livingston Board of Education at its July 15, 2015 meeting:

4.11 Settlement Agreement

Resolved, that the Livingston Board of Education approves the Settlement Agreement with Employee #4380 which is on file at the Board of Education office.

Certified to be a true copy of Resolution
approved on July 15, 2015

Steven K. Robinson, Board Secretary

SCIARRILLO CORNELL
MERLINO, MCKEEVER & OSBORNE, LLC
Attorneys at Law

E-mail: edlawgroup@sciarrillolaw.com

July 20, 2015

Sent via facsimile and regular mail
Honorable Leland S. McGee
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: Johnson v. Livingston Board of Education
OAL Dkt. No. EDU 04301-2011N
Agency Ref. No. 42-2/1

Dear Judge McGee:

Enclosed please find the Board-approved Stipulation of Settlement Agreement and Board Resolution approving same for the referenced matter.

Thank you for Your Honor's Courtesies.

Respectfully submitted,
SCIARRILLO, CORNELL, MERLINO, MCKEEVER & OSBORNE, LLC

Anthony P. Sciarrillo
APS/sdz
Enclosure
cc: Nancy Iris Oxfeld, Esq. (via electronic mail)
Steven Robinson, SBA/BS (via electronic mail)

OAL DKT. NO. EDU 17623-13
AGENCY DKT. NO. 184-8/13

ANTIONNA ROBINSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/26/15

Date of Mailing: 8/26/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 17623-13

AGENCY DKT. NO. 184-8/13

ANTIONNA ROBINSON,

Petitioner,

v.

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

Respondent.

Antionna Robinson, petitioner pro se

Cherie L. Adams, Esq., for respondent (Adams, Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: July 13, 2015 Decided: July 28, 2015

BEFORE **JOHN F. RUSSO, JR.**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 9, 2013, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the settlement agreement. (J-1.) The resolution by the Board is also attached. (R-1.)

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

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

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

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

July 28, 2015
DATE

JOHN F. RUSSO, JR., ALJ

Date Received at Agency: Mailed 7/31/15

Date Mailed to Parties: 7/31/15
/bdt

RESOLUTION AUTHORIZING APPROVAL OF SETTLEMENT AGREEMENT WITH ANTIONNA ROBINSON

WHEREAS, the Trenton Board of Education has reviewed the Settlement Agreement between Antionna Robinson and the Board of Education in regard to Docket No. EDU 17623-2013S/Agency Ref. No. 184-8/13; and

WHEREAS, the Board has voted on this date to accept the Settlement Agreement with Antionna Robinson; and

WHEREAS, the Board designates and authorizes the Board President to execute the Settlement Agreement on the Board's behalf; now therefore be it

RESOLVED that the Trenton Board of Education approves the Settlement Agreement between Antionna Robinson and the Board of Education

Denise Millington
Board President

Jayne S. Howard
School Business Administrator/Board Secretary

February 23, 2015
ADOPTED

File No. 15062-5010

Law Offices
PARKER McCAY P.A.
Carl Tanksley, Jr, Esquire
ID No. 7231996
1009 Lenox Drive, Building Four East
Suite 102A
Lawrenceville, New Jersey 08648
(609) 896-4222
Attorneys for Respondent Trenton Board of Education, in the County of Mercer

Antionna Robinson, Petitioner, v. Trenton Board of Education, Shelly Jallow, Brenda Torrence, and Mary Scott-White Respondents.	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO.** EDU 17623-2013 S **AGENCY REF. NO.** 184-8/13 **SETTLEMENT AGREEMENT**

1. Petitioner Antionna Robinson has filed a petition before the Commissioner of Education under Agency Reference number 184-8/13 and docketed as EDU 17623-2013 S, requesting that the Commissioner of Education direct the Board of Education of the City of Trenton ("Trenton") to issue to her a high school diploma.

2. Ms. Robinson believes that she has fulfilled all state and local requirements for graduation from high school. She indicates in her petition that she has taken and passed all required courses and the AHSA, has earned a satisfactory grade point average in those requirements, and has fulfilled her attendance obligations so as to be eligible for graduation.

3. Ms. Robinson states that while she completed the vast majority of her academic requirements via daily classroom attendance, she also supplemented her traditional classroom coursework through an internet based academic program

called Advanced Academics. Ms. Robinson further asserts that Advance Academics and the courses they offer have been approved by Trenton as part of the regular curriculum.

4. Trenton disputes that Ms. Robinson has fulfilled the necessary coursework to earn a high school diploma. Trenton acknowledges the fact that Ms. Robinson has a grade point average and attendance sufficient to meet graduation standards. However, Trenton disputes that Ms. Robinson has completed the necessary coursework to fulfill her graduation requirements.

5. State graduation requirements for 2012 required that Ms. Robinson successfully complete 20 academic credits in the general course of English. Ms. Robinson's transcript demonstrates that she has currently fulfilled 17.5 of those 20 credits.

6. State graduation requirements for 2012 required that Ms. Robinson successfully complete 15 academic credits in the general course of Science. Ms. Robinson's transcript demonstrates that she has currently fulfilled 12.5 of those 15 credits.

7. The parties acknowledge that Ms. Robinson attended Advance Academics during the Fall of 2012; successfully completing Part A of Biology and Part B of English IV. These courses and the equivalent credits are reflected on Ms. Robinson's current transcript.

8. The parties agree that in order to earn a diploma, Ms. Robinson must enroll in Advance Academics and successfully complete Part B of Biology and Part A of English IV.

9. If the required courses are unavailable through Advance Academics, Ms. Robinson may utilize another approved online course provider. However, Trenton shall approve any alternate provider before Ms. Robinson enrolls in classes.

10. Trenton agrees that the only remaining requirements for graduation are those listed in this settlement agreement. Upon proof of completion of the above two courses with a passing grade of 60% or higher in each class, Trenton shall issue a high school diploma to Ms. Robinson.

11. Ms. Robinson agrees to dismiss all claims that were or could have been raised based on the facts underlying this petition. This dismissal shall be with prejudice, meaning that Ms. Robinson shall be prohibited from initiating litigation to seek her high school diploma in the future. The dismissal shall include all parties and employees of the board of education and board members.

12. The parties agree that this agreement may be signed in one or more counterparts.

Date 7-11-14 Antionna Robinson
Antionna Robinson

Date _____ _____
Shelly Jallow

Date _____ _____
Mary Scott-White

Date _____ _____
Patrice Daley, Board President

Date _____ _____
Jayne Howard, BA/BS

11. Ms. Robinson agrees to dismiss all claims that were or could have been raised based on the facts underlying this petition. This dismissal shall be with prejudice, meaning that Ms. Robinson shall be prohibited from initiating litigation to seek her high school diploma in the future. The dismissal shall include all parties and employees of the board of education and board members.

12. The parties agree that this agreement may be signed in one or more counterparts.

Date _____ _____
Antionna Robinson

Date Feb. 18, 15 _____
Dr. Kendra Johnson, Chief Academic Officer

Date July 22, 2014 _____
Mary Scott-White

Date 2/18/15 _____
Denise Millington, Board President

Date _____ _____
Jayne Howard, BAABS

282-15L

State of New Jersey

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

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

DAVID C. HESPE
Commissioner

August 26, 2015

Angela L. Velez, DAG
Office of the Attorney General
Department of Law and Public Safety
Division of Law
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625-0112

Kerri A. Wright, Esq.
Porzio, Bromberg & Newman, P.C.
100 Southgate Parkway
P.O. Box 1997
Morristown, New Jersey 07962-1997

Re: *Board of Education of the Township of Springfield, Union County and Board of Education of the Borough of West Cape May, Cape May County v. New Jersey Department of Education, OAL Dkt. No. EDU 4191-14, Agency Dkt. No. 49-3/14.*

Dear Counsel:

I have reviewed the parties' submissions in connection with the New Jersey Department of Education's (Department) request for interlocutory review of Administrative Law Judge (ALJ) Miller's August 4, 2015 order requiring disclosure of documents that the Department contends are subject to the deliberative process privilege.

The longstanding justification of the deliberative process privilege acknowledges an interest in protecting government advisory opinions, recommendations and deliberations that would reveal the process by which its decisions and policies are formulated, as well as "the desire to prevent disclosure of proposed policies before they have been fully vetted and adopted by a government agency." *Ed. Law Ctr. v. Dep't of Ed.*, 198 *N.J.* 274, 285-86 (2009); *Ciesla v. Dep't of Health*, 429 *N.J. Super.* 127, 140-41. "Without such protection, policy advisers would be reluctant to express on paper or a computer screen their tentative thoughts on a pending issue, lest their words be prematurely launched into the public domain." *Ciesla*, *supra*, 429 *N.J. Super.* at 140-41.

In order for the deliberative process privilege to apply, the document at issue must be pre-decisional, or "generated before the adoption of an agency's policy or decision." *IMO Integrity Ins. Co.*, 165 *N.J.* 75, 84 (2000). Next, the document must be considered "deliberative." *Id.* at 84. Deliberative documents often contain "opinions, recommendations or advice about agency policies." *Id.* at 84-85. In addition, "factual material that reveals the nature of the decision-making process" also warrants protection under the deliberative process privilege. *Ed. Law. Ctr.*, *supra*, 198 *N.J.* at 297. When analyzing a document, "the deliberative nature of the material sought must be functionally determined based on the document's nexus to the decision-making process and its capacity to expose the agency's deliberations during that process." *Ibid.*

Upon review of the parties' submissions, and all of the documents at issue, I find that the following pre-decisional, deliberative e-mail messages exchanged between Department employees – which were deemed not privileged by the ALJ – contain advisory opinions and recommendations about its decision-making process and policies and are therefore subject to the deliberative process privilege: DOE155-156, 157-158, 159-160, 162-166, 167-172, 306-307, 310-313, 314-317, 321-325, 326-332, 338-348, 349-360, 363-375, 376-392, 395-396, 397-399, 400-403, and 404.[1] With the exception of DOE404, the release of these materials would expose the agency's deliberations leading up to its October 3, 2013 and December 12, 2013 policy decisions concerning School Choice Program enrollment caps. As to DOE404 – which was authored on December 13, 2013 – it is pre-decisional and deliberative in the sense that it discusses further review and potential revision of School Choice Program target enrollment numbers for 2014-2015.

I also find that the following pre-decisional, deliberative e-mail attachments – which were deemed not privileged by the ALJ – contain drafts, spreadsheets, charts, projections, and other manipulated data that reveal the nature of the Department's decision-making process as to School Choice Program target enrollment numbers for 2014-2015: 178-190, 233-287, 290, 361-362, and 405-409. These documents bear a significant nexus to the decision-making process and are discussed among Department employees within the e-mail conversations listed above. If released, the documents – created to aid the Department's deliberations – have the capacity to expose the agency's deliberations as to development of its policies regarding School Choice Program target enrollment. Therefore, these documents are likewise subject to the deliberative process privilege.

I further find that DOE 393-394 – an October 31, 2013 internal memorandum to the Commissioner from a Department employee discussing School Choice Program funding and target enrollment for 2014-2015 – is a pre-decisional, deliberative document containing opinions and policy recommendations subject to the deliberative process privilege.

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[1] According to page 11 of its brief, the Department redacted the deliberative content ("email conversations between NJDOE employees") from DOE155-156, 162-166, 338-348, 349-360, 363-375, and 376-392 and provided the remainder of the documents to petitioners. Because these documents contain – in part – opinions, recommendations, or advice about agency policies subject to the deliberative process privilege, the Department's redaction of its internal conversations from the documents prior to disclosure was appropriate. *See Gannett N.J. Partners, L.P. v. County of Middlesex*, 379 *N.J. Super.* 205, 220 (App. Div. 2005) (discussing redaction of deliberative entries prior to release of documents).

Once the privilege is invoked, the presumption of confidentiality afforded to deliberative materials can only be overcome "upon a showing that the need for the materials overrides the government's interest in confidentiality." *Ed. Law Ctr.*, *supra*, 198 *N.J.* at 286-87. "Only in 'exceptional' cases will it be deemed consistent with the public interest to compel an agency to produce inter- or intra- agency advisory opinions." *Ciesla*, *supra*, 429 *N.J. Super.* at 146. Among the factors to be considered are "the importance of the evidence [to petitioners], its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies." *Integrity*, *supra*, 165 *N.J.* at 88. While petitioners' brief generally asserts that the documents at issue are important to this "contractual dispute", petitioners have failed to demonstrate a substantial need for the deliberative materials listed above that would override the Department's interest in confidentiality.

Therefore, the ALJ's determination ordering disclosure of the documents listed above is rejected as the documents are protected by the deliberative process privilege, and petitioners have not demonstrated a substantial need for the documents that would warrant disclosure. The Commissioner concurs with the balance of the ALJ's letter order of August 4, 2015.

Accordingly, the ALJ's August 4, 2015 order is modified as indicated herein.

IT IS SO ORDERED.[2]

Sincerely,

Peter Shulman
Acting Commissioner of Education

c: W. Todd Miller, ALJ
Clerk, Office of Administrative Law
Executive County Superintendents
State Law Library

PS/MKD/DCS

VIA FACSIMILE AND REGULAR DELIVERY

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

255-15

OAL DKT. NO. EDU 9802-14
AGENCY DKT. NO. 158-6/14

J.W., ON BEHALF OF MINOR CHILD, M.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that the Settlement Agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation. Furthermore, the file does not contain a copy of the Board's resolution approving the Settlement Agreement and designating the Interim Director to sign the agreement on its behalf, as required – under these circumstances – by *N.J.A.C.* 6A:3-1.13, nor is the resolution attached to the Settlement itself. Without either the Board attorney's signature or the appropriate Board resolution and signature of its designee, the Commissioner cannot approve the within Settlement Agreement. Additionally, a true and exact redacted copy of "Exhibit A" – as referenced in Paragraph 1 – is not attached to the Settlement Agreement, nor is it contained within the file.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement and Release consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/26/15
Date of Mailing: 8/26/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9802-14
AGENCY DKT. NO. 158-6/14

J.W. ON BEHALF OF MINOR CHILD, M.W.,
Petitioner,
v.
TOWNSHIP OF NORTH BRUNSWICK
BOARD OF EDUCATION, MIDDLESEX COUNTY
Respondent.

Denise Lanchantin Dwyer, Esq. for petitioner (Law Office of Denise Lanchantin Dwyer, attorney)

Marc G. Mucciolo, Esq., for respondent (Schwartz, Simon, Edelstein and Celso, attorneys)

Record Closed: July 14, 2015 Decided: July 14, 2015

BEFORE **TIFFANY M. WILLIAMS**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 5, 2014 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

July 14, 2015
DATE

Tiffany M. Williams
TIFFANY M. WILLIAMS, ALJ

Date Received at Agency: 7-16-15

Date Mailed to Parties: JUL 16 2015

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

SCHWARTZ SIMON
EDELSTEIN & CELSO LLC
100 South Jefferson Road, Suite 200
Whippany, New Jersey 07981
(973) 301-0001
Attorneys for Respondent, North
Brunswick Township Board of Education

J.W. and P.W. o/b/o M.W.,	**STATE OF NEW JERSEY DEPARTMENT OF EDUCATION**
Petitioners,	**OFFICE OF ADMINISTRATIVE LAW**
vs.	**SETTLEMENT AGREEMENT AND RELEASE**
NORTH BRUNSWICK TOWNSHIP BOARD OF EDUCATION	**OAL DKT. NO. EDU 09802-2014N**
Respondent.	

WHEREAS, the parties have negotiated in good faith concerning this matter, and have a desire to settle this matter in an amicable way, without the need for further litigation and without admitting any liability or wrongdoing by either party, the parties enter into this Agreement in order to reach a compromise in the best interest of M.W.;

NOW, THEREFORE, in consideration of the following terms, it is agreed by and between the parties as follows:

1. The District agrees to remove the document entitled "Disciplinary Hearing Student Data Sheet" from M.W.'s student record. A true and exact redacted copy of that document is attached hereto as Exhibit A for reference.

2. This Agreement shall constitute full and complete settlement regarding any and all claims the Parents and/or student have or may have against the District through June 4, 2015, including but not limited to procedural rights, compensatory education, and/or compensatory damages, as well as withdrawal of the instant matter, OAL Docket No. EDU 09802-2014N, with prejudice.

3. The parties acknowledge and agree that they have entered into this Agreement freely, willingly, and voluntarily, without duress or coercion, and with the opportunity to consult with counsel of each party's choosing and option. Petitioners acknowledge that they were able to review the contents of this Agreement with counsel of their choosing, namely Denise Lanchantin Dwyer, Esq., and that they were able to ask any questions they had about the

Agreement. The parties acknowledge that they were represented by competent counsel, that they understood the contents of this Settlement Agreement and Release, and that each party hereto will be responsible for bearing the costs of their own attorneys' fees and costs, and any other costs pursuant to 20 U.S.C.A. §1415 or any other Federal or State Statutes. It is further agreed that neither party is considered a "prevailing party" for any purposes.

4. This Agreement shall be governed by the Laws of the State of New Jersey and constitutes a legal release of all claims that were or could have been raised as set forth herein.

5. This Agreement shall be incorporated into a Final Order by the Honorable Tiffany Williams, the Administrative Law Judge assigned to this matter.

Date: 6/15/2015

J.W., individually and o/b/o M.W.

Date: 6/15/2015

P.W., individually and o/b/o M.W.

NORTH BRUNSWICK TOWNSHIP BOARD OF EDUCATION

Date: _____

Dr. Frances Stromsland, Interim Director

Agreement. The parties acknowledge that they were represented by competent counsel, that they understood the contents of this Settlement Agreement and Release, and that each party hereto will be responsible for bearing the costs of their own attorneys' fees and costs, and any other costs pursuant to 20 U.S.C.A. §1415 or any other Federal or State Statutes. It is further agreed that neither party is considered a "prevailing party" for any purposes.

4. This Agreement shall be governed by the Laws of the State of New Jersey and constitutes a legal release of all claims that were or could have been raised as set forth herein.

5. This Agreement shall be incorporated into a Final Order by the Honorable Tiffany Williams, the Administrative Law Judge assigned to this matter.

Date: _____

_____
J.W., individually and o/b/o M.W.

Date: _____

_____
P.W., individually and o/b/o M.W.

NORTH BRUNSWICK TOWNSHIP BOARD OF EDUCATION

Date: 6/15/15

Frances Stromsland, Ed.D.
Dr. Frances Stromsland, Interim Director

284-15

284-15

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

BUREAU OF CONTROVERSIES AND DISPUTES

TENURE HEARING

In the Matter of the Arbitration Between STATE-OPERATED SCHOOL DISTRICT CITY OF NEWARK, NJ **PETITIONER** And TONI LENZ **RESPONDENT** Agency Docket 97 4/15	**DECISION ON** **MOTION TO DISMISS** **TENURE CHARGES**

ARBITRATOR — GERARD G. RESTAINO, ASSIGNED BY NEW JERSEY DEPARTMENT OF EDUCATION IN ACCORDANCE WITH CHAPTER 26, P.L. 2012, AND 18A:6-17.1

APPEARANCES:

FOR THE PETITIONER

RAMON RIVERA, ESQ.	COUNSEL FOR PETITIONER
SHANA T. DON, ESQ.	COUNSEL FOR PETITIONER

FOR THE RESPONDENT

NANCY OXFELD, ESQ.	COUNSEL FOR RESPONDENT

BACKGROUND

On August 27, 2014, Lynn Irby-Jackson, employed by the Petitioner as the Principal of Arts High School, filed a Notice of Inefficiency against the Respondent. That Notice of Efficiency included twenty-one (21) separate counts of an inability of the Respondent to *"completely and reasonably execute her duties as a teacher for the period of October 12, 2012 to the present."*

On January 17, 2015, the undersigned rendered an Award, docket 289-9/14,in the matter of The State-Operated School District of the City of Newark and Toni Lenz. The Respondent was charged with inefficiency and I accepted the Respondent's Motion to Dismiss the Tenure Charges in their entirety and returned Ms. Lenz to her teaching position with full back pay and benefits.

On March 6, 2015, the Petitioner filed Amended Tenure Charges against the Respondent. Those charges are the same charges that were filed against the Respondent in 2014. The only difference is that in 2014 under subsection G, *"the Respondent has failed to establish a culture of learning is also repeated in subsection H."* Except for that typographical error, the charges are the same. In fact, the statement of evidence submitted for the Amended Charges is dated August 27, 2014, the same date as in docket 289-9/14.

On March 19, 2015, counsel for the Respondent submitted answers to the tenure charges of inefficiency, which included ten separate defenses and asked that the tenure charges be dismissed.

On April 30, 2015, I was appointed to the instant matter by the Department of Education identifying this case as docket 97 4/15.

On June 5, 2015, the Arbitrator had a conference call with Shana Don, representing the Petitioner and Nancy Oxfeld, representing the Respondent.

On June 17, 2015, Kathleen Duncan, Director of the Bureau of Controversies and Disputes for the Department of Education, sent a letter to Ms. Don and Ms. Oxfeld, with a copy to the Arbitrator. In that letter, she indicated that the above-captioned tenure charges (97 4/15) are being *"processed with respect to Section 8, inefficiency charges only – were reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to determination by the Arbitrator of Respondent's defenses and any motions to be filed with the Arbitrator."* She further indicated that the Arbitrator is to utilize the preponderance of evidence standard in this matter.

On June 19, 2015, Ramon Rivera, also counsel for the Petitioner, submitted a motion to the Commissioner of Education for emergent relief. The Petitioner argued that the application for interim relief of staying the tenure matter must be granted because the District satisfies the requirement set forth in N.J.A.C. 6A:3-1.6. Additionally, the Petitioner has filed a Notice of Appeal with the Appellate Division on the following issues:

"1. The Commissioner of Education transferred the Tenure Hearing to the same Arbitrator who heard the parties' previous tenure charges, Gerard Restaino, in violation of N.J.S.A. 18A:6-17.1; and

2. The Commissioner of Education transferred this matter to arbitration without addressing the legal sufficiency of the tenure charges in violation of N.J.S.A. 18A:6-16."

On July 15, 2015, Commissioner of Education, David C. Hespe, denied the Petitioner's request for emergent relief. The Commissioner determined that he lacks jurisdiction to hear and decide Petitioner's motion for emergent relief. This determination shall not preclude the parties from seeking the desired relief before the

Arbitrator pursuant to N.J.A.C. 6A:3-5.5(b). The section of N.J.A.C. provides, *"Where a party to a tenure matter requests, the Commissioner may agree to hold the matter in abeyance at any time prior to transmittal to an arbitrator. Thereafter, requests to hold the matter in abeyance shall be directed to the Arbitrator."*

The parties and the Arbitrator had agreed upon the following briefing schedule: Respondent's Motion to Dismiss and supporting briefs to be filed on July 10, 2015. Petitioner's reply to the Respondent's Motion to Dismiss and Motion to Compel Arbitration Hearing and supporting brief is to be filed on July 17, 2015. Respondent's reply to the Petitioner's Motion to Compel Arbitration is to be filed on July 27, 2015. The record reflects that the Respondent did not submit a reply to the District's response to Respondent's Motion to Dismiss. Those dates were also transmitted to the Department of Education.

On July 10, 2015, the Respondent submitted a brief in support of the Notice of Motion for Summary Judgment. On July 17, 2015, the Petitioner submitted its brief in opposition to the Respondent's Motion to Dismiss the Tenure Charges.

These are the essential uncontroverted facts in the mater at bar and the matter now comes to me for resolution.

RELEVANT STATUTORY PROVISIONS:

5. N.J.S. 18A:6-11 is amended to read as follows:

Written charges, statement of evidence; filing; statement of position by employee; certification of determination; notice.

18A:6-11. Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an

opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statement of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. The board of education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address. In the event the board find that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner for a hearing pursuant to N.J.S. 18A:6-16, together with a certificate of such determination. The consideration and actions of the board as to any charge shall not take place at a public meeting.

8. N.J.S. 18A:6-16 is amended to read as follows:

Proceedings before commissioner; written response; determination.

18A:6-16. Upon receipt of such a charge and certification, or of a charge lawfully made to the commissioner, the commissioner or the person appointed to act in the commissioner's in the proceedings shall examine the charge and certification. The individual against whom the charges are certified shall have 15 days to submit a written response to the charges to the commissioner. Upon a showing of good cause, the commissioner may grant an extension of time. The commissioner shall render a determination on the sufficiency of charges as set forth below within 10 days immediately following the period provided for a written response to the charges.

If, following receipt of the written response to the charges, the commissioner is of the opinion that they are not sufficient to warrant dismissal or reduction in salary of the person charged, he shall dismiss the same and notify said person accordingly. If however, he shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section 22 of P.L. 2012, c.26 (C.18A:6-17) for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for purposes of deciding the motion.

C. 18A:6-17.3 Evaluation process, determination of charges.

25. a. Notwithstanding the provisions of N.J.S. 18A:6-11, or any other section of law to the contrary, in the case of a teacher, principal, assistant principal and vice principal:

(1) the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency whenever the employee is rated ineffective or partially effective in an annual summative evaluation and the following year is rated ineffective in the annual summative evaluation;

(2) If the employee is rated partially effective in two consecutive annual summative evaluations or is rated ineffective in an annual summative evaluation and the following year is rated partially effective in the annual summative evaluation, the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency,

except that the superintendent upon a written finding of exceptional circumstances may defer the filing of tenure charges until after the next annual summative evaluation. If the employee is not rated effective or highly effective on this annual summative evaluation, the superintendent shall promptly file a charge of inefficiency.

b. Within 30 days of the filing, the board of education shall forward a written charge to the commissioner, unless the board determines that the evaluation process has not been followed.

c. Notwithstanding the provisions of N.J.S. 18A:6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a. of this section, the commissioner shall examine the charge. The individual against whom the charges are filed shall have 10 days to submit a written response to the charges to the commissioner. The commissioner shall, within five days immediately following the period provided for a written response to the charges, refer the case to an arbitrator and appoint an arbitrator to hear the case, unless he determines that the evaluation process has not been followed.

d. The only evaluations which may be used for purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L. 2012, c.26 (C. 18A:6-117, et al).

C. 18A:6-122 Annual submission of evaluation rubrics

16. a. A school district shall annually submit to the Commissioner of Education, for review and approval, the evaluation rubrics that the district will use to assess the effectiveness of its teachers, principals, assistant principals and vice-principals and all other teaching staff members. The board shall ensure that an approved rubric meets the minimum standards established by the State Board of Education.

b. Notwithstanding the provisions of subsection a. of this section, a school district may choose to use the model evaluation rubric established by the commissioner pursuant to subsection f. of section 117 of P.L. 2012, c.26 (C. 18A:6-123) to assess the effectiveness of its teachers, principals, assistant principals, and vice-principals and all other teaching staff members. In the case in which the district fails to submit a rubric for review and approval, the model rubric shall be used by the district to assess the effectiveness of its teachers, principals, assistant principals and vice-principals and all other teaching staff members.

C. 18A:6-123 Review, approval of evaluation rubrics.

17. a. The Commissioner of Education shall review and approve evaluation rubrics submitted by school districts pursuant to section 16 of P.L. 2012, c.26 (C. 18A:6-122). The board of education shall adopt a rubric approved by the commissioner.

d. Beginning no later than January 31, 2013, a board of education shall implement a pilot program to test and refine the evaluation rubric.

e. Beginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric for all educators in all elementary, middle and high schools in the district. Results of evaluations shall be used to identify and provide professional development to teaching staff members. Results of evaluations shall be provided to the commissioner, as requested, on a regular basis.

POSITION OF THE PARTIES

For the District

The District argues that these amended tenure charges, *"alleging inefficiency were brought against the Respondent, Toni Lenz, based upon her deficient teaching performance, consistent lack of improvement and receipt of negative evaluations. For these reasons, the Petitioner filed amended tenure charges for inefficiency against the Respondent with the District, pursuant to N.J.S.A. 18A:6-10; N.J.S.A. 18A:6-11; N.J.S.A. 18A:6-16, N.J.S.A. 18A:6-17.1; N.J.S.A. 18A:6-17.3; and N.J.A.C. 6A:3.5.1(b) with the Commissioner of Education."* Furthermore, the Respondent argues that inefficiency charges can only be brought pursuant to Section 25, rather than Section 8 of Teach NJ and therefore, the Petitioner's charges must be dismissed. However, the Petitioner argues that that argument is wrong because it is either too early or too late. More importantly, that position overlooks *"the Commissioner's directive that these charges have been docketed as new charges and which are being processed with respect to Section 8, inefficiency charges only – were reviewed and deemed sufficient to either warrant dismissal or reduction in salary."*

The Petitioner contends that the Respondent's reliance on I/M/O Tenure Hearing of Leonard Yarborough and the State-Operated School District of the City of Newark, docket 69-3/15, I/M/O Tenure Charges of Jodi Thompson and the State-Operated School District of the City of Newark, docket 24-8/14 and I/M/O Tenure Charges Against Sandra Cheatham and the State-Operated School District of the City of Newark, docket 226-8/14 is seriously flawed because each one suffers from the same fundamental weaknesses: the arbitrator exceeded his or her statutory authority in the absence of

clear legal mandates from the Commissioner. The same is true in the instant matter, and this issue is currently pending before the Appellative Division.

The Petitioner argues that in the prior case, *"The Respondent's Motion to Dismiss was granted based upon the Arbitrator's determination that Section 25 tenure charges were premature, based upon a theory of collateral estoppel, without expressly addressing the tenure charges under Section 8 and without any hearings or findings of facts. The prior decision did not address the issue of Section 8 Tenure Charges. Following this holding, the Petitioner submitted the instant amended tenure charges adding an additional charge of inefficiency pursuant to Section 8 of Teach NJ."*

Furthermore, the Petitioner contends, *"The Amended Tenure Charges were initially served on the Respondent after being submitted to the State-District Superintendent on or about January 14, 2015. These charges were drafted in light of the then-building trend of arbitrators dismissing Section 25 tenure charges of inefficiency as premature and refusing to consider the alternate basis of Section 8 as un-plead. Because the Amended Tenure Charges address Section 8 charges, the Respondent was afforded the statutorily mandated time period of fifteen (15) days rather than the ten (10) day response prescribed for charges brought under Section 25."*

The Petitioner contends that the School District did determine that there was probable cause, and the State-appointed District Superintendent completed the Certificate of Determination on March 3, 2015, which was then filed with the Commissioner of Education on March 6, 2015. Therefore, the tenure charges were timely filed with the Commissioner on the 42nd day after the District's receipt of the Respondent's answer, which was within the 45 day time limitation to same.

The Petitioner contends that *"they are seeking its first bite at the apple to have the merits of this teacher's inefficiency charges heard by the fact-finders required by applicable law."* Furthermore, the motion for summary decision should be denied as there are significant disputed facts, and the matter should move forward toward a hearing on the merits of the Section 8 Tenure Charges.

Additionally, the Petitioner contends that the Arbitrator has jurisdiction to decide this matter for inefficiency under Section 8 of Teach NJ.

The Petitioner references specific arbitration awards (see, I/M/O Tenure Hearing of Edward Newton and State-Operated School District of the City of Newark, docket 276-9/14), and I/M/O Marie Ebert and State-Operated School District of the City of Newark docket 49-3/15. In the Ebert matter, Arbitrator Tia Schneider Denenberg determined that, *"Although a charge involving 2012-2013 evaluations may not be brought under Section 25; no similar impediment prevents the District from seeking removal according to the requirements of Section 8."*

The District contends that they anticipated that the tenure charges in the prior proceeding would be dismissed and began proceeding to amend the tenure charge to cure the defect ultimately cited by the Arbitrator in dismissing the charges in the January 17, 2015 Opinion and Award. The amended tenure charge was perfected before the Department of Education adding the comprehensive and pre-existing charge of inefficiency to be assessed on a preponderance of the evidence standard rather than the more limited two annual evaluations of the Teach NJ Act. Furthermore, the Petitioner argues that, *"The contention that an inefficiency charge cannot proceed on any basis other than N.J.S.A. 18A:6-17.3, and that a charge cannot proceed on that*

basis either until all applicable requirements are met – essentially, that the legislature intended to hand poorly performing teachers a free pass for two years after the Act's defective date has been rejected by Teach NJ Arbitrators."

Additionally, in I/M/O Jodi Thompson State-Operated School District of the City of Newark docket 240-8/14 and 16-1/15, Arbitrator Daniel Brent stated, *"Nothing in the provision of the Teach NJ statute explicitly created a two-year, much less a four-year hiatus during which ineffective teachers were immune from evaluation of their performance resulting in discipline or discharge."* Moreover, arbitrators in several cases in which Section 25 charges have been dismissed have suggested that dismissal might not have been required if the charges had been plead, in the alternative, on the basis of Section 8, as well as Section 25. See, I/M/O Rinita Williams and State-Operated School District of the City of Newark and, docket 504-14, I/M/O Elena Brady and State-Operated School District of the City of Newark docket 478-14. These arbitrators have read Teach NJ to allow inefficiency charges to proceed on grounds other than Section 25, contrary to Respondent's contention here.

The District contends that in accordance with N.J.S.A. 18A:6-10, once a matter is transmitted to arbitration by the commissioner, the arbitrator must proceed to a hearing on the merits. Under N.J.S.A. 18A:6-16, the question before the Arbitrator is whether the evidence in the record presented supports the charge of inefficiency.

The District strongly argues that the evaluations of the Respondent for the 2012-2013 school year are valid as Section 25 of Teach NJ was in effect and in full force in the 2012-2013 school year and may be considered under a preponderance of the credible evidence standard. The question under Section 8, inefficiency charges, is

whether the District has met its burden under the long-established preponderance of credible evidence. In support of the preponderance of credible evidence standard, the District contends that inefficiency has been defined as a charge against an employee that he/she has failed to reasonably perform the duties of his/her title, an inability to maintain classroom decorum and discipline, an inability to teach a prescribed curriculum and a failure to submit required information on time, even after constant written reminders.

The Petitioner references the four standards in N.J.S.A. 18A:6-17.2 governing Section 25 charges. Those four standards are:

"(1) the employee's evaluation failed to adhere substantially to the evaluation process, including to, but not limited to providing a corrective action plan;

(2) there is a mistake of fact in the evaluation;

(3) the charges would not have been brought but for consideration of political affiliation, nepotism, union activity, discrimination as prohibited by federal and state law, or other conduct prohibited by state or federal laws; or

(4) the District's actions were arbitrary and capricious."

The Petitioner strenuously argues that the only issue for the Arbitrator is whether the record supports a finding that the charges are true. Without developing the record at a hearing and considering the District's evidence, which goes beyond the summary statement of evidence, it is impossible to make this determination.

In support of its position that the 2012-2013 evaluations are valid and may be considered under the preponderance of credible evidence standard, the Petitioner contends, *"The District piloted a new teacher evaluation system in the 2011-2012 school year, not 2012-2013 as asserted without support by Respondent. Thus, evaluations conducted in the 2011-2012 pilot year did not count for official purposes, but*

the experience of that pilot program informed the development of the teacher evaluation process adopted, approved and implemented in subsequent school year 2012-2013. It is indisputable that the legislature purposely adopted and approved Teach NJ August 6, 2012 in the 2012-2013 school year. As such, there is no question that the evaluations in the 2012-2013 school year were to be used toward determining if tenure charges are warranted, if not as the sole basis."

As stated by Arbitrator Brent in Thompson, supra, "*Nothing in the new Teach NJ statute precludes a school district that had been designated pilot district in 2011-2012 and successfully implemented a rubric approved by the Commissioner in 2012-2013 from evaluating its teachers under the approved Teacher Performance Assessment Criteria."*

The doctrines of *res judicata* and double jeopardy do not apply to preclude the instant charges. The Respondent's argument that the instant charges must be dismissed because the parties are barred from re-litigating in a new case an issue already disposed of *"is misplaced and is a mischaracterization of the facts that exist in the instant matter."* Furthermore, a party asserting a defense of collateral estoppel has the burden of demonstrating that the issue is litigated in a prior proceeding. Nevertheless, the amended tenure charges were never adjudicated, and as such, that defense does not apply. I/M/O Leonard Yarborough and State-Operated School District of the City of Newark, docket 69-3/15 the Arbitrator Gerber did not reach the merits of the charge under Section 8, i.e., he never addressed whether the School District had met its burden of proving inefficiency. As such, the Section 8 charge was not adjudicated. Therefore, even if the School District is bound by the Arbitrator's decision

in the previous matter, it is not precluded by that decision from bringing the instant charge as the Arbitrator's decision does not address the charge not presented pursuant to Section 8.

The Petitioner contends that the Respondent cannot meet the burden of demonstrating that the issue was litigated in a prior proceeding. The decision dismissing the previous charge was based on statutory grounds and applicable to the instant charge, specifically the requirements of N.J.S.A. 18A:6-123(d), which are applicable only to charges brought pursuant to Section 25. Accordingly, this is not a second bite at the apple as the Respondent asserts; this matter must proceed to hearing for a determination on the merits of the inefficiency charge under Section 8.

The entire controversy doctrine is not a bar to the tenure charges in the instant matter. The three-fold objectives behind the doctrine are (1) to encourage the comprehensiveness and conclusive determination of a legal controversy; (2) to achieve party fairness, including both parties before the court, as well as respective parties; and (3) to promote traditional economy and efficiency by avoiding fragmented, multiple and duplicative litigation.

The Respondent's argument that the District is re-litigating the tenure charges against her because these charges have already been brought before an arbitrator in a District loss is not the fact pattern in the matter at bar. In the prior decision, the determination was not based upon the Respondent's evaluation or the merits of the District's argument. Arbitrator Restaino dismissed the previous charges against the Respondent based upon the theory of collateral estoppel. This, respectfully, is not a conclusive determination of the legal controversy presented for the parties.

Furthermore, a dismissal of the instant charges would not achieve an equitable result because the District would essentially be unable to bring tenure charges against any teacher based upon their poor evaluations in the 2012-2013 school year. Lastly, the instant tenure charges do not constitute a duplicative litigation because the merits of the charges have yet to be heard. Therefore, the issue regarding the substance of the District's underlying charges was never litigated, and no legal determination was made in this regard.

Should this matter proceed to a hearing and be heard on the merits, it will be the first time the parties have had an opportunity to argue their positions with regard to the substance of the allegations against the Respondent. This issue has yet to be argued – let alone re-litigated. This is not a case with a District loss on the merits of the previous tenure charges and now wishes to refile.

Accordingly, in recognition of the underlying principles of the enforcement of the entire controversy doctrine, the District's tenure charges against Respondent should proceed to hearing on determination of the merits.

The tenure charges were timely filed pursuant to N.J.S.A. 18A:6-13 and N.J.A.C. 6A:3-5.1. The District argues that the fact-pattern in evidence establishes without reservation that the amended charges were filed in accordance with the statute and were done so within 45 days as required by the statute.

For all of the foregoing reasons, the State-Operated School District for the City of Newark respectfully requests that Respondent's Motion for Summary Judgment be denied in its entirety and the matter proceed to a hearing on the merits.

For the Respondent

Preliminarily, the Respondent argues inefficiency charges can only be brought under Section 25 of Teach NJ. Additionally, the entire controversy doctrine gives credence and support to the Respondent's position that the instant charges should be dismissed. This is the second time that the Petitioner has brought the same tenure charges against the Respondent based on the same statement of evidence of Principal Lynn Irby-Jackson dated August 27, 2014. The Respondent argues that she is being subjected to double jeopardy. Furthermore, *"an employer, whether in a disciplinary arbitration governed by a collective bargaining agreement or a disciplinary arbitration pursuant to a statute, does not have the option of continually filing charges against an individual based on the same facts in the hopes that the Employer will, if it tries hard enough, succeeding in imposing discipline on the individual."*

The Respondent argues, *"Three arbitrators have now ruled that the Petitioner in this matter cannot do what it is doing herein, refile under Section 8 of the tenure laws a charge based on the same underlying factual allegations on which charges have previously been dismissed by an arbitrator pursuant to Section 25, i.e. Yarborough, supra; Thompson,"* Additionally, I/MO/ Sandra Cheatham and State-Operated School District of the City of Newark, docket 69-3/15 Arbitrator Bluth reached the same conclusion.

In Yarborough, supra, Arbitrator Gerber found that, *"The District was obligated, pursuant to the entire controversy doctrine, to bring all possible claims based on the same set of facts in one proceeding."* In Cheatham, supra, Arbitrator Bluth found, *"The doctrine of res judicata prevented the District from refiling charges based on the same set of facts under different legal theory."* In Thompson, supra, Arbitrator Brent

determined, *"There is no valid basis in the statute to afford the District two separate, sequential opportunities to litigate identical charges arising from the same set of facts by citing two different sections of the statute in two separate tenure hearings."* The three Arbitrators all arrived at the same conclusion that the employer cannot rewrap the identical factual charges against an employee which have been dismissed in a new wrapping and be allowed to proceed.

The Respondent further argues, *"The fact pattern in evidence further shows that this is the second time the Petitioner has brought tenure charges based on the same factual allegations against the Respondent. A careful review of the two charges shows that they are essentially identical. The first charge (Oxfeld Certification, Exh. A) and the second charge (Oxfeld Certification, Exh. D), contain one charge of inefficiency. There are only two differences in the two sets of charges against the Respondent. The first difference is that the initial charge, the charge from August 2014, includes one tenure charge of inefficiency with subparts A-U (Oxfeld Certification, Exh. A), while the second tenure charge contains one tenure charge of inefficiency, with subparts A-T."* The difference between the two charges is that there has been a typographical correction. The first tenure charge had an identical allegation in subparagraph G and subparagraph H, where it stated the Respondent has failed to establish a culture of learning. The second tenure charge only has that allegation once so there is one less specification. The only other difference is that in paragraph 2 of the first charge, Principal Irby-Jackson indicates that tenure charges have been brought pursuant to N.J.S.A. 18A:6-10; N.J.S.A. 18A:6-11; N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1. In the amended

notice of inefficiency charges, Ms. Irby-Jackson adds N.J.S.A. 18A:16-6 and N.J.S.A. 18A:6-17.1.

The statements of evidence relied upon by Principal Irby-Jackson are identical, wherein in the first tenure charges she states, *"The above charge is supported by the attached statement of evidence under oath by Lynn Irby-Jackson annexed hereto (Oxfeld Certification, Exh. A, to which is annexed Ms. Irby-Jackson's August 27, 2014, statement of evidence; Oxfeld Certification, Exh. B)."* The date of the amended notice of inefficiency charges signed by Principal Irby-Jackson is August 27, 2014, and is the identical date of the first charges under Section 25 of the statute. The Petitioner did not even re-date the statement of evidence (Oxfeld Certification, Exh. B and Oxfeld Certification, Exh. F).

The Respondent again argues that an inefficient tenure charge can only be brought under Section 25 of Teach NJ and, therefore, the District's charge must be dismissed. The Respondent argues, *"A brief review of the history underlying the passage of Teach NJ and its implementing regulations, the statutory and regulatory language itself, as well as arbitrable precedent makes clear that charges of inefficiency are now defined by and required to proceed pursuant to Section 25 and only pursuant to Section 25 of the Teach NJ Act."*

Moreover, by eliminating the 90 day notice of inefficiency required prior to Teach NJ and replacing it with a new procedure, with all its specific requirements, *"The legislature clearly meant to allow only one method of pursuing tenure charges of inefficiency against a tenured teacher. Had the legislature intended to simultaneously*

allow the pursuit of tenure charges of inefficiency with no procedure required of the District, the legislature would have so stated."

The Respondent also argues, *"The applicable law and its implementing regulations were a part of a larger quid pro quo of which the new Section 25 of Teach NJ lies at its very heart. The radically transformed system of teacher evaluation and accountability provides that teachers are more readily subject to removal based only on two years of inadequate performance, subject to a speedy and formidable limited review and defenses available under prior law. (See N.J.S.A. 18A:6-17.2). That was the quid, but the quo in exchange for that stream-lined discharge procedure was well-defined, transparent, and uniform observation and evaluation guidelines, processes and procedures and the transparent and uniform tenure removal procedure for claims of inefficiency outlined in Section 25 of the Teach NJ Act."*

Additionally, the legislature, for the first time created a specific and inclusive definition of teacher inefficiency. In doing so, *"they substantially revised existing statutes, principally Section 8, while creating a new Section 25 governing inefficiency charges. Gone from the law was the prior requirement that teachers receive notice of the 90 day improvement period prior to the commencement of inefficiency charges. In its place the legislature crafted Section 25 (N.J.S.A. 18A:6-17-3) entitled, Filing with the Secretary of the Board of Education Notice of a Charge of Inefficiency Procedural Requirement."*

It should also not be overlooked, *"that in enacting the new Section 25 of Teach NJ and specifically defining inefficiency, as well as revamping the entire teacher evaluation process, the legislature substantially curtailed the defenses available to*

educators subject to tenure charges. Thus, the legislature concurrently enacted Section 23, which applies to inefficiency charges brought pursuant to Section 25 and substantially limits the scope of review of employee evaluations and defenses which may be raised by the teacher."

The limited scope of review of teacher evaluations and the limitation on defenses set forth in Section 23 of Teach NJ (N.J.S.A. 18A:6-17.2) directly flow from the concurrent overhaul of the evaluation process and procedures. Teachers may no longer challenge an evaluator's determination - but, only so long as the determination is based on evaluations which comply with applicable procedures.

The Respondent contends that the District is, "*Effectively saying that both N.J.S.A. 18A:6-17.2 and 17.3 are simply optional and that it may comply with statutory and regulatory procedures, or not. The District apparently believes that if it fails to comply with applicable procedures necessary to bring charges under Section 25 – as was previously determined in this case – it may simply ignore Section 25 altogether. In that case, the limitations on review of evaluations were predicated on compliance with statutory evaluation requirements and procedures. Under this bizarre theory, the efforts of the legislature to streamline tenure proceedings are rendered a complete nullity. That simply was not the intent of the legislature in revamping the State's tenure laws."*

The Respondent continues to argue that, *"The terms of the applicable statute and regulatory provisions all confirm that the exclusive means to which to bring inefficiency charges against a teacher is through Section 25 and only Section 25."*

In support of its argument that inefficiency charges can only be brought under Section 25 of Teach NJ, the Respondent refers to I/M/O Ursula Whitehuirst and State-

Operated School District of the City of Newark, docket 282-9/14, where Arbitrator Simmelkjaer addressed this issue once again against the same Petitioner, concluding that inefficiency charges could not be brought under Section 8. He stated, *"The Arbitrator is not convinced that having dismissed the inefficiency charge against Ms. Whitehurst based on the District's non-compliance with N.J.S.A. 18A:6-17.3, through its utilization of the Respondent's annual summative evaluation for the 2012-2013 school year it can now proceed to a hearing under N.J.S.A. 18A:6-16."* Furthermore, Arbitrator Simmelkjaer stated, *"Since the charge of inefficiency filed with the Commissioner alleged that over a two year period from September 22 to the present, the teacher was determined to be either ineffective or partially effective in her annual summative ratings under Section 25 and the statement of evidence reinforces the charge, the District is bound by the procedural requirements of Section 25."*

Additionally, the Respondent contends that the Williams, supra; Whitehurst, supra; and Thompson, supra arbitration determinations flatly rejected the District's pursuit of charges of inefficiency under Section 8.

The Respondent argues, *"The District has not provided, and cannot provide, any reason to deviate from these consistent and persuasive arbitration opinions and awards. They are firmly grounded in not only the legislative of the Teach NJ Act, but also the language of the statute itself, its regulations and authoritative guidance issued by the Department of Education."*

The Respondent contends, *"In what appears to be a desperate bid to rehabilitate its previously dismissed charges against the Respondent, the District has pressed forward with its already discredited effort to pursue charges of inefficiency pursuant to*

Section 8 of Teach NJ. For purposes of pursuing charges of inefficiency, Section 8 now stands as little more than a legal relic supplanted by Section 25."

The Respondent contends that the Petitioner apparently believes that through Section 8 it does not need two school years, beginning with the 2013-2014 school year of ineffective or partially effective ratings to bring a charge of inefficiency. The Respondent continually argues, *"If the legislature had intended for deficient Section 25 inefficiency charges to proceed to arbitration via Section 8, they would have so stated."*

Moreover, if a district could *"simply file an inefficiency tenure charge under the other charges section of Section 8, it would render the entire legislative overhaul of the tenure system, as set forth in Teach NJ and the creation of Section 25 framework and procedure for inefficiency charges, meaningless and unnecessary."*

Section 25 imposed an obligation upon the District to comply with the new evaluation system. Absent from Section 25 or any other authority is any language that the legislature intended for a deficient Section 25 inefficiency charge to proceed to arbitration via Section 8 as a fall back or alternate means through which to pursue inefficiency charges.

The Respondent argues that the Petitioner's charge is barred by the entire controversy doctrine, which is equitable in nature and is fundamentally predicated upon judicial fairness and will be invoked in that spirit. In this case, the Petitioner had the opportunity to raise all legal bases for its tenure charge of inefficiency against the Respondent based upon her evaluation and conduct for the 2012-2013 and 2013-2014 school years when it filed charges in August 2014. It could have chosen to bring those

charges simultaneously under Section 8 based upon the same facts or series of transactions or occurrences. It did not do so and it cannot now re-litigate the case.

The action of the District clearly violates the entire controversy doctrine, as well as the principle of judicial finality and efficiency. No less importantly, it violates the Respondent's due process rights to not be subject to the same charges repeatedly and indefinitely by the Petitioner. This matter has been litigated, and it has, concluded.

The Respondent continues to rely upon prior arbitration decisions in Yarborough, supra, Cheatham, supra, and Thompson, supra. In Yarborough Arbitrator Gerber stated, *"The entire controversy doctrine embodies a principle that the adjudication of a legal controversy should occur in one litigation at which all of the claims and defenses of the parties should be presented. When an action is brought, alternative causes of action should be included in the initial pleadings. There was nothing to prevent the District from alternatively pleading a count of inefficiency under Section 8 in its initial papers."* In Thompson, Arbitrator Brent stated, *"The second tenure charge did not amend the first charge by the introduction of new facts, nor was a second theory raised in a timely manner. The second set of tenure charges simply alleged a second cause of action under a different statutory standard in order to prove that the Respondent's teaching was legally unacceptable to the extent that her tenure should be rescinded."* In Cheatham, Arbitrator Bluth stated, *"Moreover, I find that the doctrine of res judicata is relevant in this matter. This is so because I have examined both the first and second set of charges and observed the charges for January 2015 were virtually identical to the charges I had previously dismissed. Further, I reject the District's claim that the matter raised in the second set of charges are not the same matter and, thus, do not fall under*

res judicata. In my opinion this is pure nonsense: just because the charges were filed under a different section of the law does not render the matter indifferent."

In conclusion, the Respondent asks that the tenure charges against Toni Lenz be dismissed with prejudice and she be returned to work with full salary and benefits.

DISCUSSION AND ANALYSIS

The unique facts of each case can and do control how a particular disputed action by a school district might be adjudicated if a claim is submitted to arbitration pursuant to c.26, P.L. 2012. I have included extensive positions of both parties concerning whether and not N.J.S.A. 18A:6-16 or N.J.S.A. 18A:6-17.3 is controlling in the instant matter.

The Department of Education, by way of a letter dated June 17, 2015, sent to counsel for both parties indicating that the above-captioned tenure charges – which have been docketed as new charges (see Agency docket number 97-4/15) and are being processed with respect to Section 8, inefficiency charges only were reviewed and deemed sufficient if true to warrant dismissal or reduction in salary. *"The Arbitrator shall review those charges which are not dismissed as a result of a motion under the preponderance of evidence standard."*

Counsel for the Petitioner submitted a motion to the Commissioner of Education for emergent relief dated June 19, 2015, and indicating that *"The District had demonstrated irreparable harm if the application for emergent relief is not granted."*

On July 17, 2015, the Commissioner of Education denied the application because he stated he *"lacks jurisdiction to hear and decide the Petitioner's Motion for*

Emergent Relief. This determination shall not preclude the parties from seeking the desired relief before the Arbitrator pursuant to N.J.A.C. 6A:3-5.5(b)."

Due to the fact that the Department of Education has required me to make a determination in the instant matter using a preponderance of evidence standard, it is appropriate to quote the preponderance of evidence standard into the record. Black's Law Dictionary , 9th edition, defines preponderance of the evidence as, *"the greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact, but by evidence that has the most convincing force, superior evidentiary weight, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other."*

Additionally, other legal terms have been utilized in various arbitration hearings dealing with tenure charges against teachers and in particular, with the State-Operated School District, City of Newark. The following legal terms will be utilized in my Award:

Res *judicata*: an affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essential elements are (1) an earlier decision on the issue; (2) a final judgment on the merits; and (3) involvement of the same party or parties in privity with the original parties.

Collateral Estoppel: a doctrine barring a party from re-litigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one.

The Entire Controversy Doctrine: this doctrine embodies the principle that adjudication of a legal controversy should occur in one litigation at which all of the claims and defenses of the parties should be presented. When an action is brought, alternative causes of action should be included in the initial pleadings.

Additionally, in support of its arguments to sustain the tenure charges, the District, *"has filed a Notice of Appeal with the Appellate Division on the following issues: (1) the Commissioner of Education transferred the Tenure Hearing to the same arbitrator who heard the parties' previous Tenure Charges in violation of N.J.S.A. 18A:6-17.1, and (2) the Commissioner of Education transferred this matter to arbitration without addressing the legal sufficiency of the Tenure Charges in violation of N.J.S.A. 18A:6-16."*

Moreover, Exh. A of the Petitioner's Motion to the Commissioner of Education for emergent relief, is a Notice of Appeal to the Superior Court/Appellate Division and on that form the NJ Department of Education is referenced as well as Agency Number 97-4/15, which is the Agency number assigned to the amended Tenure Charges. The first decision I rendered on January 17, 2015, docket number 289-9/14 was not appealed by the District.

One of the defenses raised by the Petitioner is that the amended charge of inefficiency was not timely filed. N.J.A.C. 6A:3-5.1 establishes the procedure for implementing the 45 day limitation set forth in N.J.S.A. 18A:6-13. The Respondent filed a written response to the amended tenure charges dated January 23, 2015, and the District had 45 days from that date to make a determination as to the probable cause and the amended tenure charges pursuant to N.J.A.C. 6A:3-5.1(b)(4). The Petitioner

did determine there was probable cause to the amended charges and the State-appointed District Superintendent completed the Certification on the 42nd day, March 6, 2015, which was well within the 45 day limitation. I find the argument raised by the Respondent in this area to be absurd to say the least. The charges were accepted by the Department of Education, and on April 30, 2015, the undersigned was appointed arbitrator in the instant matter.

The Respondent's argument that the amended charge had to be effective August 27, 2014, is unrealistic. That is the date that the first set of charges were filed. Below is my rationale for my determination in the instant matter, but suffice it to say, the charges were timely filed.

The Petitioner argues, *"The evaluation of Respondent for the 2012-2013 school year are valid as Section 25 of Teach NJ were in effect and in full force in the 2012-2013 school year and may be considered under a preponderance of the credible evidence standard."* Section 25 or N.J.S.A. 18A:6-17.3 is the evaluation process, and determination of the charges. N.J.S.A. 18A:6-17.2 is the considerations for arbitrators when rendering a decision and there are four areas an arbitrator is required to review to determine if the charges filed by any board of education are to be sustained or dismissed. Section B of that statute states, *"If the arbitrator determines that the four factors did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the Board and the employee shall be dismissed."*

N.J.S.A. 18A:6-16, also known as Section 8, is the section of the statute utilized by the Department of Education in referring this matter to me. All provisions of a statute must be read harmoniously. N.J.S.A. 18A:6-123, 17.e. states, *"Beginning with the*

2013-2014 school year, a board of education shall ensure implementation of the improved, adopted evaluation rubric for all educators in all elementary, middle and high schools in the District. Results of evaluations shall be used to identify and provide professional development to teaching staff members. Results of evaluations shall be provided to the Commissioners as requested on a regular basis." The Petitioner's argument that the evaluations of the Respondent for the 2012-2013 school year is misplaced because of N.J.S.A. 18A:6-123, 17.e.

The standards for an arbitrator to review inefficiency charges are found in N.J.S.A. 18A:6-17.3. It is not found in N.J.S.A. 18A:6-16. In fact, N.J.S.A. 18A:6-17.3 c. specifically states, *"Notwithstanding the provisions of N.J.S.A. 18A:6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a. of this section, the Commissioner shall examine the charge."* There is nothing in Section 25 that would allow a charge of inefficiency to be heard under N.J.S.A. 18A:6-16. However, it is important to review the application of N.J.S.A. 18A:6-16. That section, commonly referred to as Section 8, refers to conduct unbecoming such as, but not limited to, excessive absenteeism, insubordination, misuse of school equipment/property, egregious conduct, open and notorious disrespect for management authority, physical altercation with other staff member(s), corporate punishment, theft, etc. This is not an exhaustive list, but a list of the type of charges that could be addressed with this section. Nothing can be found in Section 8 that would grant a board of education the right to process inefficiency charges.

In contract construction or construction in creating a statute, the Latin phrase *expressio unius est exclusio alterius* is controlling in the instant matter. That Latin

phrase simply means that to express or include one thing implies the exclusion of the other or of the alternative. Here, the legislature clearly established that Section 25, N.J.S.A. 18A:6-17.2 and 17.3 are to be utilized. They specifically reference inefficiency. They did not reference conduct unbecoming such as those enumerated above. Therefore, to attempt to extend Section 8 to inefficiency charges was never contemplated by the legislature and that action by the Employer must be rejected.

It is a subterfuge for Petitioner to argue that even if Section 25 inefficiency charges are determined to be without merit, those charges can be re-cast and proceed to arbitration under Section 8.

Most importantly, nothing can be found in Section 25, or any other provision of Chapter 26 of the Legislative intent to allow for amended tenure charges of inefficiency to be brought against the Respondent.

The arbitration decisions in Yarborough, Thompson, Cheatham, Williams and Whitehurst clearly establish without reservation that the Board is attempting to get two bites at the apple, which is not allowed under these proceedings. The Arbitrators in those cases determined that Section 25 was the applicable section for inefficiency cases and not Section 8 and, therefore, denied the State-Operated School District, City of Newark's position to sustain the tenure charges. The Board presented tenure charges in all of those cases and when they came back for a second bite at the apple, they were rebuffed and rejected by the Arbitrators.

The Board references the Felicia Pugliese and the State-Operated School District of the City of Newark docket 272-9/12 and I/M/O/ Edgard Chaves and the State-Operated School District of the City of Newark, docket 269-9/12 cases as support for its

argument that I have jurisdiction to decide the instant matter under Section 8 of TEACHNJ. In those two cases, both teachers appealed the determinations of the Arbitrators Brent and Brown respectively, because they believed the Arbitrators' decisions to sustain the tenure charges didn't address the fact pattern in evidence. Those matters were argued before the Appellate Division of Superior Court on March 17, 2015, and a decision was rendered on May 19, 2015. The panel consisting of Judges Koblitz, Has and Higbee stated in an opinion delivered by J.A.D. Koblitz as follows: *"Thus, we remand both matters to the Department of Education to determine the validity of those legal defenses raised by each teacher deemed appropriate by the Agency for resolution by the Agency, so that a uniformed educational policy will be promulgated. The Agency should determine the appropriate standards to be used by arbitrators when adjudicating tenure hearings, thus determining a consistent procedure for teachers in a position similar to Chavez and Pugliese who have received tenure charges after the effective date of Teach NJ alleging poor performance that occurred prior to the implementation of the statutes new standards."* Those two cases do not offer any support for the Board's position in the instant matter.

The Certifications of Nancy Oxfeld, counsel for the Respondent, dated July 10, 2015, are both informative and illuminating. Exh. A are the 21 components of the inefficiency charge signed by Arts High School Principal, Lynn Irby-Jackson on August 27, 2014. Additionally, the statement of evidence has 51 separate components and is also signed on August 27, 2014. It should be noted for the record that subsections G and H, which are part of the inefficiency charge are the same. Apparently, it appears to be a typographical error. Therefore, there are only 20 charges. Exhibit D is the

amended notice of inefficiency charges signed by Principal Lynn Irby-Jackson. There are 20 parts of the inefficiency charge and the interesting fact is that there is a paragraph that states, "*The above charge is supported by the statement of evidence previously submitted under oath by Lynn Irby-Jackson dated August 27, 2014, and filed with the Commissioner of Education on or about September 29, 2014.*" That has a notation of December ___, 2014, with the Principal's signature. Accordingly, I do not know if it was actually signed in December. However, it was notarized on January 14, 2015. The statement of evidence (see Exh. E) has the exact same 51 components and is signed August 27, 2014, which is exactly the one which was filed for the first tenure charges of inefficiency against the Respondent. Those charges were adjudicated by the undersigned on January 17, 2015.

The Petitioner did not even change the dates of the charges of inefficiency with all of the subcomponents or the statement of evidence. They are all dated August 27, 2014. That in itself is outrageous to say the least. To advance such an document and expect the Arbitrator to accept it expands the boundaries of believability to beyond any recognizable limit.

The charges are exactly the same, the dates are critical and that is why I use the word illuminating, because they illuminate that the District did not do anything different. The charges are identical. I determined that the amended petition was timely filed, but that amended petition is the same petition that was filed for the first set of charges. Accordingly, the District has not added any new charges; there are no amended charges. If there are, I didn't find them.

The District's action in the instant matter in filing the amended tenure charges is violative of *res judicata* and collateral estoppel. It also violates the entire Controversy standard when the District had the opportunity to include N.J.S.A. 18A:6-16 as the basis for the tenure charges. In fact, the Petitioner stated, *"Even if the Arbitrator here concludes, notwithstanding the facts and arguments presented herein, that the requirements for inefficiency tenure charges under N.J.S.A. 18A:6-17.3 have not been met, the inefficiency charges against Respondent should not be dismissed. Instead, the charges must be evaluated under N.J.S.A. 18A:6-16 and the case should proceed to hearing."* Unfortunately for the District the utilization for evaluations for the 2012-2013 school year were violative of Chapter 26 and, therefore, could not be included. Even though the District established a pilot program with the Commissioner of Education, that pilot program could not set aside N.J.S.A. 18A:6-123, 17.e. No matter how this matter is reviewed, the evaluations for the 2012-2013 school year are inappropriate to be utilized for inefficiency charges based on the above-referenced section of the statute.

The District has not met its burden to have a hearing in the instant matter. The District's appeal to the Appellate Court was based upon the following:

"1. The Commissioner of Education transferred the Tenure Hearing to the same Arbitrator who heard the parties' previous tenure charges, Gerard Restaino, in violation of N.J.S.A. 18A:6-17.1; and

2. The Commissioner of Education transferred this matter to arbitration without addressing the legal sufficiency of the tenure charges in violation of N.J.S.A. 18A:6-16."

Moreover, Exh. A attached to the Petitioner's Motion for Emergent Relief references only DOE docket 97-4/15. It does not reference DOE 289-9/14, my award in the first case. Therefore, DOE 289-9/14 is final and binding on the parties, which unequivocally establishes that res judicata and collateral estoppel are alive and

controlling in the instant matter. When the Entire Controversy Doctrine is factored into this award enhancing res judicata and collateral estoppel, it exposes the Petitioner's arguments and establishes that the District has not met its burden of having a hearing in the matter at bar.

Utilizing the preponderance of evidence standard, it is clear and without reservation that the District's actions in the instant matter violated the statute and, accordingly, must be dismissed.

AWARD

In accordance with the preponderance of credible evidence standard, the Respondent's Motion for Summary Judgment to dismiss the tenure charges against Toni Lenz is hereby granted. The Petitioner's motion to compel a hearing in this matter is denied.

The Respondent, Toni Lenz, shall be returned to work with full back pay, benefits, and seniority. The Petitioner shall also reimburse the Respondent for any documented medical expenses she incurred while she was under suspension.

Dated: August 24, 2015

Gerard G. Restaino, Arbitrator

State of Pennsylvania)

County of Wayne) ss:

On this 24th day of August, 2015, before me personally came and appeared GERARD G. RESTAINO to me known to be the person who executed the foregoing document and he duly acknowledged to me that he executed the same.

Judith K. Restaino

Notary Public

Lake Twp., Wayne County

My Commission expires on November 10, 2017

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Judith K. Restaino, Notary Public
Lake Twp., Wayne County
My Commission Expires Nov. 10, 2017
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

285-15L

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
Commissioner

August 27, 2015

Anastasia P. Winslow, Esq.
95 Spruce Street
Princeton, New Jersey 08542

Derlys Maria Gutierrez, Esq.
Adams Gutierrez & Lattiboudere, LLC
The Legal Center
1037 Raymond Blvd., Suite 900
Newark, New Jersey 07102

Re: *A.P.W., on behalf of minor children, A.T.W. and N.A.W. v. Board of Trustees of the Princeton Charter School, Mercer County. OAL Dkt. No. EDU 12704-14, Agency Dkt. No. 229-8/14.*

Dear Parties,

I have considered the papers filed in connection with the petitioner's request for interlocutory review of ALJ Susan M. Scarola's Order dated August 11, 2015 in the above-captioned matter. Upon full consideration of all of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10.

Accordingly, the petitioner's request for interlocutory review is hereby denied.*

Sincerely,

Peter Shulman
Acting Commissioner

c: Honorable Susan M. Scarola
County Superintendent
State Law Library

PS/MKD/JKH

Via Facsimile and Regular Delivery

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

PURCELL MULCAHY HAWKINS FLANAGAN & LAWLESS, LLC
One Pluckemin Way
Bedminster, NJ 07921
908-658-3800
Attorneys for the State Operated
School District of the City of Newark
File No. 650-10163

IN THE MATTER OF TENURE CHARGES OF ADELA CAMPOS and the STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK	AGENCY REF. NO. 99-4/15 **STIPULATION OF SETTLEMENT**

The State-Operated School District of the City of Newark (the "District"), whose principal office is located at 2 Cedar Street, Newark, New Jersey 07102, and its successors, assigns, officers, employees, agents and representatives (collectively, "School District"), and Adela Campos, residing at 1250 E. Front Street, Plainfield, NJ 07062 ("Respondent") (collectively, the "Parties") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

WHEREAS Respondent is a tenured teaching staff member employed by the District as a teacher; and

WHEREAS the State District Superintendent of the School District ("Superintendent") certified tenure charges of conduct unbecoming to the Commissioner of Education of the State of New Jersey, captioned *In the Matter of Tenure Charges Against Adela Campos, State-Operated School District of the City of Newark, Essex County* ("Tenure Charges"), primarily based upon allegations that Respondent had engaged in conduct unbecoming a teacher's staff member and

such charges were assigned Docket No. 99-4/15; and Respondent filed an answer opposing the charges; and the Commissioner of Education, having reviewed the charges and Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation, and accordingly referred the matter to Arbitrator Walter DeTreux ("Arbitrator") for a hearing; and

WHEREAS, the District is an *Abbott* District, with stringent budget limitations and due to the uncertainty of the outcome of arbitration as well as the expenditure of resources due to multiple days of hearings with numerous witnesses, and the concern that school personnel will be removed from their educational duties and responsibilities during that time, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

WHEREAS the proposed Stipulation of Settlement is in the best interest of the Parties and the public because it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

NOW, THEREFORE, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. Upon final approval of the signed Stipulation by the District, the District shall and hereby does withdraw the instant Tenure Charges. The District agrees to not pursue the subject Tenure Charges against Respondent as long as this Stipulation remains in effect and is not voided by any court or administrative agency of competent jurisdiction. In the event the Stipulation is voided, the District retains the right to refile and consider for certification, tenure charges against Respondent, including those tenure charges which have been previously filed against her by the District, and Respondent reserves the right to defend same. Any future action by the District

against Respondent must be based upon new allegations, and these withdrawn charges shall not be used to support any new charges.

2. Upon final approval by the Arbitrator of the Stipulation signed by the District, Respondent agrees not to make any claim for the 120 days salary which was withheld during her suspension beginning April 27, 2015. Her right to resume salary only begins on or about September 1, 2015. The District agrees to return Ms. Campos to her appropriate level of medical coverage as soon as this matter is completed and no later than 9/1/15.

3. Respondent agrees that any pension payment and medical contribution and/or premium payment during the period of suspension starting 4/27/15 shall be her sole responsibility.

4. Respondent will be assigned to a position, in the discretion of the District.

5. Except as noted above, Respondent waives all claims of any nature against the District with regard to her employment with the District including fees, or other monetary relief, with the exception of workers' compensation claims for the term of her prior employment until the date of this Agreement.

6. In exchange for the consideration set forth in paragraph 3 above, the sufficiency of which is hereby acknowledged, Respondent hereby waives, releases and discharges any and all claims or rights that she has or may have against the District, the State District Superintendent, its Advisory Board of Education and its Advisory Board members, and any and all other District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Respondent's employment with the District up to

the date of this Agreement. It specifically includes, without limitation, all claims which Respondent may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on her employment, including but not limited to any claim for back pay, vacation pay, sick pay, wages, attorneys' fees, costs, and/or future wage loss, except for workers' compensation claims.

7. Notwithstanding the terms of paragraph 10 of this Agreement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. However, should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 6, Respondent agrees not to seek or accept any resulting relief whatsoever.

8. Notwithstanding the terms of paragraph 6 of this Stipulation, Respondent does not hereby waive any right she may have to workers compensation benefits or pension benefits.

9. This Agreement shall not constitute a precedent in any matters involving other District employees.

10. This Stipulation, and all of its terms, are and will remain confidential to the maximum extent permitted by law. Respondent is expressly forbidden from discussing this Stipulation with any person, other than her accountant, tax advisor and attorney ("permitted disclosures") and any other individual or entity as necessary to implement the Stipulation or to which it is legally obligated to respond ("legally-required disclosures"). In making any permitted disclosure, Respondent agrees that it will inform the person to whom it is making the permitted disclosure that the existence and substance of this Stipulation and the settlement giving rise to this Stipulation are to be held strictly confidential to the fullest extent permitted by law. Respondent specifically agrees not to discuss the nature, terms, conditions of this Stipulation with others, any representative of the media, or any past, present, or prospective employee of the District, or its agents or attorneys. Respondent understands that this provision is not a simple recital but is an

important, integral part of this Stipulation. The District agrees that it will keep this Stipulation confidential to the extent permitted by law.

11. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

12. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

13. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have jurisdiction over any dispute arising from, in connection with, or related to this Stipulation.

14. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

15. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

16. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

17. If any provision of this Stipulation is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

18. This Stipulation of Settlement is subject to the final approval of the State District Superintendent of the State-operated School District of the City of Newark and will only become effective upon the final approval of the Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue the matter.

19. Additionally, this Stipulation is subject to approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and will become effective only upon approval by the Arbitrator. Counsel for the Parties shall jointly request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

Dated: 8/24/15

ADELA CAMPOS

Dated: 8-27-15

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

By: CHRISTOPHER CERF
State District Superintendent

CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):

Dated: 8/28/15

Robert M. Tosti
Attorney for State-operated School District of the City of Newark

APPROVED:

Dated: 8/31/15

WALTER DE TREUX, Arbitrator

CERTIFICATION

I, Adala Campos, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 8/24/15

Adala Campos

OAL DKT. NO. EDU 12765-15
AGENCY DKT. NO. 228-8/15

BOARD OF EDUCATION OF THE HIGH POINT REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION ON
v.	:	APPLICATION FOR EMERGENT RELIEF
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE, SUSSEX COUNTY and PORT JERVIS CITY SCHOOL DISTRICT BOARD OF EDUCATION, ORANGE COUNTY, NEW YORK,	:	
RESPONDENTS.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner finds that the petitioner has demonstrated entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

The Commissioner finds that petitioner has demonstrated a likelihood of irreparable harm absent emergent relief. The continuity of education for the children of Montague for the 2015-2016 school year and the potential for withholding of Montague's State aid pursuant to *N.J.S.A.* 18A:55-2 and *N.J.A.C.* 6A:23A-5.1 demonstrate that irreparable injury will result if Montague is permitted to enter into send/receive relationship with Port Jervis for those students who would otherwise be required to go to High Point. The Commissioner finds that Montague has intentionally defied a Commissioner's decision and may not be permitted to continue to do so. The Commissioner

concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has met the remaining factors set forth in *Crowe*, *supra,* and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is rejected. Montague is enjoined from entering into a send/receive relationship with Port Jervis for those students who would otherwise be required to go to High Point, pursuant to the send/receive relationship currently in effect. This case shall proceed at the OAL to a plenary hearing, or such other proceedings as the ALJ and the parties determine, to resolve the underlying claim on the merits.[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: Sept. 2, 2015

Date of ~~Mailing~~: Sept 2, 2015
Faxing

[1] Although the ALJ indicated that all issues in this matter have been resolved, this controversy must proceed at the OAL for resolution of the underlying claim on the merits. *See N.J.A.C.* 1:1-18.1.

[2] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 12765-15
AGENCY DKT. NO. 228-8/15

BOARD OF EDUCATION OF THE HIGH POINT REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE, SUSSEX COUNTY, AND PORT JERVIS CITY SCHOOL DISTRICT BOARD OF EDUCATION, ORANGE COUNTY, NEW YORK,

Respondents.

Gregory F. Kotchick, Esq., and **M. Murphy Durkin**, Esq. for petitioner, Board of Education of the High Point Regional High School District, Sussex County (Durkin & Durkin, attorneys)

Daniel M. Perez, Esq., and **Gary A. Kraemer**, Esq., for respondent, Board of Education of the Township of Montague, Sussex County (Daggett & Kraemer, attorneys)

Thomas Scapoli, Esq., for respondent, Port Jervis City School District Board of Education, Orange County, New York, (Ingerman Smith, attorneys)

BEFORE **EVELYN J. MAROSE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the Board of Education of the High Point Regional High School District (hereinafter High Point), seeks an order enjoining students from the Township of Montague (hereinafter Montague) from enrolling in Port Jervis City School District, Orange County, New York (hereinafter Port Jervis), except as permitted by approved transition plan and other related relief. Opposition was filed on behalf of Montague. Both High Point and Montague appeared for oral argument on August 31, 2015, and submitted supplemental papers on September 1, 2015.

Port Jervis was not represented at oral argument. Both counsel for High Point and counsel for Montague indicated at oral argument that they had not received any papers from counsel for Port Jervis regarding the Petition for Emergent Relief. Today, on September 1, 2015, I received a fax from Thomas Scapoli, Esq., indicating that it was faxed August 31, 2015. Counsel, on behalf of Point Jervis, opposes High Point's request for emergent relief. The fax does not indicate that it was served upon either Montague or High Point and accordingly was not considered by me. However, based upon my determination, Point Jervis is not prejudiced.

FACTUAL DISCUSSION AND FINDINGS

The underlying facts relevant to this decision are not in dispute. For perhaps eighty-five years Montague has provided educational programs for its elementary students and has sent its seventh- through twelfth-grade students to other schools, including those in Port Jervis. A Sending-Receiving Tuition Contract Agreement, between Montague and Port Jervis, dated September 19, 2000 (hereinafter Montague/Port Jervis Agreement), provides among other things that Port Jervis will provide educational services on a nonexclusive basis to some of Montague's students. The Montague/Port Jervis Agreement expressly notes that some students may attend private, vocational-technical, charter, parochial, or other public schools rather than

attend school in Port Jervis. The term of the Montague/Port Jervis Agreement is perpetual, with cancellation upon a minimum of five years written notice by either party. The agreement is expressly noted to be governed by and construed in accordance with the laws of the State of New Jersey. (Perez Certification, Exhibit A.)

In late 2012/early 2013, Montague and High Point began to communicate regarding the possibility of a sending/receiving relationship. Montague's counsel wrote a letter to the New Jersey Commissioner of Education on March 4, 2013. Counsel advised the Commissioner that, while Montague had been in a long-term relationship with Port Jervis, the goal of the Montague Board of Education was "ultimately to return all of its students to New Jersey for grades pre-K to 12." Counsel asked for guidance as to the ability to withdraw from a sending/receiving relationship with an out-of-state district upon reasonable notice. Counsel inquired if it would be possible for the Commissioner to withdraw consent for the out-of-state relationship, and, if not, what process should Montague follow in replacing an out-of-state sending relationship with a sending/receiving relationship in-state. Copies of the March 4, 2013, letter sent to the Commissioner were forwarded to the Montague Board President, the Montague Chief School Administrator, the Montague Business Administrator, and Sussex Executive County Superintendent. (Perez Certification, Exhibit F.)

Approximately three months later, Montague's counsel wrote a second letter to the Commissioner, on June 18, 2013, regarding Montague's long-term sending relationship with Port Jervis. Counsel noted that the district and the community had continued concerns about paying tuition to an out-of-state district with an inability to provide a New Jersey diploma to Montague students and a district that relied upon New York assessments and educational standards. The Commissioner was informed that Montague and High Point had agreed upon terms for a sending/receiving agreement that they were interested in memorializing within a month or two. Counsel made "an application to the Department of Education to facilitate the withdrawal of consent and potential return of its [Montague's] high school age students to New Jersey beginning as of September 2013" pursuant to N.J.S.A. 18A:38-10. In particular, it was noted that the initial decision to seek permission to contract for out-of-state educational services was first signed over sixty year ago. Since then the New Jersey County roads at issue were

developed, maintained, and upgraded for safety. In the event of inclement weather, Montague and administrators of the nearby schools consulted with each other regarding inclement weather closings or delayed openings. In the case of inclement weather, two routes were available between the High Point and Montague Districts. The shorter route involved travel over "the mountain" and was 14.48 miles in length. The longer route did not involve travel over "the mountain" but was 21.29 miles in length. Counsel also provided the Commission with details regarding mileage between Montague and other relevant schools that Montague students were attending. Copies of the June 18, 2013, letter sent to the Commissioner were also forwarded to the Montague Board President, the Montague Chief School Administrator, the Montague Secretary/Business Administrator, and the Interim Executive Sussex County Superintendent. (Perez Certification, Exhibit F.)

On June 24, 2013, the Commissioner of Education wrote a letter to Montague's counsel stating as follows:

> Please be advised that the application submitted on behalf of the Montague Board of Education, dated June 18, 2013, requesting that the Commissioner withdraw his consent for the attendance of pupils in grades 9 through 12 at the public schools of Port Jervis, New York, pursuant to N.J.S.A. 18A:38-10, is hereby granted. After carefully considering the information submitted, including a historical description of the circumstances that led to the creation of the out-of-State send-receive relationship and an explanation of the improved road and travel conditions in the geographic area served by the Montague Board of Education and the surrounding school districts, I conclude that the reasons for the initial consent now cease to exist. As such, the Montague Board of Education may enter into a send-receive relationship with the High Point Regional School District for the education of its students in grades 9 through 12.

The Commissioner also was forwarded copies of his determination to the Montague Board President, the Montague Chief School Administrator, the Montague Secretary/Business Administrator, and Interim Executive Sussex County Superintendent. (Perez Certification, Exhibit F.)

Thereafter, High Point and Montague executed a Sending-Receiving Agreement, dated August 13, 2013 (Montague/High Point Agreement). This Agreement was signed on behalf of High Point by the Vice President of the High Point Board of Education and on behalf of Montague by the President of the Montague Board of Education. The Montague/High Point Agreement concerned the provision of educational services only to Montague pupils in grades nine through twelve and was effective only for ninth-grade students beginning last September 1, 2014. (Perez Certification, Exhibit E.)

On November 12, 2013, Montague made a further application to the Commissioner requesting that he withdraw his consent for Montague seventh- and eighth-grade students to be educated at Point Jervis pursuant to the Montague/Point Jervis Agreement. Counsel forwarded copies of this application to the Montague Board President, the Montague Chief School Administrator, the Montague Secretary/Business Administrator, and the Interim Executive Sussex County Superintendent. (Verified Petition of Appeal, Exhibit E.) On November 19, 2014, the Commissioner granted Montague's request to terminate its send-receive relationship with Port Jervis for its seventh- and eighth-grade students. The Commissioner also forwarded copies of his determination to the Montague Board President, the Montague Chief School Administrator, the Montague Secretary/Business Administrator, and the Interim Executive Sussex County Superintendent. (Verified Petition of Appeal, Exhibit F.)

By letter dated April 10, 2015, High Point sought confirmation from Montague that Montague students would be attending High Point, in according with the Montague/High Point Agreement. (Verified Petition of Appeal, Exhibit G.) By letter dated April 20, 2015, the Interim County Executive for the Sussex County Board of Education advised Montague that it had come to her attention that several Montague parents were intending to enroll their children in Port Jervis. In fact, the Interim County Executive was advised that the Montague Board President may have indicated at Port Jervis Board Meetings that Montague students should be able to continue to attend schools in Port Jervis. The Interim County Executive advised Montague that such actions were not in compliance with the Commissioner's prior decisions and the Montague/High Point Agreement, by which Montague was obligated to abide. The Interim County Superintendent stated that she had unsuccessfully attempted to meet

with the Montague Board President and Montague school administration on several occasions and remained willing to meet with them. A copy of her letter was sent to the Assistant Commissioner, the Deputy Chief Legal and External Affairs, the Executive County Business Office, the Montague Superintendent, the Montague School Business Administrator/Board Secretary, the High Point Superintendent, the High Point Business Administrator/Board Secretary, the Port Jervis Superintendent, and the Port Jervis Assistant Superintendent for Business. (Verified Petition of Appeal, Exhibit H.)

A Notice of Motion for Emergent Relief was filed by High Point on August 19, 2015, seeking to enjoin Montague from enrolling any students in Port Jervis, except as permitted by the transition plan. Emergent relief is opposed by Montague who asserts that injunctive relief is inappropriate.

LEGAL ARGUMENT AND CONCLUSIONS OF LAW

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

> (b) A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has the likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

Emergent relief should not be granted except "when necessary to prevent irreparable harm." Crowe, supra, 90 N.J. at 132. The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated.

"The requisite for injunctive relief has been characterized as a 'clear showing of immediate irreparable injury,' or a 'presently existing actual threat; [emergent relief] may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by the common law.'" Cont'l Group v. Amoco Chems. Corp., 614 F.2d 351, 359 (D.N.J. 1980) (citations omitted). Injunctive relief is only appropriate where money damages are not readily calculable. United Board and Carton Corp. v. Britting, 63 N.J. Super. 517, 533 (Ch. Div. 1959).

After hearing the arguments of High Point and Montague and considering their documents submitted, I **CONCLUDE** that the law regarding High Point's Claim is settled. There is a statute on point as to a sending/receiving agreement between a New Jersey district and out-of-state district. Such an agreement must be approved by the New Jersey Commissioner of Education, who may withdraw his consent upon reasonable notice, wherever the reason or reasons for the consent shall cease to exist.

I **CONCLUDE** that High Point is likely to prevail on the merits of its underlying claim. As detailed above, approximately eight months prior to execution of the Montague/High Point Agreement, an inquiry was made to the Commissioner of Education regarding the possibility of educating Montague's students in New Jersey rather than New York State, where they would receive a New York diploma that relies upon New York assessments and standards. Subsequently, after being provided with more of a factual basis for the request, the Commissioner withdrew his consent for Montague's ninth- through twelfth-grade students to enroll in Port Jervis. Thereafter, Montague made a further request to be able to terminate its send/receive relationship with Port Jervis as to its seventh- and eighth-grade students. After the review of that supplemental request and with the input of the County Superintendent, the Commissioner then withdrew his consent for Montague's seventh- and eighth-grade students to be enrolled in Port Jervis. All of the determinations were made pursuant to transition plans. All requests and determinations, including those made by Montague's then counsel were carbon copied, among others, to the Montague Board of Education and County Superintendent. No appeal of either determination of the Commissioner was ever filed.

The cited cases by Montague are not on point. In both matters, the decision of the Montague Board was affirmed, against a parent of Montague student. In this case, a current Montague Board of Education is seeking to act in opposition to the actions of a former Montague Board of Education. Further, both decisions were made some time ago—one in 1994 and one in 2000.

Despite the foregoing, High Point has not met all four prongs necessary for any emergent relief. Essentially, in determining its staffing needs, High Point has relied upon the High Point and Montague Sending/Receiving Agreement, dated August 13, 2013, which provides a schedule for the sending/receiving relationship that began in September 1, 2014. The parties agreed upon a flat per pupil rate from 2014 to 2024. The per pupil rate for the 2015-2016 school year is $14,796. Thus, the damage at issue is the monies that would have been paid to High Point for the education of Montague students who are presently enrolled to attend school in Port Jervis for the 2015-2016 school year. Based, solely for purposes of this Petition, upon the representations of High Point in their supplemental papers, High Point's damage is the loss of seventeen pupils (6 - 47 = 17) times the per pupil rate, or $251,532. (Ripley Certification, Paragraph 5, and Exhibit A.) Thus, I **CONCLUDE** that High Point has not presented any credible evidence that it will suffer any irreparable harm if the requested relief is not granted, with the exception of calculable monetary damages.

While the equities favor High Point, I further **CONCLUDE** that neither party will suffer greater harm than the other if emergent relief is denied. As noted in detail above, after many years of a sending/receiving relationship with Port Jervis, the Montague Board of Education, sitting in 2012-2013 asked the New Jersey Commissioner of Education to determine if he would withdraw his consent to have Montague pupils educated out of state in Port Jervis. Subject to transition plans, the Commissioner withdrew his consent. All correspondence at issue, though at times addressed to or by Montague's counsel, was carbon copied to the Montague Board President, the Montague Chief School Administrator, the Montague Secretary/Business Administrator, and the Interim Executive County Superintendent, who did not object to the substance of the communications nor to the determinations of the Commissioner. In fact, the Commissioner's determinations were never appealed. The Montague/High Point

Sending/Receiving Agreement took effect last year, September 2014. In equity, it is reasonable for High Point to believe that Montague should act in accordance with the Montague/High Point Agreement's terms. In equity, it is unreasonable for the current Montague Board of Education and Montague citizens to not be obligated to comply with an Agreement entered by a former Board. No evidence was presented by Port Jervis that Port Jervis objected to the implementation of the Montague/High Point Agreement last year. Further, documentation was presented at Oral Argument that indicates that the Port Jervis Board Of Education was aware, at least as early as July 2, 2013, of a transition plan for Montague pupils to begin being educated at High Point as of September 2014. (Port Jervis City School District, Board of Education Meeting Minutes, July 2, 2013.)

Based on the foregoing, I **CONCLUDE** that High Point has failed to meet the requirements set forth in N.J.A.C. 6A:3-1.6(b) and is not entitled to emergent relief.

I further **CONCLUDE** and the parties have confirmed and I **AGREE** that there are no further issues left to be determined.

ORDER

I hereby **ORDER** that the High Point's request for emergent relief is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Sept. 2, 2015
DATE

EVELYN J. MAROSE, ALJ

289-15LM

2-89-15

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
Commissioner

September 3, 2015

Daniel M. Perez, Esq.
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Newton, New Jersey 07860

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Thomas Scapoli, Esq.
Ingerman Smith, LLP
550 Mamaroneck Avenue, Suite 209
Harrison, New York 10528

Re: *Board of Education of the High Point Regional School District v. Board of Education of the Township of Montague, Sussex County and Port Jervis City School District Board of Education, Orange County, New York, Agency Dkt. No. 228-8/15*

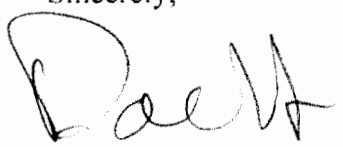
Dear Counsel:

I have reviewed the materials filed in connection with the Montague Board of Education's (Montague) Motion to Stay the September 2, 2015 decision enjoining Montague from entering into a send/receive relationship with Port Jervis for those students who would otherwise be required to go to High Point, pending appeal of this decision to the Superior Court, Appellate Division.

Pursuant to *N.J.A.C.* 6A:3-1.6(b), a motion for stay is considered an extraordinary remedy that may only be issued upon a finding that petitioner has met each prong of the four-pronged standard for the granting of interim relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Thus, a stay may be granted where necessary to prevent irreparable harm, where the legal right underlying the movant's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Id.* at 132-134.

Upon review of the papers submitted, I find that Montague has failed to meet the standard required for a stay of the September 2, 2015 decision. Accordingly, Montague's request for a stay of the September 2, 2015 decision is hereby DENIED.[1]

Sincerely,



David C. Hespe
Commissioner

c: County Superintendent
State Law Library

DCH/MKD/BON

[1] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

290-15

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Hearing
of Jason Ali

Clearview Regional School District,

"Petitioner,"

- and -

Lisa Massing,

"Respondent."

DECISION APPROVING SETTLEMENT AGREEMENT

Agency Docket No. 127-6/15

Before
Robert C. Gifford, Esq.
Arbitrator

Appearances:

For the Petitioner:
Frank P. Cavallo, Jr., Esq.
Tracey L. Schneider, Esq.
Parker McCay

For the Respondent:
Barbara E. Riefberg, Esq.
Shimberg & Friel

On July 20, 2015, I was assigned as the arbitrator for the above referenced matter. Settlement discussions took place on July 22nd. The hearing commenced on July 29th, but the parties agreed to continue their settlement discussions in lieu of proceeding on the evidentiary record. I agreed to cancel the hearing scheduled for July 30th. A drafted settlement agreement was executed by the Respondent on August 10th during a settlement conference. The Board's next meeting was scheduled for August 27th.

On August 27, 2015, the Clearview Regional Board of Education [the "Petitioner"] formally executed and adopted the settlement resolving the tenure charges it filed with the State of New Jersey, Department of Education on June 12, 2015. A fully executed settlement agreement was forwarded to me on September 4, 2015. The terms of settlement are included in the settlement agreement attached hereto.

N.J.A.C. 6A:3-5.6 requires the arbitrator to issue a brief decision approving the settlement of tenure charges and explaining why the arbitrator is approving the terms of settlement.

The parties' settlement agreement expressly details the basis for resolution. I have thoroughly reviewed and considered the parties' reasons for settlement set forth therein. Having considered the stated reasons in conjunction with the issues raised in the Statement of Tenure Charges and the Statement of Evidence

filed by the Petitioner and the Response to Tenure Charges filed by the Respondent, I am persuaded that the parties entered the settlement agreement knowingly and willingly and that the terms of the settlement agreement represent a reasonable basis for settlement that will serve the public's interest and are consistent with the public good.

Accordingly, and based upon the foregoing, I approve the parties' settlement agreement.

Dated: September 5, 2015
Sea Girt, New Jersey

Robert C. Gifford

State of New Jersey }
County of Monmouth }ss:

On this 5th day of September, 2015, before me personally came and appeared Robert C. Gifford to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Linda L Gifford
Notary Public
Expires 1-10-2016

Law Offices of
PARKER McCAY P.A.
9000 Midlantic Drive, Suite 300
P.O. Box 5054
Mount Laurel, New Jersey 08054
Attorneys for Petitioner, Clearview Regional Board of Education

IN THE MATTER OF THE TENURE CHARGES AGAINST LISA MASSING CLEARVIEW REGIONAL BOARD OF EDUCATION, GLOUCESTER COUNTY

SETTLEMENT AGREEMENT

Docket No. 127-6/15

BOARD OF EDUCATION OF THE CLEARVIEW REGIONAL SCHOOL DISTRICT, COUNTY OF GLOUCESTER (hereinafter **"BOARD"**) with offices located at 420 Cedar Road, Mullica Hill, New Jersey and **LISA MASSING** (hereinafter **"MASSING"**) hereby agree as follows:

WHEREAS, MASSING has been employed in the Clearview Regional School District as a Teacher since the April 3, 1997; and.

WHEREAS, MASSING has been on a worker's compensation based leave of absence during the 2013-2014 School Year, from Mid-January 2014 through June 2014 and on worker's compensation leave/sick leave/Family Medical Leave/personal leave during the 2014-2015 School Year through March 9, 2015; and.

WHEREAS, the **BOARD** certified and filed Tenure Charges against **MASSING** on May 28, 2015; and.

WHEREAS, MASSING served an Answer to the said Tenure Charges on or about July 13, 2015 contesting the allegations contained in the Tenure Charges; and.

WHEREAS, MASSING submitted an application for retirement with the State of New Jersey, Division of Pensions, prior to the certification of tenure charges; and,

WHEREAS, the initial Hearing as to those Tenure Charges was conducted on July 29, 2015; and,

WHEREAS, the **PARTIES,** with the advice of their respective counsel entered into settlement discussion and desire to settle all aspects of **MASSING'S** employment rights and benefits by executing this **SETTLEMENT AGREEMENT AND GENERAL RELEASE** ("**AGREEMENT**");

IT IS HEREBY AGREED by and between **MASSING** and the **BOARD**, as follows:

1. **MASSING**, for and in consideration of the undertakings of the **BOARD** set forth in paragraphs 3, 4 and 5 and herein, and intending to be legally bound, does hereby remise, release and forever discharge the **BOARD** and its officers, members, employees and agents, its and their respective successors and assigns, heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which she ever had, now has, or hereinafter may have, or which her heirs, executors or administrators hereinafter may have with respect to her employment relationship with the **BOARD**, however specifically excluding any claims under the Workmen's Compensation Laws of the State of New Jersey.

2. **MASSING** has submitted a Letter of Resignation (Exhibit "A").

3. The **BOARD**, for and in consideration of the undertakings of set forth herein, and intending to be legally bound, does hereby remise, release and forever discharge **MASSING** and her heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which it ever had, now

has, or hereinafter may have, or which its officers, members, employees and/or agents, and its respective successors and assigns, heirs, executors or administrators hereinafter may have with respect to her employment relationship with the **BOARD,** except for claims arising from the breach of this **AGREEMENT**.

4. The **BOARD** has requested, based upon the terms and conditions of this **AFREEMENT,** that the Tenure Charges be dismissed.

5. The **BOARD** agrees to provide any prospective employers with the following information: **MASSING** was hired on April 3, 1997 and remained employed until her resignation on August 1, 2015.

6. **MASSING** hereby agrees and recognizes that her employment relationship with the **BOARD** will be permanently and irrevocably severed as of June 30, 2015, and that the **BOARD** does not have any obligation, contractual or otherwise, to hire, rehire, or re-employ her in the future.

7. By signing this **AGREEMENT,** the Parties certify that they have had the opportunity to discuss this **AGREEMENT** with counsel. They are fully satisfied with the services of their counsel with respect to both this **AGREEMENT** and all other aspects of this case and they enter into this **AGREEMENT** knowingly, willingly and without any coercion or improper inducements.

8. The parties agree that this **AGREEMENT** may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

Intending to be legally bound hereby, **MASSING** and the **BOARD** execute the foregoing **AGREEMENT** dated August ___, 2015.

WITNESS:

LISA MASSSING

WITNESS:

BOARD OF EDUCATION OF
CLEARVIEW REGIONAL SCHOOL DISTRICT

BOARD SECRETARY

BOARD PRESIDENT

Ms. Lisa Massing
129 Windsor Drive
Woolwich Twp., NJ 08085

August 10, 2015

John Horchak, III, Superintendent
Clearview Regional High School District
Administration Building
420 Cedar Road
Mullica Hill, NJ 08062

RE: Letter of Resignation

Dear Mr. Horchak:

In accordance with the Settlement Agreement reached in connection with the pending tenure case, I am submitting my letter of resignation from my position as a teacher with the Clearview Regional High School District, effective immediately. Unfortunately, the injuries that I sustained in the accident of January 10, 2014 have compelled me to make this very difficult decision.

I thoroughly enjoyed my years of service to the students in the District and I wish my health would have allowed me to continue my career.

Very truly yours,

Lisa Massing

Clearview Regional High School District

ADMINISTRATION BUILDING
420 CEDAR ROAD • MULLICA HILL, NJ 08062
Fax (856) 478-0409

DIANE CUMMINS
ASSISTANT SUPERINTENDENT
FOR CURRICULUM & INSTRUCTION
(856) 223-2766

JOHN HORCHAK III
SUPERINTENDENT
(856) 223-2765

ESTHER R. PENNELL, CPA
BUSINESS ADMINISTRATOR
(856) 223-2764

August 31, 2015

The following is an excerpt from the Clearview Regional Board of Education minutes for their meeting held on August 27, 2015:

Finance, Student Activities & Personnel

Mr. Moore moved, seconded by Mr. Ware, that the Board of Education approve the following Finance, Student Activities & Personnel Items:

Settlement Agreement

Acceptance of the approval of a settlement agreement with employee #4049.

The motion was unanimously approved by a roll call vote.

Aye:	**Mr. Burgin, Mr. Fuller, Mrs. Glaquinto, Mr. Moore, Mrs. Vick, Mr. Ware, and Mr. Campbell**
Nay:	**None.**

I certify that the above is a true and correct copy of the minutes of the Clearview Regional Board of Education meeting held on August 27, 2015.

Esther R. Pennell, Business Administrator

8/31/15

Date

291-15

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

BUREAU OF CONTROVERSIES AND DISPUTES

.....

In the Matter of the Tenure Dismissal between:

CAROL ZEPRALKA,
Respondent,

-AND

AWARD AND OPINION

GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION

Docket No. 162-7/15

.....

BEFORE: Ernest Weiss, Arbitrator

APPEARANCES: For the Respondent: Ned P. Rogovoy, Esq.

For the School District: Louis J. Greco, Esq.

Issue: **Did the Greater Egg Harbor Regional High School District Board of Education meet its burden of proof to justify the tenure termination of Respondent, and if not, what shall be the remedy?**

PRELIMINARY STATEMENT

Having been selected in accordance with the provisions of N.J.S.A. 18A:6-16 as amended by P.L. 2012, c.26, on August 19, 2015 I conducted an arbitration hearing at the offices of the Greater Egg Harbor Regional Board of Education, 1824 Dr. Dennis Foreman Drive, Mays Landing, NJ, at which time the parties were offered a full opportunity to present evidence and argument in support of their respective positions. At that time, both the Respondent and the School District submitted exhibits that were admitted, along with joint exhibits. Post hearing briefs were submitted by counsel and considered herein.

STATEMENT OF FACTS

Joint Ex 1, the case history record, was submitted and marked for identification and taken into evidence. Both sides waived making opening statements.

The Greater Egg Harbor Regional High School District ("the District") brought tenure charges based on "conduct unbecoming" against its employee, Carol Zepralka ("Zepralka" or "Respondent"). Prior to the hearing, it was established that the Respondent had been employed with the District during the 1995-96 school year, had worked since 2000 as a computer operator/secretary and continued in that role in the 2014-15 school year. On March 4, 2015, Zepralka consumed alcohol during school hours in the work place, when students were present. The District chose to seek termination rather than the more usual practice when a long serving employee has an unblemished record, citing its zero-tolerance policy and its concern over the potential harm to "young and impressionable children (who

were high school students in this case – emphasis mine) in the public school setting." The employee had daily contact with the students and parents in the course of tracking student attendance, which was part of her duty.

It is undisputed testimony that the Respondent voluntarily entered an inpatient employee assistance program on March 29, 2015, continuing for eighty days and was discharged by the facility's Medical Director (see Ex. R-1) and on June 22, 2015, was cleared to return to work without restriction, and determined fit for duty. The Superintendent did not have first hand knowledge of the March 4, 2015 incident and acknowledged that this was the Respondent's only incident of misconduct in the workplace.

SUMMARY OF TESTIMONY

The District called John J. Keenan ("Keenan"), the District Superintendent, to testify. He testified that he had been employed as the District Superintendent since July 1, 2014 and had been a school district superintendent for the previous five years elsewhere in New Jersey, and had taught for nine years, and had been an educator for twenty-eight years, all those roles having certificates issued by the State of New Jersey.

Keenan testified that he first met Zepralka at the beginning of July 2014 and stated that on March 15, 2015, Dr. Gatto, (the Principal of the Greater Egg Harbor Regional High School) was advised by an assistant principal that there was a strong smell of alcohol coming from the attendance office, and that she was concerned that the Respondent was believed to be under the influence of alcohol during school hours on March 14, 2015. Ultimately it was documented that there was a strong odor of alcohol coming from the attendance office and the Respondent was the only person using that office. Following several procedural steps, the Respondent

was interviewed and the outcome of that investigative interview was reported to Keenan, who testified that he reviewed everything that had occurred to that point, including Zepralka's personnel file, which included her prior performance evaluations.

Keenan testified that after reviewing all the evidence, he came to the decision that he would recommend tenure termination to the Board of Education, which in turn reviewed, authorized and certified that his recommendation be followed. There followed a delay in the proceedings due to a requested and approved leave of absence sought by the Respondent for the purpose of entering a rehab facility. Further, he testified with respect to the tenure termination, that the hearing in question proceeded upon completion of the leave of absence. Keenan explained that he pressed for tenure termination because of his concern and responsibility for the safety and security of the District, together with the students and staff. He stated that "zero tolerance is self explanatory." He went on to explain that alcohol is an ongoing issue and concern and that not enforcing the Policy would amount to enabling such behavior in his part. He noted that the Respondent's office is in the main lobby of the high school and is the first office one sees upon entering the school.

On cross-examination, Respondent's attorney began by identifying Exhibit R-1, the letter of clearance of the Respondent by the rehabilitation facility, and offering it into evidence. Keenan acknowledged having seen the letter previously and that he understands that the Respondent has a "medical condition." Keenan expressed concern about future failures in job performance by reason of this condition. He acknowledged that the statute gave him the right to require that the Respondent be examined for a fitness for duty determination by an independent medical examination which must

be complied with under the statutory scheme, but that neither he nor the District made such a request. Thus, the only medical determination of the Respondent's fitness for duty was from the Medical Director of the rehabilitation facility.

He testified that he reviewed the Respondent's personnel file as part of the process is determining the discipline for so serous a charge with its potential consequences. Keenan stated that absent this incident there was nothing in the record that indicated any unfitness for duty. He testified that there may have been individual items requiring improvement, but overall the record was satisfactory, if Average. Average is one of five categories of evaluation, being the middle category and Superior being the top.

Respondent's counsel then requested Keenan to review Exhibit R-2, which was Zepralka's entire record of performance evaluations, and it was marked and entered into evidence. Keenan had reviewed this performance record prior to making his recommendation, including the fact that the evaluators were her different supervisors over the course of her employment.

Since the fact of the Respondent's having imbibed alcohol in school during school hours was the "primary," reason for the recommended tenure termination, Respondent's counsel pressed Kennan for any "secondary" reasons. There was a difficult series of exchanges around that question, the only answer that the Arbitrator received was that Keenan had many years of experience, including experience with substance abuse, which should not be discounted.

Zepralka's counsel then inquired as to Keenan's use of the phrase ". . . under the influence of alcohol," and Keenan acknowledged that there was no record or indication of behavior that appeared to be "under the influence of alcohol," and that he had not observed the Respondent on March 4, 2015.

He stated that he was aware of and had resources readily available with respect to the State's definition of "under the influence," as well as available testing for it.

On redirect, the District's counsel elicited from Keenan that the medical clearance letter was neither directed to the school nor included any knowledge that the Respondent was a public school employee with close contact with students. The letter in question was addressed to the Human Resources Department at the school and somehow found its way to the payroll supervisor.

On re-cross, it was determined that the "letter" had been in the District's possession prior to its determination to pursue tenure termination.

The District closed its case in chief.

Zepralka's attorney offered for identification an amendment to R-2, an original copy of the Respondent's personnel evaluation which has not been part of the original submission of R-2. It was marked for identification as R2B. With that, the Respondent's counsel closed her case.

The parties agreed to submit letter briefs by close of business of August 31, 2015 in order to meet the parties' separate tight timeframe needs.

DISCUSSION AND OPINION

This case is an appeal of a certification and subsequent disciplinary action of termination sought by the Respondent.

Both parties agree that prior to this arbitration full due process was observed in this case. I am reviewing the case based on the credibility of the witness before me, together with the exhibits and documents presented.

The District's sole witness, Superintendent Keenan, has been the Districts Superintendent for about a year, but brings twenty-eight years of experience as a teacher, principal and superintendent

He had, however, no first hand knowledge of the incident that occurred on March 4, 2015, and relied on the report of his subordinate principal, Dr. Gatto, on whom he had no reason not to rely. He was familiar with the Respondent, who he met from time to time since her office was the first that one encountered upon entering the high school.

He acknowledged that this was the Respondent's only incident of misconduct in the workplace. He testified to having reviewed the Respondent's personnel record as part of his normal practice before reaching any decision of such magnitude. Of the five categories used for performance evaluation over the twenty-plus years of Zepralka's employment, Keenan concluded that her performance was average or slightly above average, with areas in need of improvement. In fact, on cross- examination, he acknowledged that there were years where most or all of her evaluations, performed by her various supervisors, were superior. He further acknowledged that the District had in its possession the medical clearance letter, issued after 80 days of voluntary inpatient rehabilitation, stating that she was fit for duty without restriction. Finally, he testified that the primary reason for his and the Board's decision to pursue tenure termination was his concern for and his responsibility for the safety of his students and staff, and indicated that to not enforce the zero tolerance policy would be enabling unacceptable behavior on his and the Board's part.

In the letter brief submitted by the Respondent's attorney, several cases were cited to show how public employers should deal with an employee who can be considered an alcoholic (a medical condition). In

these cases, where the employees had either been cross-addicted and/or had multiple instances of being under the influence, were given multiple chances to return to work following a successful rehabilitation program.

As a condition for continued employment, the employer can monitor the employee's performance closely and may require random testing to insure compliance.

The conclusion of Respondent's counsel is that in appropriate circumstances, as in this case, the courts would favor multiple chances for an employee to rehabilitate his/herself and return to work subject to employer monitoring.

Given her twenty years of otherwise unblemished behavior, I was not persuaded by Superintendent Keenan's testimony regarding the possibility of repeated future behavior. There was no showing that her rehabilitated status would not hold under a last chance agreement.

I have thoroughly considered Superintendent Keenan's testimony and the arguments of the parties herein and also I considered the evidence in the Record. Having thoroughly considered all the evidence, including the arguments and allegations of both parties, I have determined for the above stated reasons that the District has not met its burden of proof to justify the tenure termination of the Respondent after twenty years of otherwise unblemished service.

I have included here a copy of a "last chance agreement," provided by Respondent's Counsel, with minimal modification, and directed herein as binding upon the parties and mutually executed the "last chance agreement" upon receipt of the instant Arbitration award.

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

BUREAU OF CONTROVERSIES AND DISPUTES

.....

In the Matter of the Tenure Dismissal between:

CAROL ZEPRALKA,
Respondent,

-AND **AWARD**

GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION
Docket No. 162-7/15

.....

The undersigned arbitrator, having been designated in accordance with N.J.S.A. 18A:6-16 as amended by P.L. 2012, c. 26, entered into by the above parties, and having duly heard the proofs and allegations of the parties, AWARDS as follows:

The Tenure Termination is not sustained. The parties shall enter into the "Last Chance Agreement" as annexed hereto. The Arbitrator shall retain jurisdiction for the sole purpose in the event that there are any issues arising out of this decision.

ERNEST WEISS, ARBITRATOR

STATE OF NEW JERSEY)
) ss:
COUNTY OF SOMERSET)

On this 4TH day of September, 2015, before me personally came and appeared Ernest Weiss, known to me to be the individual described in and who executed the foregoing instrument and he acknowledged that he executed the same.

JULIE KARMAS
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires

LAST CHANCE AGREEMENT

THIS AGREEMENT made and entered into the date last written below, by and between GREATER HARBOR REGIONAL HIGH SCHOOL DISTREICT BOARD OF EDUCATION (the "Employer"), a body politic of the State of New Jersey, having its principal office at 1824 Dr. Dennis Foreman Drive, Mays Landing, New Jersey 08330 and CAROL ZEPRALKA (the "Employee"), having an address of 8 Franklin Drive, Somers Point, New Jersey 08244.

W I T N E S S E T H:

WHERAS, the Board is the governing body of the GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTREICT BOARD OF EDUCATION; and

WHEREAS, the Employee is a computer operator/secretary and has been employed by the Board in different positions since on or about the 1995-1996 school year or for approximately twenty years; and

WHEREAS, on or about March 4, 2015, the Employee, a tenured secretarial staff employee, consumed some alcohol during school hours and while on school premises; and

WHEREAS, as a result of her behavioral health medical condition she became enrolled in a full time treatment program at the Recovery Institute of South Florida, with her admission being on March 29, 2015 and her fit for duty discharge with no restrictions occurring on June 22, 2015; and

WHEREAS, the District by and through their Board of Education certified Tenure Charges based on unbecoming conduct pursuant to N.J.S.A. 18A:6-10 et seq. and N.J.A.C. 6A:3-51 et seq.; and

WHEREAS an Arbitration took place on August 19, 2015 at the Greater Egg Harbor Regional District Offices.

NOW, THEREFORE, the parties agree to the terms of this Last Chance Agreement as follows:

1. Employee agrees that she shall never again imbibe in the consumption of alcohol during school hours or on school property, and at any and all times any testing, as set forth in subparagraph 2 below cannot yield over a .02% blood alcohol content (BAC) or there will be immediate unilateral termination under this agreement, with the only due process

right of the Employee if a test should come back over a .02% BAC is the propriety of the test.

2. Employer shall be entitled under minimum probable cause to ask the Employee to submit an alcohol test either by blood or urine sample at its cost. Again, if the Employer requests the Employee to take a blood alcohol level test and it yields more than .02% BAC, or if the Employee refuses the request, there shall be immediate termination without bringing tenure charges and subject only to the Employee's right to see that the test was properly performed.

3. In this case the Arbitrator has decided the tenure charges and orders the District and the Respondent to enter into this last chance agreement, both sides shall sign this Last Chance Agreement and be bound by the language herein.

4. So long as the Employee complies with the terms herein, she shall return to her regular status and regular job with all benefits and emoluments.

Witness:

_____

_____
CAROL ZEPRALKA, Employee
Dated:_____

GREATER EGG HARBOR REGIONAL
HIGH SCHOOL DISTRICT BOARD
OF EDUCATION

Attest:

By:_____
John Keenan, Superintendent

_____
Thomas Grossi, Board Secretary

Dated:_____

293-15

IN THE MATTER OF THE TENURE	:	
HEARING OF MARIA TAYLOR,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
LONG BRANCH, MONMOUTH COUNTY.	:	

SYNOPSIS

Petitioning Board certified tenure charges of chronic absenteeism, incapacity, and conduct unbecoming against respondent – a tenured teacher – and sought to terminate her employment with the district. Neither respondent nor any attorney acting on her behalf filed an answer to the petition following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.4(h), the allegations – which respondent has chosen not to deny – may be deemed admitted and overwhelmingly warrant the termination of the respondent from her tenured position. Accordingly, the Commissioner granted summary decision to the petitioner, dismissed the respondent from her tenured position in petitioner's school district, and forwarded a copy of this decision to the State Board of Examiners for review and action as that body deems appropriate.

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

Issued 9/11/15

AGENCY DKT NO. 200-7/15

IN THE MATTER OF THE TENURE	:	
HEARING OF MARIA TAYLOR,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
LONG BRANCH, MONMOUTH COUNTY.	:	

For the Petitioner, J. Peter Sokol, Esq.
No appearance by or on behalf of Respondent, Marie Taylor

This matter was opened before the Commissioner of Education on July 27, 2015, through tenure charges of chronic absenteeism, incapacity and conduct unbecoming certified by JanetLynn Dudick, District Administrator for Personnel of the Long Branch School District, together with supporting evidence against Maria Taylor, a tenured teacher in the petitioner's employ. The petitioner provided respondent with written notice of such certification at the respondent's last known address on July 23, 2015.

On July 28, 2015, the Commissioner directed the respondent – via both certified and regular mail – to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*" and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. The certified mail return receipt card indicates that the July 28, 2015 notice was delivered on August 7, 2015. No reply to the tenure charges was received from or on behalf of respondent.

The certified tenure charges and statement of supporting evidence filed by the petitioner in this matter indicate that respondent was absent from her teaching assignment between September 3, 2012 until June 30, 2013 because of her worker's compensation claim, her use of sick days and her use of urgent business days. The charges also contend that the petitioner was absent from her teaching assignment the entire 2013-2014 school year because of her worker's compensation claim and her use of sick days. Additionally, the charges state that the respondent was absent from her teaching position for the entire 2014-2015 school year because of her medical leaves and absences without permission. Finally, the charges maintain that the Board has made several inquires to the respondent about her health and her ability to return to her teaching position, and – since August 2014 – the respondent has failed to communicate with the Board.

Deeming the allegations to be admitted and noting that respondent has failed to respond to the charges certified against her, the Commissioner finds that petitioner's charges of chronic absenteeism, incapacity and conduct unbecoming a teaching staff member have been proven and overwhelmingly warrant the respondent's dismissal. Accordingly, summary decision is hereby granted to the petitioner, and the respondent is dismissed from her tenured position with the District. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/11/15
Date of Mailing: 9/11/15

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

7-24-15

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges Against Elena Brady:

THE STATE OPERATED SCHOOL DISTRICT FOR THE CITY OF NEWARK

Petitioner,

- and -

ELENA BRADY

Respondent.

Agency Dkt No.
121-5/15

DECISION ON MOTION TO DISMISS AND/OR SUMMARY DECISION

Before: Joyce M. Klein, Arbitrator

Appearances:

For the Petitioner:
Ramon E. Rivera, Esq.
Christine M. Michaelson, Esq.
Scarinci & Hollenbeck

For the Respondent:
Richard A. Friedman, Esq.
Colin Lynch, Esq. on the Brief
Melissa A. McAleer, Esq. on the Brief
Zazzali, Fagella, Nowak,
Kleinbaum & Friedman, P.C.

On or about August 22, 2014, the District served a Notice of Inefficiency on Respondent. With that Notice, Debora R. Weaver, Principal at the State Operated School District for the City of Newark's (District) Lincoln School, filed notice of charges based on inefficiency pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1 against Respondent Elena Brady (Respondent). Then District Superintendent Cami Anderson certified

tenure charges against Respondent and filed those charges with the Department of Education on September 18, 2014.

On December 7, 2014, I dismissed those charges in accordance with N.J.S.A. 18A:6-17.3(c) and N.J.A.C. 6A:3-5.1(c). In doing so, I found:

> For the reasons stated herein, I determined that Respondent's Motion to Dismiss the inefficiency charges is properly before me for decision. The Respondent's Motion to Dismiss the tenure inefficiency charges under N.J.S.A. 18A:6-17.3 is granted. Respondent has established that N.J.S.A. 18A:6-17.3 does not provide for consideration of her 2012-2013 year summative evaluations for purposes of tenure revocation. The timeline established by N.J.S.A. 18A:6-123(c), (d) and (e) specifically requires full implementation of the new evaluation rubric "[b]eginning with the 2013-2014 school year." The regulatory scheme that became effective in March of 2013, as well as guidance issued by the Department of Education supports the finding that the 2012-2013 school year summative evaluations using the evaluation rubric required by TEACHNJ may not be used for purposes of tenure revocation pursuant to N.J.S.A. 18A:6-17.3. The District's pleadings do not include a basis for considering the tenure inefficiency charges pursuant to N.J.S.A. 18A:6-16.

On March 31, 2015, Debora R. Weaver, Principal at the District's Lincoln School, filed "charges based upon inefficiency pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-16, N.J.S.A. 18A:6-17.1, N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1 against Respondent. The District served Respondent with an Amended Notice of Inefficiency Charge on or about March 31, 2015. This notice provided in part:

> The above charge is supported by the Statement of Evidence previously submitted under oath by DEBORA R. WEAVER dated August 22, 2014 and filed with the New Jersey Commissioner of Education on or about September 22, 2014.

Respondent filed a written response on April 20, 2015. On May 29, 2015, then District Superintendent Cami Anderson certified amended tenure charges against Respondent and filed those charges with the Department of Education. No new evidence or factual allegations were submitted with the Amended Tenure Charges.

On June 19, 2015, Respondent filed a Motion to Dismiss or for Summary Decision with David Hespe, Commissioner of Education. Also on June 19, 2015, Respondent filed an answer to the tenure charges. On June 23, 2015, M.

Kathleen Duncan, the Director of Bureau of Controversies and Disputes advised the parties that:

> ... following receipt of respondent's answer and motion for summary decision or to dismiss on June 19, 2015, the above-captioned tenure charges – which have been docketed as new charges and which are being processed with respect to Section 8 inefficiency charges only – were reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to determination by the arbitrator of the motion for summary decision/to dismiss, and should it be denied, subject to determination by the arbitrator of respondent's defenses and any motions which may be filed with the arbitrator. The arbitrator shall review those charges which are not dismissed as the result of a motion under the preponderance of the evidence standard.

On July 14, 2015, the District filed a brief in Opposition to Respondent's Motion to Dismiss or for Summary Decision. On July 27, 2015, Respondent filed a brief in response to the District's Opposition to its Motion to Dismiss or for Summary Decision.

DISCUSSION

Respondent seeks dismissal of the tenure charges filed against her by the District asserting initially that it is bound by the Opinion and Award dated December 7, 2014 which barred the District from proceeding against her based on Section 8 or any other section of the TEACHNJ Act. Respondent emphasizes that the inefficiency charges here rely upon the exact same facts and the exact same evidence as was included in the initial charges, which were dismissed. Respondent emphasizes that the District has not sought to vacate the December 7, 2014 Award and the time for vacating that Award is long since past.

The District asserts that it filed amended tenure charges for inefficiency against Respondent based upon her "consistent lack of improvement and receipt of poor evaluation ratings of 'ineffective' and 'partially effective.'" pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-16, N.J.S.A. 18A:6-17.1, N.J.S.A. 18A:6-17.3 and N.J.A.C. 6A:3-5.1(b).

The District emphasizes that when Respondent's Motion to Dismiss was granted, the Motion was limited to the District's then filed tenure charges pursuant to Section 25 (N.J.S.A. 18A:6-17.3) and prohibited the District from advancing the charges to arbitration under Section 8 (N.J.S.A. 18A:6-16) as part of the same proceeding. Now, the District emphasizes the amended tenure charges invoking Section 8 are not part of the same proceeding and that issue was not addressed in the December 7, 2014 Opinion and Award.

As a result, the District has filed these amended tenure charges based on a charge of inefficiency under Section 8 of TEACHNJ because Respondent's evaluations for the 2012-2013 and 2013-2014 school years were "ineffective" and "partially effective." The District argues that if it is unable to pursue tenure charges for Respondent or any teacher for the 2012-2013 and 2013-2014 school years, Respondent and other similarly situated teachers would get a "free pass" for her performance during this time period.

Initially, Respondent asserts that the District's amended charges are untimely and thus must be dismissed. Assuming for the sake of argument that the District filed new charges, Respondent asserts that those charges have not been filed in a timely manner under either Section 25 or Section 8 of TEACHNJ and thus they must be dismissed. Specifically, Respondent argues that neither the statutory nor the regulatory scheme includes a procedure for the amendment of tenure charges, whether for inefficiency or for conduct unbecoming. Respondent asserts that by its amendment of previously dismissed charges, the District ignores the procedural protections outlined in both the statutory and regulatory scheme and is essentially attempting "an end run" around those procedures. Respondent emphasizes that the notice of tenure charges was initially proffered pursuant to Section 25 in August of 2014 and she filed a statement of position with the State District Superintendent in response in September of 2014. Respondent's Motion to Dismiss was granted on December 7, 2014. The District then had a three month period of time which was consensually extended for three weeks within which the District could have moved to vacate the Award but did not do so and that period expired on or about March 30, 2015. At this juncture, the District has filed "new" charges, that Respondent maintains, are simply a rehash of the same charges of "inefficiency" complete with the same statement of evidence and exhibits despite the fact that those charges have been dismissed.

Respondent argues that whether the current charges are filed pursuant to Section 25 of TEACHNJ or Section 8 of TEACHNJ or both is irrelevant because it is too late for the charges to be brought at all. Because the charges were certified in September of 2014, and the District was required to file charges against Respondent with the Commissioner of Education within thirty (30) days of filing with the State District Superintendent, the current charges are outside that time period and are thus untimely under TEACHNJ.

Respondent asserts further that if the charges are deemed to be filed under Section 8 of TEACHNJ, they are still untimely because the District filed charges with the State District Superintendent on May 29, 2015 based upon the identical facts and allegations as in the previous charges and pursuant to N.J.S.A. 18A:6-13, the District was obligated to vote on whether to file charges under Section 8 within forty-five (45) days of receiving Respondent's response to the charges and then subsequently was required to file those charges with the

Commissioner within fifteen (15) days of making its decision. Because it did not do so, Respondent asserts the charges were filed outside the applicable timeframe and thus were untimely. Respondent asserts that the statutory and regulatory timeframes are designed to protect the due process rights of those subject to tenure charges and by belatedly amending its earlier charges, the District violates Respondent's due process rights.

The District contends that the tenure charges were timely filed pursuant to N.J.S.A. 18A:6-13 and N.J.A.C. 6A:3-5.1. Noting that Respondent concludes that the State-appointed District Superintendent completed a Certification of Determination outside of the applicable time limit for tenure charges filed under Section 8, the District points out that N.J.S.A. 18A:6-13 addresses a board of education's obligation to make a probable cause finding within forty-five (45) days and provides "[i]f the board does not make such a determination within 45 days after receipt of the written charge, the charge shall be deemed to be dismissed and no further proceeding or action shall be taken thereon." The District notes that N.J.A.C. 6A:3-5.1 provides that this time limitation does not begin until Respondent has filed a response to the notice of tenure charges or until the fifteen (15) day time period in which to do so has expired. In this instance, the District points out that Respondent filed a written response to the amended tenure charges on April 20, 2015 so, according to the District, under N.J.A.C. 6A:3-5.1(b)(4) the District had forty-five (45) days from April 20, 2015 to make a determination as to the probable cause as to the amended tenure charges. The District points out that it determined that there was probable cause and the State-appointed District Superintendent completed the certification on May 12, 2015, well within the forty-five (45) day limitation.

The TEACHNJ Act does not include an express provision for the amendment of tenure charges filed under Section 8 or Section 25. Respondent would base all time limits on the initial certification of charges in September of 2014. Absent a provision addressing the time for filing amended charges, such amendments must be viewed under the circumstances of their filing. The Commissioner of Education referred the charges to me with the direction that they "have been docketed as new charges." Regardless of the merits or other procedural issues that have arisen out of these charges, they were docketed as if they were new charges and shall be treated as such for purposes of evaluating timeliness.

In this instance, an Amended Notice of Inefficiency Charges was filed on March 31, 2015. Respondent filed a written response on April 20, 2015. The District Superintendent certified those charges and filed the amended tenure charges with the Department of Education on May 29, 2015. This is within forty-five (45) days after the Respondent's response as provided in N.J.A.C. 6A:3-5.1(b)(4) for a probable cause finding. N.J.A.C. 6A:3-5.1(b)(6) permits the State District Superintendent an additional fifteen (15) days to file charges with the

Commissioner of Education. In this instance, the District's Superintendent filed charges with the Commissioner of Education within the permitted forty-five (45) days. Accordingly, I find the amended tenure charges of inefficiency timely.

Respondent raises three alternate theories revolving around the fact that Respondent's initial tenure charges for inefficiency were dismissed in the December 7, 2014 Award. Respondent argues that the Law of the Case Doctrine, the doctrine of *res judicata* and the Entire Controversy Doctrine all require dismissal of the District's amended charges.

Respondent would rely upon the Law of the Case doctrine which "[r]equires judges to respect unreversed decisions made during the trial by the same court or a higher court regarding questions of law." Sisler v. Gannett Co., 222 N.J. Super. 153 (App. Div. 1987) (citing State v. Reldan, 100 N.J. 187, 203 (1985)), Respondent emphasizes that the Law of the Case doctrine avoids re-litigation of the same issue. In this instance, Respondent emphasizes the issue has already been decided so the amended charges should be controlled by the December 7, 2014 Opinion and Award.

Respondent argues that the District's effort to proceed under Section 8 of the TEACHNJ Act was rejected unequivocally in the December 7, 2014 Award. Nonetheless, Respondent asserts that the District has disregarded this ruling and certified amended charges against her based upon the same facts and occurrences that were initially rejected. Respondent argues that the fact that the District's claim has been rejected in this case and has not been challenged through an action to vacate should be sufficient to end this case.

In the event that the charges are treated as "new" charges, Respondent argues that they are barred as a matter of law under the doctrine of *res judicata*. Noting that *res judicata* contemplates that once a controversy has been "fairly litigated and determined", it may not be re-litigated. Respondent emphasizes that *res judicata* is a mandatory doctrine that must be applied to bar a party from re-litigating an issue that has already been fully disposed of in a new case. Citing Elkouri and Elkouri, How Arbitration Works (6th Ed. 2003), Respondent notes that the "issuance of an arbitration award generally bars any subsequent court or arbitration action on the merits of the same event." In this instance, since the charges have been dismissed, Respondent argues *res judicata* requires that the new charges be dismissed because the underlying facts have not changed. Further, Respondent argues whether the current charges are characterized as "amended" charges or "new" charges the issue has been litigated, the parties are the same and both sets of charges arise out of the same transaction or occurrence as the dismissed charges, thus requiring their dismissal under the doctrine of *res judicata*.

Respondent also argues that the District's amended charges are barred by the entire controversy doctrine, which bars the District from bringing "amended" or "new" charges based upon the same facts and occurrences at this point in the proceedings. Emphasizing that the entire controversy doctrine requires that courts determine an entire controversy in a single judicial proceeding whenever possible including the joinder of related claims and persons, Respondent emphasizes that New Jersey Court Rule 4:30-A provides in pertinent part:

> [n]on-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine.

Because the District has fully litigated the tenure charges based upon Respondent's evaluation for 2012-2013 and 2013-2014 school years, Respondent asserts it cannot now re-litigate the case. Citing Arbitrator Gerber's decision in In the Matter of Tenure Charge of Inefficiency of Leonard Yarborough and School District of the City of Newark, Agency Docket No. 69-3/15 (June 8, 2015, Arb. Gerber), Respondent emphasizes that he held that when tenure charges based upon Section 25 were dismissed, the entire controversy doctrine precluded the District from filing new charges based upon Section 8.

Turning to the question of whether inefficiency charges for the 2012-2013 and 2013-2014 school years may be brought under Section 8, Respondent argues that under TEACHNJ inefficiency tenure charges may be brought only under Section 25. Therefore, the District's charges must be dismissed. Respondent cites the guide to the TEACHNJ Act issued by the Department of Education, which it contends provides that "inefficiency" charges are governed exclusively by Section 25. Among the dramatic changes to the tenure revocation process recounted by Respondent, the substitution of the former ninety (90) day improvement period during which teachers were provided notice of "inefficiency" and an opportunity to improve was replaced with a new Section 25 specifically addressing charges of inefficiency where teachers receive ineffective or partially effective annual summative ratings in two consecutive years. As a result of this statutory change, Respondent emphasizes the new regulatory framework was developed and partially implemented during the 2012-2013 school year and finalized with the beginning of the 2013-2014 school year. Respondent asserts that the tradeoff which provides teachers who may be subject to removal based upon only two years of inadequate performance with a quick and more limited review in exchange for a well-defined, streamlined discharge procedure, transparent and uniform observation and evaluation guidelines, processes and procedures and transparently uniform tenure removal procedures for claims of inefficiency.

Respondent asserts that under TEACHNJ, the legislature created a specific and exclusive definition of teacher "inefficiency" and provided a detailed statutory scheme for the filing of tenure revocation charges based upon that definition. At the same time, when the Department of Education implemented new regulations under TEACHNJ covering the filing and processing of tenure charges, it created a track for "inefficiency charges" and a separate track for other charges including "conduct unbecoming" and other misconduct charges. N.J.A.C. 6A:3-5.1. Respondent emphasizes that there is no provision for the filing of inefficiency charges under Section 8 rather than under Section 25.

Respondent cites the guidance issued by the Department of Education regarding the impact of the new law on "tenure decisions" addressing whether the summative ratings for the 2012-2013 year would count towards tenure decisions. Respondent cites the guidance, which provides "no evaluation outcomes in the 2012-2013 school year will impact tenure decisions. 2013-2014 is the first year when the statewide system will be in place and the first year when the summative rating "clock" (i.e.: teachers needing to be rated at least effective for two of three years) will start." Respondent emphasizes that under the new limited scope of review of teacher evaluations and the limitations on defenses included in Section 23 of TEACHNJ, teachers are no longer able to challenge an evaluation which complies with the proper procedures. Respondent argues that by seeking to file under Section 8, the District would interpret N.J.S.A. 18A:6-17.2 and 17.3 as optional. In other words, Respondent asserts that under the District's theory, if it fails to comply with the applicable procedures required to file charges under Section 25, it may ignore that section completely. Respondent suggests that if this is the case, the legislature's efforts to streamline tenure proceedings are ineffective because in creating TEACHNJ the legislature eliminated the ninety (90) day improvement plan previously included in Section 8 for purposes of providing teachers with notice and an opportunity to cure their performance. Respondent points out that a ninety (90) day improvement plan is superfluous with the new "corrective action plan" required by TEACHNJ. In other words, using Section 8 to process inefficiency charges would allow the District to ignore its obligation to have a CAP without affording the teacher a ninety (90) day notice period and opportunity to improve their performance.

Turning to arbitral precedent, Respondent notes the District's efforts to amend charges dismissed under Section 25 in order to pursue them under Section 8. Respondent emphasizes that the majority of arbitrators have rejected this argument. Respondent cites In the Matter of the Tenure Charge of Inefficiency of Ursula Whitehurst and the State Operated School District of the City of Newark, Agency Docket No.: 282-9/14, (Arbitrator R. Simmelkjaer), In the Matter of the Tenure Charge of Inefficiency of Neil Thomas, State Operated School District of the City of Newark, Agency Dkt. No.: 244-9/14 (Arbitrator R. Simmelkjaer), In the Matter of the Tenure Charge of Inefficiency of Sandra Cheatham, School District of the City of Newark, Docket No.: 226-8/14 (Arbitrator

S. Bluth October 16, 2014), In the Matter of the Tenure Charges Against Elena Brady, State Operated School District for the City of Newark, Dkt. No. 270-9/14 (Arbitrator J. Klein, December 7, 2014), In the Matter of the Tenure Charges Against Linda Kelly-Gramble, State-Operated School District of the City of Newark, Docket Nos. 226-9/14 (Arbitrator M. Pecklers).[1]

Relying upon the principle of statutory construction that where two statutes address a subject and one statute addresses the subject with specificity and the other statute deals with the subject generally, the specific statute controls, Respondent asserts that the purpose of TEACHNJ is to separate inefficiency charges from other types of charges and keep them procedurally and substantively distinct from charges brought under Section 8. Respondent points out that Section 25 requires the District to comply with the new evaluation system. Respondent asserts that there is no provision for inefficiency charges to proceed to arbitration under Section 8 as a fallback or alternative or for a district to disregard the requirements in Section 25. Giving meaning to all words and phrases, Respondent points out that there is no evidence that the legislature intended to revamp the tenure revocation system for inefficiency and then allow school districts to bring charges under Section 8 if they were unsuccessful under the revamped Section 25.

Respondent emphasizes that is the District sought to file statutory tenure charges against her on statutory grounds other than inefficiency, it was free to do so last year in accordance with the requirements of Section 8 but it did not do so. Respondent contends that the District is not free to file Section 25 charges, lose and then seek to re-file the same charges under Section 8.

The District argues that the Law of the Case doctrine is discretionary and does not apply in the case of an "ambiguous or uncertain decision" and applies usually only "where a judge must decide whether a ruling made during one stage of the action is binding throughout the remainder of the trial." Sisler v. Gannett Co., Inc., 222 N.J. Super. 153, 159 (App. Div. 1987), cert. denied, 110 N.J. 304 (1988) (citing Procanik v. Cillo, 206 N.J. Super. 270, 293 (Law Div. 1985)). In this case, the initial tenure charges against Respondent were dismissed on a procedural issue regarding Section 25 of TEACHNJ without review in support of the charges or analyze the legal sufficiency of the District's legal position. Further the Opinion and Award in this matter was ambiguous with regard to using the authority of Section 8 to bring charges, holding only that the charges could not proceed to an analysis under Section 8 in this proceeding. Because the substance of the District's underlying charges has not been litigated, if the matter proceeds to a hearing on the merits, it will be the first opportunity for the parties to argue their positions with respect to the subject of the allegations against the

[1] Respondent provided additional examples of awards issued in August of 2015. Because the District did not have an opportunity to address those more recent awards, I do not address them.

Respondent. Accordingly, the District asserts that this issue has not been argued let alone re-litigated. For these reasons, the District asserts that the Law of the Case doctrine is inappropriate and should not be applied in this case.

The District asserts that the doctrine of *res judicata* does not apply to preclude litigation of the current charges because the issue has not been litigated in a prior proceeding and the doctrine of *res judicata* applies only to a valid and final adjudication on the merits of a claim. Restatement (Second) of Judgments, § 27, (1982). Because the merits of the amended tenure charges against Respondent have not been adjudicated, the defense of *res judicata* does not apply, according to the District. Because the charge under Section 8 (N.J.S.A. 18A:6-16) was not addressed on the merits, the District maintains that the Section 8 charge has not been adjudicated. The District argues that even if it is bound by the December 7, 2014 Opinion and Award, that decision does not preclude it from bringing the amended tenure charges because that decision did not address the charge now presented under Section 8.

Assuming for the sake of argument that the merits of Respondent's inefficiency charge had been litigated, pursuant to § 28 of Restatement (Second) of Judgments, supra., re-litigation of the issue in a subsequent action between the parties is not precluded in the following circumstance:

> The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws...

The District argues that unless it is able to proceed with tenure charges under Section 8, the evaluations during the 2012-2013 period cannot be used at all for purposes of tenure charges. This result, according to the District, would result in an inequitable administration of TEACHNJ, which was promulgated to streamline the tenure charge process. The District also notes that absent TEACHNJ the District would simply have charged Respondent under Section 8. As a result of the enactment of Section 25, the District points out that the evaluations of 2012-2013 are rendered meaningless. So, the District argues that pursuant to Restatement (Second) of Judgments, supra., § 28, this matter must proceed to a hearing even if the issues presented here have already been litigated and received a final judgment.

The District asserts that the entire controversy doctrine does not apply to preclude the amended tenure charges. Emphasizing that the previous charges against Respondent were dismissed based upon the arbitrator's interpretation of TEACHNJ, which she determined does not allow for evaluations from the 2012-2013 school year to be considered in tenure charge matters under Section 25.

The District maintains that this is not a conclusive determination of the legal controversy between the parties and dismissal of these charges would not achieve an equitable result because the District would be unable to bring tenure charges against any teachers based upon their poor evaluations in the 2012-2013 school year. Further, the District asserts that the tenure charges do not constitute duplicative litigation because the merits of the charges have not been heard. The District maintains that this is not a situation where the District lost on the merits of the previous tenure charges and now seeks to re-file.

The District asserts that the arbitrator has jurisdiction to decide this matter for inefficiency under Section 8 of TEACHNJ and inefficiency tenure charges are not limited to being filed only under Section 25 of TEACHNJ. The District asserts that the contention that the legislature intended that inefficiency charges can proceed only under N.J.S.A. 18A:6-17.3 is tantamount to arguing that the legislature intended to hand poorly performing teachers a "free pass" for two years after the effective date of the Act. The District notes that this has been rejected by several arbitrators. (IMO the Tenure Hearing of Henchey and the School District of the Borough of New Milford, Bergen County, Agency Dkt. No. 8-15 (January 3, 2015)).

The District also notes that arbitrators who dismiss charges under Section 25 have suggested dismissal might not have been required if the charges had been filed under Section 8. (In the Matter of the Tenure Hearing of Williams, Agency Dkt. No. 501-14 (December 20, 2014)). Citing the Henchey and Williams awards, the District asserts that where Section 25 of TEACHNJ is inapplicable, a school district must be permitted to proceed with an inefficiency charge in an appropriate case and N.J.S.A. 18A:6-16 provides a statutory basis to do so. The District points out that since TEACHNJ's adoption, arbitrators have considered charges of inefficiency in non-mandatory cases pursuant to N.J.S.A. 18A:6-16. IMO Tenure Hearings of Lawrence E. Hawkins and the State Operated School District of the City of Newark, Dkt. No. 243-10/13 (March 10, 2014). The District points out that under N.J.S.A. 18A:6-16 the arbitrator is required to determine whether the evidence in the record presented supports the charge of inefficiency and the Commissioner had the authority to determine procedural issues pursuant to N.J.S.A. 18A:6-17.3. To that end, the District cites Pugliese v. State-Operated School District of the City of Newark, Dkt. No. A-0857-13T2; Chavez v. State-Operated School District of the City of Newark, Dkt. No. A-1012-13T2 (App. Div. May 19, 2015), which held that the Commissioner must determine the appropriate standards to be used by arbitrators when adjudicating tenure hearings. In this instance, the District points out that on June 23, 2015 the parties were advised that the matter was to proceed based upon Section 8 inefficiency charges only.

The Law of the Case doctrine is a discretionary principle of law designed to prevent parties from relitigating issues that have already been decided. In the December 7, 2014 Award, I found that Section 25 did not allow the District's revocation of tenure charges to go forward based upon summative evaluations for the 2012-2013 and 2013-2014 school years. In this amended charge, the District seeks to move forward on the same inefficiency charges, but under Section 8 (N.J.S.A. 18A:6-16). The December 7, 2014 Opinion and Award provided that there was "no basis for proceeding under N.J.S.A. 18A:6-16" based upon the pleadings, thus did not reach the question of whether the District could have proceeded under N.J.S.A. 18A:6-16 had that been included in the initial proceeding. Because the question of whether the District could proceed to bring tenure charges for inefficiency against Respondent under Section 8 was not directly addressed, I find that the Law of the Case doctrine does not apply to preclude a discussion of its application to the inefficiency charges brought against Respondent.

The doctrine of *res judicata* provides an affirmative defense that prohibits the same parties from "litigating a second lawsuit on the same claim...that could have been—but was not—raised in the first suit." Elkouri & Elkouri, How Arbitration Works (6th Ed. 2003) p. 387. *Res judicata* applies where the claim is fully disposed of in the first case. Here, the issue previously decided was whether the tenure charges of inefficiency for the 2012-2013 and 2013-2014 school years could proceed under Section 25. Now, the District seeks to address the same charges under Section 8. Since the initial case decided only whether the charge of inefficiency could proceed under Section 25, the matter has not been fully decided and is not subject to dismissal under the doctrine of *res judicata*.

New Jersey Court Rule 4:30a provides, "[n]on-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine." The Entire Controversy Doctrine requires that courts determine an entire controversy in a single judicial proceeding whenever possible. Arbitrator Gerber addressed the application of the Entire Controversy Doctrine to instances where the District has amended initially dismissed tenure charges to seek tenure revocation based upon inefficiency under Section 8.

> The Entire Controversy Doctrine embodies the principle that the adjudication of a legal controversy should occur in one litigation at which all of the claims and defenses of the parties should be presented. When an action is brought, alternative causes of action should be included in the initial pleadings. There was nothing to prevent the District from alternatively pleading a count of inefficiency under Section 8 in its initial papers.

IMO Tenure Charge of Inefficiency of Leonard Yarborough and School District of the City of Newark, Agency Docket No. 69-3/15 (June 8, 2015, Arb. Gerber), p. 16.

In this case, during the initial pleadings, the District argued that it should, in the alternative, be permitted to proceed under Section 8, but did not include it in its pleadings or amend its pleadings to include tenure revocation under Section 8. With the amended charges, the District seeks a second chance to pursue the exact same charges of inefficiency against Respondent as were dismissed under Section 25. The charges of inefficiency were dismissed pursuant to Section 25 in large part because the statute did not contemplate that such charges would be brought before the new procedural process to evaluate tenure charges for inefficiency was implemented. In this instance, the District seeks to apply those same standards pursuant to Section 8. The District points out that the December 7, 2014 Award was not a "conclusive determination of the legal controversy" and thus the doctrine does not apply here. As noted previously, the District could have included Section 8 in its initial pleadings. The District has not proffered a reason why it did not do so. As the District has pointed out, the objectives of entire controversy doctrine include encouraging "the conclusive and comprehensive determination of a legal controversy" and promotion of "judicial economy and efficiency by avoiding fragmented, multiple and duplicative litigation." Under these circumstances, the District's amended tenure charges have not met the objectives of the entire controversy doctrine. By not including Section 8 in its initial pleadings, the District deprived the parties of the opportunity to receive a conclusive and comprehensive determination of whether the tenure charges of inefficiency against Respondent could properly proceed to hearing. Instead, when its initial charges pursuant to Section 25 were dismissed, it filed amended charges under Section 8, seeking a second chance to pursue the same charges of inefficiency against Respondent. Accordingly, I find that the entire controversy doctrine precludes further consideration of the amended tenure charges against Respondent.

The District asserts that unless it is allowed to pursue tenure charges pursuant to Section 8, it is between a proverbial rock and a hard place with respect to its ability to pursue charges of inefficiency for the 2012-2013 school year. The December 7, 2014 Award found that the 2012-2013 school year could not be used to pursue charges of inefficiency under Section 25. According to the District, if it cannot pursue inefficiency charges against Respondent for the 2012-2013 school year pursuant to Section 8, it has no vehicle for addressing Respondent's poor performance for that school year and Respondent will be given a "free pass." The District did have the opportunity to address Respondent's alleged inefficiency for the 2012-2013 school year under Section 8, together with any other alleged performance issues under the standards for inefficiency that were in effect prior to the implementation of TEACHNJ in the 2013-2014 school year. As Arbitrator Licata observed, "boards of education still

had the ability to take action prior to the commencement of the 2013-2014 school year for inefficiency under Section 8." IMO Tenure Charges Against Lawrence Henchey and the School District of the Borough of New Milford, Bergen County, (Arb. Licata, January 6, 2015) p. 4. That the District did not pursue such a charge under Section 8 at the time does not mean that it was deprived of its ability to charge Respondent with inefficiency for the 2012-2013 school year.

Accordingly, for all of the reasons discussed above, I enter the following:

AWARD

Respondent's Motion to Dismiss the charges is granted in its entirety. Respondent Elena Brady shall be reinstated to her teaching position with the State Operated School District of Newark with full back pay, benefits and seniority.

Dated: September 11, 2015
Ocean Grove, New Jersey

Joyce M. Klein

State of New Jersey }
County of Monmouth } ss:

On this 11th day of September, 2015, before me personally came and appeared Joyce M. Klein to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

WILLIAM T. HEANEY
NOTARY PUBLIC OF NEW JERSEY
ID # 2421775
My Commission Expires 6/11/2017

2914-15

OAL DKT. NO. EDU 5039-15
(EDU 17178-13 ON REMAND)
AGENCY DKT. NO. 272-11/13

CLAUDIA CAVANAUGH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SADDLE RIVER, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision on Remand of the Office of Administrative Law (OAL) have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/15/15
Date of Mailing: 9/15/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05039-15N

AGENCY DOCKET NO. 272-11/13

(on remand EDU 17178-13)

CLAUDIA CAVANAUGH,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF SADDLE RIVER, BERGEN COUNTY,

Respondent.

Alfred Maurice, Esq. appearing on behalf of petitioner (Springstead & Maurice)

Jessica V. Henry, Esq., for respondent (Clear, Giacobbe, Alfieri & Jacbs, LLC)

Record Closed: July 30, 2015 Decided: August 6, 2015

BEFORE **KIMBERLY A. MOSS**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on April 13, 2015, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. This matter was initially transmitted to the OAL under docket number EDU 17178-13. An initial decision was rendered under that docket number on January 13, 2015. However, the Commissioner remanded the matter to the OAL "for

complete development of the record, and a determination of petitioner's tenure and seniority rights as of the RIF in April 2013.

A telephone prehearing was conducted on May 14, 2015. A status conference was held on June 2, 2015 during which time the parties advised the matter was resolved. On July 30, 2015 the parties submitted a copy of the signed Settlement Agreement and Board Resolution, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement and General Release, I **FIND**:

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

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

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

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

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

8-6-15
DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: 8-12-15

Date Mailed to Parties: AUG 12 2015

ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SPRINGSTEAD & MAURICE, ESQS. (251631971)
COURT PLAZA SOUTH, EAST WING
21 MAIN STREET, SUITE 304
HACKENSACK, NEW JERSEY 07601
TEL: (201) 343-0003
ATTORNEYS FOR PETITIONER

CLAUDIA J. CAVANAGH

Petitioner,

Vs.

SADDLE RIVER BOARD OF EDUCATION

Respondent.

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY

OAL DKT. NO. EDU 17178-13
AGENCY DKT. NO. 272-11/13

STIPULATION OF SETTLEMENT

The matter in difference between the parties has been amicably resolved under the terms set forth below:

1. Petitioner Claudia J. Cavanagh with be assigned to a permanent, tenure track, full-time teaching position within the scope of her licensure and/or endorsements issued by the New Jersey State Board of Education for the 2015-2016 school year.

2. The Respondent will report the total sum of $12,025 as retroactive pay which includes full-time pension contributions to the Division of Pensions & Benefits for each of the 2013-2014 and 2014-2015 school years and credit Petitioner with seniority for each such period.

3. The Respondent will adjust the Petitioner's employment records to reflect 1.0 FTE for each of the school years 2013-2014 and 2014-2015.

4. As a settlement of Petitioner's claims, the Respondent will pay the Petitioner the sum of $12,025.00 less ordinary taxes and withholding, as total monetary compensation for economic loss suffered in school years 2013-2014 and 2014-2015. The Respondent will report, appropriately, to

the Division of Pensions, that Petitioner was a full-time employee for 2013-2014 and 2014-2015 school years pursuant to a determination of the Commissioner of Education.

5. The payment identified in Paragraph 4 will be made on or before August 30, 2015. Petitioner withdraws the subject Petition of Appeal under **OAL DKT. NO. EDU 17178-13** and **AGENCY DKT. NO. 272-11/13**, with prejudice; subject only to the enforcement of this agreement.

6. This is the entire agreement of the parties and may not be altered or amended, except in writing, with the same formality as this agreement.

7. The withdrawal of this matter is subject to the approval, as appropriate, of the Administrative Law Judge and Commissioner of Education of New Jersey.

Springstead & Maurice, Esqs.
Attorneys for Petitioner

By: _____
Alfred F. Maurice, Esq.

Cleary Giacobbe Alfieri Jacobs LLC
Attorneys for Respondent

By: Jessica V. Henry
Jessica V. Henry, Esq.

Saddle River Board of Education

Claudia J. Cavanagh
Claudia J. Cavanagh, Petitioner

By: Dr. William Longstreth

Dated:

Dated:

Saddle River Board of Education

Wandell School

97 East Allendale Road, Saddle River, New Jersey 07458
Tel (201) 327-0727 *Fax (201) 327-0704*

Dr. William Ronzitti
Interim Superintendent/Principal

Donna M. Logan
Business Administrator/Board Secretary

The following is a certified copy of a resolution adopted by the Saddle River Board of Education at its meeting on July 28, 2015:

F-2272 REVISED STIPULATION OF SETTLEMENT
BE IT RESOLVED that the Saddle River Board of Education approves the revised Stipulation of Settlement, OAL DKT. NO. EDU 17178-13, AGENCY DKT. NO. 272-11/13.

Roll Call Vote for F-2272:

Motion: Henry Senger
Second: Irene Feldsott
Roll Call Vote: TW: aye, JC: aye, IF: aye, JL: aye, HS: aye
Motion Passed 5-0

I hereby certify that this is a true and accurate copy of the minutes of the Regular Session of the Saddle River Board of Education held on July 28, 2015.

Donna M. Logan
Donna M. Logan
Board Secretary
July 30, 2015

299-15

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

IN THE MATTER OF THE TENURE HEARING OF EBRAHIM HADDAD

ELIZABETH BOARD OF EDUCATION, UNION COUNTY Petitioner and	:	Agency DKT.NO.:111-5/15
	:	AWARD APPROVING SETTLEMENT
EBRAHIM HADDAD Respondent	:	

Before: Carol F. Laskin, Esquire, Arbitrator

APPEARANCES:

For the Petitioner
Stephen M. Bacigalupo, II
Schwartz Simon Edelstein & Celso, LLC

For the Respondent
Nicholas Poberezhaky, Esquire
Caruso Smith Pinini, PA

On May 14, 2015, the Board of Education of the City of Elizabeth ("Board") referred certified tenure charges against teaching staff member Ebrahim Haddad. On May 29, 2015, Respondent Haddad answered the tenure charges. After review, the Department of Education appointed the undersigned, pursuant to *P.L. 2012, c.26* to hear and evaluate the tenure charges.

The parties, determining to amicably resolve all disputed claims and severe their employment relationship entered into a

Stipulation of Settlement, Resignation and Release, attached hereto as Exhibit 1. Attached hereto as Exhibit 2 is the Resolution adapted by the Board at its meeting on August 20, 2015 approving the settlement and resignation, certified by School Business Administrator/Board Secretary Harold E. Kennedy, Jr.. Thereafter, the parties submitted the Stipulation of Settlement, Resignation and Release for my review, seeking approval.

The New Jersey Administrative Code contains procedures for filing Controversies and Disputes with the Commissioner of Education, *N.J.A.C 6A:3-1.1,et seq.* The new Subchapter 5, applies to *Charges Under the Tenure Employee's Hearing Act. N.J.A.C. N.J.A.C. 6A:3-5.6* addresses *withdrawal, settlement, or mooting of tenure charges.* Section (a), identifies the criteria a panel arbitrator must review prior to approving any settlement, as follows:

> 6A:3-5.6 **Withdrawal, settlement, or mooting of tenure charges**
>
> (a) Once tenure charges are certified to the Commissioner, they may be withdrawn or settled only with approval. Any proposed withdrawal or settlement, whether submitted to the Commissioner or to the arbitrator, shall address the following standards established by the State Board of Education in the matter entitled *In re Cardonick,* State Board decision of April 6, 1983 (1990 *School Law Decisions (S.L.D.)* 842, 846):
>
> 1. Accompaniment by documentation as to the nature of the charges;
>
> 2. Explication of the circumstances justifying settlement or withdrawal;

3. Consent of both the charged and charging parties;

4. Indication the charged party entered into the agreement with a full understanding of his or her rights;

5. A showing the agreement is in the public interest; and

6. If the charged party is a teaching staff member, a showing the teaching staff member has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

Upon review, I ***find*** the instant Stipulation of Settlement in is consistent with the Administrative Code, *N.J.A.C. 6A:3-5.6.* Accordingly, the attached executed Stipulation of Settlement is, hereby ***APPROVED.***

DATED: 9/21/15

Carol F. Laskin
CAROL F. LASKIN, ESQUIRE

STATE OF NEW JERSEY:

COUNTY OF CAMDEN:

I CERTIFY that on September 21, 2015 CAROL F. LASKIN, personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as his or her act and deed.

DATED: 9/21/2015

K. Flanagan-Kelly
NOTARY PUBLIC

KRISTIN M FLANAGAN-KELLY
Commission # 2391982
Notary Public, State of New Jersey
My Commission Expires
December 11, 2019

Schwartz Simon
Edelstein & Celso LLC
100 South Jefferson Road, Suite 200
Whippany, New Jersey 07981
P: (973) 301-0001; F: (973) 993-3152
Attorneys for the
Elizabeth Board of Education

IN THE MATTER OF THE TENURE CHARGES AGAINST EBRAHIM HADDAD,	BEFORE THE COMMISSIONER OF EDUCATION, NEW JERSEY DEPARTMENT OF EDUCATION
	AGENCY DKT. NO.: 111-5/15
BY THE ELIZABETH BOARD OF EDUCATION, UNION COUNTY, NEW JERSEY.	BEFORE CAROL F. LASKIN, ESQ., ARBITRATOR
	TENURE HEARING
	STIPULATION OF SETTLEMENT, RESIGNATION AND RELEASE

This Agreement and Release ("Agreement") is entered into and effective as of the 20th day of August, 2015 (the "Effective Date"), by and between the Elizabeth School District Board of Education ("Board") and Ebrahim Haddad ("Mr. Haddad" or "Employee").

WITNESSETH:

WHEREAS, the Board is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1, which is entrusted with maintaining and conducting the public schools of said school district; and

WHEREAS, the Board has its administrative offices located at 500 North Broad Street, Elizabeth, New Jersey 07028; and

WHEREAS, Mr. Haddad, a tenured teacher employed by the Board, has his current address located at 47 Woodland Avenue, North Brunswick, New Jersey 08902-2974; and

WHEREAS, on or about April 15, 2015, Olga Hugelmeyer, Superintendent of Schools, filed Sworn Tenure Charges against Mr. Haddad, together with a Sworn Statement of Evidence in support of the charges, with the Board; and

EXHIBIT 1

WHEREAS, the parties, wishing to resolve the tenure charges presently pending against Mr. Haddad without the need for further litigation, hereby stipulate to settle the same, subject to the terms and conditions as set forth herein; and does not wish for the Board to consider and/or certify the subject tenure charges but intends to resign effective April 13, 2016 in furtherance of retirement; and

NOW, THEREFORE, the parties hereby agree, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged, as follows:

1. TENURE CHARGES TO BE ABANDONED/NO FURTHER BOARD ACTION

The Board agrees that upon execution of the within Agreement by the parties and Mr. Haddad's fulfillment of the obligations as set forth herein, that the subject tenure charges shall be abandoned and that no further action shall be initiated by the Board regarding the underlying charges. The Board fully reserves all rights in the event this Agreement is breached by Mr. Haddad, as well as with respect to any third party claims that may be made against the Board as a result of any acts and/or omissions by Mr. Haddad during his employment with the Board.

2. IRREVOCABLE RESIGNATION FROM EMPLOYMENT

Mr. Haddad has tendered his irrevocable resignation effective April 13, 2016, a copy of which is attached hereto as Attachment A, from all employment with the Board, subject only to the Board's fulfillment of its obligations as set forth herein. In the interim, Mr. Haddad shall be on an administrative/medical leave, with pay and benefits, through April 13, 2016. Mr. Haddad will be required to supply, periodically throughout this leave, the necessary medical documentation necessitating the need for same. Mr. Haddad agrees that he will not seek any future employment or consultant relationship with the Board in perpetuity and that the Board has no obligation, contractual or otherwise, to re-hire or re-employ him.

3. RELEASE

In exchange for the above consideration, Mr. Haddad, his heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any and all claims or rights, up until the date of execution of the instant Agreement by both parties, whether known or unknown, which they have or may have against the Board, personally and officially, individually and collectively, its past and present Board members, all officers and administrators, its attorneys, agents and employees, personally and officially, as well as their successors, and assigns, including, but not limited to any and all claims for attorneys' fees, back pay or front pay, any claims for emotional distress or pain and suffering, any and all claims involving tax liability stemming from this Agreement, and any and all claims arising under any federal, state or local ordinance, regulation or law

including, but not limited to, the New Jersey and Federal Constitutions; Title VII of the Civil Rights Acts of 1871 and 1991; the Americans with Disabilities Act; the Age Discrimination in Employment Act; the Older Workers Benefit Protection Act of 1990; the Employee Retirement Income Security Act; the Federal Family and Medical Leave Act; the Fair Labor Standards Act; the Equal Pay Act; the Workers' Adjustment and Retraining Notification Act; the New Jersey Law Against Discrimination; the New Jersey Family Leave Act; the New Jersey Conscientious Employee Protection Act; the New Jersey Wage and Hour Law; the Employer-Employee Relations Act; any collective negotiations agreement; any common law claim and any and all other claims, that could be initiated in any venue, for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim. Specifically exempted from this release are any claims arising under the Workers' Compensation Act, N.J.S.A. 34:15-1 et seq., and for health insurance continuation coverage under and pursuant to Consolidated Omnibus Budget Reconciliation Act (referred to hereinabove as "COBRA"). This release does not limit Mr. Haddad's right to seek indemnification, in accordance with N.J.S.A. 18A:16-6 and/or N.J.S.A. 18A:16-6.1, with respect to a claim filed against him for any act or omission arising out of and in the course of the performance of his duties as an employee of the Board. The parties are not aware of the existence of any such claims. Mr. Haddad represents that as of the date of this Agreement he has not filed and does not intend to file a Workmen's Compensation or disability claim.

It is expressly understood that the arrangement herein is predicated exclusively upon the special circumstances of this matter and shall not be construed to represent any policy or procedure of the Board.

4. NO ADMISSIONS

The execution of this Agreement does not constitute an admission or acknowledgement by Mr. Haddad or the Board of any wrongful or otherwise improper conduct, nor as to the liability of any party. The parties mutually acknowledge that this matter has been resolved in good faith, and that this Agreement is entered into solely for the purpose of avoiding the time and expense attendant to any further litigation.

5. COMPENSATION/BENEFITS

The Board agrees to pay to Mr. Haddad his regular salary, less all normal payroll deductions and withholdings, through April 13, 2016. Mr. Haddad agrees that he will remain on administrative/medical leave through that date, and that his accumulated sick days will be utilized during this period. Mr. Haddad agrees that he will not seek reimbursement for any remaining unused personal, sick and/or vacation days. Mr. Haddad waives any right he may have to any other compensation from the Board of any kind.

Upon the effective date of Mr. Haddad's resignation, he shall be entitled to no further compensation, emolument of employment or fringe benefit of any kind and specifically waives his right to same, with the exception of any benefits to which he may lawfully be entitled to under the Workers' Compensation Act or COBRA.

Upon the effective date of Mr. Haddad's resignation in furtherance of resignation and consistent with his rights under the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA"), Mr. Haddad shall be entitled to purchase, at his own cost and expense, the insurance coverage then in effect for teachers in the school district.

6. NON-DISPARAGEMENT

The parties and their agents shall refrain from public negative comments regarding each other, and each other's employees and/or agents. However, nothing in this Agreement shall be construed to limit the Board and its agents' obligation to provide accurate information in response to legitimate requests for public information, nor to provide information requested by various State Agencies, including but not limited to the State Department of Education; the State Board of Examiners and its agents, including copies of the Tenure Hearing documents, witness list and information, proposed exhibits and work-product related thereto; the Division of Pensions and Benefits; and the Unemployment Compensation Board and/or their agents.

7. INQUIRIES

The Board agrees, through its Administration, to respond to post-employment inquiries regarding Mr. Haddad by providing basic work history such as confirming the dates of Mr. Haddad's employment within the school district, the amount of Mr. Haddad's salary in the final year of his employment, the positions that Mr. Haddad held within the District, and the date of Mr. Haddad's resignation. However, nothing herein shall be deemed to limit the Board's actions in compliance with the Open Public Records Act, or its obligation to respond fully and accurately to any and all inquiries from State agencies such as, without limitation, the Public Employees Retirement System ("PERS"); TPAF; for example.

8. REQUIREMENTS PURSUANT TO *N.J.A.C.* 6A:3-5.6

A. Mr. Haddad was charged with conduct unbecoming based on inappropriate interactions with students.

B. Both parties have freely consented to the within Agreement, as evidenced by their respective signatures below.

C. Both parties have had the benefit of independent legal counsel and have been fully apprised of their rights and obligations, and have indicated their full understanding and acceptance of same, by their respective signatures below.

D. The within settlement will serve the public interest by avoiding the cost of further litigation guarantying the desired result.

E. Mr. Haddad has been advised by his attorney that the Commissioner of Education and the Superintendent of Schools may refer the within matter to the State Board of Examiners for possible suspension or revocation of his certification.

F. The parties agree that nothing in the within Agreement shall restrict access to information or records deemed public by law or result in misrepresentation of the fact that Mr. Haddad's separation from service was incident to the prosecution of Tenure Charges against him by the Board. The Board and its agents shall cooperate fully and honestly in responding to requests for information from government agencies and in response to requests from the public for information that it is legally required to provide.

G. The Board has formally approved this Settlement Agreement, subject only to approval by the Arbitrator. A certified resolution is annexed hereto as Attachment B.

9. NO RETALIATION

Mr. Haddad shall take no retaliatory action of any kind against any student, parent, staff, Board member or agent of the Board, and shall cooperate fully and in good faith regarding any inquiries from colleges and/or employers that may be addressed to him regarding his former students.

10. ENTRY ONTO BOARD PROPERTY

Mr. Haddad may enter Board Property when working with a private entity that has Board approval for use of a facility for a particular event, or attendance at a venue or event that is open to the general public. In all other instances, Mr. Haddad shall first receive prior permission from the Superintendent of Schools before entering onto Board Property.

11. SURRENDER OF BOARD PROPERTY

A. Mr. Haddad shall surrender all school keys and property in his possession to the Superintendent of Schools or her designee.

B. The Superintendent of Schools shall arrange an appointment for Mr. Haddad to retrieve his personal property, if necessary.

12. BOARD APPROVAL

This Agreement is subject to Board approval. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.

13. ASSENT TO TERMS

A. Mr. Haddad hereby acknowledges that he entered into this Agreement with a full understanding of his rights and that he does so without duress and of his own free will and volition, and that he has consulted with independent legal counsel prior to executing same.

B. Mr. Haddad acknowledges that he was given the opportunity to fully consider this Agreement for a period of at least twenty-one (21) days, and was given seven (7) days from the execution of this document to revoke this Agreement by delivering written notification to Stephen M. Bacigalupo, II, Esq., Schwartz Simon Edelstein & Celso, LLC, 100 South Jefferson Road, Whippany, New Jersey 07981.

14. SUCCESSORS AND ASSIGNS

This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

15. ENTIRE AGREEMENT

This Agreement constitutes the entire agreement between the parties with respect to the subject matters herein, and supersedes and integrates any and all prior representations, negotiations, discussions, understandings and agreements, whether oral or written. This Agreement shall not be amended, changed or modified except in a writing signed by all parties. Each party acknowledges that the other party, nor any agent or attorney of the other party, have made any promise, representation or warranty whatsoever, express or implied, not contained in this Agreement to induce it to execute this Agreement.

16. SEVERABILITY

In the event that a court or agency of competent jurisdiction shall deem any part of this Agreement to be contrary to law, then the remaining portions of this Agreement shall remain in full force and effect, except that the provisions of Paragraph 1 hereinabove shall be deemed to be material and of the essence of this Agreement. Should the provisions set forth in Paragraph 1 be compromised, then the entire Agreement shall be deemed to be null and void and the Board shall be free to proceed with appropriate disciplinary action, up to and including the further prosecution of Tenure Charges.

17. GOVERNING LAW

This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

IN WITNESS WHEREOF, the signatures and/or seals of the parties or their duly authorized representatives have been set forth on the dates indicated below:

EBRAHIM HADDAD

Dated: 8/19/15

Witness:

Nicholas Paberzhitsky, ESQ

Dated:

For the Elizabeth School District Board of Education:

ANA MARIA AMIN
Board President

Dated: 8/20/15

Witness:

HAROLD E. KENNEDY, JR.
Board Secretary/Business Admin.

Dated: 8/20/2015

Attachment A

Irrevocable Letter of Resignation

Elizabeth School District Board of Education
c/o Harold E. Kennedy, Jr., Board Secretary/Business Administrator
500 North Broad Street
Elizabeth, New Jersey 07208

Re: Irrevocable Letter of Resignation

Dear Ladies and Gentlemen:

Subject to the terms and conditions of our Separation from Employment Agreement and Release ("Agreement"). and approval of same by the Board of Education, I hereby tender my irrevocable resignation from all employment with the Elizabeth School District Board of Education effective April 13, 2016.

Very truly yours,

Ebrahim Haddad

Attachment B

Certified Board Resolution

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BOARD OF EDUCATION

RESOLUTION

BE IT RESOLVED, that the Elizabeth Board of Education hereby approves the attached Employment Separation Agreement with Employee Ebrahim Haddad; and

BE IT FURTHER RESOLVED, that the Elizabeth Board of Education hereby accepts Ebrahim Haddad's irrevocable resignation effective April 13, 2016.

NOW, THEREFORE, BE IT RESOLVED that the Elizabeth Board of Education authorizes the Board President and the Business Administrator/Board Secretary to execute the Employment Separation Agreement on behalf of the Board, and to take such further steps as may be necessary to effectuate the within Employment Separation Agreement and carry out this action of the Board.

TRUE COPY APPROVED AND ADOPTED AT
THE ELIZABETH BOARD OF EDUCATION MEETING
HELD ON **August 20, 2015**

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

Elizabeth, New Jersey
August 20, 2015

15-45

300-15

N.W., ON BEHALF OF MINOR CHILD, T.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the residency determination of the respondent Board that his son, T.W., was ineligible for continued enrollment in Pine Hill schools. Respondent's determination was based on information provided by T.W. and his mother during a disciplinary hearing in February of 2015. Both T.W. and his mother advised the Board that T.W. and his father – N.W. – resided in Philadelphia, and took a train to New Jersey each morning to board a school bus at a relative's house. Petitioner contended that he has custody of his son from Wednesday to Sunday, and that he and T.W. share a room at his brother's home in Pine Hill. The Board sought to have T.W. removed from Pine Hill schools, and sought reimbursement of tuition for the period of his ineligible attendance.

The ALJ found, *inter alia*, that: petitioner bears the burden of proof by a preponderance of the evidence that he is domiciled within the school district; in this case, N.W. failed to produce any evidence that he was domiciled in Pine Hill; petitioner's driver's license lists his home address as Philadelphia; and, during a disciplinary hearing, both T.W. and his mother told Pine Hill's superintendent that T.W. lives in Philadelphia and takes the train to New Jersey every day for school. The ALJ concluded that the weight of the evidence indicates that during the period in question, N.W. and his son resided in Philadelphia. Accordingly, the ALJ affirmed the determination of the Board that T.W. was not domiciled in the Pine Hill school district, and ordered that petitioner reimburse the Board tuition at the rate of $84.24 per day for the period from February 6, 2015 through the remainder of the 2014-2015 school year.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion that the petitioner's son was not entitled to a free public education in Pine Hill schools. The Commissioner ordered petitioner to reimburse the Board for tuition in the amount of $7,160.40 for tuition costs incurred during the 85 days of T.W.'s ineligible attendance in Pine Hill schools. The petition was dismissed.

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

Issued 9/24/15

OAL DKT. NO. EDU 4710-15
AGENCY DKT. NO. 41-3/15

N.W., ON BEHALF OF MINOR CHILD, T.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The parties did not file exceptions.

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner failed to sustain his burden of establishing that he was a domiciliary of Pine Hill for the 2014-2015 school year. The Commissioner further concurs with the ALJ's conclusion that the minor child was, therefore, not entitled to a free public education in the District's schools during this time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in Pine Hill. The ALJ ordered that petitioner reimburse the Board in the amount of $84.24 per day from February 6, 2015 for the remainder of the 2014-2015 school year. Although the ALJ did not calculate the total amount of tuition owed to the Board, a review of the record indicates that there were 85 days of ineligible attendance by the minor child from February 6, 2015 through the

[1] The Commissioner was not provided with a transcript of the July 7, 2015 hearing at the OAL.

end of the 2014-2015 school year. Therefore, the Board is entitled to tuition reimbursement in the amount of $7,160.40 ($84.24 per day for 85 days), pursuant to *N.J.S.A.* 18A:38-1b.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $7,160.40 for tuition costs incurred during the time period that T.W. was ineligible to attend school in Pine Hill. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 9/24/15

Date of Mailing: 9/24/15

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 04710-15
AGENCY DKT. NO. 41-3/15

N.W. ON BEHALF OF T.W.,

Petitioners,

v.

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

Respondent.

N.W., petitioner, pro se

Tracey L. Schneider, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: July 7, 2015 Decided: August 10, 2015

BEFORE **SARAH G. CROWLEY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about February 6, 2015, petitioner, N.W., received a letter from respondent, Pine Bill Board of Education (BOE), informing appellant that his son, T.W. was ineliglble for continued enrollment in the District, due to his residency in Philadelphia, PA. The District also seeks reimbursement for eighty-five days at a rate of $84.24 per day. Petitioner contested the determination and filed an appeal with the

Commissioner of Education. The Department of Education, Bureau of Controversies and Disputes transmitted this case to the Office of Administrative Law (OAL) on April 7, 2015, for a hearing pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14 F-1 et seq. A hearing was held on July 7, 2015, and the record closed on that date.

ISSUE

Does petitioner reside in Pine Hill, New Jersey with his son, T.W.?

SUMMARY OF TESTIMONY

For Respondent:

Dr. Kenneth Kozcur, Superintendant of Schools for Pine Hill School District, has been employed by the Pine Hill School District for thirty-two years. He testified that there was a disciplinary hearing involving T.W. in February of 2015. T.W. and his mother appeared before the Board in connection with the disciplinary matter. At that time, T.W.'s mother advised Dr. Kozcur that neither T.W. nor his father live in Pine Hill and that they reside in Philadelphia. She told Dr. Kozcur that they leave Philadlephia at 5:00 a.m. every day and take the speedline to New Jersey to get on a school bus at a relatives house. Dr. Kozcur testified that T.W. told him that he lives in Philadlephia and takes the train to get to school every day. He testified that the cost of attending school in the district is $84.24 per day.

Kathleen M. Klemick, is the principal at Pine Hill Middle School, where T.W. attended school. She testified that the District initially had some concerns regarding T.W.'s residency, but she recived a letter from Christine Barksdale in September of 2014 advising her that T.W. and his father N.W. reside with her and her husband in Pine Hill. The letter further advised that N.W. has custody of T.W. from Sunday to Wednesday. She testified that when an issue arose with respect to the disciplininary matter with T.W., the mother came forward and advised them that the child did not live

in the District. The father did not provide any evidence of residency in response to their letter seeking to discontinue T.W.'s enrollment in the District.

For petitioner:

N.W. testified that he lives with his brother and sister-in-law, in Pine Hill, N.J. He testified that he has custody of his son, T.W. from Wednesday to Sunday and T.W.'s mother, who lives in Philadelphia, has custody from Sunday through Wednesday. He testified that his driver's license contains an address in Philadelphia and that "he just never changed it." He testified that he is an apprentice in Philadelphia, and uses his employer's address for employment purposes. He testified that he does not pay any taxes so he does not list a home address on a W-2 or anything else for tax purposes. He had no proof of residency at the purported Pine Hill residence. He stated that he and his son share a room at his brother's home in Pine Hill. He testified that he often stays with his girlfriend in Philadelphia. He stated that T.W. was expelled from the charter school he was attending in Philadelphia and T.W.'s mother does not like him going to school in New Jersey, so she told the District that he and T.W. did not reside in Pine Hill, N.J. He had no other testimony or evidence of residency in Pine Hill, New Jersey.

FINDINGS OF FACT

Based on the credible testimonial and documentary evidence, I **FIND** the following as **FACTS** in this matter:

1. The Pine Hill Board of Education had good cause to question the residency of T.W. after T.W.'s mother told the superintendent that T.W. and his father lived in Philadelphia, PA.

2. During a meeting regarding a disciplinary issue with T.W., T.W., who is twelve-years-old told the superintendent that he is living in Philadelphia and takes the train to school in New Jersey every day.

3. The appellant was unable to produce any evidence that he and his son do in fact live in Pine Hill, New Jersey.

4. The appellant's driver's license lists his home address as Philadelphia. The appellant had no documentation which indicated a mailing address or residency for him or his son in Pine Hill, New Jersey.

5. I **FIND** that neither T.W., nor his son live in Pine Hill, N.J.

LEGAL DISCUSSION

A student is eligible to attend a school free of charge if the student is domiciled within the school district. A student is domiciled in the school district when he or she is living with a parent or legal guardian whose permanent home is located within the district. A home is permanent when the parent or guardian intends to return to it after being absent from the home and has no present intent of moving from the home, notwithstanding the existence of homes or residences elsewhere. N.J.A.C. 6A:22-3.1(a)(1). Domicile may also be defined as a residence. N.J.S.A. 18A:1-1.

Consideration in proving residency for purposes of establishing eligibility for school district placement is found at N.J.A.C. 6A:22-3.4(a),

> (a) A district board of education shall accept a combination of any of the following or similar forms of documentation from persons attempting to demonstrate a student's eligibility for enrollment in the school district:
>
> 1. Property tax bills, deeds, contracts of sale, leases, mortgages, signed letters from landlords and other evidence of property ownership, tenancy or residency;
>
> 2. Voter registrations, licenses, permits, financial account information, utility bills, delivery receipts, and other evidence of personal attachment to a particular location;
>
> . . .

> 4. Receipts, bills, cancelled checks, insurance claims or payments, and other evidence of expenditures demonstrating personal attachment to a particular location, or, where applicable, to support of the student;
>
> . . .
>
> 6. Affidavits, certifications and sworn attestations pertaining to statutory criteria for school attendance, from the parent, guardian, person keeping an "affidavit student," adult student, person(s) with whom a family is living, or others as appropriate;
>
> . . .
>
> 8. Any other business record or document issued by a governmental entity.
>
> (b) A district board of education may accept forms of documentation not listed in (a) above, and shall not exclude from consideration any documentation or information presented by a person seeking to enroll a student.
>
> (c) A district board of education shall consider the totality of information and documentation offered by an applicant, and shall not deny enrollment based on failure to provide a particular form of documentation, or a particular subset of documents, without regard to other evidence presented.

N.J.S.A. 18A:38-1(a) and N.J.A.C. 6A:22-3.1(a) sets forth the right of a student to a free public education, which in pertinent parts states:

> Public schools shall be free to the following persons over five and under twenty years of age:
>
> a. Any person who is domiciled within the school district[.]
>
> . . .
>
> (a) A student over five and under twenty years of age pursuant to N.J.S.A. 18A:38-1, or such younger or older student as is otherwise entitled by law to free public education, is eligible to attend school in a school district if the student is domiciled within the district.

CONCLUSION

Based on all of the foregoing, I **CONCLUDE** that the weight of the evidence, which includes portions of appellant's testimony, indicates that during the 2015 school year, appellant and his son resided in Philadelphia, PA and did not reside in Pine Hill, NJ.

ORDER

It is **ORDERED** that the determination of the Pine Hill Board of Education that T.W. is not domiciled in the Pine Hill School District for the 2015 School Year, is **AFFIRMED**.

It is further **ORDERED** that the Pine Hill Board of Education be entitled to tuition reimbursement from appellant T.W. from February 6, 2015 for the remainder of the school year in the amount of $84.24 per day.

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

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

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

August 10, 2015
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: August 10, 2015

Date Mailed to Parties: 8/13/15

SGC/mel

APPENDIX

WITNESSES

For Appellant:

N.W., appellant

For Respondent:

Dr. Kenneth Kozcur, Superintendant of School

Kathleen M. Klemick, Principal

EXHIBITS

For Appellant:

For Respondent:

R-1 Notice of Ineligibility dated February 6, 2015

R-2 Pine Hill School District 2014-2015 Calendar

R-3 T.W. Registration Form

R-4 Letter to N.W. from District

R-5 Letter to District from Christine Barksdale

301-15 L

301-15

State of New Jersey

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

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

September 23, 2015

G[redacted] A[redacted] *pro se*
[redacted]
Elizabeth, New Jersey 07206

Board Secretary
Elizabeth Public Schools
Mitchell Building
500 North Broad Street
Elizabeth, New Jersey 07208

Re: *G.A., on behalf of minor child, N.P. v. BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY, AGENCY DKT. NO. 202-7/15*

Dear Parties:

Upon review of the Petition of Appeal filed in connection with the above captioned matter – and based upon the Board's failure to submit an Answer to the petition – I have determined to grant summary decision in favor of petitioner.

On July 31, 2015. G.A. filed a Petition of Appeal in accordance with *N.J.A.C.* 6A:3-8.1 *et seq.* claiming that her minor child, N.P., was entitled to attend school in the District pursuant to *N.J.S.A.* 18A:38-1 *et seq.*, as both she and her child have continued to reside at the same address in the city of Elizabeth since 2010. A copy of the Petition of Appeal was served upon the Board Secretary via facsimile as per *N.J.A.C.* 6A:3-8.1(a)2 on July 31, 2015, together with an acknowledgment of filing and notice that an Answer to the petition was due within 20 days. *N.J.A.C.* 6A:3-1.5.

Because the Board failed to respond to the initial notice, on August 21, 2015, a second and final notice was sent to the Board Secretary via certified and regular mail. The second and final notice clearly indicated that, absent receipt of an Answer to the Petition of Appeal within 10 days, each count in the petition would be deemed admitted and the matter may be decided on a summary decision basis pursuant to *N.J.A.C.* 6A:3-1.5(e). Having received no response from the Board, an amended second and final notice – with a copy to the Board attorney – was sent to the Board Secretary via certified and regular mail on September 2, 2015. Although both return receipt cards were returned to the Bureau of Controversies and Disputes

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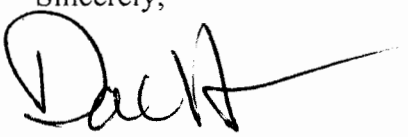
with signatures confirming delivery of the notices, the Board has failed to respond to the Petition to date.

Accordingly, petitioner's claim that her minor child, N.P., is entitled to attend school in the District pursuant to *N.J.S.A.* 18A:38-1 *et seq.* is deemed admitted by the Board. The Board is hereby ordered to continue to admit N.P. into its public school system, free of charge, so long as there is no change in circumstances that would alter that entitlement.*

Sincerely,



David C. Hespe
Commissioner

c: County Superintendent
Marvin Lehman, Esq.
State Law Library

DCH/MKD/DCS

VIA REGULAR MAIL

*Final determinations of the Commissioner may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

302-15

OAL DKT. NO. EDU 16702-12
AGENCY DKT. NO. 336-11/12

SMADAR CALANDRI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,	:	DECISION
RESPONDENT.	:	

The record, the Initial Decision of the Office of Administrative Law, and the parties' Stipulation of Dismissal have been reviewed. Since no settlement terms were presented for the Commissioner's review, this matter is appropriately categorized as a withdrawal pursuant to *N.J.A.C.* 1:1-19.2. Such withdrawal is approved by the Commissioner and this matter is hereby dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/24/15
Date of Mailing: 9/24/15

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, c. 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 16702-12
AGENCY DKT. NO. 336-11/12

SMADAR CALANDRI,
Petitioner,
v.
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY
Respondent.

Eugene G. Liss, Esq., for petitioner, (Law Office of Eugene G. Liss, Attorneys)

Sandro Polledri, Esq., for respondent (Adams, Gutierrez & Lattiboudere, LLC, Attorneys)

Record Closed: August 10, 2015 Decided: August 10, 2015

BEFORE: **SANDRA ANN ROBINSON,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Department of Education Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law (OAL) on December 18, 2012, a hearing

as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13. On December 19, 2012, the matter was assigned to the Honorable Mumtaz Bari-Brown, ALJ and hearings were scheduled for dates in 2013, 2014 and 2015, but postponed pending the outcome of a related complaint filed in Essex County Superior Court that asserts claims similar to the within increment withholding matter.

In June 2015, ALJ Bari-Brown retired and the matter was reassigned to the undersigned with testimony to commence on September 29, 2015. On July 29, 2015, Sandro Polledri, attorney for respondent informed the undersigned that the within matter was resolved amicably by and between the parties, as evidenced by a "Stipulation of Dismissal With Prejudice" that is dated and signed by both counsel and attached hereto and made a part hereof.

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

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

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

August 10, 2015
DATE

SANDRA ANN ROBINSON, ALJ

Date mailed to the Agency: August 10, 2015

Date mailed to the Parties: AUG 11 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

ADAMS GUTIERREZ & LATTIBOUDERE, LLC
By: Sandro Polledri, Esq. (NJ Attorney I.D. No.: 038971989)
The Legal Center
1037 Raymond Boulevard, Suite 900
Newark, New Jersey 07102
(973) 735-2742
Attorneys for Respondent
State-Operated School District of the City of Newark

RECEIVED
2015 AUG -4 P 2:53
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

SMADAR CALANDRI,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,,

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO.: EDU 16702-2012N
AGENCY REF. NO.: 336-11/12

STIPULATION OF DISMISSAL WITH PREJUDICE

IT IS HEREBY STIPULATED AND AGREED by and between Petitioner Smadar Calandri, through her attorney, and Respondent State-Operated School District of the City of Newark (commonly known as Newark Public Schools), through their attorney, that this matter, having been amicably resolved by and between the parties, is hereby voluntarily dismissed with prejudice and without costs or attorneys' fees.

ADAMS GUTIERREZ & LATTIBOUDERE, LLC

SANDRO POLLEDRI, ESQ.
Attorneys for Respondent,
State-Operated School District of the City of Newark, (commonly known as Newark Public Schools)

Dated: July 27, 2015

EUGENE G. LISS, ESQ.

EUGENE G. LISS, ESQ.
Attorney for Petitioner,
Smadar Calandri

Dated: July 22, 2015

303-15

D.R., on behalf of minor child, C.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the decision of the respondent Board to remove her daughter, C.R., from Paramus High School because she has moved out of the school district. The Board contended that C.R. is not entitled to attend Paramus for her senior year free of charge pursuant to its Policy 5118, which in part provides that a student in her junior year of high school may remain in district for her senior year if she moved out of district during the final marking period of eleventh grade – which in this case began on April 2, 2015. It is undisputed that petitioner moved to Franklin Lakes in February 2015, and that C.R. was therefore no longer domiciled in Paramus as of the end of that month. The petitioner averred that she was not familiar with Policy 5118 and did not understand its meaning; further, she contended she was not properly informed of the consequence of moving when she did. The Board filed a motion for summary decision; sought payment of tuition for the 2015-2016 school year, in the event that petitioner sends her daughter back to Paramus High School for her senior year; and waived tuition reimbursement for the final marking period of the 2014-2015 school year.

The ALJ found, *inter alia*, that: there are no material facts at issue, and this matter is ripe for summary decision; pursuant to *N.J.S.A.* 18A:38-1, public schools are required to provide a free education to individuals aged 5 to 20 years who are domiciled within the school district; in this case, it is undisputed that C.R. no longer resides in Paramus, and moved before the start of the fourth marking period in her eleventh grade year; the Board's determination was not arbitrary or capricious as C.R. did not meet the requirements of Policy 5118 for attending Paramus High School tuition-free in her senior year. Accordingly, the ALJ concluded that the Board properly removed C.R., there is no tuition due and owing to the Board for the remainder of C.R.'s junior year, and C.R. is ineligible to attend Paramus High School on a tuition-free basis for her senior year. The ALJ granted the Board's motion for summary decision and dismissed the appeal.

Upon review of the record and the Initial Decision, the Commissioner concurred with the findings and conclusions of the ALJ. Accordingly, the Initial Decision was adopted as the final decision in this matter, for the reasons expressed therein.

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

September 24, 2015

OAL DKT. NO. EDU 10277-15
AGENCY DKT. NO. 140-6/15

D.R., on behalf of minor child, C.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) – for the reasons stated in the Initial Decision – that C.R. is no longer domiciled in the district and that the Board's decision denying C.R. the ability to attend school in the district as a tuition free student was not arbitrary, capricious or unreasonable.

Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/24/15
Date of Mailing: 9/24/15

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10277-15
AGENCY DKT. NO. 140-6/15

D.R. ON BEHALF OF MINOR CHILD, C.R,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS, BERGEN COUNTY,
Respondent.

D.R., petitioner, pro se,

Cherie Adams, Esq. for respondent, (Adams, Guitierrez & Lattibourdere, LLC)

Record Closed: July 24, 2015 Decided: August 13, 2015

BEFORE **JOANN LASALA CANDIDO**, ALJ:

STATEMENT OF THE CASE

Petitioner, D.R. appeals the decision by respondent Borough of Paramus Board of Education (respondent/Board) to remove her daughter, C.R., from Paramus High School (Paramus) because she had moved from the district. On or about February 23,

2015, petitioner moved from Paramus to Franklin Lakes, New Jersey. C.R. was in the third marking period of her eleventh year at Paramus on that date. The third marking period ended April 2, 2015. The Board determined that C.R. was no longer domiciled in Paramus at the end of February 2015 and D.R. filed an appeal with the Commissioner requesting an over ride of Board Policy 5118 which addresses residency. The Board denied the request at its meeting on May 11, 2015. The Commissioner transmitted the matter to the Office of Administrative Law, where it was filed on July 14, 2015 as a contested case.

On July 14, 2015, the Board filed a motion for summary decision, characterizing the matter as a residency appeal wherein there is no genuine issue as to the only material fact, C.R.'s non-residency under terms of Board Policy 5118. The Board is seeking an Order dismissing this appeal and for petitioner to be responsible for tuition for the 2015-2016 school year in the amount of $18,246.00 should D.R. decide to send her daughter back to Paramus for her senior year. The Board has waived tuition reimbursement for the fourth marking period of C.R.'s junior year and need not be addressed here.

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . , are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).

And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536 (citation omitted).

In the present matter, it is not disputed that C.R.'s residency was outside of the district prior to the start of the fourth marking period of April 2, 2015. The question is whether the Board is entitled to summary decision as a matter of law.

Under N.J.S.A. 18A:38-1(a), "[a]ny person who is domiciled within the school district" is entitled to a free education from that district.[1] However, "[i]f the superintendent or administrative principal of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district . . . , the superintendent or administrative principal may apply to the board of education for the removal of the child." N.J.S.A. 18A:38-1(b)(2). "A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district." N.J.A.C. 6A:22-3.1(a)(1). "Domicile" has been "defined as 'the place where [a person] has his [or her] true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has an intention of returning.'" See D.L. v. Bd. of Educ. of Princeton Reg'l Sch. Dist., 366 N.J. Super. 269, 273–74 (App. Div. 2004) (quoting T.B.W. v. Bd. of Educ. of Belleville, EDU 5959-96, Initial Decision (April 30, 1998), adopted, Comm'r (June 18, 1998), <http://www.njlaw.rutgers.edu/collections/oal/>.

The parents may contest a local school board's decision regarding the student's right to attend school in the district to the Commissioner of Education and "shall have the burden of proof by a preponderance of the evidence" to prove domicile in the school district. N.J.S.A. 18A:38-1(b)(2). Here the parent contends that she did not know of or understand what the policy meant and she was not informed properly of the consequence of moving when she did.

The Board avers that C.R. is not entitled to attend Paramus for her senior year free of tuition since pursuant to its Policy 5118, which provides in part that a student

may remain in district if they moved out of district during their final marking period without having to pay non-resident tuition, she moved during her third marking period and is therefore not eligible.

It is undisputed that C.R. no longer resides in Paramus, and moved before the start of the fourth marking period of her eleventh grade. The policy undoubtedly restricts the attendance that petitioner seeks to students who move during their final marking period, here being April 2, 2015. Thus, C.R. does not fall within that aspect of the District's policy with respect to the 2015–2016 school year, and petitioner has not set forth specific facts raising a genuine issue in this regard. Even though the district does not have to allow C.R. to remain in the district under N.J.S.A. 18A:38-3(a) that grants such discretion, even if her parents are willing to pay tuition, it has offered to do so and has waived tuition reimbursement for the remainder of her junior year after her move to another district.

Finally, the Board did not act arbitrarily when it met and determined that J.R. would not be allowed to attend Paramus as a tuition free student under the policy. It clearly states the student must be in her final marking period of her junior year to be permitted to attend her senior year tuition free. Again, the Board had the discretion to admit J.R. as a tuition student, but determined that she did not meet the requirements of Policy 5118, and that decision therefore was not arbitrary or capricious. Even assuming petitioner was not informed of the meaning of Policy 5118, the language is clear as to non-resident students.

Therefore, I **CONCLUDE** that there is no genuine issue of material fact and that the Board is entitled to summary decision as a matter of law. I **CONCLUDE** that Paramus Board of Education properly removed J.R. I further **CONCLUDE** that, there is no tuition reimbursement due to the Board based upon the Board's waiver of tuition for the remainder of J.R.'s junior year.

ORDER

Accordingly, I hereby **ORDER** that the respondent's motion for summary decision is **GRANTED** and petitioner's appeal is hereby dismissed.

I further **ORDER** that there is no tuition due and owing to the Paramus Board of Education for the remainder of J.R.'s junior year and that J.R. is ineligible to attend Paramus High School for her senior year tuition free.

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

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

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

August 13 2015
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: August 13, 2015

Date Mailed to Parties: AUG 14 2015

ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

304-15L

304-15

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

September 23, 2015

Cristal Holmes-Bowie, Esq.
Michael A. Armstrong & Associates
79 Mainbridge Lane
Willingboro, New Jersey 08046

Tara L. Humma, Esq.
Brown & Connery, LLP
360 Haddon Avenue
Westmont, New Jersey 08108

Re: *In the Matter of the Tenure Hearing of Stephanie Hale, State-Operated School District of the City of Camden, Camden County. Agency Dkt. No. 251-9/15.*

Dear Counsel,

I have reviewed the correspondence filed by the parties seeking to withdraw the tenure charges against respondent, Stephanie Hale, based on resignation, along with the respondent's letter of resignation from the District. Upon review of the submissions, I find that since the respondent has resigned from the District, there is no need to proceed with the tenure charges.

Accordingly, the withdrawal of the tenure charges is approved pursuant to *N.J.A.C.* 6A:3-5.6, and this matter is hereby dismissed. Additionally, this matter is being forwarded to the State Board of Examiners for such action as that body deems appropriate.

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library
State Board of Examiners

DCH/MKD/BON

Mailed 9/24/15

305-15

E.S., on behalf of minor children, M.S. and Z.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Pro se petitioner challenged the respondent Board's determination that his children, M.S. and Z.S., were not entitled to a free public education in the City of Linden schools. Petitioner asserted that he owns two houses, one in Linden and the other in Roselle, and that the children spend much of their time in the Linden house. The Board maintained that a residency investigation found that M.S. and Z.S. are domiciled in Roselle, and therefore not eligible to attend Linden schools free of charge. The Board sought tuition reimbursement for the period of M.S. and Z.S.'s ineligible attendance, from February 9, 2015 through June 23, 2015.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1(a), public schools are required to provide a free education to individuals aged 5 to 20 years who are domiciled within the school district; the domicile of unemancipated children is the domicile of their parent or guardian; the results of the Board's residency investigation show that the children herein were domiciled in Roselle during the time period in question; petitioner failed to demonstrate by a preponderance of the credible evidence that his children were entitled to a free public education in Linden; pursuant to *N.J.S.A.* 18A:38-1(b)(2), a school board is entitled to recover tuition from a parent or guardian of a child found ineligible to attend school it its district; the daily tuition cost in Linden schools is $103.22 per child; and petitioner's two children attended Linden schools for a total of eighty four days from the beginning of the residency investigation until the end of the school year. Accordingly, the ALJ concluded that M.S. and Z.S. were not entitled to attend school in Linden free of charge, and the Board is owed tuition for the period of the children's ineligible attendance. The ALJ dismissed the petition with prejudice and ordered E.S. to reimburse the Board for tuition in the amount of $17,340.96.

Upon review of the record and the Initial Decision, the Commissioner found that petitioner failed to sustain his burden of establishing that he was a domiciliary of Linden during the period in question. Accordingly, the Initial Decision was adopted as the final decision in this matter and petitioner was directed to reimburse the Board in the amount of $ 17,340.96. The petition was dismissed.

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

Issued 9/24/15

OAL DKT. NO. EDU 3312-15
AGENCY DKT. NO. 37-2/15

E.S., on behalf of minor children, M.S. and Z.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by petitioner and the Board of Education's (Board) reply thereto.[1]

In his exceptions, petitioner argues that because the Board only conducted surveillance of his Roselle home, and not at his Linden home, the Board did not observe that his minor children resided at the Linden home. In reply, the Board argues that petitioner failed to meet his burden of establishing that M.S. and Z.S. resided in Linden. The Board noted that it conducted surveillance on the Roselle property on approximately twenty dates between January and April 2015, which showed petitioner leaving the Roselle home and driving his minor children to school in Linden, and that petitioner's father also told the Board's attendance officer that petitioner lived in Roselle, and not at the Linden address.

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner failed to sustain his burden of establishing that he was a domiciliary of Linden for the 2014-2015 school year. The Commissioner further concurs with

[1] The Commissioner was not provided with a transcript of the August 3, 2015 hearing at the OAL.

the ALJ's conclusion that the minor children were, therefore, not entitled to a free public education in the District's schools during this time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Board is entitled to tuition reimbursement in the amount of $17,340.96 ($103.22 per child per day for 84 days) for the time period from February 9, 2015 through June 23, 2015, during which petitioner's minor children were ineligible to attend, as detailed in the ALJ's Initial Decision.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $17,340.96 for tuition costs incurred during the time period that M.S. and Z.S. were ineligible to attend school in Linden. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 9/24/15

Date of Mailing: 9/24/15

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 03312-15
AGENCY DKT. NO. 37-2/15

E.S. ON BEHALF OF MINOR CHILDREN,
M.S. AND Z.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,
Respondent.

E.S., petitioner appearing pro se,

Steven R. Nevolis, Esq. for respondent (Weiner Lesniak, LLP)

Record Closed: August 3, 2015 Decided: August 13, 2015

BEFORE: **JOANN LASALA CANDIDO**, ALAJ

PROCEDURAL HISTORY

On February 27, 2015, petitioner, E.S., filed a residency appeal on behalf of his two children, M.S. and Z.S., grades six and three, respectively. On March 6, 2015, the Township of Linden Board of Education (BOE or respondent) filed an Answer with the

State Department of Education (DOE) seeking reimbursement from petitioner for the costs of tuition incurred by the attendance of his two minor children in the BOE's school district from the onset of the investigation.

The DOE transmitted this matter to the Office of Administrative Law (OAL) on March 9, 2015, for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13. A hearing was held on August 3, 2015, on which date the record closed.

FINDINGS OF FACT

Based upon a consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS:**

Jim McCullough, the district attendance officer, gave compelling and credible testimony as confirmed by his report which reads and I accept as **FACT**:

1. On January 29, 2015, McCullough conducted a residency check at 1100 Middlesex Street, Linden. He spoke with E.S.'s father who advised that E.S. does not live there any longer. The father stated that his son moved to Roselle and provided him with their current address of 104 Kennedy Drive in Roselle. The tax records revealed they have owned 104 Kennedy Drive in Roselle since at least 2010.

2. On January 30, 2015, McCullough conducted a surveillance of 104 Kennedy Drive in Roselle and at approximately 0800 hours, two blue car which was parked in the driveway. They drove small children (male and female) exited the house with an adult male and entered small into Linden to Passaic Street, turned and drove back to 104 Kennedy Drive. Small female re-entered the house then returned to vehicle. Vehicle drove back to Linden directly to school 4 where the two children exited the vehicle and walked into school (video). E.S. owns a business, "Goodness Transportation LLC" and uses the address of 104 Kennedy

Drive, Roselle. A tax record check of 1100 Middlesex Street in Linden, shows that E.S. also owns that property since July 2, 2011.

3. On February 2, 2015, McCullough sent a letter to the parents advising them that their children will receive a transfer card to the Roselle school district since the family is domiciled in Roselle.

4. On February 3, 2015, McCullough conducted a surveillance of 104 Kennedy Street in Roselle and observed the small blue vehicle parked in front of the house. Approximately 0810 hours, an adult male, E.S. and two small children exited the house and entered the vehicle. They proceeded directly to School 4 and at approximately 0821 hours (video) and the children exited the vehicle.

5. On February 3, 2015, McCullough received a telephone call from E.S. advising that he and his family live at 1100 Middlesex Street in Linden. McCullough advised E.S. that it is board policy that where the children sleep determines their eligibility of where they go to school.

6. On February 11, 2015 at 0750 hours, McCullough conducted a surveillance of 104 Kennedy Drive in Roselle and observed the same blue small car parked in front of the house with an SUV parked in the driveway. At approximately 0800 hours E.S. exited the house and entered the vehicle and drove the two children directly to School 4. The vehicle pulled in to the lot and the two children exited the vehicle and entered the school at approximately 0807 hours, (video).

7. On February 12, 2015 at 0759 hours, McCullough conducted a surveillance of 104 Kennedy Drive in Roselle and observed a blue vehicle parked in the street in front of the house. E.S. and two children exit the house at 0754 hours and drive directly to School 4 to drop the children off at 0802 hours, (video).

8. On February 18, 2015 at 0745 hours, McCullough conducted a surveillance of 104 Kennedy Drive in Roselle and observed a gray SUV in the driveway. At 0813 hours, an adult female and two small children exited house and entered the

SUV and drove directly to School 4. The children were dropped off at 0825 hours (video).

9. On February 19, 2015 at 0755 hours, McCullough conducted a surveillance of 104 Kennedy Drive in Roselle and observed the blue vehicle parked in front of the house. At approximately 0801 hours, E.S. and two small children exited the house and entered the vehicle and drove directly to School 4. The children were dropped off at School 4 at approximately 0807 hours, (video).

10. On February 23, 2015 at 0740 hours, McCullough did a drive by to 104 Kennedy Drive in Roselle, and observed a SUV parked in the driveway and the blue car parked in street.

11. On March 2, 2015 at 0750 hours, McCullough conducted a surveillance of 104 Kennedy Drive in Roselle, at observed E.S. exiting the house with two small children and enters his blue car at approximately 0820 that's parked in street. They drive directly to School 4 where the children are dropped off at approximately 0829 hours, (video).

12. On March 3, 2015 at 0742 hours, McCullough conducted a drive by to 104 Kennedy Drive in Roselle and observed the blue car parked in the street in front of the house. The SUV was not seen.

13. On March 4, 2015 at 0735 hours, McCullough conducted another drive by to 104 Kennedy Drive in Roselle and observed the blue car parked in the street in front of the house. The SUV was not seen.

14. On March 10, 2015 at 0745 hours, McCullough conducted a surveillance of 104 Kennedy Drive, Roselle and observed only a Yellow cab parked in front of house. E.S. and the children exited the house at 0754 hours and entered the yellow cab and exit area, arriving at School No. 4 at 0810 hours and dropped off both children (video).

15. On March 11, 2015 at 0746 hours, McCullough conducted a drive by to 104 Kennedy Drive, Roselle and observed a Nissan SUV in driveway (photo).

16. On March 18, 2015 at 0741 hours, McCullough conducted a drive by of 104 Kennedy Drive, Roselle and observed the blue vehicle parked in the street in front of the house. He proceeded to School No. 4 to set up surveillance. At 0806 hours, McCullough observed the same blue vehicle approach School No. 4 parking lot and drop off the children (photo and video).

17. On March 25, 2015 at 0744 hours, McCullough conducted a drive by of 104 Kennedy Drive, Roselle. The blue vehicle was parked in the street in front of the house (photo). McCullough went back to the Roselle address at 1:18 p.m. and observed the blue Nissan SUV in driveway.

18. On March 26, 2015 at 0744 hours, McCullough conducted a drive by of 104 Kennedy Drive, Roselle. The blue vehicle was parked in the street in front of the house. The blue Nissan SUV was parked in the driveway (photo).

19. On March 30, 2015 at 0742 hours, McCullough conducted a drive by of 104 Kennedy Drive, Roselle, and observed the blue Nissan SUV parked in the driveway (photo).

20. On March 31, 2015 at 0740 hours, McCullough conducted a drive by of 104 Kennedy Drive, Roselle, and observed the blue vehicle parked in the street.

21. On April 13, 2015 at 0745 hours, McCullough conducted a drive by of 104 Kennedy Drive, Roselle, and observed the Blue SUV parked in driveway (photo).

22. On April 20, 2015 at 0742 hours, McCullough conducted a surveillance of 104 Kennedy Drive, Roselle. At 0758 hours, McCullough observed E.S. and two children exit the house and enter the blue vehicle parked in the street in front of the house. At 0806 hours, E.S.'s blue vehicle pulled in front of School No. 4 and children exited the car and entered the school (video).

23. The parents own a two-family in Linden and a home in Roselle. I **FIND** the primary residence to be in Roselle.

24. The individual cost to the BOE for the period of time for the two children is calculated upon the daily cost for each student at the rate of $103.22 per diem per child for a total of eighty four days from February 9, 2015 to June 23, 2015. The combined total cost for both children to attend school in Linden for the eighty four days was $17,340.96.

LEGAL ANALYSIS AND CONCLUSION

The issue in this appeal is whether M.S. and Z.S. were domiciled students during the eighty-four days they attended school in Linden.

Public schools are required to provide a free education to individuals between the ages of five and twenty years in certain circumstances, including individuals who are domiciled within the school district. N.J.S.A. 18A:38-1(a). Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is the domicile of the parent, custodian or guardian. P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001). Thus, a child would routinely attend school in the district where his or her parents live.

From the evidence submitted, it is clear that both children were domiciled in Roselle during the time they attended school for eighty-four days in Linden. E.S. failed to demonstrate, by a preponderance of the credible evidence, that his children were entitled to a free public education in Linden. To the contrary, the BOE has proven that they were not since they were not domiciled there. N.J.A.C. 6A:22-3.1(a)(1) provides:

> A student is domiciled in the school district when he or she is living with a parent or legal guardian whose

> permanent home is located within the school district. A home is permanent when the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere.

Thus, domicile is what is regarded as an individual's true and permanent home. In re Jaffe, 74 N.J. 86, 90-91 (1977). The question of domicile is one of fact and must be determined on a case-by-case basis. Lea v. Lea, 18 N.J. 1, 7 (1955). Intent is the touchstone of domicile, and the manifestation of a person's intent converts residence from a mere place in which a person lives to a domicile. State v. Benny, 20 N.J. 238, 251 (1955). A person may have multiple residences, but may have only one domicile at a time; as such, the residence may coincide with domicile, but does not alone determine domicile. Ibid.

Based upon the facts adduced, I **CONCLUDE** that M.S. and Z.S. were domiciled in Roselle during the eighty-four school days they attended in Linden. The children were observed leaving their Roselle address early in the morning over the course of several days and driven to Linden to attend school. Accordingly, they were not entitled to attend school in Linden and given a free public education there pursuant to N.J.S.A. 18A:38-1(a).

A school board is entitled to recover tuition from a parent or guardian of a child found ineligible to attend a school in its district. N.J.S.A. 18A:38-1(b)(2). M.S. and Z.S. were not entitled to a free public education in Linden based upon the above. Accordingly, respondent is entitled to reimbursement from E.S. in the sum of $17,340.96 for the cost of providing a public education to both children from February 9, 2015 until June 23, 2015, and I so **CONCLUDE.**

ORDER

Based upon the foregoing, it is hereby **ORDERED** that the petition of petitioner, E.S., be and is hereby **DISMISSED WITH PREJUDICE**. It is further **ORDERED** that

E.S. reimburse respondent the total sum of $17,340.96 for tuition costs associated with the attendance of his children, M.S. and Z.S., in Linden from February 9, 2015 until June 23, 2015.

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

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

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

August 13, 2015
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

Date Mailed to Parties: AUG 14 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

APPENDIX

EXHIBITS

Petitioner

P-1 Appeal packet

Respondent

R-1 Residency investigation report of Jim McCullough and video

R-2 Residency check

R-3 Linden student contact sheet

R-4 Property detail

R-5 New Jersey Property Information

R-6 Notice of Determination of Ineligibility For Residency

R-7 Final Determination of Ineligibility For Residency

R-8 Certification of Kathleen Gaylord

306-15

LEARNING CENTER FOR EXCEPTIONAL CHILDREN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	
AND	:	
LEARNING CENTER FOR EXCEPTIONAL CHILDREN,	:	
PETITIONER,	:	
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, the Learning Center for Exception Children (LCEC) -- a private school for the disabled, which had been approved by the New Jersey Department of Education (Department) to receive public school students on a tuition basis – challenged the Department's action in placing LCEC on conditional approval status. LCEC asserted that there is no factual or legal basis for the Department's action, and sought an order restoring full approval of its educational program. The Department contended that LCEC is not operated in accordance with applicable agency regulations. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts in dispute, and the matter is ripe for summary decision; the Department's action in placing LCEC on conditional approval status was reasonable, warranted, and effectuated in accordance with the law; the only remaining issue for consideration in this case is whether improper mainstreaming of special needs students continues to occur at LCEC; it is uncontroverted that some students at LCEC were educated for at least a part of their day in mainstream settings, which in many cases was not stipulated in the students' Individual Education Program (IEP); therefore, the action of the Department in March 2014 in placing LCEC on conditional approval because children were improperly mainstreamed was appropriate and consistent with law and regulation; and the record offers no cause to question the Department's continued belief that LCEC must remain on conditional approval. Accordingly, the ALJ granted the Department's motion for summary decision, denied petitioner's motion, and dismissed the petition.

Upon comprehensive review of the record, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter.

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

Issued 9/24/15

OAL DKT. NOS. EDU 5929-14, EDU 7995-14 (CONSOLIDATED)
AGENCY DKT. NOS. 60-3/14, 155-6/14

LEARNING CENTER FOR EXCEPTIONAL CHILDREN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	
AND	:	
LEARNING CENTER FOR EXCEPTIONAL CHILDREN,	:	
PETITIONER,	:	
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Learning Center for Exceptional Children (LCEC), and the Department of Education's (Department) reply thereto.[1] In this matter, LCEC, an approved private school for

[1] After the deadline for filing exceptions expired, LCEC submitted a copy of an Opinion issued by the Third Circuit Court of Appeals in *D.M., et al. v New Jersey Department of Education, et al.* which involves a student who currently attends LCEC. It should be noted that nothing in the Third Circuit Opinion dictates a different result in this case.

students with disabilities, challenges the Department's decision placing LCEC on conditional approval status.

In its exceptions, LCEC maintains that the Administrative Law Judge (ALJ) erroneously granted summary decision in favor of the Department. Specifically, LCEC maintains that the ALJ wrongfully stated in the Initial Decision that is was "uncontroverted" that the mainstreaming of LCEC students with students at Today's Learning Center[2] was not approved. Although LCEC maintains that it is no longer mainstreaming students, it contends that the Department actually approved the practice of mainstreaming its students when the Department granted its program application in 2011. LCEC also takes exception to the ALJ's determination that there was "no competent evidence" showing that the mainstreaming had ended, arguing that the school has in fact provided ample evidence to the Department proving that the school is not mainstreaming students. Finally, LCEC argues that the ALJ erroneously treated the ongoing IEP/scheduling issues as if they are the same as mainstreaming issues. Therefore, LCEC requests that the Initial Decision be rejected and that the Commissioner issue an order releasing LCEC from conditional approval status.

In reply, the Department maintains that the ALJ properly rejected LCEC's argument that it had satisfactorily addressed the mainstreaming issue and upheld the conditional approval status. The Department also contends that LCEC did not offer anything in its exceptions to justify the modification of the Initial Decision. The Department emphasizes that LCEC is only authorized to operate special class programs, and LCEC's argument that the Department approved the mainstreaming of student's at LCEC should be rejected.[3]

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[2] Today's Learning Center is a private, regular educational program that is located alongside LCEC.

[3] Special class programs are defined as programs that "serve students who have similar intensive educational, behavioral, and other needs related to their disabilities in accordance with their individualized education programs."

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that the Department's decision to place LCEC on conditional approval status was appropriate and consistent with the law and governing regulations. Moreover, despite the fact that LCEC has rectified the Department's concerns regarding the full-time principal and inappropriate rental space, LCEC has yet to provide enough evidence to prove that it is no longer mainstreaming students. Finally, the Commissioner is not persuaded by LCEC's suggestion that the conditional approval should be removed based on its argument that the Department approved the mainstreaming of its students in 2011 when the program application was granted. LCEC was approved to operate special class programs only, and its practice of mainstreaming is in violation of its approval under *N.J.A.C.* 6A:14-4.7.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 9/24/15

Date of Mailing: 9/24/15

Placement in a special class program shall occur when the IEP team determines that the nature and severity of the student's disability is such that no other school-based program will meet the student's needs." *N.J.A.C.* 6A:14-4.7(a).

[4] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION

LEARNING CENTER FOR EXCEPTIONAL CHILDREN,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION,
Respondent.

OAL DKT. NO. EDU 05929-14
AGENCY DKT. NO. 60-3/14

LEARNING CENTER FOR EXCEPTIONAL CHILDREN,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION,
Respondent.

OAL DKT. NO. EDU 07995-14
AGENCY DKT. NO. 155-6/14

Vito Gagliardi, Jr., Esq., for petitioner (Porzio, Bromberg and Newman, attorneys

Beth N. Shore, Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: July 14, 2015 Decided: August 14, 2015

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

The Learning Center for Exceptional Children (LCEC) is a private school for the disabled, which had been approved by the New Jersey Department of Education (the Department) to receive public school students on a tuition basis. The Department has placed LCEC on conditional approval status, and contends that the school is not being operated in accordance with applicable agency regulations. LCEC asserts that there is no factual or legal basis for the Department's action, and seeks an order restoring full approval for its educational program.

PROCEDURAL HISTORY

This matter arose with the filing of a petition of appeal and motion for emergent relief by LCEC on March 4, 2014, through which LCEC sought to stay the effects of a February 14, 2014, decision by the Passaic County Supervisor of Child Study denying LCEC's "Request to Establish a Special Education Program or Service" at its facility on Scoles Avenue in Clifton, New Jersey. The Department opposed the motion on March 31, 2014, and it was denied by the Commissioner of Education (the Commissioner) on May 12, 2014. The contested case was transmitted to the Office of Administrative Law (OAL) on May 14, 2014. (EDU 05929-14)

In the interim, via letter dated March 18, 2014, LCEC was advised by the Department that it was being placed on conditional approval. On May 21, 2014, LCEC filed a motion for emergent relief seeking to immediately lift its conditional approval status. A second petition of appeal was filed on June 17, 2014. (EDU 07995-14). The request for emergent relief was transmitted to the OAL, where it was heard and denied on July 3, 2014, by Judge Michael Antoniewicz, ALJ. The two pending petitions of appeal were consolidated for hearing before me via order dated July 15, 2014.

A motion for summary decision was filed by LCEC on May 1, 2015. The Department filed a cross-motion on May 18, 2015, and oral argument took place that day. LCEC was granted leave to file an additional brief and did so on June 9, 2015. The parties thereafter renewed their efforts to amicably resolve this matter, and at their request the record was held open until July 14, 2015.

ISSUE PRESENTED

At oral argument the parties agreed that the issues raised by the petition of appeal filed on March 4, 2014, are now moot. That petition (EDU 05929-14) is **DISMISSED,** and accordingly, the sole issue for determination is whether the action of the Department in placing LCEC on conditional approval per its March 18, 2014, letter was consistent with applicable law and regulation. The Department's monitoring of LCEC and its programs is ongoing, and appears to continually give rise to new concerns that prevent the Department from lifting LCEC's conditional approval. To the extent that these latter issues post-date the filing of LCEC's second petition of appeal, they are not before me for review or adjudication.

FINDINGS OF FACT

Established in 1978, LCEC is a private not-for-profit school that educates students with special needs ages three through twenty-one. Housed alongside LCEC is a private, regular education program, Today's Learning Center (TLC). Students who attend LCEC are classified by their local public school districts as eligible to receive special education and related services pursuant to the Individuals with Disabilities Act, (IDEA), 20 U.S.C.A. § 1415 et seq., and the New Jersey regulations that implement Federal law. See: N.J.A.C. 6A:14-1.1. et seq.

Peggy McDonald is the Director of the Office of Special Education Programs (OSEP). Her office is responsible for implementing state and federal laws governing special education to ensure that students with disabilities receive a free and appropriate education (FAPE). In February 2014, McDonald grew concerned that LCEC was

placing special needs children and typically developing children in the same classroom. Notwithstanding the statutory preference for mainstreaming, she viewed LCEC's practice as violative of N.J.A.C. 6A:14-4.7(a) because the school had been approved to operate only special education programs. McDonald also was disturbed about LCEC's facility. It included rental space, and she felt insufficiently assured that tenants using this space would "not compromise the health, safety, and welfare of LCEC's students." Finally, OSEP expressed concern that LCEC did not employ a full-time, certified non-teaching principal, as required by N.J.A.C. 6A:14-7.6(d). On March 18, 2014, for these three reasons, McDonald advised LCEC that it was being placed on conditional approval.

Mainstreaming

In correspondence dated December 19, 2013, counsel for LCEC confirmed that the school places "special needs children and typically developing children in the same classroom." In a letter dated April 17, 2014, counsel for LCEC disputed that such mainstreaming was improper, but nonetheless reconfirmed that "[s]tudents in the Speer program are mainstreamed to the extent required by their IEPs." Counsel moreover noted that students in the Speer program at LCEC may be integrated with typically developing peers for lunch, recess and assemblies. I **FIND** that LCEC admitted that it was mainstreaming some of its students for at least a part of their day.

To resolve the conditional approval status, OSEP indicated that it required written assurances that no children would be mainstreamed.[1] LCEC was directed to provide daily schedules for all currently enrolled students, as well as schedules for their teachers. The Department additionally requested IEPs for every student enrolled for the 2014-2015 school year. LCEC promptly began the process of supplying the requested IEPs and other documentation, but OSEP found its submissions inadequate.

[1] The parties note that LCEC filed a separate action in Federal Court pertaining to E.M., an LCEC student. They successfully obtained an injunction allowing E.M. to continue receiving an educational program that included mainstreaming. But, of course, this suit is a further admission that mainstreaming took place at LCEC.

Some student IEPs had not been supplied; IEPs that were supplied exacerbated the Department's concerns. Via letter dated December 17, 2014, OSEP reiterated its concerns about programming at LCEC. The following statement is representative:

> In addition, a review of student schedules and IEPs provided by you raises questions about the types classes you are providing within LCEC. For example, the IEPs of students in one class describe the same program as "self-contained," 'inclusion," "in-class support," "self-contained" Language Arts and Math and all other subjects as "general education." These descriptions, which include general education, cannot all be delivered simultaneously in one single classroom.

The agency review of LCEC's submissions revealed missing information, and revealed that the proffered IEPs were inconsistent with student schedules, "thus calling into question how, or whether, LCEC is implementing its students' IEPs." The OSEP letter noted that LCEC's submission of its teachers' schedules was likewise unsatisfactory, and that the submitted schedules "failed to include very basic information, such as the teacher's name, assignment and a roster of all students in each class period." McDonald reiterated that her office needed this information to verify that students are receiving FAPE via their IEPs.

In response to the December 17, 2014, letter, LCEC supplied yet additional, voluminous documentation for OSEP's review. But according to McDonald, its submissions continued to insufficiently assure OSEP that the school was operating in accordance with agency regulations. Indeed, McDonald notes that upon reviewing what was sent by LCEC, "OSEP [continued to observe] a number of discrepancies between students' IEPs and their LCEC schedules." OSEP directed LCEC to correct these discrepancies. LCEC again provided additional information regarding students who were previously mainstreamed. But again, its submissions only served to further heighten OSEP's concerns. Indeed, in a February 6, 2015, letter LCEC admitted "deviations" existed "between certain students' IEPs and their current schedules." At site visits conducted on February 18, 2015, and March 4, 2015, OSEP officials still found discrepancies between the student schedules that LCEC had provided the month before and the actual classes that were in session. On March 27, 2015, McDonald's

office sent non-compliance letters to the sending school districts of students who were identified by LCEC as having discrepancies between their IEPs and the services actually delivered at LCEC. McDonald explained that such letters are sent as a matter of policy when her office becomes aware that IEPs are not being implemented as written.

LCEC correctly points out that an April 28, 2015, letter from the Deputy Attorney General states that "when OSEP representatives visited LCEC in March 2015, it appeared that LCEC had, nearly a year after being placed on conditional approval, finally stopped 'mainstreaming' its students with TLC students." But it is noteworthy that although counsel argued vigorously in his brief and at oral argument that no such mainstreaming persists at LCEC, I received no certification from a representative of LCEC that so states, definitively. Moreover, as late as May 13, 2015, lingering concerns surrounded the documentation being supplied by LCEC. McDonald again communicated with LCEC, directing it to create schedules that conform with the services mandated by student IEPs, and to do so no later than June 30, 2015, in order for conditional approval to be lifted. I **FIND** that these concerns persist to date.

Full-Time Principal Issue

McDonald's March 18, 2014, letter states that "OSEP has received information from the county office that the school does not have a full-time, certified non-teaching principal...and has not received county office approval for a waiver of the full-time principal status." Her letter references a representation allegedly made by Elizabeth Yeager that she served both as principal of LCEC and TLC; Yeager vigorously denied having made such a representation. Counsel for LCEC clarified that Yeager's only affiliation with TLC was as a consultant who worked before or after the LCEC school day. She did so for a total of 65 hours during the entirety of the 2013-2014 school year. The parties continued to communicate in regard to this issue, and LCEC even unsuccessfully applied for a waiver, without prejudice to its contention that one was not required.

In a letter dated March 12, 2015, the Department advised, via counsel, that it would accept LCEC's representation that Yeager was not serving as principal of both LCEC and TLC, and that accordingly, LCEC had a full-time principal as required by regulation. That letter noted that the LCEC website still appeared to reflect otherwise; this concern persisted and was raised when counsel appeared before me for oral argument. In a certification dated June 8, 2015, Linda Buonauro, Director of LCEC, confirmed that the website had been adjusted some time ago to reflect that Yeager served only as principal of LCEC. Noting that she has "no control over what old versions of the website appear using various search terms," she indicated that the entire website has been taken down, to insure that there is no further confusion in regard to Yeager's role.

I **FIND** that Liz Yeager is not currently serving as the principal of any school or program other than LCEC, and that this issue does not continue to be a basis for LCEC's conditional approval status.

Rental Space

This concern was articulated in the Department's March 18, 2014, letter as follows:

> The OSEP has also conducted a review of the documents submitted with the December 19, 2013 correspondence, which included a "first floor plan" of the building. The floor plan identified an area which is labeled "rental space" with no further description of the space provided. The OSEP is requesting information as to the use of that space to ensure that the health, safety and welfare of the students are not being compromised by the use of that space.

Thereafter, in his April 17, 2014, letter, counsel for LCEC advised that the rental space is leased to the New Jersey State Opera, which uses it via a separate entrance, and only when school is not in session. The March 12, 2015, letter from the Deputy Attorney General confirms, and I **FIND**, that the issue of allowing outside parties to use

space at LCEC has been resolved to the Department's satisfaction, and does not continue to be a basis for conditional approval status.

The Effect of Conditional Approval on LCEC

A certification submitted by Mary Bawarski, the accountant for LCEC, outlines the financial difficulties the school's continued conditional status has created. She advises that, "[b]ased on...30 years of experience as an accountant for approved private schools for disabled children, it is my opinion that, under the circumstances, LCEC may run out of cash on or about August 1, 2015." Her concerns were echoed by Yeager, who submitted a certification that emphasized her consternation after OSEP sent its March 27, 2015, letter to LCEC's sending districts. The following comment by Yeager is representative of the tone of her certification, and she writes:

> ...[b]ased on my conversation with representatives of the Passaic School District, it is my understanding that the DOE's March 27th letter has caused the district to demand compensatory education for its students – which LCEC cannot afford and would not even have to discuss but for the DOE's inflammatory letter.

Yeager moreover stressed that the Department's correspondence failed to advise the sending districts about ongoing efforts between the local child study teams and LCEC staff to ensure that students were receiving the programming promised by their IEPs.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

The parties have cross-moved for relief under N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c), which provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'Fanciful, frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (citing Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, supra, 477 U.S. at 251–52, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214. I **CONCLUDE** that this matter is ripe for summary decision. There are no material facts in dispute, and the Department is entitled to judgment as a matter of law.

As a recipient of federal funds, the Department is required to ensure that all New Jersey special needs students receive FAPE. 20 U.S.C. § 1412(a). One way that educational programming is delivered is via contract with private schools for the disabled, such as LCEC. See: 20 U.S.C. §1412(a)(19)(B). The Department correctly points out that "state oversight and monitoring is an essential component of a [private school for the disabled's] relationship with the State and its ability to educate public students." Consistent with this obligation, our State regulations provide for the monitoring of approved private schools for the disabled. N.J.A.C. 6A:14-7.10. See also: N.J.A.C. 6A: 14-9.1.

As part of the monitoring process, the Department "may issue a conditional approval status when noncompliance is demonstrated with State or Federal statute or rules and/or implementation of the corrective action plan." N.J.A.C. 6A: 14-7.10(b)(1). When placing a school on conditional approval, the Department's actions "must be warranted under the circumstances and effectuated in accordance with applicable law." All Can Excel (A.C.E.) Academy v. New Jersey Dep't. of Educ., Office of Special Educ. Programs, EDU 1240-07, Final Decision (May 16, 2008), <http://njlaw.rutgers.edu/collections/oal/>. I **CONCLUDE** that the action of the Department here was reasonable; warranted under the circumstances; and effectuated in accordance with law.

No further analysis is required relative to the issues of rental space and assignment of a full-time principal. Both areas of alleged noncompliance have been resolved to the Department's satisfaction. Accordingly, I **CONCLUDE** that the claims raised relative to these two justifications for conditional approval are moot. For a claim to be justiciable, petitioner must have suffered a distinct injury or harm that can be remedied by the Commissioner. See e.g. :New Jersey Turnpike Auth. v Parsons, 3 N.J. 235, 240 (1949). It is not the role of the Commissioner to function in the abstract or to enter rulings that are advisory. See: N.J. Civil Serv. Ass'n v. State of New Jersey, 88 N.J. 605, 611 (1982); Crescent Park Tenants Assoc. v Realty Eq. Corp. of New York, 58 N.J. 98,107. There is no further action that can be taken by this tribunal relative to the full-time principal and floor space issues.

Moreover, throughout the time that LCEC has remained on conditional approval, a third area of noncompliance, mainstreaming, would have kept the school conditionally approved regardless. It is uncontroverted that LCEC is approved only to operate special class programs. These are defined as programs that "shall serve students who have similar intensive educational, behavioral, and other needs related to their disabilities in accordance with their individualized education programs." N.J.A.C. 6A:14-4.7. There is a strong statutory preference for educating children in the "least restrictive environment," and for including them, to the extent appropriate, with typically developing peers. 20 U.S.C.A. § 1412(a)(5). Oberti v. Board of Education, 995 F.2d

1204 (3d Cir. 1993). Thus, the Department's position may, at first blush, appear to flout this statutory requirement. But LCEC is a private entity, and not a public school. The parameters of its approval to provide services to New Jersey public school children is as determined by the Department; and it has been approved exclusively to serve those children who are not able, due to the severity of their disabilities, to enroll in integrated settings. Indeed, notwithstanding its preference for inclusion, the IDEA contemplates a continuum of placement options, ranging from mainstreaming in a regular public school as least restrictive to enrollment in a non-approved residential private school as most restrictive. 34 C.F.R. § 300.115 (2009); N.J.A.C. 6A:14-4.3.

It is uncontroverted that some students at LCEC were educated for at least a part of their day in mainstream settings, and that indeed, some were accepted to the school with IEPs that so stipulated. I **CONCLUDE** that the action of the Department in March 2014, placing LCEC on conditional approval because children were improperly mainstreamed, was appropriate and consistent with law and regulation. The record reveals that it took close to a year to even begin to assure the Department that mainstreaming was no longer taking place. LCEC has offered no competent proof, in certification form, that its students are no longer being mainstreamed. Conversely, McDonald has certified that the discrepancies in student IEPs and schedules that were revealed when LCEC responded to the mainstreaming issue remain ongoing concerns. This record thus offers no cause to question the validity of OSEP's continued belief that LCEC must remain on conditional approval.

Finally, certifications from LCEC staff attest to the financial ramifications of conditional approval status, and these certifications were credible and compelling. But my focus, and that of the Department, must be not on LCEC's financial liquidity, but rather, on its appropriateness as an environment to deliver services to New Jersey's most educationally needy children.

ORDER

Based on the foregoing, the Department's motion for summary decision is **GRANTED** and the petitions of appeal are **DISMISSED**. LCEC's motion for summary decision is **DENIED**.

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

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

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

August 14, 2015
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: August 14, 2015

Date Mailed to Parties: AUG 17 2015

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

307-15

307-15

TOM KAECHELE	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

On August 28, 2014, petitioner – the tenured Athletic Director at Old Tappan High School – filed an appeal of the determination of the respondent Board to withhold his salary increment for the 2014-2015 school year. The Board had notified petitioner by memorandum on May 8, 2014 that his salary increment would be withheld for the coming year based on his alleged poor performance with respect to his role in personnel matters. The petitioner acknowledged that his appeal was filed outside of the 90-day rule set forth in *N.J.A.C.* 6A:3-1.3, but claimed that extraordinary circumstances justified the relaxation of the 90-day limitation period in this case. Specifically, the petitioner detailed a medical diagnosis and hospitalization from June 22 through July 11, 2014, and an at-home recuperation period from July 12 through July 25, 2014, concluding that his month-long illness was the reason his petition was late-filed and that it would be a gross injustice if the 90-day limitations was not relaxed. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: boards of education may withhold salary increments for good cause pursuant to *N.J.S.A.* 18A:29-14; appeals to the Commissioner must be filed within 90-days pursuant to *N.J.A.C.* 6A:3-1.3; prior case law has determined that without a showing of circumstances amounting to genuine incapacity, relaxation of the 90-day rule is not warranted; in the instant matter, there is no evidence that petitioner was rendered mentally incapacitated by his condition; and by his own assertions, petitioner had two weeks after he was fully recuperated to file his petition. The ALJ concluded that the circumstances in this case do not warrant relaxation of the 90-day rule. Accordingly, the Board's motion for summary decision was granted and the petition was dismissed.

Upon independent review and consideration, the Commissioner concurred with the ALJ that the within petition is appropriately dismissed because it was filed outside the 90-day limitation period, and that the petitioner failed to set forth any compelling reason to relax the timely filing requirement.

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

September 28, 2015

OAL DKT. NO. EDU 12811-14
AGENCY DKT. NO. 238-8/14

TOM KAECHELE	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

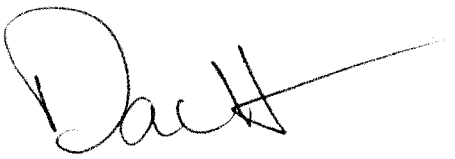
The record of this matter and the Initial Decision of the Office of Administrative Law (OAL), along with the parties' exceptions filed in accordance with *N.J.A.C.* 1:1-18.4, have been carefully reviewed.

In essence, petitioner's exceptions contain an unpersuasive reiteration of the arguments he advanced at the OAL. Because the Administrative Law Judge thoroughly addressed those arguments in the Initial Decision, further discussion herein is unnecessary. While recognizing that unfortunate personal circumstances contributed to the late filing of petitioner's appeal, respondent maintains that – absent a showing of exceptional circumstances – the 90-day rule should be strictly enforced by the Commissioner.

Upon full consideration of the record and the parties' submissions, the Commissioner concurs with the ALJ that the instant petition is appropriately dismissed because it was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i). Additionally, the Commissioner finds that petitioner has failed to set forth any compelling reason to relax the timely filing requirement.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons stated therein; respondent's motion for summary decision is granted; and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 9/28/15

Date of Mailing: 9/28/15

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 12811-14
AGENCY DKT. NO. 238-8/14

TOM KAECHELE,
Petitioner,
v.
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY
Respondent.

William Nossen, Esq., for petitioner (New Jersey Principals and Supervisors Association)

Yaacov Brisman, Esq., for respondent (Cleary, Giacobbe, Alfieri, Jacobs, LLC, attorneys)

Record Closed: July 17, 2015 Decided: August 13, 2015

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Tom Kaechele, appeals the determination of the respondent, Board of Education of Northern Valley Regional High School District, Bergen County, that would withhold his salary increment for the 2014-15 school year.

FINDINGS OF FACT

I **FIND** the following facts as undisputed, thus they are adopted as the **FACTS** herein:

Petitioner, Tom Kaechele ("Kaechele" or "Petitioner") is employed by the Board of Old Tappan High School as the Athletic Director. As Athletic Director, Kaechele supervises teachers who serve in curricular and extra-curricular positions, such as, advisors, coaches, chaperones, etc. Kaechele evaluates them and recommends them to the school principal for contract on an annual basis. Ultimately, however, the appointments are made by the Superintendent with Board approval.

On May 8, 2014, Kaechele was notified by memorandum that his increment would be withheld for the 2014-15 school year. The denial of a salary increment was based on Kaechele's alleged poor performance, miscommunications and misrepresentations related to his recommendation for a soccer coach position. (Brisman Cert. Ex. B.)

On May 9, 2014, the Superintendent emailed Kaechele a Rice notice of the scheduled May 12, 2014 Board meeting, where his increment withholding would be addressed. On May 12, 2014, at 11:19 a.m., Kaechele emailed the Superintendent an acknowledgement that simply stated "I am in receipt of the letter." (Brisman Cert. Ex. D.)[1] Later that day, the Board approved Kaechele's salary, at $178,385.28, the maximum step of the salary guide, with the loss of the annual increment.[2]

The next day, on May 13, 2014, the Board sent Kaechele formal written notice of the approval of his placement on the salary guide, and the decision to withhold his

[1] In opposition to the Board's motion for summary decision, Kaechele asserts that he first received notice on May 13, 2014. (See Pet'r's Opp'n to Summ. Decision 1.) Nevertheless, for the reasons discussed below, that factual distinction is legally immaterial.

[2] Counsel for the Board mistakenly writes that "[o]n May 12, 2014, the Board approved Petitioner's increment (See Pet. Ex. A.)." (Reps't's Mot. for Summ. Decision.) Obviously, the Board did not approve Kaechele's increment; that is the basis for this appeal. See ibid. Indeed, the cited document expressly states "Loss of increment 2014-2015." Ibid. Accordingly, counsel's statement appears to be an unfortunate typographical error.

increment. (Pet. Ex. A.) Kaechele signed the notice, but wrote that "[i]n signing this contract, I notify the [Board of] my desire to continue as Athletic Director. However, my signature should not in any way be taken as my agreement with the Board's decision to withhold my salary increment for the 2014-2015 school year." Ibid.

On August 28, 2014, one-hundred seven (107)[3] days after Kaechele received notice of the Board's decision to withhold his increment, Kaechele appealed to the Commissioner of Education (the Commissioner). In his Petition, Kaechele fully "acknowledge[d] that the Petition was being filed more than ninety days following his notice of the Board's action to withhold his salary increment. However, Kaechele claimed that extraordinary circumstances existed for a relaxation of the 90-day limitation period." (Pet. ¶ 6.)

Specifically, Kaechele noted that on June 21, 2014, he "went to Pascack Valley Hospital, suffering from a 104 degree temperature. The following day, June 22, 2014, through on or about July 11, 2014, he was hospitalized at Englewood Hospital and Medical Center, and was eventually diagnosed with Polyarteritis Nodosa." (Pet. ¶ 7.) Polyarteritis Nodosa is a serious blood vessel disease in which small and medium sized arteries become swollen and damaged. (Pet. ¶ 8; Pet. Ex. B.) After his hospitalization, on July 12, 2014 through July 25, 2014, he was recuperating at his home. He was that time. (Pet. ¶ 9.) Kaechele does not explain why or how his condition rendered him unable to communicate with his attorney. He concludes that due to his month-long illness and recuperation period, a gross injustice would result if the 90-day limitations period were not relaxed. (Pet. ¶ 10.)

Kaechele attached a description of Polyarteritis Nodosa from the National Institute of Health to the Petition. (Pet. Ex. B.) That description states that symptoms of Polyarteritis Nodosa include

Abdominal pain
Decreased appetite
Fatigue
Fever

[3] The Board incorrectly calculated the period between May 13, 2014 and August 28, 2014, as one-hundred seventeen days (117), rather than one-hundred seven days (107). Again, for reasons discussed below, that factual distinction is legally immaterial.

Joint aches
Muscle aches
Unintentional weight loss
Weakness

[Ibid.]

The aforementioned description does not include any mention of the effect of Polyarteritis Nodosa on a patient's mental capacity.

FINDINGS AND CONCLUSIONS

The New Jersey school laws provide that boards of education "may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education." N.J.S.A. 18A:29-14. Within ten days, the board of education must provide "written notice of such action, together with the reasons therefore . . ." Ibid. The employee may appeal the increment holding to the Commissioner. Ibid.

However, appeals to the Commissioner must be filed with ninety-days, aka "the 90-day rule". N.J.A.C. 6A:3-1.3. Specifically, a petitioner must file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. Ibid.

Our Supreme Court has held that "[t]he limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration." Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 582 (1993). Indeed, the Kaprow decision noted that education disputes often implicate a remedy of back pay, so the 90-day rule "gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. Moreover, because local school boards operate on a cash basis, claims must be filed promptly so that the local board can anticipate any back-pay requirements." Ibid.

Accordingly, the 90-day rule is strictly enforced, in the absence of a compelling reason, "such as the presence of a substantial constitutional or other issue of fundamental public interest beyond that of concern only to the parties . . . [or] that strict adherence to the time limitation would possibly result in an injustice, except for the loss of [a petitioner's] claim." Portee v. Newark Bd. of Educ., 94 N.J.A.R.2d (EDU) 381, 384.

Here, petitioner fully acknowledges that he filed this appeal outside of the 90-day limitation. However, he argues "that, at a minimum, the ninety (90) day limitations period should have been tolled during the period of his twenty-one (21) day hospital stay. To not toll this period, when Mr. Kaechele was fighting a possibly fatal disease, would be highly inappropriate and would surely result in gross injustice." (Pet'r's Br. 2.) However, Kaechele cites no authority for the proposition that the 90-day rule should be relaxed under similar circumstances, and acknowledges that he "is not aware of any case that has addressed this discrete factual issue." Ibid.

The Board argues that the 90-day rule is strictly applied, and "[a] petitioner's genuine personal problems occurring within the 90-day period that do not completely deprive a petitioner from filing an appeal do not qualify for a waiver of the rule." (Resp't's Br. 4 (citing Bland-Carter v. State-Operated Sch. Dist. of Newark, EDU 1505-00, Initial Decision, (June 15, 2000), adopted, Comm'r. (September 14, 2000) <http://njlaw.rutgers.edu/collections/oal/>.)) In Bland-Carter, a teacher was notified on September 1 that her increment would be withheld. Initial Decision at 2. At that time, the employee's "father, who had been diagnosed several years earlier with lung cancer, was hospitalized. He remained in the hospital until his death on October 8, 1999." Ibid. During this period, the employee "went to the hospital on a daily basis to support and assist in his care. [She] later arranged and attended her father's funeral, held on October 13, 1999." Ibid. Though she resumed work on October 18, "[s]ubsequent to the funeral, [she] had to put her father's affairs in order." Ibid. Finally, she "was left to care for her mother, who [had] Parkinson's disease." Ibid. In light "of these unfortunate stresses [she] did not file the subject petition within 90 days of receipt of the notice of the District's decision." Ibid.

There, the presiding ALJ recognized that "[e]ven when the 90-day rule applies,

the Commissioner may relax the rule when appropriate. The Commissioner has the discretion to dispense with any general rule of practice 'where a strict adherence thereto may be deemed inappropriate or unnecessary or may result injustice.'" (quoting N.J.A.C. 6A:3-1.16.) She noted that "[t]he 90-day time limitation has been relaxed to resolve a dispute or delay attributable to the Board of Education or to consider a substantial constitutional issue or a matter of significant public interest." Ibid. (Citations omitted). Mee v. Bd. of Educ. of Village of Ridgewood, 1990 S.L.D. 663, 668). However, the ALJ explained that "[n]o recorded cases have been located . . . that show that the rule was relaxed due to personal circumstances of petitioner that occurred several weeks or months prior to the 90th day." Id. at 2-3. While she recognized that the employee "was clearly under a great deal of personal stress, especially in September and early October . . . [she] had almost two months after the death of her father during which time she could have timely filed the petition." Id. at 3. Rather, the employee "returned to work on October 18, 1999 and thus must have been able to function in the workplace." Ibid. Accordingly, the ALJ concluded that though the employee "had genuine personal problems . . . there is no evidence that [her] circumstances rendered her unable to function." Ibid. Therefore, "holding her to the 90-day time period would not be inappropriate or an injustice." Ibid. In affirming, the Commissioner adopted the decision dismissing the petition, and noted that "[n]o constitutional issues are involved nor does it present issues of significant public interest beyond the parties." Bland-Carter, supra, EDU 1505-00, Final Decision at 2.

Similarly, in Unangst v. Bd. of Educ. of Fredon, EDU 9828-98, Initial Decision, (March 13, 2003), adopted, Commissioner, (May 1, 2003) http://njlaw.rutgers.edu/collections/oal/, was found that a teacher's extreme personal problems did not warrant relaxation of the 90-day rule. There, a teacher was involved in a severely abusive domestic relationship with a convicted murderer, and eventually procured protective orders and a contempt order incarcerating the abuser to extricate herself from the relationship. Unangst, supra, EDU 9828-98, Initial Decision at 3-7. After the teacher attempted to leave the abuser, in a campaign of intimidation and harassment, the abuser went to the teacher's superintendent's home, and apparently spoke with her superintendent. Id. at 5. The next day, the superintendent instructed the teacher to resign, and she tendered her resignation that week. Ibid. Two weeks

later, the teacher sought and obtained domestic violence counseling services. Id. at 6-7. It was held that

> [u]ndeniably, [the teacher] was under extreme emotional distress at the time of her resignation due to constant threats and continued harassment by her boyfriend. Whether or not her condition amounted to 'battered woman's syndrome' cannot be derived from the proofs because [the teacher's] only expert lacked adequate qualifications to make a definitive diagnosis. Nevertheless, the factual pattern clearly presents many of the attributes commonly associated with battered woman's syndrome, including physical or psychological coercion, episodes of severe abuse, and periods when her abuser expresses remorse and seeks forgiveness. It cannot be doubted that these conditions put [the teacher] in genuine fear for her own safety and that of her family.
>
> [Id. at 9.]

However, it was further noted that the teacher

> was able to function remarkably well under the circumstances. She had the presence of mind to obtain a preliminary and final protection order . . . Throughout her difficulties, she received outside support from her counselor at a women's advocacy group, an attorney retained to enforce her legal rights and her own family. By her own admission, she felt much better by mid-May 1998, when she discontinued going to counseling. During this same time, she managed to prepare lessons plans for her replacement at school, search diligently for a new job and take care of her grandchildren.
>
> [Ibid.]

The ALJ explained that "If the rule were relaxed every time that a harsh result occurred, then the rule and its salutary public policy of encouraging prompt resolution of disputes would be nullified." Id. at 10. The teacher argued that the 90-day rule should be relaxed "on the basis of battered woman's syndrome." Id. at 11. Indisputably, "a potential litigant can always argue that the running of the limitations period should be tolled because she was incapable of understanding her legal rights or because she acted under duress." Id. at 12. However, the ALJ reasoned that "[e]ven if battered

woman's syndrome were deemed relevant to such an inquiry, the evidence presented is insufficient to sustain [the teacher's] burden. Proofs demonstrate that the teacher possessed the mental capacity to make meaningful decisions." Ibid. Accordingly, he concluded that "[e]motional distress alone, without a showing of circumstances amounting to genuine incapacity, is not enough to toll the time limit for bringing an appeal to the Commissioner." Id. at 13.

Similarly, here, I **FIND** that there is no evidence that petitioner was rendered mentally incapacitated by his condition. While petitioner was hospitalized, and later spent approximately two weeks recuperating in his home, he does not explain how or why his condition prevented him from communicating with his attorney during that period. (See Pet. ¶ 7, 9.) Moreover, as in Bland-Carter, petitioner offers no reason to relax the 90-day rule "due to personal circumstances of petitioner that occurred several weeks or months prior to the 90th day." Bland-Carter, supra, EDU 1505-00, Initial Decision at 2-3. Here, the ninetieth day from the May 12, 2014 notice was August 10, 2014. According to petitioner's own assertions, he had finished recuperating by July 25, 2014. (Pet. ¶ 9.) Thus, I **FIND** and **CONCLUDE** that petitioner had two weeks after he had fully recuperated to file his petition.

Therefore, I **CONCLUDE** that petitioner has not alleged any circumstances that warrant relaxation of the 90-day rule. Accordingly, I **CONCLUDE** that the Board's motion for summary decision is **GRANTED** and the Petition is hereby **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

8/13/15
DATE

IRENE JONES, ALJ

Date Received at Agency: 8/13/15

Date Mailed to Parties: AUG 17 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

sej

308-15

KIMBERLYNN JURKOWSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY, AND DONNA HAYE, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner – formerly employed as a School Library Media Specialist – challenged the Board's decision terminating her employment because she entered into a Pretrial Intervention (PTI) program, a condition of which was that she forfeit her current employment. On October 23, 2013, petitioner was found guilty by a jury of theft by deception and falsifying or tampering with records; however, the trial judge did not enter a judgment of conviction, but instead – in December 2013, post-trial – granted the petitioner's request for PTI. The respondent Board notified petitioner – by letter dated October 30, 2013 – that her conviction qualified as an automatic job forfeiture pursuant to *N.J.S.A.* 2C:51-5, and did not file tenure charges based on the jury verdict and the forfeiture statute. The petitioner asserted that she was already terminated before she entered into PTI, and therefore had no "current employment" to forfeit; she sought to be rehired to her former position. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: although the Board's conclusion that petitioner had been convicted after her trial was technically incorrect because the trial judge did not perfect the jury verdict pursuant to R. 3:21-5(b), the respondent Board clearly anticipated that the trial judge was going to enter a judgment of conviction, and equated the jury verdict as the legal equivalent to a judgment of conviction and forfeiture, negating the need for tenure charges; since petitioner had not been terminated by either statutory forfeiture or statutory tenure proceedings, she was technically and legally still employed by the Board on December 6, 2013, when she entered into PTI; and therefore all the terms of the PTI Order were applicable and petitioner agreed to forfeit her employment with the Board, which she remained entitled to on December 6, 2013. The ALJ concluded that petitioner, pursuant to the PTI Order, was terminated from her employment with the Board effective on December 6, 2013, obviating the requirement for tenure charges or hearings. Accordingly, the ALJ granted the Board's motion for summary decision.

Upon comprehensive review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, and dismissed the petition.

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

September 28, 2015

308-15

OAL DKT. NO. EDU 13701-14
AGENCY DKT. NO. 252-9/14

KIMBERLYNN JURKOWSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY, AND DONNA HAYE, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Kimberlynn Jurkowski, and the Atlantic City Board of Education's (Board) reply thereto. The petitioner, a tenured School Library Media Specialist, is challenging the decision of the Board terminating her employment because she entered into Pretrial Intervention (PTI) where a condition of PTI was that she forfeit her current employment.

In her exceptions, petitioner argues that the Initial Decision should be rejected because the matter should not have been decided on summary decision as there are material facts in dispute. The petitioner maintains that at the time she entered into the PTI program, she had already been terminated from her position with the Board and as a result she had no "current employment." The petitioner further asserts that the PTI Order does not reference the Atlantic City Board of Education but simply states "current employment" and the sentencing Judge never questioned the petitioner to ascertain that she understood each condition of PTI. If a condition of the PTI was to forfeit her right to appeal the termination of her employment with the Board or the forfeiture of her employment with the Board, the petitioner stresses that she would not have entered into the PTI Order. Therefore, the petitioner contends that a hearing must be held to ascertain the intent of the parties who entered into the PTI Order.

The petitioner also argues that to the extent there was ambiguity or uncertainly as to what the petitioner was agreeing to as a condition of PTI, all inferences should be resolved in her favor as the non-moving party. Instead the ALJ wrongfully stated that he addressed the motion solely on the legal side to avoid a trial by affidavit. Finally, the petitioner points out that the Board failed to respond to interrogatories served on the Board in April 2015. As a result, the petitioner maintains that based upon these facts it cannot be determined that petitioner agreed to forfeit her employment with the Board, and her petition seeking reimbursement and back pay should be granted. In the alternative, the petitioner argues that fundamental fairness suggests that she should be given an opportunity to withdraw her consent to the terms of PTI.

In reply, the Board contends that the ALJ properly granted summary decision to the Board based on the application of the relevant law to the material facts necessary for his determination. Although the petitioner may have raised contested factual issues, those facts were not material. The Board stresses that the petitioner's intention or understanding regarding her entry into the PTI program is irrelevant because she voluntarily forfeited her position with the Board and her claim that she agreed to give up a position she thought she did not have is disingenuous. The ALJ found that the Board could not have legally terminated the petitioner on October 30, 2013, and as a result she was employed by the Board when she entered into the PTI Order in December 2013. Therefore, when she agreed to "forfeit her current employment" as a condition of PTI, she forfeited her employment with the Board. Finally, the Board claims that it is of no matter that the discovery responses were not produced because the ALJ's decision was based solely on the undisputed material facts.

The resolution of this case turns on the impact of the Board's October 30, 2013 letter terminating the petitioner's employment and whether the petitioner was employed by the Board when she was admitted into PTI. Upon review, the Commissioner concurs with the ALJ's determination – for the reasons stated in the Initial Decision – that the Board properly terminated the petitioner's employment as a result of the condition of PTI requiring her to forfeit her "current employment." Although the timing of the events in this case has resulted in a convoluted scenario, the Commissioner is also in accord with the ALJ's determination that the material facts are not in dispute.

On October 23, 2013, an Atlantic City jury found the petitioner guilty of third degree theft by deception and fourth degree falsifying or tampering with records.[1] For unknown reasons, the jury verdict was not recorded by the presiding judge. It is undisputed that – had the verdict been recorded – the petitioner would have been required to automatically forfeit her employment with the Board pursuant to *N.J.S.A.* 2C:51-2.[2] Based on the jury verdict alone, by letter dated October 30, 2013, the Board wrongfully informed the petitioner that her employment was terminated effective October 23, 2013.

On December 6, 2013, a PTI Order was entered granting the petitioner admission into the PTI program – despite the jury verdict – with one of the conditions being that she forfeit her "current employment." In light of the fact that the Board wrongfully issued the petitioner a termination letter on October 30, 2013, the Commissioner finds that when the petitioner entered into the PTI program in December, 2013, she was then currently employed by the Board. The Commissioner is not persuaded that the exceptions submitted by the petitioner dictate a different result, as the arguments advanced by the petitioner in her exceptions were considered and fully addressed by the ALJ in the Initial Decision. Further, the petitioner's contention that the forfeiture of her "current employment" did not include her employment with the Atlantic City Board of Education is not supported by the record.[3]

It is important to recognize that the Commissioner only has jurisdiction to determine whether the petitioner was lawfully terminated by the Board. The bizarre circumstances surrounding the jury verdict and petitioner's subsequent entry into PTI, coupled with the Board's erroneous termination letter, have complicated this matter. Nonetheless, the resolution of the case before the Commissioner is dictated by the fact that the petitioner agreed to forfeit her "current employment" as a condition of PTI,

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[1] The complete procedural history related to the petitioner's arrest and the actions taken by the Board are outlined in the Initial Decision and will not be repeated here.

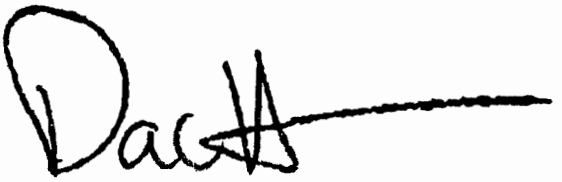
[2] Under *N.J.S.A.* 2C:51-2(a)(1), forfeiture of public employment is mandatory for a conviction of crime of the third degree or higher.

[3] Despite the fact that petitioner contends she believed she was already terminated by the Board when she agreed to forfeit her current employment as a condition of PTI, a review of the parties' submissions indicates that the parties agree that the Board did not properly terminate the petitioner effective October 23, 2013, because a judgment of conviction was not entered against the petitioner.

and her current employment at the time of the entry of the PTI Order in December 2013 was with the Board.[4] Therefore, the petitioner's employment with the Board was terminated after the PTI Order was entered. To the extent that the parties involved with the PTI Order – including the Atlantic City Prosecutor's Office and the Superior Court Judge – may have had different intentions concerning the terms and conditions of PTI, that analysis is beyond the scope of the Commissioner's jurisdiction. Further, if the petitioner wishes to withdraw her consent to the terms of PTI at this juncture, those efforts must be commenced in Superior Court – to the extent authorized by law – as the Commissioner does not have jurisdiction over the PTI program.

Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[5]



COMMISSIONER OF EDUCATION

Date of Decision: 9/28/15

Date of Mailing: 9/28/15

[4] It should be noted that the petitioner has pointed to no other employment that the PTI could have been conditioned upon and the petitioner did not file a petition of appeal after the Board issued the October 30, 2013 letter but instead filed a petition in November 2014 when the Board refused to reinstate her following her completion of PTI.

[5] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 13701-14
AGENCY DKT. NO. 252-9/14

KIMBERLYNN JURKOWSKI,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY, AND DONNA L. HAYE, SUPERINTENDENT

Respondents.

Elizabeth Zuckerman, Esq., for petitioner, Kimberlynn Jurkowski, (Zuckerman & Fisher, LLC, attorneys)

James J. Panzini, Esq., for respondent Board of Education of the City of Atlantic City, Donna L. Haye, Superintendent, (Jackson Lewis, P.C., attorneys)

Record Closed: June 4, 2015 Decided: June 29, 2015

BEFORE **W. TODD MILLER**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Kimberlynn Jurkowski was found guilty by jury of theft by deception and falsifying or tampering with records. On October 30, 2013, respondent, Atlantic City Board of Education (Atlantic City BOE or district) through its Superintendent Donna Haye, notified petitioner, after learning of the announcement of the jury verdict, but before the verdict was recorded and filed by the Criminal Court, that she was terminated from her position as a School Library Media Specialist due to her conviction of a disqualifying offense under the criminal forfeiture statute. N.J.S.A. 2C:51-5. No tenure charges were initiated by the district pursuant to N.J.S.A. 18A:6-14 and N.J.S.A. 18A:6-16. Petitioner was granted admission into Pretrial Intervention (PTI), before the jury verdict was entered and recorded by the presiding Judge. Indeed, PTI was expressly conditioned upon petitioner forfeiting her current employment as stated in the PTI Order dated December 6, 2013.

Petitioner seeks her position as a School Library Media Specialist back because she claims to have had "no current employment" when the PTI Order was executed on December 6, 2013. She was already fired by the Atlantic City BOE on October 30, 2013. Thus the PTI condition of employment forfeiture was inapplicable.

The Commissioner determined to treat the matter as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on October 23, 2014.

The Atlantic City BOE filed a motion for summary decision with supporting certifications and exhibits setting forth the undisputed history and facts. For the reasons discussed below, the motion for summary decision is **GRANTED** in favor of the Atlantic City BOE.

UNDISPUTED BACKGROUND

The September 12, 2014, petition for relief and the motion briefs contain the following undisputed facts. Petitioner was/is employed as a School Library Media Specialist by the Atlantic City BOE. Petitioner attained tenure in that position in 2008.

On July 24, 2012 a warrant was issued for petitioner's arrest on charges of conspiracy, theft by deception, falsification of records and forgery. On August 7, 2012, petitioner was informed by the Atlantic City Superintendent of Schools that she was suspended due to the indictment. On January 10, 2013, the Atlantic City Superintendent of Schools recommended to the Board of Education that petitioner be suspended without pay.

On February 4, 2013, petitioner was offered PTI. However, the County Prosecutor's Office reversed course and eventually opposed petitioner's PTI application because the victim, Hamilton Township School District, strongly opposed petitioner's participation in PTI. Petitioner conspired, by signing and approving falsified tutoring invoices worth $20,000 for her daughter's tutor. The tutor was paid by the Hamilton Township District resulting in theft from the district. Since petitioner was herself a school employee in Atlantic City, her participation in the fraud in Hamilton Township justified her denial into PTI. Consequently, on May 10, 2013, petitioner's PTI application was rejected by the Court.

The criminal trial was held on October 22, 2013, and October 23, 2013. Petitioner was convicted on two counts of the indictment. The jury found petitioner guilty of theft by deception and falsifying or tampering with records. A judgment of conviction was **not** entered by the trial judge pursuant to R. 3:21-5.

By letter dated October 30, 2013, the Atlantic City Superintendent of Schools notified petitioner that her conviction qualified as an automatic job forfeiture pursuant to N.J.S.A. 2C:51-5; also citing, State v Eroclano, 335 N.J. Super. 236 (App. Div. 2000). Petitioner was provided notice that a board meeting was scheduled for November 28, 2013, to ratify the Superintendent's position. Petitioner was informed she could attend

the meeting. The Atlantic City BOE did not file tenure charges against petitioner, based upon the jury verdict and the forfeiture statute.

On December 6, 2013, the trial judge reconsidered petitioner's request for the PTI program, after the jury verdict. The trial judge granted petitioner's request for PTI, post trial but before the entry of the judgment of conviction pursuant to R. 3:21-5.

The PTI agreement provides, inter alia, that petitioner shall "forfeit current employment" (Petition; Exhibit C).

Petitioner creatively asserts that she sought and was accepted into the PTI program, knowing that her employment had already ended with the Atlantic City BOE when PTI began. Her plan was to assert that the PTI Agreement/Order regarding forfeiting employment was moot so she could seek reinstatement with the Atlantic City BOE by claiming the PTI condition was inapplicable since she had no "current employment." In other words, the employment forfeiture language in the PTI Order did not apply because she was already terminated.

Petitioner's criminal defense attorney, H. Robert Boney, Jr., submitted a certification dated May 11, 2015, that contradicts petitioner's understanding of the PTI agreement. Therein, Boney states that:

> 4. I fully explained in detail to Jurkowski that by accepting the conditions to enter PTI, she was no longer entitled to reinstatement to seek her position with the Atlantic City Board of Education. Instead she could seek employment with the Atlantic City Board of Education or any other School District but the Board of education was not required to hire her into her prior position or any other position.
>
> 5. It is my understanding that Jill Houck ("Houck"), PTI director for Atlantic County, also explained the general and special conditions of the entry into PTI to Jurkowski. This included specifically advising Jurkowski that she was agreeing to forfeit her position with the Atlantic City Board of Education and not seek reinstatement to that position.

CONCLUSIONS

Forfeiture of public employment is embodied in N.J.S.A. 2C:51-2(a) and it provides, in relevant part:

> a. A person holding any public office, position, or employment, elective or appointive, under the government of this State or any agency or political subdivision thereof, who is convicted of an offense shall forfeit such office or position if:
>
> (1) He is convicted under the laws of this State of an offense involving dishonesty or of a crime of the third degree or above or under the laws of another state or of the United States of an offense or a crime which, if committed in this State, would be such an offense or crime;
>
> (2) He is convicted of an offense involving or touching such office, position or employment. . . .

Conversely, tenure is intended to protect teachers from dismissal for unfounded, flimsy or political reasons. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 73 (1982) (quoting Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 71 (1962)). Accordingly, a tenured teacher may be dismissed for inefficiency, incapacity, unbecoming conduct, or other just cause, only after a hearing in compliance with the Tenure Employees Hearing Law. N.J.S.A. 18A:6-10 to-30.1. In order to dismiss a tenured teacher, the underlying charges must be filed with the local board of education. N.J.S.A. 18A:6-1. The teacher is given an opportunity to submit a written statement in defense. Ibid. After the board considers the charges, it must determine by majority vote whether there is probable cause to believe the charges are true. If so, the Board must decide whether the charges warrant dismissal or a reduction in salary. Ibid. If the board determines the charges warrant either of those penalties, it must certify and forward the charges to the Commissioner of Education for a hearing. Ibid.

In 2012, the Legislature passed the Teacher Effectiveness and Accountability for the Children of New Jersey (TEACHNJ). The Act provides at N.J.S.A. 18A:6-14 that;

> upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the arbitrator is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made.

N.J.S.A. 18A:6-16 states:

> Upon receipt of such a charge and certification, or of a charge lawfully made to the commissioner, the commissioner or the person appointed to act in the commissioner's behalf in the proceedings shall examine the charges and certification. The individual against whom the charges are certified shall have 15 days to submit a written response to the charges to the commissioner. Upon a showing of good cause, the commissioner may grant an extension of time. The commissioner shall render a determination on the sufficiency of charges as set forth below within 10 days immediately following the period provided for a written response to the charges.
>
> If, following receipt of the written response to the charges, the commissioner is of the opinion that they are not sufficient to warrant dismissal or reduction in salary of the person charged, he shall dismiss the same and notify said person accordingly. If, however, he shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section 22 of P.L.2012, c.26 (C.18A:6-17.1) for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for purposes of deciding the motion.

The forfeiture language found in N.J.S.A. 2C:51-2(g) supersedes the tenure rights of a teaching staff member, if exercised by a court with the power to impose forfeiture. The Commissioner and the local board are relieved of their roll under TEACHNJ if procedural requirements in the forfeiture statute are perfected. To be perfected, a criminal conviction must be signed by the trial judge and entered by the

clerk of the court. R. 3:21-5(b); Sassano v BLT Discovery, Inc., 245 N.J. Super. 539 (App. Div. 1991). In Sassano the Court observed:

> As we pointed out in State v. Moore, 178 N.J.Super. 417, 427, 429 *A.*2d 397 (App.Div.), certif. denied, 87 *N.J.* 406, 434 *A.*2d 1083 (1981), "under R. 3:21-5, a judgment of conviction occurs when the judge signs the sentencing order and it is entered by the clerk." *See* State v. Womack, 206 N.J.Super. 564, 570, 503 *A.*2d 352 (App.Div.1985), certif. denied, 103 *N.J.* 482, 511 *A.*2d 658 (1986) (stating that "the judgment is prepared by the clerk and signed by the judge and provides 'finality'"); State v. Robinson, 198 N.J.Super. 602, 603, 487 *A.*2d 1304 (Law Div.1984) (holding that "the judgment is entered following sentencing forthwith by the clerk"); State v. L.R., 167 N.J. Super. 364, 367-368, 400 *A.*2d 877 (Law Div.1979) (stating that "[a] 'conviction' is merely an intermediate step. It is that stage in a criminal proceeding at which a finding of guilt is made by the court or jury as a result of a trial on the merits or the defendant's entry of a plea of guilty. . . . A 'judgment of conviction' is a formal document which includes the defendant's plea, the verdict and the court's sentence"); cf. State v. Pratts, 145 N.J.Super. 79, 93-94, 366 *A.*2d 1327 (App.Div.1975), *aff'd o.b.*, 71 *N.J.* 399, 365 *A.*2d 928 (1976) (holding that having signed the judgment of conviction, the judge thereafter had no authority to increase a legal sentence).
>
> Sassano, 245 N.J. Super. at 546.

It's obvious that the Atlantic City BOE anticipated that the trial judge was going to enter a judgment of conviction after the (guilty) jury verdict on October 23, 2013. The Atlantic City BOE equated the jury verdict as the legal equivalent of a judgment of conviction and forfeiture, negating the need for tenure charges. In a letter dated October 30, 2013, the Superintendent of Schools stated that "your employment with the Atlantic City Board of Education (Board) was automatically terminated effective October 23, 2013, the date on which you were convicted . . ." This conclusion was incorrect because the trial judge did not record (perfect) the jury verdict pursuant to R. 3:21-5(b).

I **CONCLUDE** that petitioner was never subject to a tenure proceeding resulting in her termination up to and until the PTI Order was entered. Nor was the criminal jury verdict ever perfected by the trial judge triggering the forfeiture of her public

employment pursuant to N.J.S.A. 2C:51-2. Therefore, when petitioner accepted the terms of PTI on December 6, 2013, she was still legally employed by the Atlantic City BOE, because the tenure process was not completed. And as a condition to her admission into PTI, petitioner had to forfeit her "current" employment (i.e. her rights to a hearing under tenure law). Since petitioner was not "already" terminated by either statutory forfeiture or statutory tenure proceedings, she was technically and legally employed with the Atlantic City BOE on December 6, 2013. Therefore, all the terms of the PTI Order were applicable on December 6, 2013, and petitioner agreed to forfeit her "current employment" with Atlantic City BOE, for which she remained entitled to, on this date. The Superintendent's October 23, 2013, letter stating petitioner was terminated due to forfeiture law was null and void because the guilty verdict was not perfected by the trial judge. The superintendent, in the absence of a perfected judgment of conviction/forfeiture, had no right to dispense with the statutory tenure protections afforded teaching staff members. Therefore, the superintendant's October 30, 2013, termination letter was ineffective in discharging petitioner because she retained tenure rights (until the PTI order was signed).

STANDARD FOR SUMMARY DECISION

The OAL rules governing motions for summary decision are found at N.J.A.C. 1:1-12.5. These provisions mirror the language of R. 4:46-2 and the Supreme Court's decision in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant summary decision should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding.

I am mindful that petitioner claims that she was already terminated before she entered the PTI program, thus she had no "current employment" to forfeit. Indeed, her own attorney and apparently the director of the PTI program informed petitioner that she

was not entitled to "legal" reinstatement with the Atlantic City BOE under the terms of the PTI order.

While the above-mentioned arguments by petitioner might present contested factual issues, I have addressed the motion solely on the legal side to avoid a trial by affidavit. Petitioner was not fired at the time she entered PTI and thus she had a legal right to "current employment" under title 18A and her title 18A tenure rights were forfeited pursuant to the PTI Order.

ORDER

Based upon the foregoing, it is **ORDERED** that respondent's motion for summary decision is granted. Petitioner, pursuant to the PTI Order dated December 6, 2013, was terminated from her employment with the Atlantic City BOE effective on said date, obviating the requirement for tenure charges or hearings.

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

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

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

June 29, 2015

DATE

W. TODD MILLER, ALJ

Date Received at Agency: June 29, 2015

Date Mailed to Parties:

/jb

DOCUMENTS CONSIDERED

For Petitioner:

Petition

Opposition brief to the Motion for Summary Decision, dated May 22, 2015, and June 4, 2015, along with Certifications and Exhibits

For Respondent:

Answer

Motion for Summary Decision dated May 15, 2015, Reply dated May 28, 2015, and Sur-reply dated June 18, 2015, along with Certifications and Exhibits

309-15

OAL DKT. NO. EDU 11337-14
AGENCY DKT. NO. 231-8/14

J.M., ON BEHALF OF MINOR CHILDREN, E.M. AND S.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, it is noted that the Settlement Agreement makes reference to actions intended to be taken within 30 days of July 13, 2015. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

Subject to the foregoing, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter – which is hereby dismissed subject to compliance with the terms of the settlement – provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of same.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/28/15

Date of Mailing: 9/28/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11337-14

AGENCY DKT. NO. 231-8/14

J.M., ON BEHALF OF MINOR CHILDREN, E.M. AND S.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,

Respondent.

J.M., petitioner, pro se

Casey P. Acker, Esq., for respondent (Lenox, Socey, Formidoni, Giordano, Cooley, Lang and Casey, attorneys)

Record Closed: July 24, 2015 Decided: August 11, 2015

BEFORE **JOHN S. KENNEDY,** ALJ:

This matter was transmitted to the Office of Administrative Law on September 9, 2014, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

August 11, 2015
DATE

JOHN S. KENNEDY, ALJ

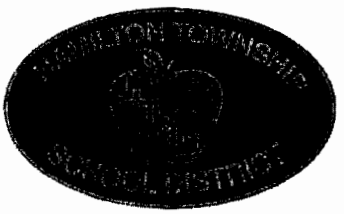
Date Received at Agency: 8-13-14

Date Mailed to Parties: 8-13-14

/lam

That the Hamilton Township Board of Education accepts the Residency settlement agreement on S.M. & E.M. with approval effective July 20, 2015.

2015 JUL 24
STATE OF
OFFICE



2015 JUL 24
STATE OF
OFFICE

Agenda Item Details

Meeting	Jul 20, 2015 - Regular Session Meeting - @ 5:30 PM @ Park Avenue
Category	G. Curriculum & Instruction
Subject	13. Residency Settlement (pg 17)
Type	Action
Recommended Action	Upon the recommendation of the Interim Superintendent that the Board of Education accepts the Residency Settlement, as per Confidential C & Enclosure 13.

LENOX, SOCEY, FORMIDONI, GIORDANO, COOLEY, LANG & CASEY
A LIMITED LIABILITY COMPANY
COUNSELLORS AT LAW
136 FRANKLIN CORNER ROAD, UNIT B2
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RUDOLPH A. SOCEY, JR., P.C. †Ŧ
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PATRICK F. CARRIGG**
MICHAEL A. PATTANITE, JR.
MICHAEL J. MASELLI
STEPHANIE L. DELUCA*
CASEY P. ACKER***

SAMUEL D. LENOX
1922-1975

*MEMBER OF NJ & PA BAR
**MEMBER OF NJ & NY BAR
***MEMBER OF NJ, NY & MA BAR
†CERTIFIED AS A CIVIL TRIAL ATTORNEY

2015 JUL 24 P
STATE OF NEW
OFFICE OF

July 13, 2015

Jeffrey Matthews
12 Wickom Avenue
Hamilton, New Jersey 08690

Re: Shane Matthews & Ethan Matthews

Dear Mr. Matthews:

On behalf of the Hamilton Township Board of Education ("Board"), please be advised that the Board approved the settlement in this matter. Pursuant to the agreed upon terms, the Matthews's shall pay $100.00 for tuition reimbursement and withdraw their petition challenging the Board's residency determination (OAL Docket No.: EDU 11337-2014 S; Agency Ref. No.: 231-8/14). This payment shall resolve any and all issues between the Matthews's and the Board relative to residency existing prior to and on the date of November 7, 2013. The parties shall have and retain any and all rights and remedies relative to any future residency issues occurring on or after November 7, 2013.

The aforementioned payment of $100.00 shall be due and payable within thirty (30) days. Please make a check payable to "Hamilton Township Board of Education" and deliver same to my office at the above address. Please execute below and return an original signed copy to me in the envelope provide. The Board President, Anthony Celentano, shall execute on behalf of the Board and a fully executed copy will be provided to you.

Very truly yours,

Casey P. Acker

CPA/cpa

cc: Thomas Ficarra

BY: Jeffrey Matthews, parent\legal guardian of Shane Matthews and Ethan Matthews

BY: Anthony Celentano, Board President, Hamilton Township Board of Education

310-15

OAL DKT. NO. EDU 13570-15
AGENCY DKT. NO. 239-9/15

L.C. and P.C., on behalf of minor child, L.C.,	:	
Petitioners,	:	COMMISSIONER OF EDUCATION
v.	:	DECISION ON
BOARD OF EDUCATION OF THE BOROUGH OF SAYREVILLE, MIDDLESEX COUNTY	:	APPLICATION FOR EMERGENT RELIEF
Respondent.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioners have failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioners' application for emergent relief is adopted for the reasons expressed therein. This case shall proceed at the OAL to a plenary hearing, or such other proceedings as the ALJ and the parties may determine, to resolve the underlying claim on the merits.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/28/15

Date of Mailing: 9/29/15

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 13570-15
AGENCY DKT. NO. 239-9/15

L.C. AND P.C. ON BEHALF OF L.C.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SAYREVILLE, MIDDLESEX COUNTY,
Respondent.

Kristie M. Howard, Esq., appearing for petitioners (Law Offices of Kristie M. Howard, attorneys)

Ari D. Schneider, Esq., and **Jonathan Busch**, Esq., for respondent (The Busch Law Group, attorneys)

Record Closed: September 10, 2015 Decided: September 10, 2015

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, L.C. and P.C., the parents of L.C., a student who is currently serving a long-term suspension from the Sayreville Memorial High School, have filed a petition

for emergent relief, challenging the actions of the Sayreville Board of Education for failing to hold a hearing regarding L.C.'s long term suspension from the Sayreville Public School System. Petitioners seek to have all school charges dismissed against L.C. and immediately reinstate him into school with all rights and privileges as a student in good standing and to permit L.C. to return as a member of the football team and to immediately be allowed to participate with the football team. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on September 3, 2015 for emergent relief. Oral argument was held on September 10, 2015, at which time the record closed.

FINDINGS OF FACT

Based on the underlying facts as set forth in the verified complaint, answer and certifications and supporting documents filed for and in opposition to the application, I **FIND**:

Student L.C. is currently serving a long-term suspension that was confirmed by the Sayreville Board of Education (Board) on October 23, 2014. On October 10, 2014, L.C. was charged with Conspiracy to Commit Aggravated Criminal Sexual Contact, Aggravated Assault and Hazing by the Middlesex County Prosecutor's Office.

On October 13, 2014, L.C. was suspended from school and charges with violating the Student Code of Conduct by engaging in acts of disruptive behavior, malicious mischief, physical misconduct, assault, threatening violence and harassment/intimidation/bullying. On October 16, 2014, petitioners were advised that the Board would be conducting a hearing on August 21, 2014. On October 21, 2014, petitioner's attorney, Kevin Flood, Esq., postponed the hearing "indefinitely pending the outcome of the proceedings against him" via a letter on that date by further stating: "By requesting this indefinite adjournment, we hereby waive the mandatory thirty (30) day requirement pursuant N.J.A.C. 6A:16-7.3(a)10.iii, regarding time limitations of such hearings on long-term suspensions and ask that educational services continue until a hearing on said long-term suspension can be conducted after final disposition on the matters instituted by the Middlesex County Prosecutor's Office. Finally, it is important to

note that by making this adjournment request, L.C. is in no way waiving any due process rights under the Code of Student Conduct with regard to his long-term suspension from the Sayreville Public School System."

On August 17, 2015, L.C.'s criminal matter was fully resolved whereby he was found guilty of simple assault and disorderly conduct. On August 13, 2015, the Board scheduled a hearing on this matter to take place on August 31, 2015. The parties appeared for the hearing, based on the petitioners' attorney's position that use of certain evidence would result in criminal charges against a Detective as a witness and the Board's attorney. The hearing was adjourned until an unscheduled date as the Board sought an Order from Judge Hyland, who heard the underlying criminal matter, to permit the Board to elicit testimony from Detective witness and to use Middlesex County Prosecutor's office investigation materials during L.C.'s disciplinary hearing. It has been represented that Judge Hyland will render a decision on this motion on Tuesday, September 15, 2015.

It was the position of the Board to schedule L.C.'s disciplinary hearing soon after the issuance of the ruling on the motion by Judge Hyland. Attorney for petitioners had no complaints regarding the educational services being provided to L.C. during oral argument and instead raised issues regarding L.C.'s lack of social interaction and his inability to participate in varsity football.

CONCLUSIONS OF LAW

In accordance with N.J.A.C. 1:1-12.6, emergency relief may be granted "where authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case . . . ." My determination in this matter is further governed by the standard for emergent relief set forth by our Supreme Court in Crowe v. DeGioia, 102 N.J. 50 (1986), as follows:

> The judge may order emergency relief . . . if the judge determines from the proofs that:

1. The petitioner will suffer irreparable harm if the requested relief is not granted.

2. The legal right underlying the petitioner's claim is settled.

3. The petitioner has a likelihood of success on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the relief is not granted.

The moving party must satisfy all four prongs of the Crowe v. DeGioia standard to establish an entitlement to emergent relief. Id. at 132-35. I **CONCLUDE** that petitioner cannot meet their burden under the Crowe v. DeGioia standard. In fact, petitioners address this standard only in passing and with no specificity.

Harm is irreparable when there can be no adequate after-the–fact remedy in law or in equity; or where monetary damages cannot adequately restore a lost experience. Nabel v. Board of Education of the Township of Hazlet, EDU 8026-09 (June 24, 2009); Tomlin v Lower Cape May Regional Board of Education, EDU 4952-09. Petitioners view L.C.'s participation in varsity football as jeopardizing his ability to obtain a football scholarship to attend college. There is little debate that a monetary claim could be made to obtain funding to make up the potential loss of a scholarship although the petitioners' counsel seem to raise a delay in time as a barrier to obtaining such relief. I **FIND** that the issues raised by the petitioners as "irreparable harm" can be addressed through a claim for monetary damages, if necessary. I, therefore, **CONCLUDE** that petitioners have not met their burden of demonstrating irreparable harm.

Furthermore, petitioners cannot demonstrate that the law is settled in their favor, or the likelihood of succeeding on the merits of their claims. Furthermore, the law is well settled in favor of the Board, which has broad discretion to take the actions needed to effectively operate its public schools. The Commissioner will not overturn the decision of a local board in the absence of a finding that the action below was arbitrary, capricious or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008) <http://lawlibrary.rutgers.edu/oal/search.html>, citing

Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966). The Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960).

Our courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Thus, at the hearing petitioners will have to demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it. T.B.M. v. Moorestown, supra, EDU 2780-07, Initial Decision (February 6, 2008) <http://lawlibrary.rutgers.edu/oal/search.html>.

With my finding as fact that August 17, 2015 is the proper date for the final disposition on the criminal matters, the Board has until September 16, 2015 to hold the disciplinary hearing on L.C. As was admitted by L.C. at oral argument, with my acceptance of the August 17, 2015 date, this application for emergent relief is not ripe on this date.

I cannot find that the Board violated N.J.A.C. 6A:16-7.3(10)(iii) because as of the time the petitioners filed their application for emergent relief, there was still time available to the Board to hold a hearing within thirty (30) days of the final disposition of L.C.'s criminal matter, i.e., August 17, 2015. In fact, the petitioners must shoulder at least some of the blame for the delay of the disciplinary hearing by raising the issue of criminal liability to the Detective witness and the Board's counsel pursuant to N.J.S.A. 2A:4A-60h. It was prudent for the Board's attorney to seek an order via motion from Judge Hyland once this issue was raised.

I **CONCLUDE**, based on the record developed for this emergent application, that petitioners are not likely to be able to demonstrate that the actions of this Board were

induced by improper motives, or were taken in utter disregard of the circumstances before it.

Finally, a balancing of the equities militates against granting the relief sought by the petitioners. The rights of this petitioner are less weighty than those of the Board because participating in football is a privilege. See M.A.A. v Edison Bd. of Educ., EDU 4134-98, Initial Decision (May 29, 1998), aff'd, Comm'r (June 12, 1998), <http://njlaw.rutgers.edu/collections/oal/>; N.B. v Gloucester Bd. of Educ., EDU 6740-11 Initial Decision (June 14, 2011) <http://njlaw.rutgers.edu/collections/oal/>. Although I entirely appreciate why he so strongly wishes to participate, L.C. has no right to participate prior to a disciplinary hearing which I find the Board still has time to conduct, and for this reason petitioners cannot demonstrate harm weighty enough to tip the balance in favor of a grant of extraordinary relief. Conversely, the Board has a strong and valid interest in the effective and orderly operation of its schools.

Accordingly, I **CONCLUDE** that the request for emergent relief must be denied.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that petitioners' request for emergency relief is hereby **DENIED**.

This decision on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days, this recommended decision shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

September 10, 2015
DATE

MICHAEL ANTONIEWICZ, ALJ

jb

311-15

OAL DKT. NO. EDU 10098-15
AGENCY DKT. NO. 131-6/15

D.R., ON BEHALF OF MINOR CHILD, S.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the Initial Decision of the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, and the parties' settlement terms – which were placed orally on the record and recited by the Administrative Law Judge in her decision – have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/28/15
Date of Mailing: 9/29/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10098-15
AGENCY REF. NO. 131-6/15

D.R. ON BEHALF OF S.B.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,
Respondent.

D.R., pro se

Jessica Kleen, Esq., for respondent (Machado Law Group, attorneys)

Record Closed: August 26, 2015 Decided: August 26, 2015

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals the determination of the respondent, Orange Board of Education (the Board), that she is not domiciled in its district. The Board seeks to remove petitioner's nephew, S.B., from its schools pursuant to N.J.S.A. 18A:38-1(b)(2), and demands tuition reimbursement.

Petitioner filed an appeal with the Department of Education (the Department) on June 16, 2015. The Board filed an answer and counterclaim on July 10, 2015. The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on July 13, 2015. A hearing was conducted on August 26, 2015, at which time the record closed.

STATEMENT OF FACTS AND CONCLUSIONS OF LAW

There are no facts in dispute and I **FIND** as follows:

1. D.R. is the legal guardian of her nephew, S.B., who is a rising senior.

2. S.B. has attended the Orange Schools for his entire educational career.

3. D.R. is no longer domiciled in Orange. She understands that, as a result, her nephew is no longer eligible to attend the Orange public schools.

4. D.R. has agreed to withdraw S.B. from the Orange schools, and transfer him to the school district where she will now reside, but she reserves the right to reenroll him in Orange as an affidavit student, pursuant to N.J.S.A. 18A: 38-1(b)(1). D.R. indicated that a family member who is domiciled in Orange may be willing to keep S.B. in her home gratis, and may be willing to execute an affidavit to that effect.

5. If the proper affidavits are filed, and S.B. in fact resides with the family member "gratuitously for a longer time than merely through the school term," as required by the statute, the Board agrees to accept his reenrollment and permit S.B. to attend the Orange public schools.

6. In view of D.R.'s willingness to withdraw her nephew, and in view of her clear understanding that he is not presently eligible to attend the Orange schools, the Board has agreed to withdraw its counterclaim for tuition.

Public schools are required to provide a free education to individuals between the ages of five and twenty years who are domiciled within the school district. N.J.S.A. 18A:38-1(a). Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is that of her parent, custodian or guardian. P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001). During an on the record conversation, D.R. indicated that she fully understood that he nephew is not presently eligible to attend the Orange schools, in accordance with N.J.S.A. 18A:38-1(a). The parameters of a legally proper affidavit arrangement under N.J.S.A. 18A:38-1(b)(1) was explained to D.R. on the record. Both parties reserve their rights under law in the event of a dispute regarding the validity of the affidavit arrangement.

In light of the foregoing, the parties asked that I reduce their understandings to an **ORDER**, and I additionally **FIND** as follows:

1. D.R. and the Board, via counsel, have voluntarily agreed to settle the within matter and have disclosed the settlement terms orally on the record, per N.J.A.C. 1:1-19.1(a)(2). These terms are as set forth herein.

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

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

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

August 26, 2015

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

312-15

OAL DKT. NO. EDU 13422-15
AGENCY DKT. NO. 235-8/15

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
MICHAEL AZZARA, STATE MONITOR,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This case shall proceed at the OAL to a plenary hearing, or such other proceedings as the ALJ and the parties determine, to resolve the underlying claim on the merits.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/28/15
Date of Mailing: 9/29/15

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF
OAL DKT. NO. EDU 13422-15
AGENCY REF. NO. 235-8/15

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,

Petitioner,

v.

MICHAEL AZZARO, STATE MONITOR,

Respondent.

Marc H. Zitomer, Esq., and **Joseph L. Roselle**, Esq., appearing on behalf of petitioner, Lakewood Township Board of Education (Schenck Price Smith and King, attorneys)

David Rubin, Esq., appearing for respondent, Michael Azzara

Angelo Genova, Esq., **Jennifer Mazawey**, Esq., and **Jennifer Borek**, Esq., appearing on behalf of intervenor Catapult Learning, Inc. (Genova Burns, attorneys)

Michael Inzelbuch, Esq., appearing on behalf of intervenor Mekor Hachinuch School

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

The petitioner, Board of Education of the Township of Lakewood (Board), alleges that respondent, State Monitor Michael Azzara (Monitor or Azzara), improperly overturned the Board's decision to award a contract for in-class resource programming (ICRP) services to Catapult Learning, LLC (Catapult).

PROCEDURAL HISTORY

On August 28, 2015, the petitioner filed a petition for emergent relief with the Bureau of Controversies and Disputes, Department of Education (DOE). The respondent filed a reply on September 7, 2015.

On August 31, 2015, Catapult filed a motion to intervene. On September 9, 2015, Mekor Hachinuch School, a nonpublic school, filed a motion to intervene.[1]

The matter was transmitted to the Office of Administrative Law, where it was filed on September 1, 2015, to be heard as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Oral argument was heard on the emergent application on September 9, 2015.

FINDINGS OF FACT[2]

In June 2015 the Board sought requests for proposals (RFP) pursuant to the competitive contracting process authorized by N.J.S.A. 18A:18A-4.1 et seq. from interested vendors for the provision of ICRP services to be provided to eligible nonpublic school students in accordance with the Individuals with Disabilities Education Act (IDEA). The Board indicated that contracts could be awarded to multiple vendors.

[1] Counsel for the proposed intervenors were permitted to argue at the hearing on emergent relief.
[2] These facts were taken from the parties' briefs, as no testimony was taken on the date of the hearing on emergent relief.

Three vendors submitted proposals for services: Tree of Knowledge Learning Center, Inc. (TOK); Tender Touch Educational Services (TT);[3] and Catapult.

The school district convened a selection committee[4] to review the proposals and ensure they were consistent with the specifications set forth in the RFP. After evaluation, the committee scored the proposals. While deficiencies were noted in all of the proposals, all proposals scored within five to six points of one another. The committee issued an evaluation report reflecting the scores, and recommended that two of the vendors (TT and TOK) receive contracts. Catapult, a previous service provider, was advised that due to a number of identified material deficiencies in its proposal, it would not be awarded a contract.

Catapult responded with a full explanation of the RFP and indicated that many of the identified deficiencies were inaccurate. The Board's attorney advised the Monitor that the remaining issues in Catapult's response were not material and were subject to cure through the provisions of a contract.

The Board meeting was scheduled for August 5, 2015. The contract awards to TOK and TT as vendors for the ICRP were placed on the agenda, but the meeting was canceled due to a lack of a quorum. The Monitor exercised his authority to approve items on that evening's agenda, including the ICRP contract awards to TT and TOK.

In the interim before the next Board meeting, the Board became concerned that TT and TOK would not be able to perform because Catapult advised that many of the specialized instructors in its employ had signed non-compete agreements and would therefore not be available to TT or TOK to provide the services those companies said they could provide for the upcoming school year.[5] The Monitor discounted this conclusion and indicated that the two approved vendors had stated that they could

[3] Neither TT nor TOK appeared at the hearing, although counsel advised that they had received notice of these proceedings.
[4] The Committee included the supervisor of related services, the supervisor of special education, and the supervisor of Lakewood Early Childhood Center.
[5] The Lakewood nonpublic schools started on August 31, 2015.

perform. In addition, the Monitor felt that the non-compete agreements were not enforceable.

The Board met again on August 26, 2015, at which time a motion was made from the floor to award a contract to Catapult in addition to the contracts awarded to TT and TOK.[6] The motion carried by a majority of the Board. The Monitor overrode the motion.[7]

LEGAL ANALYSIS AND CONCLUSION

Special Monitor

The School District Fiscal Accountability Act, N.J.S.A. 18A:7A-54 to -60, was passed to address the problem of some school districts' failure to correct serious deficiencies identified in their annual audits. The Act authorizes the Commissioner to appoint a monitor "to provide direct oversight of a board of education's business operations and personnel matters." N.J.S.A. 18A:7A-55(a). Once appointed, the Monitor shall

> (1) oversee the fiscal management and expenditures of school district funds, including, but not limited to, budget reallocations and reductions, approvals of purchase orders, budget transfers, and payment of bills and claims;
>
> . . . .
>
> (5) have authority to override a chief school administrator's action and a vote by the board of education on any of the matters set forth in this subsection, except that all actions of the State monitor shall be subject to the education, labor, and employment laws and regulations . . . .
>
> [N.J.S.A. 18A:7A-55(b).]

[6] As of September 9, 2015, neither TT nor TOK had executed contracts for the ICRP services. Counsel indicated that TOK had received a contract, and that TT had signed a letter of intent to perform until the contract was executed.

[7] The Monitor expressed concern whether a contract awarded to Catapult would have violated the Public Schools Contracts Law, and also expressed concern over possible litigation from TT and TOK if an additional vendor were approved that had not met selection criteria. The Board expressed its concern over possible litigation threatened by Catapult if it were not awarded a contract.

The Monitor is subject to the supervision of the Commissioner and provides oversight until such time as the Commissioner determines that "the necessary local capacity and fiscal controls have been restored to school district operations." N.J.S.A. 18A:7A-55(e).

In Board of Education of Pleasantville v. Riehman, EDU 11454-10, Initial Decision (May 31, 2011), rejected, Comm'r (July 13, 2011), <http://njlaw.rutgers.edu/collections/oal/>, aff'd, No. A-5928-10 (App. Div. February 11, 2013), <http://njlaw.rutgers.edu/collections/courts/>, the school board had rejected the advice of its counsel to settle a pending whistleblower lawsuit. The Monitor overturned the Board's decision and the Board appealed. The administrative law judge (ALJ) agreed with the Board that the Monitor had exceeded his statutory authority because the enabling legislation, N.J.S.A. 18A:7A-55, did not expressly authorize him to settle lawsuits. The Commissioner rejected the ALJ's analysis and upheld the Monitor's authority to override a school board's refusal to settle a lawsuit that, in the Monitor's reasonable estimation, could have significant financial exposure for the Board. The Appellate Division affirmed the Commissioner's decision, finding that a history of fiscal instability by a board warrants the limits of exercise of those powers through oversight by the Monitor.

In Rankins v. Board of Education of Pleasantville, EDU 6819-09, Initial Decision (August 3, 2010), rejected, Comm'r (October 26, 2010), <http://njlaw.rutgers.edu/collections/oal/>, aff'd, No. A-1662-10 (App. Div. October 22, 2012), <http://njlaw.rutgers.edu/collections/courts/>, the Monitor terminated an employee over the objection of the Board of Education. The ALJ vacated the Monitor's action, which was rejected by the Commissioner, who took an expansive view of the Monitor's powers. While a Monitor does not have "unfettered power" to make decisions for the district, he must "have fiscal or financial concerns or motivations in order to appropriately overturn a Board's decision." In affirming, the Appellate Division also noted the Broad powers of the State Monitor conferred by statute and rejected the argument that the Monitor has no authority to override a board's exercise of its own power because no statute permits that action.

The conclusion to be drawn is that the Monitor exercises broad powers of oversight of a Board's actions wherever fiscal considerations are a concern. The standard to be used in determining whether a Monitor's decisions are ultra vires, as the Board suggests, is whether the Monitor acted "arbitrarily and capriciously." Arbitrary and capricious means acting without rational basis, a willful and unreasoning action without consideration of and in disregard of circumstances. J.P. and M.P. ex rel M.P. and J.P. v. Bd. of Educ. of South Brunswick, EDU 4969-01, Initial Decision (December 17, 2002), adopted, Comm'r (February 3, 2003), <http://njlaw.rutgers.edu/collections/oal/>.

Intervention

Catapult has filed a motion to intervene in this matter, and, indeed, the Board and the Monitor have expressed no objection to Catapult's intervention. N.J.A.C. 1:1-16.1(a) provides that "any person or entity not initially a party, who has a statutory right to intervene or who will be substantially, specifically and directly affected by the outcome of a contested case, may on motion, seek leave to intervene."

Catapult claims that it has a legitimate interest to protect in this matter which is not the same as the interest of the Board. It contends that the action of the Monitor resulted in its being deprived of economic benefit, as well as the students being deprived of continuity of services. Catapult contends that the Monitor acted ultra vires in depriving it of the opportunity to correct any deficiencies in its bid, if indeed there were in fact any significant deficiencies from the other bids that were accepted. To that extent, Catapult has a different position from the Board: the Board does not contend that there were errors in the bidding process; rather, it contends that any deficiencies in the bidding process could be corrected by the contracts offered to all three successful bidders. Catapult, on the other hand, argues that it is in a superior position to provide the services required by the Board, having adequate personnel to meet the demands of the student population.

Accordingly, I will permit Catapult to intervene.

Mekor Hachinuch School, a nonpublic school, has also filed a motion to intervene. It contends that it will be substantially, specifically and directly affected by the outcome of this case, in that its students will be deprived of the specialized instructors, aides and teachers previously assigned to the school. It contends that the school year has started and that no services are being provided to the students of the school. At this time, the school has presented no sufficient reasons that would permit it to intervene. The Board is actively protecting the interest of students within the district, including students of this school, by seeking to expand the number of vendors who provide services to the students. Nothing has been presented to indicate that the school's interest is so disparate from the Board's or so unique as to require intervention at this time.

Accordingly, the school will not be permitted to intervene at this time.

Emergent Relief

N.J.A.C. 6A:3-1.6 provides for emergent relief or stay as follows:

> (a) Where the subject matter of the controversy is a particular course of action by a district board of education or any other party subject to the jurisdiction of the Commissioner, the petitioner may include with the petition of appeal, a separate motion for emergent relief or a stay of that action pending the Commissioner's final decision in the contested case.
>
> (b) A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [See also N.J.A.C. 1:1-12.6.]

For emergent relief to be granted, the petitioner must satisfy all four prongs of the Crowe test by clear and convincing evidence, a "particularly heavy" burden. Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 396 (App. Div. 2006) (quoting Punnett v. Carter, 621 F.2d 578, 582 (3d Cir. 1980)); see also Guaman v. Velez, 421 N.J. Super. 239, 247–48 (App. Div. 2011).

The Board seeks injunctive relief in the form of a determination that the Monitor acted arbitrarily and capriciously when he overruled the Board's decision to offer a contract to Catapult. The effect would be a return to the "status quo" of the three vendors being given contracts for the provision of ICRP services.

As to the first requirement, that the petitioner will suffer irreparable harm if the requested relief is not granted, the Board contends that students' educational programs will be harmed if the Monitor's decision is permitted to stand, because it has received information that Catapult had entered into non-compete agreements with its individual service providers, thus making them unavailable to be hired by TT or TOK.[8] After receiving this information, the Board endeavored to award a third contract to Catapult, contending that any deficiencies noted in the bid could be corrected in the contract, only to be denied by the Monitor.

The Monitor contends that he followed the recommendation of the selection committee in awarding the contracts to TT and TOK, and finding deficiencies in Catapult's proposal. No evidence has been presented that TT and TOK will be unable to perform. Indeed, at this point it is conjecture, based upon allegations that Catapult will attempt to enforce non-compete agreements.

[8] This position essentially assumed that TT and TOK would default on their contract requirements because of the unavailability of personnel held to their non-compete clauses with Catapult.

The Board also contends that the actions of the Monitor in overruling the Board are harmful to it because the Board will be "forced to abide by an illegal and capricious action." The Monitor contends that his action in overruling the Board is not harmful in and of itself. The Board's positon assumes that what the Monitor did was arbitrary and capricious, but this can only be determined after a full hearing.

Catapult contends that it will be irreparably harmed if the Monitor's decision is not vacated, as it will be denied economic profits as the result of its not being able to enter into a contract with the Board to provide services. However, loss of anticipated profits is not a basis for emergent relief. Contracts are not a guarantee; any business must recognize the risk that it will not be awarded every contract for which it applies. See Pritchard Industries, Inc., v. State-Operated School District of Paterson, EDU 9297-09, Order (September 25, 2009), <http://njlaw.rutgers.edu/collections/oal/>.

As to the second requirement, that the legal right underlying petitioner's claim is settled, both parties correctly note the dearth of cases regarding the power of the Monitor to overrule school-board decisions. The Monitor has authority in fiscal affairs, but, as noted above, it is "not unfettered." While the Board is correct that the New Jersey Constitution provides that students within this state are entitled to a thorough and efficient education, and that the IDEA provides that students with special needs have a right to services designed to meet those needs, that is not the legal standard to be used in determining whether the Monitor misused his authority when he overruled the Board. Indeed, given past rulings of the Commissioner as affirmed by the Appellate Division, the Monitor's authority is broad and wide-ranging when a matter has fiscal involvement, such as prevention of costly litigation.

As to the third requirement, the petitioner's likelihood of prevailing on the merits of the underlying claim, it has not been established. The law in this area is sparse, but it does provide the Monitor with a broad range of authority in fiscal matters. The Board and Catapult must demonstrate that the Monitor acted ultra vires when he followed the recommendations of the Selection Committee and overruled the Board by declining to alter the bidding process to permit a third vendor access to the same contracts. Such proof of arbitrary and capricious action can only come after a hearing in this matter.

Based on the information provided by the petitioner and Catapult, it cannot presently be concluded that the petitioner and Catapult have a likelihood of prevailing on the merits of the underlying claim.

As to the balancing of the equities of the situation and the interests of the parties, the Board and the Monitor have an interest in seeing that the children of Lakewood receive the education and special services they are entitled to by law. They both have an interest in ensuring that these educational services are timely provided in a financially sound manner in accordance with the bidding and selection process. There is no indication that either the Board or the Monitor did not attempt to act in the best interests of the students and the district in reaching their separate conclusions about the acceptance or the rejection of the bids.

Catapult has a financial interest in obtaining a contract from the Board so that it may continue to provide services and obtain the economic benefit of the contract.

Balancing the equities at this juncture, there is no indication that the two vendors approved by the selection committee and the Board cannot perform in accordance with the proposed contracts. If they cannot meet the demands of the contracts, then indeed, the matter may yet become emergent and the petitioner may then re-apply for emergent relief.

In conclusion, neither the Board nor Catapult has demonstrated that it is entitled to emergent relief. The application sought—to overrule the decision of the Monitor on the basis that he was without authority to so act—is denied.

ORDER

Having concluded that the Board has not satisfied the four requirements for emergent relief, the petitioner's request for emergent relief is **DENIED**.

The matter shall be scheduled for hearing forthwith.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

September 10, 2015
DATE

Susan Scarola
SUSAN M. SCAROLA, ALJ

SMS/cb

DOCUMENTS CONSIDERED

Petitioner's Motion for Emergent Relief, with attachments

Respondent's Brief in Opposition, with attachments

Catapult's Motion to Intervene and Supporting Brief

Mekor Hachinuch's Motion to Intervene, with attachments

(Mekor Hachinuch's Letter and Certification filed on September 10, 2015, after record closed, not considered)

314-15

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

----------X

In the Matter of Tenure Charges filed by
The Elizabeth Board of Education,
Union County, New Jersey
Against Philip Gomez

Agency Docket No. 84-4/15

----------X

APPROVAL OF SETTLEMENT

Issued: September 28, 2015

ARBITRATOR
Joseph Licata, Esq.

HEARING INFORMATION
Dates: June 24, and July 29, 2015
Time: 10:00 a.m.
Location: Law Offices of Schwartz Simon Edlestein & Celso, LLC

APPEARANCES

FOR THE PETITIONER
Stephen M. Bacigalupo, II, Esq.
Schwartz Simon Edlestein & Celso, LLC

FOR THE RESPONDENT
Ty Hyderally, Esq.

NATURE OF DISPUTE

In accordance with N.J.S.A. 18A:6-10 et. seq. and N.J.A.C. 6A:3-5.1(b), on April 21, 2015, Petitioner, Elizabeth Board of Education filed with the New Jersey Department of Education, Bureau of Controversies & Disputes, tenure charges against Respondent, Philip Gomez, seeking to dismiss him from employment as the Principal of Elmora School No. 12 for conduct unbecoming, insubordination and/or other just cause warranting dismissal and/or reduction in salary, pursuant to N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10, et. seq. On or about April 27, 2015, Counsel for Respondent filed an Answer with the Bureau of Controversies & Disputes.

By correspondence dated May 7, 2015, Kathleen Duncan, Director, Bureau of Controversies & Disputes notified the parties' respective legal representatives of the undersigned Arbitrator's appointment pursuant to N.J.S.A. 18A:6-16, as amended, P.L. 2012, c. 26. On June 12, 2014, Petitioner filed a Motion to Suppress Respondent's Defenses/Evidence. The Motion was resolved by way of adjourning the June 16, 2015 hearing and commencing the hearing on June 24, 2015. The hearing continued and both parties completed their respective case-in-chief on July 29, 2015. The hearing was held open for rebuttal testimony.

However, on or about August 24, 2015, the parties' legal representatives informed the undersigned via email that a settlement of the dispute was apparent. Subsequently, on September 22, 2015, the parties' legal representatives submitted for my approval a Stipulation of Settlement, Resignation and Release executed by and between the parties'

authorized representatives on September 14, 2015 (Petitioner) and September 17, 2015 (Respondent) (attached hereto and made a part hereof).

FINDINGS AND CONCLUSION

The undersigned has carefully reviewed the terms of settlement and the record evidence. I hereby find and conclude that the criteria governing the approval for a settlement of a tenure proceeding have been met pursuant to N.J.A.C. 6A:3-5.6 and In re Cardonick, State Board decision of April 6, 1983 (1990 School Law Decisions (S.L.D., 842, 846). The nature of the charges filed against Respondent does not warrant a determination on the merits in order to protect the public interest. Both parties will mutually benefit from the settlement in terms of avoiding the additional costs of litigation and without prejudice to the education of students at Elmora School No. 12 or to Respondent's potential desire to seek employment in another school district. For all these reasons, I hereby approve the September 17, 2015 settlement of this matter, thereby closing the record in Agency Docket No. 84-4/15.

Respectfully submitted,

Joseph Licata

Dated: September 28, 2015

Schwartz Simon
Edelstein & Celso LLC
100 South Jefferson Road, Suite 200
Whippany, New Jersey 07981
P: (973) 301-0001; F: (973) 993-3152
Attorneys for the
Elizabeth Board of Education

IN THE MATTER OF THE TENURE CHARGES AGAINST PHILIP GOMEZ,	BEFORE THE COMMISSIONER OF EDUCATION, NEW JERSEY DEPARTMENT OF EDUCATION
	AGENCY DKT. NO.: 84-4/15
BY THE ELIZABETH BOARD OF EDUCATION, UNION COUNTY, NEW JERSEY.	BEFORE JOSEPH LICATA, ARBITRATOR
	TENURE HEARING
	STIPULATION OF SETTLEMENT, RESIGNATION AND RELEASE

This Agreement and Release ("Agreement") is entered into and effective as of the 20th day of August, 2015 (the "Effective Date"), by and between the Elizabeth School District Board of Education ("Elizabeth Board of Education") and Philip Gomez ("Mr. Gomez" or "Employee").

WITNESSETH:

WHEREAS, the Elizabeth Board of Education is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1, which is entrusted with maintaining and conducting the public schools of said school district; and

WHEREAS, the Elizabeth Board of Education has its administrative offices located at 500 North Broad Street, Elizabeth, New Jersey 07028; and

WHEREAS, Mr. Gomez, a tenured principal employed by the Elizabeth Board of Education, has his current address located at 23 Iris Circle, Glen Rock, New Jersey 07452-3428; and

WHEREAS, on or about March 26, 2015, Olga Hugelmeyer, Superintendent of Schools, filed Sworn Tenure Charges against Mr. Gomez, together with a Sworn

Statement of Evidence in support of the charges, with the Elizabeth Board of Education; and

WHEREAS, the parties, wishing to resolve the tenure charges presently pending against Mr. Gomez without the need for further litigation, hereby stipulate to settle the same, subject to the terms and conditions as set forth herein; and Mr. Gomez intends to, and by executing this Agreement, hereby does resign effective June 30, 2016; and

NOW, THEREFORE, the parties hereby agree, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged, as follows:

1. TENURE CHARGES TO BE ABANDONED/NO FURTHER BOARD ACTION

The Elizabeth Board of Education agrees that upon execution of the within Agreement by the parties and Mr. Gomez's fulfillment of the obligations as set forth herein, that the subject tenure charges shall be abandoned and that no further action shall be initiated by the Elizabeth Board of Education regarding the underlying charges. The Elizabeth Board of Education fully reserves all rights in the event this Agreement is breached by Mr. Gomez, as well as with respect to any third party claims that may be made against the Elizabeth Board of Education as a result of any acts and/or omissions by Mr. Gomez during his employment with the Elizabeth Board of Education.

2. IRREVOCABLE RESIGNATION FROM EMPLOYMENT

Mr. Gomez has tendered his irrevocable resignation effective June 30, 2016, a copy of which is attached hereto as Attachment A, from all employment with the Elizabeth Board of Education, subject only to the Elizabeth Board of Education's fulfillment of its obligations as set forth herein. In the interim, Mr. Gomez shall be on an administrative leave, without pay and benefits, through June 30, 2016. Mr. Gomez agrees that he will not seek any future employment or consultant relationship with the Elizabeth Board of Education in perpetuity and that the Elizabeth Board of Education has no obligation, contractual or otherwise, to re-hire or re-employ him.

3. RELEASE

In exchange for the above consideration, Mr. Gomez, his heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any and all claims or rights, up until the date of execution of the instant Agreement by both parties, whether known or unknown, which they have or may have against the Elizabeth Board of Education, personally and officially, individually and collectively, its past and present Board members, all officers and administrators, its attorneys, agents and employees, personally and officially, as well as their successors, and assigns, including, but not limited to any and all claims for attorneys' fees, back pay or front pay, any claims for emotional distress or pain and suffering, any and all claims involving tax liability

stemming from this Agreement, and any and all claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions; Title VII of the Civil Rights Acts of 1871 and 1991; the Americans with Disabilities Act; the Age Discrimination in Employment Act; the Older Workers Benefit Protection Act of 1990; the Employee Retirement Income Security Act; the Federal Family and Medical Leave Act; the Fair Labor Standards Act; the Equal Pay Act; the Workers' Adjustment and Retraining Notification Act; the New Jersey Law Against Discrimination; the New Jersey Family Leave Act; the New Jersey Conscientious Employee Protection Act; the New Jersey Wage and Hour Law; the Employer-Employee Relations Act; any collective negotiations agreement; any common law claim and any and all other claims, that could be initiated in any venue, for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim.

Specifically exempted from this release are any claims arising under the Workers' Compensation Act, N.J.S.A. 34:15-1 et seq., and for health insurance continuation coverage under and pursuant to Consolidated Omnibus Budget Reconciliation Act (referred to hereinabove as "COBRA"). Mr. Gomez represents that he has not filed and does not intend to file a Workmen's Compensation claim related to his employment with the Board. This release does not limit Mr. Gomez's right to seek indemnification, in accordance with N.J.S.A. 18A:16-6 and/or N.J.S.A. 18A:16-6.1, with respect to a claim filed against him for any act or omission arising out of and in the course of the performance of his duties as an employee of the Elizabeth Board of Education. The parties are not aware of the existence of any such claims.

It is expressly understood that the arrangement herein is predicated exclusively upon the special circumstances of this matter and shall not be construed to represent any policy or procedure of the Elizabeth Board of Education.

4. NO ADMISSIONS

The execution of this Agreement does not constitute an admission or acknowledgement by Mr. Gomez or the Elizabeth Board of Education of any wrongful or otherwise improper conduct, nor as to the liability of any party. The parties mutually acknowledge that this matter has been resolved in good faith, and that this Agreement is entered into solely for the purpose of avoiding the time and expense attendant to any further litigation.

5. COMPENSATION/BENEFITS

Mr. Gomez shall receive a one (1) time lump sum payment of fifteen thousand dollars ($15,000.00). Mr. Gomez acknowledges that the Elizabeth Board of Education will not deduct or withhold any amounts from the payment as set forth in the preceding paragraph, but the Elizabeth Board of Education will issue him an IRS form 1099. It is expressly understood and agreed by Mr. Gomez that the Elizabeth Board of Education does

not represent or guarantee that taxes should not be paid on any portion of this settlement payment. Mr. Gomez further acknowledges that it is his responsibility to make the necessary tax payments, if any may be required, and he agrees to indemnify and hold the Elizabeth Board of Education harmless with respect to any amounts which should have been paid by him.

Besides the one (1) time lump sum payment and upon the effective date of Mr. Gomez's irrevocable resignation, he shall be entitled to no further compensation, emolument of employment or fringe benefit of any kind and specifically waives his right to same.

The Board shall send this payment to Hyderally & Associates, P.C., counsel for Mr. Gomez, no later than 30 days from the date of Mr. Gomez's execution of this Agreement.

6. NON-DISPARAGEMENT

The parties and their agents shall refrain from public negative comments regarding each other, and each other's employees and/or agents. However, nothing in this Agreement shall be construed to limit the Elizabeth Board of Education and its agents' obligation to provide accurate information in response to legitimate requests for public information, nor to provide information requested by various State Agencies, including but not limited to the State Department of Education; the State Board of Examiners and its agents, including copies of the Tenure Hearing documents, witness list and information, proposed exhibits and work-product related thereto; the Division of Pensions and Benefits; and the Unemployment Compensation Board and/or their agents. Further, nothing in this Agreement shall be construed as affecting the Parties' ability to testify truthfully or fully.

7. INQUIRIES

The Elizabeth Board of Education agrees, through its Administration, to respond to post-employment inquiries regarding Mr. Gomez by providing solely basic work history such as confirming the dates of Mr. Gomez's employment within the school district, the amount of Mr. Gomez's salary in the final year of his employment, the positions that Mr. Gomez held within the District, and the date of Mr. Gomez's resignation. However, nothing herein shall be deemed to limit the Elizabeth Board of Education's actions in compliance with the Open Public Records Act, or its obligation to respond fully and accurately to any and all inquiries from State agencies such as, without limitation, the Public Employees Retirement System ("PERS"); TPAF; for example. However, the Board would add to the extent such an inquiry and exchange occurs, that the tenure charges were contested by Mr. Gomez, who denied any misconduct and that the Parties resolved the matter during the process wherein the Board abandoned the Tenure Charges and Mr. Gomez resigned.

8. DUE DILIGENCE

Mr. Gomez has indicated that he will file an application for disability retirement benefits ("disability application") with the Division of Pensions and Benefits. Mr. Gomez agrees to file his disability application in accordance with the provisions of Section 1 of this Agreement. Mr. Gomez shall cooperate fully with the Pension Board and/or any other State or Local governmental body and comply promptly and completely with all requests and requirements. The Board too agrees that it will cooperate fully with the Pension Board and/or any other State or Local governmental body; will comply promptly and completely with all requirements and requests; and will not oppose Mr. Gomez's application.

Mr. Gomez acknowledges that the Elizabeth Board of Education has no decision-making authority with regard to his disability application and that his resignation is not contingent upon its approval. Mr. Gomez further acknowledges that his employment with the Board shall terminate no later than July 1, 2016, whether or not his disability application is approved by the State. In the event that it is approved with an effective date that is earlier in time than July 1, 2016, then he shall immediately advise Harold E. Kennedy, Jr., Business Administrator/Board Secretary to the Elizabeth Board of Education, and his administrative leave and employment shall terminate as of the effective retirement date. Mr. Gomez shall have an ongoing duty to keep the Board fully and timely apprised of all developments regarding his disability application.

9. REQUIREMENTS PURSUANT TO *N.J.A.C.* 6A:3-5.6

A. True copies of the Tenure Charges are annexed hereto as Attachment C.

B. Both parties have freely consented to the within Agreement, as evidenced by their respective signatures below.

C. Both parties have had the benefit of independent legal counsel and have been fully apprised of their rights and obligations, and have indicated their full understanding and acceptance of same, by their respective signatures below.

D. The within settlement will serve the public interest by avoiding the cost of further litigation guarantying the desired result.

E. Mr. Gomez has been advised by his attorney that the Commissioner of Education and the Superintendent of Schools may refer the within matter to the State Board of Examiners for possible suspension or revocation of his certification. However the Board represents that no such referral has been made as of the date of this Agreement.

F. The parties agree that nothing in the within Agreement shall restrict access to information or records deemed public by law or result in misrepresentation of the fact that Mr. Gomez's separation from service was incident to the prosecution of Tenure Charges against him by the Board. The Elizabeth Board of Education and its agents shall

cooperate fully and honestly in responding to requests for information from government agencies and in response to requests from the public for information that it is legally required to provide. However, the Board would add to the extent such an inquiry and exchange occurs, that the tenure charges were contested by Mr. Gomez, who denied any misconduct and that the Parties resolved the matter during the process wherein the Board abandoned the Tenure Charges and Mr. Gomez resigned.

G. The Elizabeth Board of Education has formally approved this Settlement Agreement, subject only to approval by the Arbitrator. A certified resolution is annexed hereto as Attachment B.

10. NO RETALIATION

Mr. Gomez shall take no retaliatory action of any kind against any student, parent, staff, Elizabeth Board of Education member or agent of the Elizabeth Board of Education, and shall cooperate fully and in good faith regarding any inquiries from colleges and/or employers that may be addressed to him regarding his former students.

11. ENTRY ONTO BOARD PROPERTY

Mr. Gomez may enter Elizabeth Board of Education Property when working with a private entity that has Elizabeth Board of Education approval for use of a facility for a particular event, or attendance at a venue or event that is open to the general public. In all other instances, Mr. Gomez shall first receive prior permission from the Superintendent of Schools before entering onto Elizabeth Board of Education Property.

12. SURRENDER OF BOARD PROPERTY

A. Mr. Gomez shall surrender all school keys and property in his possession to the Superintendent of Schools or her designee.

B. The Superintendent of Schools shall arrange an appointment for Mr. Gomez to retrieve his personal property, if necessary.

13. BOARD APPROVAL

This Agreement is subject to Elizabeth Board of Education approval. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Elizabeth Board of Education.

14. ASSENT TO TERMS

A. Mr. Gomez hereby acknowledges that he entered into this Agreement with a full understanding of his rights and that he does so without duress and of his own free will and volition, and that he has consulted with independent legal counsel prior to executing same.

B. Mr. Gomez acknowledges that he was given the opportunity to fully consider this Agreement for a period of at least twenty-one (21) days, and was given seven (7) days from the execution of this document to revoke this Agreement by delivering written notification to Stephen M. Bacigalupo, II, Esq., Schwartz Simon Edelstein & Celso, LLC, 100 South Jefferson Road, Whippany, New Jersey 07981.

15. SUCCESSORS AND ASSIGNS

This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

16. ENTIRE AGREEMENT

This Agreement constitutes the entire agreement between the parties with respect to the subject matters herein, and supersedes and integrates any and all prior representations, negotiations, discussions, understandings and agreements, whether oral or written. This Agreement shall not be amended, changed or modified except in a writing signed by all parties. Each party acknowledges that the other party, nor any agent or attorney of the other party, have made any promise, representation or warranty whatsoever, express or implied, not contained in this Agreement to induce it to execute this Agreement.

17. SEVERABILITY

In the event that a court or agency of competent jurisdiction shall deem any part of this Agreement to be contrary to law, then the remaining portions of this Agreement shall remain in full force and effect, except that the provisions of Paragraph 1 hereinabove shall be deemed to be material and of the essence of this Agreement. Should the provisions set forth in Paragraph 1 be compromised, then the entire Agreement shall be deemed to be null and void and the Elizabeth Board of Education shall be free to proceed with appropriate disciplinary action, up to and including the further prosecution of Tenure Charges.

18. COUNTERPARTS

This Agreement may be executed simultaneously in two (2) or more counterparts, each of which shall be deemed an original and all of which, when taken together, constitute one and the same document. The signature of any party to any counterpart shall be deemed a signature to, and may be appended to, any other counterpart.

19. GOVERNING LAW

This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

IN WITNESS WHEREOF, the signatures and/or seals of the parties or their duly authorized representatives have been set forth on the dates indicated below:

PHILIP GOMEZ

Dated: 9/14/15

Witness:

SALLY A. SATTIAN, ESQ.

Dated: 9/14/15

For the Elizabeth School District Board of Education:

ANA MARIA AMIN
Board President

Dated: 9/17/15

Witness:

HAROLD E. KENNEDY, JR.
Board Secretary/Business Admin.

Dated: 9/17/2015

Attachment A

Irrevocable Letter of Resignation

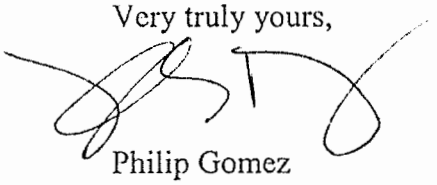
Elizabeth School District Board of Education
c/o Harold E. Kennedy, Jr., Board Secretary/Business Administrator
500 North Broad Street
Elizabeth, New Jersey 07208

Re: Irrevocable Letter of Resignation

Dear Ladies and Gentlemen:

Subject to the terms and conditions of our Separation from Employment Agreement and Release ("Agreement"), and approval of same by the Board of Education, I hereby tender my irrevocable resignation from all employment with the Elizabeth School District Board of Education effective June 30, 2016.

Very truly yours,



Philip Gomez

Attachment B

Certified Board Resolution

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BOARD OF EDUCATION

RESOLUTION

BE IT RESOLVED that the Elizabeth Board of Education hereby approves the attached Employment Separation Agreement with Employee Philip Gomez; and

BE IT FURTHER RESOLVED that the Elizabeth Board of Education hereby accepts Employee Philip Gomez's irrevocable resignation effective June 30, 2016; and

BE IT FURTHER RESOLVED that the Elizabeth Board of Education authorizes the Board President and the School Business Administrator/Board Secretary to execute the Employment Separation Agreement on behalf of the Board; and to take such further steps as may be necessary to effectuate the within Employment Separation Agreement and carry out this action of the Board.

TRUE COPY APPROVED AND ADOPTED AT
THE ELIZABETH BOARD OF EDUCATION MEETING
HELD ON **September 17, 2015**

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

Elizabeth, New Jersey
September 17, 2015

15-66

315-15

IN THE MATTER OF THE TENURE HEARING :

OF JANET SAITO, SCHOOL DISTRICT OF : COMMISSIONER OF EDUCATION

THE TOWN OF WEST NEW YORK, : DECISION

HUDSON COUNTY. :

SYNOPSIS

Petitioning Board filed tenure charges of unbecoming conduct and incapacity against respondent, a tenured teacher, and sought to terminate her employment with the district. Neither respondent nor any attorney acting on her behalf filed an answer to the petition following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.4(h), the allegations – which respondent has chosen not to deny – may be deemed admitted and are sufficient to warrant termination of the respondent from her tenured position. Accordingly, the Commissioner granted summary decision to the petitioner, dismissed the respondent from her tenured position in petitioner's school district, and forwarded a copy of this decision to the State Board of Examiners for review and action as that body deems appropriate.

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

October 2, 2015

AGENCY DKT NO. 221-8/15

IN THE MATTER OF THE TENURE HEARING	:	
OF JANET SAITO, SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
THE TOWN OF WEST NEW YORK,	:	DECISION
HUDSON COUNTY.	:	

For the Petitioner, John G. Geppert, Jr., Esq.
No Answer filed by or on behalf of Respondent, Janet Saito

This matter was opened before the Commissioner of Education on August 17, 2015 through tenure charges of conduct unbecoming and incapacity certified by Clara Brito Herrerra, Assistant Superintendent of the West New York School District, together with supporting evidence against respondent Janet Saito, a teaching staff member in the petitioner's employ. The petitioner provided respondent with written notice of such certification at her last known address, via Federal Express and U.S. Mail on August 14, 2015.

On August 18, 2015, the Commissioner directed respondent – via both certified and regular mail – to file an answer to the charges. This communication provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*" and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted.

Thereafter, on September 2, 2015, the Bureau of Controversies and Disputes ("Bureau") received a letter from respondent dated August 29, 2015, with no evidence of service

upon petitioner, indicating that she was "responding to the tenure charges" against herself and tried to reach her attorney "to no avail" but would keep trying. Via correspondence dated September 3, 2015, the Bureau informed respondent that her letter was an insufficient answer to the tenure charges as she failed to admit or deny any of the allegations contained in the petition. Further, respondent was advised that if she needed additional time to file an answer that comports with *N.J.A.C.* 6A:3-5.3(a) and *N.J.A.C.* 6A:3-1.5(a) through (d), she must request an extension of time in writing from the Bureau. Respondent was also reminded that, before making her request for an extension, she should contact counsel for petitioner to ask him whether he consents. The Bureau informed respondent that she could fax in her written extension request.

Additionally, the Bureau's September 3, 2015 correspondence to respondent stated: "If you choose not to submit a written request for an extension of time to this office by September 10, 2015, and we do not receive an answer to the tenure charges from you or your attorney that comports with the requirements set forth in *N.J.A.C.* 6A:3-5.3(a) and *N.J.A.C.* 6A:3-1.5(a) through (d) by September 10, 2015, the charges brought against you will be deemed admitted and the Commissioner may decide the matter on a summary basis." Respondent was reminded that she was required to serve a copy of any documents submitted upon counsel for petitioner. She was further advised to call the Bureau with any questions.

As of today's date, respondent has not replied to the Bureau's September 3, 2015 correspondence. No answer has been received on her behalf, and no request for an extension of time has been made.

The certified tenure charges and statement of supporting evidence filed by the petitioner in this matter indicate that respondent returned to work following a Workers'

Compensation leave in the Spring of 2013 and – despite the District's efforts to provide reasonable accommodations – her incapacity is directly affecting the educational and/or instructional program of the District and has implicated serious concerns about the safety and hygiene of the school. On or about August 18, 2014, an orthopedic surgeon concluded that respondent is not fit for return to duty as a Special Education teacher. As a result, respondent has not reported to work since on or about September 16, 2014. Her inability to return to work has had and continues to have a negative impact on the school district. Furthermore, the certified charges and evidence also indicate that respondent's chronic and excessive absenteeism within the last three years (not including her Workers' Compensation leave) has adversely affected the proper operation of the school, and that respondent failed twice to appear for a psychological evaluation requested by petitioner, despite having been offered transportation.

The charges and supporting evidence also indicate that respondent engaged in unbecoming conduct, including inappropriate classroom behavior, unprofessional comments to students, insensitivity toward students, lack of responsiveness to students, failure to follow school fire drill procedures, repeated failure to report her absences by telephone (which thwarted the District's ability to obtain a substitute teacher and resulted in cancellation of classes on multiple occasions), and failure to file lesson plans, student assignments, student objectives, and grades in a timely manner.

Deeming the allegations to be admitted and noting that respondent has failed to file an answer that comports with *N.J.A.C.* 6A:3-5.3(a) and *N.J.A.C.* 6A:3-1.5(a) through (d), the Commissioner finds that the charges of incapacity and conduct unbecoming a teaching staff member have been proven and warrant respondent's dismissal from employment.

Accordingly, summary decision is hereby granted to the petitioner, and respondent is dismissed from her tenured position with the District. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/02/15

Date of Mailing: 10/05/15

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

317-15

317-15

AGENCY DKT NO. 125-9/15

IN THE MATTER OF THE TENURE	:	
HEARING OF RICHARD GRILLO,	:	COMMISSIONER OF EDUCATION
MIDDLESEX COUNTY REGIONIAL	:	DECISION
EDUCATIONAL SERVICES COMMISSION,	:	
MIDDLESEX COUNTY.	:	

The record of this matter and the proposed settlement agreement and general release have been reviewed. Upon such review, the Commissioner finds that the proposed settlement is consistent with established standards governing settlement of tenure matters. *N.J.A.C.* 6A:3-5.6; *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/07/15

Date of Mailing: 10/07/15

BORRUS, GOLDIN, FOLEY
VIGNUOLO, HYMAN & STAHL
A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW
2875 US HIGHWAY #1
ROUTE 1 & FINNEGANS LANE
NORTH BRUNSWICK, N.J. 08902
(732) 422-1000

ANTHONY B. VIGNUOLO, ESQ.
avignuolo@borrus.com

FAX: (732) 422-1016
E-mail: attys@borrus.com

MARTIN S. GOLDIN
(1962-2002)

RECEIVED BY
CONTROVERSIES & DISPUTES
2015 JUL 30 A 10:56

July 27, 2015

M. Kathleen Duncan - Director
Bureau of Controversies and Disputes
Office of The Commissioner
New Jersey Department of Education
100 River View Plaza
P.O. Box 500
Trenton, NJ 08625

Re: In The Matter of Richard Grillo and the Middlesex County Educational Services Commission

Dear Ms. Duncan:

As you are aware my office represents the Middlesex Regional Educational Services Commission in this matter.

The parties have amicably resolved the issues raised in the Tenure Charge. Please accept this letter as authorization for dismissal of the charge. The charge should not be forwarded for any further consideration by the Commissioner or an Arbitrator.

If you have any questions regarding the within request, please feel free to contact me.

Very truly yours,

ANTHONY B. VIGNUOLO

ABV:kec

c: Aileen O'Driscoll, Esq.
Mark Finkelstein, Superintendent

P:\Docs\ABV\WP51\CORRESP\MRESC\Tenure Charges 2015\NJ.Comm.Educ.072715.docx

SETTLEMENT AND RELEASE

WHEREAS, the Middlesex Regional Educational Services Commission ("the Board") is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:6-51, which is entrusted with maintaining and conducting the public schools of the Middlesex Regional Educational Services Commission; and

WHEREAS, Richard Grillo is employed by the Board as a tenured teaching staff member; and

WHEREAS, certain disputes have arisen between the Board and Mr. Grillo and the parties hereby stipulate to resolve said disputes subject to the terms and conditions set forth herein.

NOW THEREFORE, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the parties, they agree as follows:

1. **Transfer**

   Mr. Grillo shall be transferred to a Commission non-public school position effective September 1, 2015. There has been no break in his service with the Commission.

2. **Increment Witholding**

   The Board will withhold Mr. Grillo's employment and adjustment increment for the 2015-16 school year.

3. **No Admissions**

   The parties agree that this Agreement does not constitute an admission of liability or wrongdoing by either party.

4. **Withdrawal of Charges**

   In exchange for the above consideration, the Board shall withdraw the charges filed with the Commission of Education in or around June, 2015.

5. **Employment Status**

   Both parties agree that Mr. Grillo shall remain employed by the Commission and further agree that no report to the State Board of Examiners pursuant to N.J.A.C. 6A:9-17.4 or any other statute or regulation is required with respect to Mr. Grillo's employment with the Board and no such report is being made. However,

upon request, the Board shall provide fully and truthfully all information it may be legally required to provide to any State agency or officer.

6. **Non-disparagement**

Mr. Grillo and his agents and the Board and its agents shall refrain from any private or public comment regarding each other, and each other's employees and agents.

7. **Assent to Terms**

The parties hereby acknowledge that they have entered into this Agreement with a full understanding of their rights and obligations and that they were fully informed of the implications of this Agreement by their respective attorneys, and they do so without duress, of their own free will and violation.

8. **Entire Agreement**

This Agreement represents the entire understanding of the parties.

Richard Grillo
RICHARD GRILLO
DATE: 7/13/15

DATE: 7/29/15

318-15

OAL DKT. NO. EDU 11498-15
(EDU 16345-14 ON REMAND)
AGENCY DKT. NO. 350-12/14

B.B., on behalf of minor child, M.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ESTELL MANOR, ATLANTIC COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record, Stipulation of Settlement, and Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed – mindful of the Commissioner's July 30, 2015, determination that the prior Stipulation of Settlement submitted did not comply with *N.J.A.C.* 6A:3-1.13, as it was neither signed by the Board's attorney, nor contained a copy of the Board's resolution approving the settlement and designating the Superintendent to sign the Stipulation of Settlement on its behalf. Since the Stipulation of Settlement now contains the signature of the Board attorney, the Commissioner can approve the within Stipulation of Settlement in its present form.

Accordingly, the Initial Decision recommending approval of the parties' settlement as the final decision in this matter is hereby adopted, and the matter is dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/07/15
Date of Mailing: 10/07/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11498-15
(On Remand of EDU 16345-14)
AGENCY DKT. NO. 350-12/14

B.B. ON BEHALF OF
MINOR CHILD, M.B.,
Petitioners,
v.
BOARD OF EDUCATION OF
THE CITY OF ESTELL MANOR,
ATLANTIC COUNTY,
Respondent.

Jerry L. Tanenbaum, Esq., for petitioner (Mattlemen, Weinroth & Miller, P.C., attorneys)

Brett Gorman, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: August 27, 2015 Decided: August 31, 2015

BEFORE **W. TODD MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 12, 2014, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties prepared and submitted a Settlement Agreement and General Release indicating the terms thereof.

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

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

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

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

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

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

August 31, 2015
DATE

W. TODD MILLER, ALJ

Date Received at Agency: 9/3/15

Date Mailed to Parties: 9/3/15

File No. 14743-0003
Law Offices
PARKER McCAY P.A.
9000 Midlantic Drive, Suite 300
P.O. Box 5054
Mount Laurel, New Jersey 08054
(856) 596-8900
Attorneys for Respondent, Estell Manor Board of Education

B.B. o/b/o M.B. Petitioners, v. ESTELL MANOR BOARD OF EDUCATION Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL Docket No.: EDU 16345-14 STIPULATION OF SETTLEMENT

This Settlement Agreement and General Release (the "Agreement") is entered into by and between B.B. o/b/o M.B. ("Petitioners") and the Estell Manor School District Board of Education (the "Board" or "District"), with its mailing office located at 128 Cape May Avenue, Estell Manor, New Jersey 08319, (the Board and Petitioners collectively referred to as the "Parties").

WHEREAS, M.B. is a student who attends the District; and

WHEREAS, a dispute arose regarding the findings of a Harassment, Intimidation, and Bullying investigation, pursuant to N.J.S.A. 18A:37-15; and

WHEREAS, the parties in good faith have negotiated concerning this matter and have a desire to settle this matter in an amicable way, hereby agree as follows:

1. Petitioners will withdraw the Petition of Appeal that was filed before the New Jersey Commissioner of Education on November 24, 2014 within fifteen (15) days of the date of this agreement.

2. The school counselor shall meet with M.B. once every other week, and the school counselor or administration shall be made available to M.B. at any time upon M.B.'s request. The school counselor shall discuss with M.B. how M.B. is doing at the school and whether or not other students are treating her appropriately. Any statements or reports by M.B. to the school counselor indicating that M.B. is being, or believes she is being, mistreated, harassed, intimidated or bullied by other students will be shared by the counselor in writing to both the school principal and M.B.'s parents within 24 hours of the counselor's receipt of such information.

3. In consideration of the terms herein, Petitioners hereby release the Board, its employees and agents from all possible claims they may have or have had against the Board relating to anything that has happened up until now, regardless of the forum in which such claims may have been pursuable. In addition, Petitioners voluntarily, willingly and expressly release and hold the Board and its officials, officers, employees, agents and attorneys (collectively the "Board") harmless from any and all claims and demands for compensatory, incidental and punitive damages, attorneys' fees, costs or any other damages that may arise under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 791 et seq, the Americans with Disabilities Act of 1990, 42 U.S.C. 2101 et seq, and any regulations promulgated under any aforementioned laws, 42 U.S.C. 1983, or any other State or Federal Law, statute, rule or regulation or common law, contract, policy or directive, relating to anything that has occurred through the date of this agreement.

4. The Parties agree that they will not communicate the terms of this agreement to any persons or entities other than their attorneys, accountants, tax advisors, agents and/or any other individuals necessary to effectuate this settlement, and, but only with the written agreement of the other party, others whom a party may desire to advise except any evaluators, medical providers, or treating professionals. The parties may, however, produce or disclose this agreement as required by operation of law or lawful subpoena or order of Court pursuant to official discovery proceedings. If the parties are required to produce or disclose this agreement it will first advise the other parties as soon as practical. Nothing in this paragraph shall limit a party from disclosing the terms of this agreement to any evaluators or medical providers.

5. Petitioners hereby state that they are signing this Agreement voluntarily of their own free will and not under duress or coercion of any kind.

6. This Agreement is subject to Petitioners continued domicile within the District.

7. Each party shall be responsible for their own attorney's fees and expert costs and no party shall be deemed a "prevailing party" as a result of this Agreement.

8. This Agreement shall be construed fairly according to the plain language of its terms and not for or against any party hereto.

9. All parties are bound by this Agreement and each of its provisions. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns are also bound. This agreement is made for the benefit of all parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, representatives, employees, agents, attorneys, successors or assigns.

10. This Agreement constitutes the full and complete agreement of the parties hereto with respect to its subject matter, it supersedes any prior or contemporaneous representations,

whether oral or written, and it may not be modified or amended except by a written instrument signed by all parties hereto.

11. This Agreement shall be governed by the laws of the State of New Jersey. The Parties agree that the courts of the State or District Court of New Jersey shall be the sole forum in which any legal action concerning or relating to this agreement shall be brought.

12. In the event that any provision of this contract is held to be void or unenforceable by any court or regulatory authority having jurisdiction thereof, such ruling will not affect the validity of this contract; the remaining provisions shall continue to be in full force and effect.

13. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof, and supersedes all prior written or oral and all contemporaneous oral agreements, understandings, and negotiations.

14. This Agreement may be executed in one or more original, emailed or telecopied counterparts, all of which together shall be one instrument, and all of which shall be considered duplicate originals.

15. This Agreement may only be amended in writing by way of a document signed by all Parties and counsel.

IN WITNESS HEREOF, the parties have set their hands this____ day of _____ 2015.

BY: _____ DATED: 5-15-15
Noelle Jaequelin
Superintendent of Schools
Estell Manor School District

BY: _____ DATED: 5-11-15
B.B., Petitioners

_____
Brett Gorman
Board Attorney
Estell Manor Board of Education

To: Brett Gorman

ESTELL MANOR BOARD OF EDUCATION REGULAR BOARD MEETING MAY 18, 2015

Call to Order

The Estell Manor Board of Education held its regular meeting on Monday, May 18, 2015 at the Estell Manor Elementary School. The meeting was called to order at 6:33 p.m. by Board President, Martin Klosek.

Open Public Meeting Announce-ment

This is to advise those present that adequate notice of meeting has been given in the official newspapers and posted in two public places as required by laws of 1975, Ch. 231, commonly known as the Open Meeting Act.

Flag Salute

The Flag Salute was led by the President, Martin Klosek.

Roll Call

Present – Martin Klosek (via phone), Robert Kellner, Leah McDonnell, John Cressey Brianne Seelman, Brett Gorman, Solicitor, Noelle Jacquelin, Superintendent and Rose Millar, Business Administrator/Board Secretary were also present.

Executive Session

WHEREAS, Public Law 1975, Chapter 231, known as the Open Public Meetings Act, provides that a public body may not exclude the public from any meeting to discuss any matter described therein until the public body has first adopted a Resolution; and
WHEREAS, the Board of Education of the Estell Manor School District has determined that the following items must be discussed in closed session and that the public must be excluded from said deliberations; and
WHEREAS, the Board of Education of the Estell Manor School District has determined that the subject matter of the closed discussion falls within those matters described in subsection 7b of the Open Public Meetings Act; Now, therefore, be it resolved, by the Board of Education of the Estell Manor School District, Atlantic County, state of New Jersey, that:
The Board of Education will go into closed session to discuss matters that may pertain to Legal, Privacy, Negotiations, Finance, Personnel, or Litigation. There may or may not be action taken.
Be it further resolved that the Board of Education of the Estell Manor School District will disclose to the public the subject matter of said closed discussions as soon as the matters have been resolved and the determination can be disclosed to the public.

Confidential Student Matter/H.I.B. Appeal
Negotiations
School Business Administrator renewal

MOTION: To adopt the above Resolution. Mr. Klosek Second: Ms. Seelman. Motion carried unanimously. (6:34 PM)

CLOSED SESSION

MOTION: To resume Open Public Meeting. Ms. McDonnell Second: Ms. Seelman. Motion carried unanimously. (7:49 PM)

MOTION: To affirm the Chief School Administrator's recommendation regarding HIB 2014-5. Motion Mr. Cressey Second: Mr. Kellner Unanimously approved on a roll call vote.

MOTION: To approve the renewal of the School Business Administrator's contract for the 2015-16 school year for submission to the Atlantic County Executive Superintendent for county approval with an increase of $2,600.00. Motion: Mr. Kellner Second: Ms. Seelman Unanimously approved on a roll call vote.

PARKER McCAY

Parker McCay P.A.
9000 Midlantic Drive, Suite 300
P.O. Box 5054
Mount Laurel, New Jersey 08054-5054

P: 856.596.8900
F: 856.596.9631
www.parkermccay.com
Brett E.J. Gorman, Esquire
P: 856-985-4051
F: 856-552-1427
bgorman@parkermccay.com

August 21, 2015

File No. 14743-0003

Jill Becker, Judicial Assistant
Office of Administrative Law
1601 Atlantic Avenue
Atlantic City, New Jersey 08401

Re: Brenda Burns v. Estell Manor Board of Education
OAL Docket No.: EDU 16345-14

Dear Ms. Becker:

As you are aware, this office represents the interests of Estell Manor Board of Education in the above-referenced matter. Enclosed please find a fully executed Stipulation of Settlement regarding same with my signature.

If you have any questions, please do not hesitate to contact me.

Respectfully,

BRETT E.J. GORMAN

BEJG/cb
Enclosure
cc: Jerry Tanenbaum, Esq. (w/ enclosure, via first class mail)

319-15

OAL DKT. NO. EDU 2203-15
(EDU 1621-11 ON REMAND)
AGENCY DKT. NO. 209-8/09

VIRGINIA BUSH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WARREN COUNTY TECHNICAL SCHOOL DISTRICT, WARREN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record of this matter, the proposed Settlement and Release, and the Initial Decision issued September 21, 2015 by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, it is noted that the Settlement makes reference to actions intended to be taken within 30 days of August 26, 2015. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

Subject to the foregoing, the Commissioner approves the parties' Settlement and adopts the Initial Decision as the final decision in this matter – which is hereby dismissed subject to compliance with the terms of the settlement – provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of same.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/07/15

Date of Mailing: 10/07/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2203-15
AGENCY DKT. NO. 209-8/09
ON REMAND
OAL DKT. NO. EDU 01621-11

VIRGINIA BUSH,
Petitioner,
v.
BOARD OF EDUCATION OF THE WARREN COUNTY TECHNICAL SCHOOL DISTRICT, WARREN COUNTY,
Respondent.

Ty Hyderally, Esq., for petitioner (Hyderally & Associates, attorneys)

Allan P. Dzwilewski, Esq., for respondent (Schwartz, Simon, Edelstein & Celso, attorneys)

Record Closed: September 9, 2015 Decided: September 21, 2015

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

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law on February 13, 2015 for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A.

52:14F1 to -13. A telephone conference was held on July 17, 2015 and during that time the parties advised the undersigned that a settlement had been reached. The Settlement Agreement indicating the terms of settlement was signed by the parties and forwarded to the OAL on September 9, 2015. A copy of the Settlement Agreement is attached hereto and made part hereof.

1. The parties have voluntarily agreed to the settlement as evidenced by the signature of the parties and/or signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

September 21, 2015
DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: 9-25-15

Date Mailed to Parties: SEP 25 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

sej

EXTRACT FROM THE MINUTES OF A REGULAR MEETING OF THE BOARD OF EDUCATION OF THE WARREN COUNTY TECHNICAL SCHOOL, WARREN COUNTY, NEW JERSEY AS RECORDED IN THE OFFICAL MINUTE BOOK.

RECEIVED
2015 SEP -9 A 8:23
STATE OF NEW JERSEY
OFFICE OF [illegible]

The Board of Education of the Warren County Vocational Technical School in the County of Warren, N.J., convened in Regular Session Meeting on Wednesday August 26, 2015 at 5:00 p.m. at the Warren County Technical School, Route 57, Washington, New Jersey.

The following members of the Board of Education were present: Mr. Rutledge, Mr. Roschewsk, Mr. Shotwell, and Mrs. Johnson-Demeter.

Resolution 12227-15: **Approve Settlement and Release of Virginia Bush v. Warren County Technical School District**

On the motion of Mr. Shotwell, seconded by Mr. Rutledge, RESOLVED, that this Board approves the settlement and release of the Virginia Bush V. Warren County Technical School litigation OAL Docket No. 11596-2009N/Agency Reference No. 209-8/09.

(Recommended by the Superintendent)

Exhibit: Settlement

ROLL CALL VOTE: YEAS: 4 ABSENT: Dr. Lamonte **MOTION CARRIED**

STATE OF NEW JERSEY
COUNTY OF WARREN

I, Edmund Zalewski, Secretary to the Board of Education of the Warren County Vocational-Technical School, in the County of Warren, State of New Jersey, hereby certify that the foregoing extract from the minutes of the reorganization meeting of the Board of Education of said district duly called and held on August 26, 2015, has been compared by me with the original minutes as officially recorded in the minute book of said Warren County Vocational-Technical Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education on this day of August 26, 2015.

Signature of Board Secretary

Schwartz Simon
Edelstein & Celso LLC
100 South Jefferson Road, Suite 200
Whippany, New Jersey 07981
(973) 301-0001
Attorneys for Warren County Technical
School District

RECEIVED
2015 SEP -9 A 8:23
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

Virginia Bush, Plaintiff vs. Warren County Technical School District Board of Education, Warren County Defendant.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDU 02203-2015N Agency Ref. No. 209-8/09 **SETTLEMENT AND RELEASE**

WHEREAS, the Warren County Technical School District Board of Education ("the Board") is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, Title 18A, which is entrusted with maintaining and conducting the Warren County Technical School; and

WHEREAS, Virginia Bush ("Ms. Bush") was employed by the Board as a tenured secretary; and

WHEREAS, the parties, now wishing to resolve all matters between them amicably without the need for further disputes, while achieving the goals of both parties, hereby agree and stipulate to resolve such matters;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the parties, they agree as follows:

1. Upon signature by Ms. Bush and approval by the Board at a regularly constituted Board meeting (anticipated to be on August 26, 2015), the Board will issue a check to Ms. Bush in the amount of $48,635.77. This sum is in complete and total satisfaction of any and all claims of whatever nature that Ms. Bush has or could have had against the Board. Said check will be issued and sent to Ms. Bush within 30 days of the Board's approval of the herein Settlement and Release. Upon receipt of the herein above described check, Ms. Bush will withdraw the above captioned matter with prejudice.

2. **No Admissions**

The parties agree that neither Ms. Bush's nor the Board's approval of this Agreement, constitute an admission of liability or wrongdoing by either party.

3. **Release**

In exchange for the above consideration, Ms. Bush, her heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any and all claims or rights, whether known or unknown, which they have or may have against the Board, personally and officially, individually and collectively, its past and present Board members, all officers, agents, attorneys, administrators, and employees, personally and officially, as well as their successors and assigns, including, but not limited to any and all claims for attorneys fees, back pay or front pay, any claims for emotional distress or pain and suffering, any and all claims involving tax liability stemming from this settlement; any and all claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions, Title VII of the Civil Rights Acts of 1871 and 1991, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Employee Retirement Income Security Act, the Federal Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Workers' Adjustment and Retraining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Workers' Compensation Law, the New Jersey Wage and Hour Law, the Employer-Employee Relations Act, any collective negotiations agreement, any common law claim and any and all other claims for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim. Specifically exempted from this release are any claims for health insurance continuation coverage pursuant to Consolidated Omnibus Budget Reconciliation Act (referred to hereinabove as "COBRA").

4. **Non-disparagement**

Ms. Bush and her agents and the Board and its agents shall be precluded from any and all public and private negative comment regarding each other, and each others employees and agents. Upon inquiry from any legitimate source, the Board will provide Ms. Bush's dates of employment and confirm her previous employment.

5. Both parties have freely consented to the within Agreement, as evidenced by their respective signatures below

6. Both parties have had the benefit of independent legal counsel and have been fully apprised of their rights and obligations, and have indicated their full understanding and acceptance of same, by their respective signatures below. For this purpose, Ms. Bush has consulted Ty Hyderally, Esq., and/or Jennifer Vorih, Esq.

7. **Assent to Terms**

The parties hereby acknowledges that they have entered into this Agreement with a full understanding of their rights and obligations and that they were fully informed of the implications of this Agreement by their respective attorneys, and do so without duress, of their own free will and volition.

Ms. Bush further acknowledges that she was given the opportunity to fully consider this Agreement for a period of up to twenty-one (21) days and was given seven (7) days from the execution of this document to revoke this Agreement, by delivering written notification via her attorney to Allan P. Dzwilewski, Esq., 100 South Jefferson Rd., Suite 200, Whippany, New Jersey 07981.

8. **Entire Agreement**

This Agreement represents the entire understanding of the parties.

9. **Severability**

In the event that a court or agency of competent jurisdiction shall deem any part of this Agreement to be contrary to law, then the remaining portions of the Agreement shall remain in full force and effect to the extent that they do not materially impair the consideration upon which the parties have mutually relied.

10. **Governing Law**

This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

IN WITNESS WHEREOF, the signatures and/or seals of the parties or their duly authorized representatives have been set forth on the dates indicated below:

Virginia Bush
Virginia Bush

Date: 7/26/15

WITNESS:

Catherine L. Van Dam

Date: 7/26/15

FOR THE WARREN COUTY TECHNICAL SCHOOL DISTRICT BOARD OF EDUCATION:

Ellen Johnson-Demeter
Ellen Johnson-Demeter
Board President

Date: 8/26/15

ATTEST:

Edmund Zalewski
Business Administrator/Board Secretary

Date: 8/26/15

320-15

Y.C., ON BEHALF OF MINOR CHILD, E.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the residency determination of the respondent Board that his son, E.C., was ineligible for continued enrollment in the Fair Lawn school district. Respondent's determination was based on the results of a residency investigation which indicated that E.C. was domiciled with his mother in Garfield, New Jersey. Petitioner thereafter asserted that E.C. was moving with him to a house in Fair Lawn, which is owned by petitioner's nephew. The Board sought tuition reimbursement for the period from December 8, 2014 through the end of the 2014-2015 school year.

The ALJ found, *inter alia*, that: petitioner's testimony was not credible; although petitioner argued that the house in Fair Lawn was his permanent home because he had no present intent of moving from it, Y.C.'s actions in establishing an address in Fair Lawn in December 2014 were calculated to allow E.C. to attend Fair Lawn schools; the totality of the circumstances indicates that Y.C. is not a permanent resident of Fair Lawn; petitioner purchased a house in Saddle Brook in June 2014, where his girlfriend lives and where he leaves his second vehicle; the house in Fair Lawn is a single family home owned by petitioner's nephew, who resides there with his wife and two young children; and petitioner and his son rent a single room within his nephew's house, which rental did not commence until after petitioner received notice that his son would no longer be eligible to attend Fair Lawn schools because he did not reside within the school district. The ALJ concluded that petitioner failed to demonstrate by a preponderance of the evidence that E.C. was eligible for a free education in Fair Lawn schools and, accordingly, Y.C. owes the Board tuition for the 121 school days between December 8, 2014 and the end of the school year on June 24, 2015, in the amount of $10,030.90.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion that the petitioner's son was not entitled to a free public education in Fair Lawn schools for the period in question. The Commissioner ordered petitioner to reimburse the Board for tuition in the amount of $10,030.90, representing 121 days of E.C.'s ineligible attendance in Fair Lawn schools at a cost of $82.90 per day. The petition was dismissed.

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

Issued 10/05/15

OAL DKT. NO. EDU 1447-15
AGENCY DKT. NO. 375-12/14

Y.C., ON BEHALF OF MINOR CHILD, E.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The petitioner filed exceptions which were received in the Department of Education on September 18, 2015.[2]

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner failed to sustain his burden of establishing that he was a domiciliary of Fair Lawn for the 2014-2015 school year. The Commissioner further concurs with the ALJ's conclusion that the minor child was, therefore, not entitled to a free public education in the District's schools during this time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in Fair Lawn. Although the ALJ found that the Board was entitled to reimbursement in the amount of $82.92 per day from December 8, 2014 through the remainder of the 2014-2015 school year, a

[1] The Commissioner was not provided with a transcript of the April 13, 2015 hearing at the OAL.

[2] Petitioner's exceptions were not timely filed in accordance with *N.J.A.C.* 1:1-18.4. Additionally, there was no indication that petitioner's exceptions were served upon the Board or the Administrative Law Judge. Accordingly, they were not considered by the Commissioner.

review of the record indicates that the appropriate reimbursement amount is $82.90 per day. Therefore, the Board is entitled to tuition reimbursement in the amount of $10,030.90 ($82.90 per day for 121 days), pursuant to *N.J.S.A.* 18A:38-1b.

Accordingly, the Initial Decision of the OAL – as modified herein – is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $10,030.90 for tuition costs incurred during the time period that E.C. was ineligible to attend school in Fair Lawn. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 10/05/15

Date of Mailing: 10/08/15

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01447-15
AGENCY DKT. NO. 375-12/14

Y.C. ON BEHALF OF MINOR CHILD, E.C.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,
Respondent.

Robin C. Schwartz, Esq., for petitioner (Schwartz Hunter, P.C., attorneys)

Paul H. Green, Esq., for respondent (Schenck Price Smith & King, LLP, attorneys)

Record Closed: June 28, 2015 Decided: August 19, 2015

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenges the action of the Board of Education of the Borough of Fair Lawn (Board) removing his son from the Fair Lawn School District.

By letter dated December 12, 2014, Superintendent of Fair Lawn Public Schools notified the parent(s)/legal guardian(s) of E.C. that at the December 11, 2014, Board Meeting, the Board adopted a resolution disenrolling and removing E.C. from the Fair Lawn School District. On December 29, 2014, petitioner filed a Pro Se Residency Appeal with the Department of Education. The Board filed its Answer with Separate Defenses on January 23, 2015. On January 28, 2015, the Department transmitted the case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the office, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the rules of procedure established by the Department of Education to hear and decide controversies and disputes arising under school laws, N.J.A.C. 6A:3-1.1 to -1.17. Jurisdiction is conferred under N.J.S.A. 18A:6-9. The case was filed at the Office of Administrative Law (OAL) on January 28, 2015.

The hearing was scheduled for March 16, 2015, but was adjourned at petitioner's request, due to the unavailability of a witness. The hearing was rescheduled and held on April 13, 2015. The record was left open for post-hearing submissions. The record closed on June 28, 2015.

TESTIMONY AND FACTUAL DISCUSSION

Petitioner, petitioner's nephew, A.L., petitioner's niece, D.A., and petitioner's friend, V.S., testified on behalf of petitioner. Joseph Tedeschi and Thomas Bauernschmidt testified on behalf of the Board.

Preliminary Facts

After due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following preliminary facts:

Y.C. and X.C.[1] are the parents of E.C. E.C. is presently seventeen years old, and a junior in high school. E.C.'s birthday is in November. E.C. has a provisional driver's license.

Y.C. and X.C. divorced in 2008, and E.C. and his older sister, A.C., resided primarily with X.C. In 2008, X.C. registered E.C. in Fair Lawn Public Schools, where E.C. has since attended school continuously. Included with the registration package was a portion of the settlement agreement wherein X.C. was named the parent with primary custody. In 2012, X.C. submitted documentation for a change of address to 111 Alpha Street[2] in Fair Lawn. The documentation did not include Y.C.'s information.

In 2010, Y.C. began living with his girlfriend, S.H., at 222 Beta Street[3], Ridgefield, New Jersey, which property is owned by S.H. (Ridgefield property). On June 17, 2014, Y.C. purchased a two-family home at 333 Charlie Street[4], Saddle Brook, New Jersey (Saddle Brook property) for $345,000. (P-10.) Title is held solely by Y.C., but the mortgage on the Saddle Brook property reflects Y.C. and his sister, B.Z., as borrowers. (P-11.) S.H. rented out the Ridgefield property. After some work was completed at the Saddle Brook property, Y.C. and S.H. moved into one of the apartments. Y.C.'s girlfriend continues to live at the Saddle Brook property but does not pay rent because Y.C. did not pay rent when he lived with her. The other apartment is occupied by a tenant, and Y.C.'s sister collects the rent.

Joseph Tedeschi has been employed by the Fair Lawn Board of Education as the director of student registration for approximately twelve years. His job is to insure that every student registered in Fair Lawn has provided the appropriate documentation and verifications that the student is a bona fide resident of Fair Lawn. On November 11, 2014, Tedeschi received a call from Joanne Wilson, the School Business Administrator/Board Secretary, requesting that E.C.'s residency be verified. Tedeschi pulled the documentation from August 19, 2012, wherein X.C. had submitted

[1] To avoid confusion, the initials X.C. are used herein to identify the ex-wife of Y.C., as her true initials are E.C.
[2] For confidentiality reasons, a fictitious address is used.
[3] For confidentiality reasons, a fictitious address is used.
[4] For confidentiality reasons, a fictitious address is used.

documentation that she was residing at 111 Alpha Street, and an investigation commenced.

Thomas Bauernschmidt is a private investigator employed by the Fair Lawn school district since 2012. Bauernschmidt is also the investigator for other school districts, and he was previously employed as a police officer for thirty-six years, his highest rank being chief of police. On November 11, 2014, Bauernschmidt was instructed to verify the residency of X.C. and E.C. Bauernschmidt initially observed 111 Alpha Street and determined that E.C. was not living there. On November 21, 2014, Bauernschmidt responded to 444 Delta Street[5] in Garfield, New Jersey (Garfield property), where he observed X.C.'s vehicle and a black Ford pickup truck registered to Y.C. parked in the driveway. Bauernschmidt also observed E.C. exit the home and get into the pickup truck. He followed the pickup truck to Fair Lawn High School. On November 24, 2014, Bauernschmidt returned to the Garfield property and observed E.C. exit the house, get into the black pickup truck and drive to Fair Lawn High School. On November 25, 2014, neither X.C.'s vehicle nor the pickup truck was at 111 Alpha Street.

On December 3, 2014, Tedeschi had a meeting with X.C. because he was unable to verify that she was a Fair Lawn resident. Tedeschi thereafter provided the documentation to Wilson. On December 4, 2014, Wilson sent a letter addressed to the parent/legal guardian of E.C. at 111 Alpha Street, reflecting that E.C. did not meet the criteria prescribed by law to attend the Fair Lawn Public Schools and advising that at the December 11, 2014, Board meeting application would be made to remove E.C. (R-1.) The letter further advised that a hearing should be requested by Monday, December 8, 2014. (R-1.)

On December 5, 2014, at approximately 10:45 a.m., Y.C. contacted Tedeschi's office and told Kristin Campanile that E.C. was moving in with him at 555 Echo Street[6], Fair Lawn, New Jersey. When Tedeschi received this information from Campanile on December 5, 2014, he instructed Bauernschmidt to verify residency at 555 Echo Street.

[5] For confidentiality reasons, a fictitious address is used.
[6] For confidentiality reasons, a fictitious address is used.

555 Echo Street is owned by Y.C.'s nephew, A.L., who purchased the single-family home in May 2014, and has since been residing there with his wife and two young daughters.

On December 8, 2014, after first driving past the Garfield property to verify that the pickup truck was not there, Bauernschmidt conducted surveillance of 555 Echo Street. He arrived at 6:15 a.m.; the pickup truck was not there, but A.L.'s two vehicles were parked in the driveway. He noticed activity inside the home at approximately 7:15 a.m., so he approached and knocked on the door. A.L. answered the door. Bauernschmidt identified himself and showed his badge. He told A.L. he was there to establish the residency of Y.C. and E.C. A.L. invited Bauernschmidt inside. Immediately inside the front door is a door to a flight of stairs. A.L. opened the door and asked E.C. if it was okay to come up. A.L. and Bauernschmidt went upstairs where E.C. was getting ready for school. The room contained two beds and some furniture. Bauernschmidt asked E.C. and A.L. about Y.C., and was advised that Y.C. had not slept there last night.

Bauernschmidt notified Tedeschi's office of his findings. After Tedeschi was notified that Y.C. had not slept at 555 Echo Street on December 7, 2015, Tedeschi contacted Y.C. at approximately 11:30 a.m. or 12:00 p.m. on December 8, 2014. Tedeschi explained to Y.C. that he had a problem, because despite having a lease, he had to physically occupy the home and live there, and that needed to be rectified. Y.C. told Tedeschi that he works long hours and that he had come to the school between 7:30 a.m. and 8:00 a.m. one day, but there was no one available to do the registration. Tedeschi offered to come in early to complete the registration, because it was essential that Y.C. complete and return documentation to prove he was living at 555 Echo Street. Tedeschi did not tell Y.C. about the December 11, 2014, public meeting of the Board.

On December 9, 2014, Y.C.'s truck was not at 555 Echo Street between 5:30 a.m. and 6:30 a.m. However, Bauernschmidt did observe E.C. leave the home and walk to the high school.

On December 18, 2014, at approximately 11:00 p.m., Bauernschmidt did not observe Y.C.'s pickup truck at the Saddle Brook property. On December 19, 2014, at 4:15 a.m., Bauernschmidt observed Y.C.'s pickup truck in the driveway of 555 Echo Street. The pickup was remotely started at 5:18 a.m., idled in the driveway, and then shut off at 5:35 a.m. At 5:38 a.m., Y.C. exited the home and left in the pickup truck. (P-14.)

On December 18, 2014, Y.C. went to the school with registration forms and residency documentation. Tedeschi advised him that he was unable to accept the registration because the matter had gone before the Board and Y.C. would have to take it to Wilson at the Board office. Y.C. went to see Wilson, but was told the Board had already decided.

On December 19, 2014, Bauernschmidt arrived at 555 Echo Street at 4:15 a.m. Y.C.'s pickup truck was in the driveway. At approximately 5:45 a.m., Y.C. got in the pickup truck and drove away. On December 23, 2014, Bauernschmidt went to the Saddle Brook property and observed two Mercedes Benz in the driveway; one was covered. At some point that morning, Bauernschmidt observed Y.C.'s pickup truck parked in the driveway of 555 Echo Street. (P-13.)

On January 20, 2015 at 5:45 a.m., the pickup truck was not at the Saddle Brook property. At 6:00 a.m., A.L.'s two vehicles were parked side-by-side at 555 Echo Street and tire tracks were observed crossing the sidewalk in front of the home. On February 23, 2015 at 6:00 a.m., Bauernschmidt observed Y.C.'s pickup in the driveway at 555 Echo Street. At 7:45 a.m., both Y.C. and E.C. exited the home and left in the pickup truck. E.C. was dropped off at school. (P-15.) On March 12, 2015, at 6:20 a.m., Y.C.'s pickup truck was in the driveway of 555 Echo Street with A.L.'s two vehicles. When Bauernschmidt returned at 7:40 a.m., the pickup truck was gone. On March 13, 2015, at 6:30 a.m., Y.C.'s pickup truck was not at 555 Echo Street. A

An undated, unentered Order for Change of Custody (Custody Order), signed by Y.C. and X.C. reflects that the parties' Separation and Property Settlement Agreement

was amended to reflect that Y.C. would be the parent of primary residence for E.C., and X.C. would be the parent of alternate residence. (P-1.) The Custody Order further reflects that Y.C. was not seeking the payment of child support. (P-1.)

A Basic Rental Agreement or Residence Lease, dated December 1, 2014 (Lease), for the property located at 555 Echo Street in Fair Lawn, New Jersey reflects the tenant/lessee as Y.C. and landlord/lessor as A.L. (P-2.) The lease further reflects that the rent is $1,000 per month, water and utilities are paid by the landlord, and that the occupants are Y.C. and E.C. (P-2.) The PSE&G bill for gas and electric at 555 Echo Street is presently in Y.C.'s name. (P-3.)

Y.C.'S driver's license, issued on December 6, 2014, reflects 555 Echo Street. (P-4.) The registration for both of Y.C.'s cars, a Mercedes and a Ford pickup truck, reflect 555 Echo Street. (P-5.) A duplicate vehicle registration for the Ford reflects 17-555 Echo Street. (P-5.) A United States Postal Service (USPS) change of address confirmation letter reflects that Y.C.'s mail will be forwarded from the Saddle Brook property to 555 Echo Street, effective December 1, 2014. A letter from Chase, dated December 20, 2014, and addressed to 555 Echo Street, reflects that it is confirming an address change. (P-7.) A Chase statement, for the period November 14, 2014, through February 10, 2015, reflects 555 Echo Street. (P-8.) Y.C.'s check #117, dated January 1, 2015, payable to A.L., in the amount of $1,000 with the notation "rent" was posted on January 22, 2015. (P-9.) Y.C.'s check #118, dated February 1, 2015, payable to A.L., in the amount of $1,000 with the notation "January rent" was posted on February 6, 2015. (P-9.) Y.C.'s check #119, dated March 3, 2015, payable to A.L., in the amount of $1,000 with the notation "rent" was posted on March 4, 2015. (P-9.)

The 2013-2014 per pupil cost for grades 9-12 was $14,536. (R-2.)

Testimony

Y.C.

Y.C.'s divorce from X.C. was not smooth, and X.C. does not speak with Y.C. X.C. never keeps Y.C. apprised of any issues with the children. All communication with X.C. is through E.C., but E.C. tries not to give information back and forth between the parents. Y.C. rarely sees A.C., who presently attends college and does more with her mother.

Previously, Y.C. had visitation with E.C. at school activities, every Wednesday, and every other weekend. Y.C. went to teacher meetings and went on the internet to get email notifications from school for activities and assignments. Before E.C. got his driver's license, Y.C. would pick him up and drop him off. Y.C. had previously picked up E.C. in Fair Lawn and in Garfield at E.C.'s grandparent's house. After E.C. got his driver's license, Y.C. encouraged him to be independent and gave E.C. his pickup truck. Many times E.C. drove himself.

Y.C. decided to move from Ridgefield to Fair Lawn long before December 2014. E.C.'s participation in Fair Lawn schools was Y.C.'s introduction to Fair Lawn. Since 2008, Y.C. has been going back and forth to Fair Lawn. Y.C. started to like it more and more for its location, culture, population, schools, and everything around it. E.C. grew up there and Y.C. thought it was a good town to live in. Y.C. had helped A.L. find his home in Fair Lawn. Y.C. decided to live in Fair Lawn before he had any information about X.C. moving out of Fair Lawn. Y.C. was never notified that X.C. intended to move or that she had moved. He did not know how long X.C. lived in Fair Lawn or when she moved. He suggested that maybe X.C. moved out of Fair Lawn when X.C. saw that Y.C. was moving to Fair Lawn.

Y.C. wanted to make sure the environment he chose to live in was close to school and suitable for his need; there are apartments, but they are not always attractive. In November 2014, Y.C. had a conversation with A.L. about moving to Fair

Lawn. Y.C. has been living with A.L. at 555 Echo Street, and thinks the first time he slept there was on December 4, 2014. E.C. came to live with Y.C. the first week of December 2014. When asked how it came about that E.C. went to live with Y.C., Y.C. testified that it has been an ongoing process. Y.C. had agreed that it was better for his son to reside with X.C. while he was a baby, because she could provide more of everyday chores, like cleaning and feeding. Now, as E.C. grows stronger and is more able to do things, Y.C. feels that E.C. likes Y.C. with him. Y.C. goes to sports events and teacher meetings. The kind of encouragement that he tries to give E.C. has made E.C. very close with Y.C.

Y.C. found out about the residency issue at the time he was moving into Fair Lawn. At the end of the first week of December 2014, E.C. verbally told Y.C. that the school has a problem with him, and thinks X.C. is leaving and not going to stay in Fair Lawn. Y.C. told E.C. that it did not matter and that he would call the school to change his address. Around December 3, 2015, Y.C. tried to go to the school to complete a change of address. He went at 7:30 a.m., but the doors did not open until 8:30 a.m. Y.C. was not in a rush and thought he would stop by another day because he thought he had thirty days to notify the school of a change of address. Y.C. later testified that when E.C. told him there was a problem, Y.C. told E.C. to contact the school and tell the school that he had moved and was living with Y.C.

During the weekend of December 5 to December 7, 2014, Y.C. had stayed at 555 Echo Street on Thursday night and Friday night, but did not sleep there on Sunday night. He went to his girlfriend's apartment at the Saddle Brook property, spent time there, and felt it was not necessary to go home. On December 8, 2014, Y.C. spoke to Tedeschi about it. He was not aware that Tedeschi had recorded the conversation. Y.C. started a polite conversation with Tedeschi, and tried to tell him to change the address for E.C. Tedeschi was rude, and his tone and interruptions caused a wrong turn in the conversation. Tedeschi was pressuring Y.C. and trying to make him out to be a liar. Tedeschi told him they would prove he is not living in Fair Lawn.

Since December 8, 2014, Y.C. sleeps in Fair Lawn every Sunday night. He makes sure he goes home because E.C. has to be ready for school on Monday. Y.C.'s

schedule is very inconsistent. If he has a chance, Y.C. drives E.C. to school on Monday. Y.C. prepares E.C. for school and checks his assignments on Sunday night. There are nights E.C. does not sleep in Fair Lawn. E.C. misses his mother, and on Saturday or Sunday morning he is allowed to go to X.C. When E.C. is with X.C., Y.C. goes to family or to the Saddle Brook property. If Y.C. sleeps at a family member's home or his girlfriend's home at the Saddle Brook property, it is his intention to return to Fair Lawn because that is where all of his necessities and things are located.

Y.C. could not afford to buy a single-family home, so he and his sister bought the two-family in Saddle Brook together. They believed the market was going up and it was suitable for both of them. Y.C. is the sole person on the deed, so when the time comes to sell they do not need two parties to sign. Y.C.'s girlfriend has been residing in the two-bedroom apartment at the Saddle Brook property since October 2014, or maybe earlier. She rented out her home in Ridgefield. In November 2014, Y.C. lived in the Saddle Brook property with his girlfriend. Y.C.'s girlfriend does not have any children, does not want any children, and does not want any children around. She is okay with E.C. visiting and spending a few hours, but not with him living there full-time. She said that at the beginning of their relationship and Y.C. accepted that. It was never Y.C.'s intention to live in the Saddle Brook property with E.C. Y.C. likes Fair Lawn and really wants to buy something there if he can. Y.C. moved into Fair Lawn in December 2014. Y.C. continues to see his girlfriend in Saddle Brook.

In Fair Lawn, Y.C. and E.C. have a huge room with two desks, dressers, and everything else on the second floor. They share the kitchen and living room television. He has a good relationship with his nephew and his nephew's wife, and he does not spend much time home due to his job. They share common areas. Y.C. purchases his own food. He has his own section where he places his goods. Y.C. takes E.C. out to eat, and E.C. knows how to make himself a sandwich. They can have a meal together. Sometimes when Y.C. gets home late, if his nephew's wife has cooked something, she will offer him a dish. Y.C. pays the PSE&G bill at 555 Echo Street. There is only one meter. Y.C. thought he had spent a lesser amount for gas and electric, so he and A.L. had a conversation about it and agreed that it was better for Y.C. to have control over the utility bill.

Y.C. owns a small business and a pickup truck. He is contracted by another company to handle overflow with his truck, mostly for seasonal and holiday work to supply stores with merchandise. December 2014 was a crazy work time because that was the Christmas holiday. He left at 5:00 a.m. and sometimes did not return until 9:00 p.m., 10:00 p.m., or 11:00 p.m. He had no time to deal with the change of address for E.C.

Y.C. also has an old Mercedes convertible that is paid off. He typically uses it seasonally in the summer time because it is very low and not good in snow. He keeps it parked at Saddle Brook property with a snow cover on it.

Y.C. never knew that there was going to be a meeting on December 11, 2014, or that he had a right as a parent to attend the meeting. Had he attended, an appeal would not have been necessary. There is no other place where he and E.C. can live. If E.C. is expelled, he will have to stay home and watch TV all day because Y.C. has no money to send him to another school. Y.C. lives in Fair Lawn and that is where E.C. should go to school.

A.L.

Since December 2014, Y.C. and E.C. have been residing with him at 555 Echo Street. Sometime in November 2014, Y.C. came to A.L. about moving to Fair Lawn. When Y.C. brought up renting, A.L. told Y.C. he could rent from him, even though it was not a two-family house. A.L. and his wife were both okay with the arrangement. A.L. proposed the living arrangement, and he did not know that E.C. had any residency issue until late December. A.L. also testified that Tedeschi stopped by his home in the first week after Y.C. and E.C. moved in, but he still did not understand if there was a problem or not.

In January 2014, A.L. started looking to purchase his first home. He was looking in all different towns, but Y.C. specifically compared other towns with Fair Lawn and convinced A.L. that Fair Lawn was one of the best options in Bergen County. Y.C.

participated in searching for the house until April 2014 when A.L. made an offer on his current home. His realtor and the seller's realtor know that Y.C. helped him in searching for a home. Since then A.L. feels that it is Y.C.'s house to come to any time and he is happy that Y.C. helped him make that choice. Y.C. always wanted to buy in Fair Lawn, but bought the Saddle Brook property because he could not afford Fair Lawn.

Y.C. and E.C. started moving in on December 1, 2014. A.L. obtained a security deposit and first month's rent from Y.C. A.L. requested that the security deposit and first month's rent be in cash.

With respect to the utilities, A.L. had become familiar with the average of his consumption of electricity, so he thought that it would not add much for Y.C. and E.C. to live there and he could absorb that in the rent. However, it was wintertime, and their preference was different from A.L. as far as how warm they wanted to keep the environment. Y.C. told A.L. that he wanted to participate in paying the electric because it was becoming too expensive. They agreed that they would pay the electric bill together. To decide how they were going to split the payments, A.L. suggested that he knew from previous bills how much his bills were averaging monthly, so anything beyond that would be due to Y.C. and E.C. A.L. gave Y.C. responsibility to pay the bill and Y.C. could control the temperature of the house and keep it as high as he wanted and A.L. would just pay what he had been paying before. A.L. moved the bill into Y.C.'s name in December 2014. Y.C. pays the bill and A.L. pays Y.C. what he used to pay before. He changed the bill to Y.C.'s name because his time is valuable and rather than receive the monthly bill, do the calculations, and collect the money, Y.C. does it. The bill changed because of Y.C. and E.C., so Y.C. deals with it. The heat is one zone. The temperature is now warmer than A.L. had kept it.

A.L.'s wife continues to shop and cook meals for his family. Y.C. purchases his own groceries and has his own dedicated space in the refrigerator and kitchen. A.L. and his wife always invite Y.C. and E.C. to participate in meals if they are home. A.L. has a good relationship with E.C., and approximately 1.5 years ago he tutored E.C. for

exams. A.L. encourages E.C. to spend time with his family in the common areas, even though E.C. has a room upstairs. Y.C. and E.C. do spend time in the common areas.

A.L. and his wife go to bed by 9:00 p.m. because their daughters get up early. If Y.C. arrives at the home before 9:00 p.m. they sometimes spend time together in common areas. Sometimes E.C. is in common areas. A.L. and Y.C. do not have the same schedule, so A.L. does not really know when Y.C. comes and goes. Sometimes Y.C. has very busy days, but occasionally sees Y.C. leaving the house as early as 5:00 a.m. or if A.L. is taking out the garbage late at night, he notices that Y.C. is not yet home. He has sometimes called Y.C. and Y.C. advises he is still at work.

A.L. noticed that Y.C. was there when he woke up on Saturday, December 6, 2014, and they had coffee together. That is the first night A.L. can say for certain that Y.C. was there, though Y.C. and E.C. each have had a key since December 1, 2014. A.L. would not know if Y.C. was there prior.

On December 8, 2014, a school investigator with a badge knocked on his door at 7:00 a.m., and said he was there to verify that Y.C. and E.C. lived there. A.L. was surprised. A.L. told him they were in the process of moving there. He asked to see the area where they live, so A.L. took him upstairs to the room. The beds were already there and A.L. told him that more furniture was coming. After that day he did become aware that E.C. was having a situation in school, and he did notice that there was a car in the street that would be there for several hours. The first time, it did not strike him as something wrong, but after it happened several times he thought maybe someone was observing them. At times Y.C. left early, but at least one time Y.C. was there, in January or February, when the car was outside.

A few hours after A.L. let the investigator in, his wife called him and said that someone came by again. She told him what A.L. had previously said and that they were in the process of moving in. She was asked if Y.C. had slept there that night, and she told them he had not. A.L. did not know any further specifics, because that is all his wife told him. Since December 8, 2014, nobody has come to his home again.

A.L. testified that most nights, five to six per week, Y.C. is there and that only maybe on Saturday nights he does not sleep there. There is no on-street parking, so his agreement with Y.C. was that he could only park one car at his home. Y.C. owns more than one car. Since Y.C. always leaves early, both of Y.C.'s cars are parked forward in the driveway.

A.L. testified that he had known Y.C. to live in Ridgefield, and A.L.'s grandparents live in Garfield. He did not know that Y.C. had at any point moved to Saddle Brook.

A.L. runs into Y.C. maybe two to three times per week because of their schedules. Sometimes there is already food cooked for E.C. Sometimes A.L. has seen Y.C. cook. Sometimes E.C. prepares his own food, or sometimes he goes out with school friends for pizza.

D.A.

D.A.'s father is the brother of Y.C. and of A.L.'s mother, so E.C. and A.L. are her cousins. She knows Y.C. lives in Fair Lawn because she visited Y.C. there on December 10, 2014. She also saw Y.C. there on December 26, 2014, February 10, 2015, and April 10, 2015. A.L. was also there on December 26, 2014. D.A. usually calls ahead, but sometimes just stops by. In December, she just stopped by. She once visited Y.C. in Saddle Brook with her mother, she believed near the end of October 2014, but the Saddle Brook property was still under construction and she did not believe Y.C. was living there at that time. She just went there to tell Y.C. congratulations on the house.

On April 10, 2015, she called ahead of time. She had not seen Y.C. and A.L. in some time. A.L. was still awake. Most of the time when she has gone there, A.L. has been sleeping. She had previously visited A.L. in Fair Lawn before Y.C. was living there, and she had visited Y.C. in Ridgefield.

V.S.

V.S. is a longtime friend of Y.C. He knows Y.C. is living in Fair Lawn, because he has picked Y.C. up in Fair Lawn a couple of times when Y.C. invited V.S. to go out for coffee. V.S. was out of the country for approximately one month beginning in October 2014. The first time V.S. went for coffee was in the last week of December 2014. V.S.'s wife was working in Fair Lawn, close to Y.C. V.S. went for coffee other times after that, most recently two or three days ago. He and Y.C. got coffee and talked. Maybe two or three times per month he invited Y.C. to go for coffee. Y.C. would tell him he was at his home in Fair Lawn and V.S. would pick him up. They went for coffee around 10:00 a.m. to 11:00 a.m., while V.S.'s wife was at work. V.S.'s wife is afraid to drive in the snow, so he would drop her off and get coffee with Y.C. V.S. has been inside the Fair Lawn home twice; once to see the second floor, and the other for coffee inside the home. V.S. had been to Y.C.'s girlfriend's home in Ridgefield once.

Joseph Tedeschi

Tedeschi denied that he went to 555 Echo Street to pressure the landlord, and testified that he went there to hand-deliver the landlord form letter and only spoke to A.L.'s wife.

Thomas Bauernschmidt

When at A.L.'s home on December 8, 2015, Bauernschmidt asked E.C. if Y.C. had slept there last night. E.C. said that Y.C. lived there with him, but that Y.C. had not slept there last night. Bauernschmidt asked A.L. the same question and A.L. said that Y.C. had started a big job in Saddle Brook and spends a lot of time there and was in the process of moving in. Bauernschmidt told A.L. that he would have to sign an affidavit and that it is taken very seriously. A.L. said he is just doing this for a friend so that his son can remain in school. Bauernschmidt told him that is a red flag, and that he would be back periodically to confirm Y.C. is residing there.

Factual Discussion

A credibility determination requires an "over-all evaluation of the testimony in light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). For "testimony to be believed, it must not only proceed from the mouth of a credible witness, but must be credible in itself." Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954). It must be "such as the common experience and observation of mankind can approve as probable in the circumstances." Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961). "'The interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.) (citation omitted), certif. denied, 10 N.J. 316 (1952).

Although Y.C. denies knowledge of the residency issue prior to the first week of December 2014, which is when he testified that E.C. verbally told him about it, the timing and circumstances of his move to Fair Lawn suggest otherwise. E.C. had not lived with Y.C. since 2008 and he initially testified that E.C. was "around 17 to 18 year[s] old." The record reflects that X.C. had moved out of Fair Lawn prior to November 11, 2014, when the investigation commenced, and it is not credible that Y.C. had no knowledge of where E.C. was living. Additionally, Y.C. testified that he thought he had thirty days to complete a change of address, yet also testified that he attempted to complete the change of address on December 3, 2014, before he even began sleeping in Fair Lawn.

Since 2010, Y.C. had been residing in Ridgefield with his girlfriend, and in June 2014, he purchased the Saddle Brook property. Y.C.'s girlfriend rented out her home in Ridgefield and the couple moved into an apartment at the Saddle Brook property. Y.C. changed his address to Saddle Brook, as evidenced by the United States Postal Service change of address confirmation. Y.C.'s other vehicle remains parked at the Saddle Brook property. Despite that Y.C.'s girlfriend does not have children, want children, or want E.C. to live with them, she remains Y.C.'s girlfriend and continues to live rent-free in the Saddle Brook property they both had moved into.

Further, 555 Echo Street is owned by Y.C.'s nephew. The home is a single-family home, now purportedly shared by Y.C., E.C., his nephew, nephew's wife, and their two children. Although Y.C. testified that not all apartments in Fair Lawn are nice, his living arrangements with his nephew suggest that Y.C. is attempting to establish residency in Fair Lawn without actually residing in Fair Lawn.

The record suggests that until becoming aware of the residency issue, Y.C. had no intention of living in Fair Lawn. Rather, the testimony and documents reflect that the actions taken by Y.C. in December 2014 were calculated to make it appear as though he resides in Fair Lawn when he does not. Specifically, despite having recently moved into the Saddle Brook property he purchased, he obtained a lease from his nephew, changed the address for his driver's license, automobile registrations, mail, Chase account, and had the PSE&G bill changed to his name. However, there is no evidence that he was moving to Fair Lawn in advance of December 2014. His driver's license was changed on December 6, 2014; the Custody Order was not signed until March 18, 2015; the lease was dated December 1, 2014, but the first record of a cashed check was not until January 22, 2015.

Additionally, the explanation as to how the utility bill came to be put in Y.C.'s name, when the lease provides for the landlord to pay the utilities, was not credible and further suggests that it was calculated to obtain additional documentation at 555 Echo Street with Y.C.'s name on it. If A.L.'s utility had bill increased from what it had been, though it is noted that A.L. had only been residing there since April 2014, Y.C. could easily have just paid A.L. the difference, rather than pay the entire bill and then be reimbursed by A.L. Further, given Y.C.'s testimony that he works long hours and is rarely at 555 Echo Street, it seems unlikely that A.L. would leave the thermostat as a temperature selected by Y.C. or that the bill would have increased more than nominally.

Y.C. testified that he leaves for work early, before Bauernschmidt begins his surveillance, but there were days when Y.C.'s pickup truck was at 555 Echo Street past 7:30 a.m. Y.C. also testified that he sometimes stays with family or his girlfriend. There is no dispute that during some of the investigative checks, Y.C. and/or E.C. were at 555

Echo Street and during some checks they were not. However, Y.C. was aware that there was an active investigation, and from the evidence, his actions and presence at 555 Echo Street again appear contrived to try to establish residency.

Petitioner's testimony did not hang together with the other evidence, and was not probable or credible under the circumstances. Accordingly, I **FIND** that Fair Lawn is not Y.C.'s permanent home.

CONCLUSIONS OF LAW

Per the Superintendent's December 12, 2014, letter, the Board voted to disenroll and remove E.C. from the Fair Lawn School District pursuant to N.J.S.A. 18A:38-1 for failure to meet the residency requirements.

Public schools are free to persons over five and under twenty years of age who are domiciled within the school district or are kept in the home of another person domiciled within the school district and supported by such other person gratis as if he were such other person's own child. N.J.S.A. 18A:38-1(a). If the school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district and the child is not kept in the home of another person domiciled within the school district and supported by such person gratis as if the child was the person's own child, the superintendent or administrative principal may apply to the board of education for the removal of the child. N.J.S.A. 18A:38-1(b)(2). The parent or guardian is entitled to a hearing before the board and, if in the judgment of the board, the parent or guardian is not domiciled within the district or the child is not kept in the home of another person domiciled within the school district and supported gratis, the board may order the transfer or removal of the child from school. Ibid. The parent or guardian may contest the board's decision before the Commissioner within twenty-one days of the date of the decision and is entitled to an expedited hearing. Ibid. The parent or guardian has the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in the statute. Ibid.

Pursuant to N.J.A.C. 6A:22-3.1(a)(1), a student is eligible to attend a school district if he or she is domiciled within the school district, and a student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district.

> "Domicile" is defined as "the place where [a person] has his [or her] true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has an intention of returning." T.B.W. ex rel. A.W. v. Bd. of Educ. of the Twp. of Belleville, 1998 N.J. AGEN LEXIS 122, Agency Dkt. No. I 159-5/96, 1998 WL 668678 (N. J. Adm. June 18, 1998). As the court noted in Collins v. Yancey, 55 N.J. Super. 514, 520-21 (Law Div. 1959), a person may have several residences or places of abode, but only one domicile at a time. Ibid.
>
> [D.L. v. Bd. of Educ. of Princeton Reg'l Sch. Dist., 366 N.J. Super. 269, 273-74 (App. Div. 2004).]

Petitioner argues that a home is permanent when the parent intends to return to it when absent and has no present intent of moving from it. However, Y.C.'s actions were calculated to allow E.C. to attend the Fair Lawn Public Schools and he failed to establish that Fair Lawn is a true, fixed permanent home.

Certainly, a tenant may be domiciled in the municipality where he rents, notwithstanding that he owns real property elsewhere, and living with a relative does not in and of itself make the living arrangements suspect. However, in this case, the testimony presented by petitioner was not probable or credible, and the totality of the circumstances reflects that Y.C. is not a resident of Fair Lawn. Y.C. had been living for four years with his girlfriend in Ridgefield, then moved with her into the Saddle Brook property in 2014; she continues to live at the Saddle Brook property rent-free while Y.C. visits and stays over; Y.C. leaves his second vehicle at the Saddle Brook property; Y.C. failed to provide any documentation that he had at any point prior to December 2014 requested a change in the custody arrangement, which change does not appear to have affected child support or any other terms of the Separation and Property Settlement Agreement; and the living arrangement at 555 Echo Street is a room in his nephew's single-family home where his nephew also resides with his wife and two young children.

Y.C. did not purchase a home in Fair Lawn in 2014, and he remains with a girlfriend who does not want E.C. to reside with them.

Understandably, Y.C. wants his son to continue in the school system where he has been educated and involved in athletics since 2008. However, I **CONCLUDE** that petitioner has failed in his burden to establish by a preponderance of the evidence that he is domiciled in Fair Lawn. A.L.'s home is not Y.C.'s true, fixed permanent home, and there was no credible evidence that he would have any intention of making Fair Lawn his permanent home absent the pending residency dispute. Accordingly, I further **CONCLUDE** that petitioner has failed to demonstrate by a preponderance of the evidence that E.C. was eligible for a free education in Fair Lawn.

Tuition is sought by the Board for the period of December 8, 2014, through the end of the 2014-2015 school year. Where, as here, the evidence does not support the claims of the parent or guardian, the Commissioner of Education is authorized to assess tuition prorated to the time of the student's ineligible attendance in the schools of the district, and tuition is computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance. N.J.S.A. 18A:38-1(b)(2). There were 121 school days from December 8, 2015, through and including the last day of school, June 24, 2015. The applicable per pupil cost for the 2014-2015 school year was $14,922, or $82.92 per day. 121 days at $82.92 per day totals $10,030.90.

In view of the foregoing, I **CONCLUDE** that petitioner should pay to the Board tuition in the amount of $10,030.90 for E.C.'s period of ineligible attendance during the 2014-2015 school year. I further **CONCLUDE** that E.C. should be disenrolled from the Fair Lawn School District.

ORDER

It is **ORDERED** that petitioner's Petition of Appeal be and hereby is **DENIED**.

It is further **ORDERED** that Y.C. pay to the Board tuition in the amount of **$10,030.90** for the period of ineligible attendance of E.C. in the Fair Lawn Public School District during the 2014-2015 school year and E.C. should be disenrolled from the Fair Lawn School District.

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

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

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

8/19/2015

DATE

KELLY J. KIRK, ALJ

Date Received at Agency: August 19, 2015

Date Mailed to Parties: August 19, 2015

db

APPENDIX

Witnesses

For Petitioner:

Y.C.

A.L.

D.A.

V.S.

For Respondent:

Joseph Tedeschi

Thomas Bauernschmidt

Exhibits

For Petitioner:

P-1 Order for Change of Custody

P-2 Lease

P-3 PSE&G Statement

P-4 Driver's License

P-5 Insurance Identification Cards

P-6 USPS Official Change of Address Confirmation Letter

P-7 Chase Letter, dated December 20, 2014

P-8 Chase Statement, dated February 10, 2015

P-9 Rent Checks

P-10 Saddle Brook Deed

P-11 Mortgage

P-12 (Not in Evidence)

P-13 Email from Bauernschmidt to Campanile, dated January 14, 2015

P-14 Letter from Bauernschmidt to Tedeschi, dated December 19, 2014

P-15 Letter from Bauernschmidt to Tedeschi, dated February 24, 2015

P-16 Email from Bauernschmidt to Tedeschi, dated December 8, 2014

For Respondent:

R-1 Letter from Fair Lawn Public Schools to Parent(s), dated December 4, 2014

R-2 2013-2014 Per Pupil Costs - Tuition

321-15

321-15F

OAL DKT. NO. EDU 11645-15
AGENCY DKT. NO. 212-8/15

JANENE RODRIGUEZ,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
v.	:	DECISION ON
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This case shall proceed at the OAL to a plenary hearing – or such other proceedings as the ALJ and the parties deem necessary – to resolve the underlying claim on the merits.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/08/15

Date of Mailing: 10/08/15

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

EMERGENCY ORDER
OAL DKT. NO. EDU 11645-15
AGENCY DKT. NO. 212-8/15

JANENE RODRIGUEZ,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,
Respondent.

Luretha M. Stribling, Esq., for petitioner

George F. Hendricks, Esq., for respondent (Hendricks & Hendricks, Attorneys)

BEFORE **JESSE H. STRAUSS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On August 6, 2015, Janine Rodriguez filed a Petition with the Commissioner of Education contending that her transfer from the position of Principal of New Brunswick High School to the position of Principal of McKinley Community School, a Kindergarten through Eighth Grade school, was a demotion with the potential of a $10,000 reduction in pay in violation of the Tenure Statute and TEACH NJ.

On August 6, 2015,, the Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the emergent relief application to the Office of Administrative Law (OAL), pursuant to N.J.S.A. 52:14B-1 to –15 and

N.J.S.A. 52:14F-1 to –13, for determination as a contested case. Counsel for petitioner requested an adjournment of the August 17, 2015, hearing date because she was scheduled to begin a trial in Superior Court on that date. The matter was rescheduled for and heard on September 24, 2015.

DISCUSSION

Petitioner asserts the following:

The New Brunswick Board of Education (Board or District) hired her into the position of Vice Principal at New Brunswick High School in 2010, where she remained for two years. She was promoted to Principal at the High School in 2012 and became tenured as a Principal. She has received satisfactory observations and evaluations have been designated as "effective." As Vice Principal and Principal, petitioner has made significant improvements in the lives of students and staff as evidenced by an increased student graduation rate; the elimination of a violent school designation; a rise in the attendance rate; and an improvement in HSPA test scores. After Aubrey Johnson replaced retiring Superintendent of Schools, Richard Kaplan, on July 1, 2015, Johnson transferred petitioner to the McKinley Community elementary school effective August 1, 2015, without her consent. Petitioner contends that she is tenured and trained as a high school Principal and has no tenure or experience to work in the position of elementary school Principal; the transfer is viewed as a demotion; and there is a potential for a reduction in pay since high school Principals are paid more. Petitioner argues that an employee who has tenure and has received an effective evaluation cannot be transferred to a different position or demoted unless there is cause. Petitioner demands that the Board immediately reinstate her to her position as Principal of its High School and return her to the High School.

Respondent asserts the following:

The Board has the authority to transfer a Principal from one Principal's assignment to another Principal's assignment so long as there is no reduction in salary. No disciplinary grounds or pre-transfer due process is required. It does not matter

whether petitioner was a good or bad administrator or whether she did anything wrong. A Board may base the transfer solely upon its determination that an individual school may benefit by such transfer. Contrary to petitioner's fear of a reduction in salary, the Board has not reduced her salary. Salary and benefits remain the same. Johnson transferred four Principals within the District as lateral moves which the Board determined to be in the best interest of the District's students. Petitioner holds the tenured position of Principal, and there is no separate title of "High School Principal."

For a request for interim relief or stay, N.J.A.C. 6A:3-1.6 requires as follows:

(b) A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

These four standards are in the conjunctive, and petitioner must satisfy all requirements in order to be entitled to the requested relief.

I have heard the arguments of all parties and read their submissions. I **CONCLUDE** that petitioner is not entitled to emergent relief in that she has not satisfied all of the four requirements.

The seminal case bearing on the issues here, cited by neither party, is Williams v. Bd. of Educ. of Plainfield, 176 N.J. Super. 154 (App. Div. 1980), certif. denied, 87 N.J. 306 (1981). A tenured high school Principal challenged her transfer to a position as an

elementary school Principal without a reduction of salary. The Court affirmed the decision of the State Board of Education that

> ". . . petitioner's transfer to the elementary school principalship was a proper transfer to a position of equivalent rank and could occur without appellant's consent. As long as the salary is not reduced, a transfer from the position of high school principal to that of elementary school principal is not a demotion; the certification required is the same, tenure can be acquired in both positions and the duties to be performed are of no less importance from an educational standpoint."
> [Id. at 158]

The services of a Principal, which requires the holding of an appropriate certification issued by the board of examiners, shall be under tenure during good behavior and efficiency, and he/she shall not be dismissed or reduced in compensation except for certain enumerated reasons. N.J.S.A. 18A:28-5. Tenure is acquired after employment in a given position for the period of time specified in the statute. Ibid. Petitioner erroneously tries to make a distinction between the certificate of a high school Principal and the certificate of an elementary school Principal. There is but a single certificate for the position of Principal. N.J.A.C. 6A:9B-11.5.

It is undisputed that petitioner is tenured in the title of Principal and remains so after her transfer to McKinley. Her reliance on N.J.S.A. 18A:28-6 for the proposition that she was transferred to a different position without her consent is misplaced. She was simply transferred to a different location rather than to a different position for which consent is not statutorily required. Neither her tenure nor her certified position changed. She is wrong to characterize her tenure as just in the position of high school Principal or that her transfer is a demotion. Her tenure is in the position of Principal.

Additionally, although petitioner expressed a concern that her salary would be reduced because the Collective Negotiations Agreement for administrators provides for a $10,000 differential in the salaries of high school and elementary school principals, representatives of the Board have certified that there was no reduction in salary as a result of petitioner's transfer.

Based on Williams, the law is settled but in a manner that is contrary to the position of petitioner. Petitioner does not have a likelihood of success on the merits, since her transfer was merely to another school rather than to another position requiring a different certificate and since there has been no reduction in pay and no adverse effect on her tenure. For the same reason, petitioner's reliance on Sanchez v. Bd. of Educ. of the City of Camden, EDU 23-03, State Bd. of Educ. (June 4, 2003), http://nj.law.rutgers.edu/collection/oal/ is misplaced. The State Board of Education in that case noted that the petitioner was entitled under the tenure laws to be placed in an assignment within her tenured position of "Principal," but that the Camden Board had improperly transferred her to the position of "Vice Principal" which is a separately tenurable position. Also, without a reduction of pay associated with the recent transfer of school locations, concern regarding future salary increases or adjustments does not change the calculus. The Court in Williams was very clear that, under applicable statutes, " . . . there is no suggestion much less an express statement, that future salary increases or adjustments are to be considered in determining the validity of a transfer which is otherwise proper. N.J.S.A. 18A:28-5 merely prohibits 'reduc[tion] in compensation' except for the reasons stated and in the manner prescribed therein." Williams, supra, 176 N.J. Super. 154 at 162. I am unconvinced that any aspect of TEACHNJ (N.J.S.A. 18A:6-118 et. seq.) has altered N.J.S.A. 18A:28-5 or the case law thereunder with regard to the issues in this matter.

There is no harm, no less irreparable harm, since petitioner's tenure has not been affected or jeopardized, nor has there been any loss of pay. I also disagree that her reputation is irreparably harmed because the transfer is viewed as a demotion. As stressed in Williams the duties to be performed in the elementary school are of no less importance from an educational standpoint. Finally, the equities and interests of the parties do not balance in petitioner's favor. The Board has exercised its discretion to transfer petitioner, while she maintains her same position, to a location which, within its discretion, best meets the needs of the children of the District.

ORDER

It is hereby **ORDERED** that petitioner's application for emergent relief be **DENIED.**

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

September 24, 2015

DATE

Jesse H. Strauss

JESSE H. STRAUSS, ALJ

id

322-15

322-15LM

State of New Jersey

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

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

DAVID C. HESPE
Commissioner

October 8, 2015

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Re: *Darcy Kolodziej v. Board of Education of the Southern Regional High School District, Ocean County, Agency Dkt. No. 188-7/07.*

Dear Counsel,

I have reviewed the materials filed in connection with the petitioner, Darcy Kolodziej's Motion for Reconsideration of the Commissioner's decision dated June 19, 2015, in which it was determined that – at the time of the reduction in force in 2007 – the petitioner had acquired 3.9 years of seniority credit with the Southern Regional High School District (District). As a result, the petitioner was entitled to retroactive back pay, less unemployment benefits received by the petitioner, in the amount of $137,212.00 for the 2007-08, 2008-09, and 2009-10 school years. The petitioner was also awarded seniority credits for the 2007-08, 2008-09, and 2009-10 school years as if she had actually been employed. In the June 19, 2015 decision, the Commissioner declined to address the petitioner's claim for damages stemming from the District's decision to rescind the petitioner's contract for the 2013-2014 school year because the action taken by the District in 2013 was a separate matter that was not pending before the Commissioner.[1]

[1] Following the remand of the Commissioner's May 16, 2013, decision from the Appellate Division, the parties were afforded an opportunity to submit their respective positions in connection with the petitioner's seniority rights. Specifically, the Appellate Division suggested that the Commissioner evaluate whether the petitioner is entitled to 30 days of seniority credit for the 2005-2006 school year under *N.J.A.C.* 6A:32-5.1(b), in light of the fact that the petitioner was out on unpaid maternity leave for the entire school year. It was at this juncture that the petitioner first argued that she was entitled to damages in connection with the District's action which occurred in 2013. Until the instant motion for reconsideration, the specific circumstances of petitioner's 2013 termination by the District were not addressed by either party. Whether the District's action was a reduction in force or just a rescission of her contract is not material to the Commissioner's conclusion that it presented a different cause of action.

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Pursuant to *N.J.A.C.* 6A:3-1.15(b)2., a motion for reconsideration shall be considered based upon the following:

i. claim(s) of mistake, provided, however, that disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake" for purposes of this section;
ii. newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence;
iii. newly ascertained misrepresentation or other misconduct of an adverse party, where such misrepresentation could not have been previously known; or
iv. reversal of a prior judgment on which the present matter is based.

Upon full review and consideration of the parties' submissions, I find that the petitioner has failed to satisfy any of the requisites for granting such relief specified in *N.J.A.C.* 6A:3-1.15(b)2. Petitioner is seeking reconsideration of the Commissioner's determination that the issue of potential damages – in the form of lost wages and other benefits stemming from the District's action in 2013 – was not before the Commissioner. In her papers, the petitioner has not pointed to any of the elements necessary for reconsideration, but simply disagrees with the Commissioner's failure to consider potential damages stemming from a separate cause of action which has not been pled or litigated. Although this case has a protracted procedural history, this matter originated as a petition of appeal challenging the District's decision not to renew the petitioner's employment for the 2007-08 school year due to a reduction in force. The District's decision to rescind the petitioner's contract for the 2013-2014 school year is a separate cause of action that required a new petition of appeal.

Accordingly, the Motion for Reconsideration is hereby DENIED.[2]

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library

DCH/MKD/JKH

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

323-15

K.L., on behalf of minor children, N.B. and A.B.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her children, challenging the Board's determination that petitioner and her family do not reside in the City of Orange. Petitioner asserted that she is domiciled in Orange, and submitted bills and notices bearing a City of Orange address. The Board contended that a residency investigation had revealed that petitioner's family was residing in Bloomfield, New Jersey. A hearing in the matter was held on August 24, 2015; petitioner did not appear at the hearing. Counsel for the Board did appear and presented – on the record – a Motion to Dismiss, based on petitioner's failure to litigate her appeal.

The ALJ held the record open for twenty-four hours following the hearing, but petitioner failed to make contact with the OAL and the record was closed. Respondent's counsel informed the OAL that the Board would not pursue tuition reimbursement. Accordingly, the ALJ granted the respondent's Motion to Dismiss. The matter was dismissed with prejudice.

The Commissioner concurred with the ALJ's determination to dismiss the matter based on petitioner's failure to litigate her appeal. Accordingly, the Initial Decision was adopted as the final decision in this matter.

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

October 8, 2015

OAL DKT. NO. EDU 16075-14
AGENCY DKT. NO. 321-11/14

K.L., on behalf of minor children, N.B. and A.B.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination that the Board's motion to dismiss should be granted based on the petitioner's failure to litigate her appeal. Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/08/15
Date of Mailing: 10/09/15

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 16075-14
AGENCY DKT. NO. # 321-11/14

K.L., O/B/O N.B. AND A.B.,
Appellant,
v.
CITY OF ORANGE BOARD OF EDUCATION,
Respondent.

K.L., appellant, pro se (no appearance)

Jessika Kleen, Esq., (Machado Law Group, LLC) for respondent

Record Closed: August 24, 2015 Decided: August 27, 2015

BEFORE **SANDRA ANN ROBINSON**, ALJ:

STATEMENT OF THE CASE

K.L., appellant, filed a petition challenging the determination of respondent Orange Board of Education that petitioner and her family do not reside in the Orange New Jersey School District (District). K.L. contends that the Orange registrar lists the family's address as 500 South Harrison Street in Orange, New Jersey. K.L. wrote on her Pro Se Residency Appeal that the discrepancy in address is between the housing

complex address and her unit address. Appellant submitted bills and notices bearing an Orange address.

Respondent contends that appellant's two children, a boy born on February 7, 2001 and a female born April 16, 2003 attended Orange Public Schools from October 17, 2014 to February 9, 2015. Respondent's investigation revealed that as of February 2015 appellant's family resides in Bloomfield, New Jersey. Respondent argues that appellant did not provided sufficient proof of residency in Orange and has failed to follow through with litigating her claim.

PROCEDURAL HISTORY

The New Jersey Department of Education Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law (OAL) on December 8, 2014, for a hearing pursuant to N.J.S.A. 52:14B-1 to B-15 and N.J.S.A. 52:14F-1 to F-13. The undersigned assumed responsibility for the matter on December 10, 2014. Testimony was scheduled to commence on April 21, 2015, however neither party appeared. The case was called, but not dismissed because OAL personnel were informed that respondent had not assigned an attorney to the case and that it was unknown as to whether the Love and Randall Law Firm that filed an Answer to the Petition would be continuing with the case. On July 20, 2015, OAL rescheduled a hearing date for August 24, 2015 and mailed notice of the hearing to appellant and to Cristina Mateo, President of the Orange Board of Education. The Machado Law Group, LLC submitted a letter to OAL indicating that the firm would serve as respondent's legal counsel going forward.

On August 24, 2015 appellant did not appear for the hearing nor did she contact OAL. On August 24, 2015, respondent appeared for the hearing and presented on-the-record a Motion to Dismiss based on appellant's failure to litigate her appeal. The undersigned entered the procedural history of this case on the record and made inquiries of the OAL Clerk's Office personnel and the judicial secretary assisting on the case, as to whether the notice of hearing had been returned and whether appellant had made any contact with OAL; both responses were negative. The record remained open for twenty-four hours without appellant making any contact with OAL by 5pm on August

25, 2015, when the record was closed. On August 26, 2015, respondent's counsel informed OAL that respondent would not be pursuing tuition reimbursement.

ORDER

Based on the foregoing, I hereby **ORDER** that respondent's Motion to Dismiss is **GRANTED**. **I ORDER** that the **DISMISSAL IS WITH PREJUDICE** based on appellant's failure to appear and/or pursue an action.

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

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

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

August 27, 2015
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

Date Received at Agency: August 27, 2015

Date Mailed to Parties: AUG 31 2015

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

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OAL DKT. NO. EDU 14538-15
AGENCY DKT. NO. 274-9/15

S.J.W., on behalf of minor child, J.W.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
v.	:	DECISION ON APPLICATION
BOARD OF EDUCATION OF THE BOROUGH OF MERCHANTVILLE, CAMDEN COUNTY,	:	FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

In so concurring, however, the Commissioner is compelled to clarify that petitioner has *not* demonstrated that irreparable harm will occur if the requested relief –enrollment of J.W. at Haddon Heights High School instead of Pennsauken High School – is not granted. Both high schools are capable of providing enrolled students with the thorough and efficient education to which they are entitled.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This case shall proceed at the OAL to a plenary hearing, or such other proceedings as the ALJ and the parties determine, to resolve the underlying claim on the merits.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/08/15
Date of Mailing: 10/09/15

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A* 18A:6-9.1).

E-mail 9-29-15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 14538-15
AGENCY DKT. NO. 274-9/15

S.J.W., ON BEHALF OF MINOR CHILD, J.W.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF MERCHANTVILLE, CAMDEN COUNTY,
Respondent.

S.J.W., petitioner, pro se

Kerri A. Wright, Esq., for respondent (Porzio, Bromberg & Newman, P.C., attorneys)

Record Closed: September 29, 2015 Decided: September 29, 2015

BEFORE **LAURA SANDERS**, Acting Director & Chief ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

S.J.W. (petitioner) seeks emergent relief directing the Board of Education of the Borough of Merchantville (the Board or Merchantville) to enroll her son in the sophomore class at Haddon Heights High School, pursuant to the Board's new sending-

receiving agreement with Haddon Heights High School. The Board contends that the petitioner does not meet the requirements for emergent relief, in part because the Board has the authority to determine to direct S.J.W.'s son to enroll at Pennsauken High School under the agreement with the Pennsauken Board of Education. The matter is emergent, as both sides agree that J.W. has not been attending any school since the beginning of this school year, pending resolution of this dispute.

The Commissioner of Education forwarded the contested case to the Office of Administrative Law (OAL), where it was filed on September 18, 2015, and heard on September 25, 2015. On September 29, 2015, the record was closed on receipt of additional exhibits, which were marked as P-2 through P-7, and R-5 through R-12.

FACTUAL DISCUSSION

S.J.W. testified on behalf of her son, J.W., explaining that she and her husband bought a home in Merchantville and moved on August 10, 2015. Although their former home had a Merchantville zip code, it was actually located in Pennsauken. Her son, J.W., attended Camden Catholic High School for his freshman year of high school. She was aware that the Commissioner of Education had approved the termination of a sending-receiving agreement between the Merchantville and Pennsauken boards of education and the creation of a new sending-receiving agreement with the Merchantville and Haddon Heights boards of education. In June, S.J.W. contacted the Camden County executive superintendent's office, and was advised that as Merchantville transitioned its students, all new students would be going to Haddon Heights. On June 16, Haddon Heights allowed her son to do a shadow day at its high school. Preparatory to enrolling J.W. with Merchantville, S.J.W. withdrew her son from Camden Catholic on August 28, 2015. On August 31, 2015, J. Scott Strong, chief school administrator of the Merchantville Board of Education, advised her that J.W. would be required to attend Pennsauken High School. Although Strong represented that this requirement was imposed by Board policy and by the contract with Pennsauken, he did not produce either of these documents. As her second son, now in eighth grade, will be attending Haddon Heights beginning next year, S.J.W. objects to the inconsistency of having her sons in two different high schools. However, on August 31, 2015, she contacted

Pennsauken High School, and was told the school was not accepting new students from Merchantville. A further call to the County superintendent resulted in advice as to her fair-hearing rights, and a clarification that Merchantville was only sending freshmen to Haddon Heights. Personnel at Haddon Heights High School have told her they have room in the sophomore class for her son, and that adding him to the bus run is not a problem, but Merchantville needs to agree. The slot at Camden Catholic has been lost; she cannot simply re-enroll her son there.

She further testified that she attended the September 8, 2015, meeting of the Merchantville Board of Education, arguing before the Board that her son should not be viewed as an existing student but rather as someone new to the district and, therefore, someone who could and should be directed to Haddon Heights. The Board agenda for September 8, 2015, (P-1) included a recommendation for formal approval of a "student procedure for the 2015–2016 school year, as mandated in the PBOE/MBOE Send/Receive Agreement: All Merchantville residents in the 9th grade will attend Haddon Heights High School and All Merchantville residents, whether existing or new, in 10th, 11th, or 12th grades, will attend Pennsauken High School." The resolution was not considered in open session.

The Board contends that plans for transition have been public since April, when the Commissioner of Education issued the final decision approving the change of sending-receiving agreements. The Board's minutes reflect that "the 8th grade students can choose to attend Haddon Heights. Each year, another grade will be phased into the Haddon Heights system . . . ." (R-5.) The Board also points to this statement from its website:

> We are excited to work with Haddon heights and to phase in our students into their high school. The students will be phased into Haddon Heights High School. The current graduating 8th graders (Merchantville Class of 2015) will be able to attend Haddon Heights High School under the send/receive agreement. However, students that are already attending Pennsauken HS **or other high schools** will not qualify to attend under the new send/receive agreement. Instead every year for four years, a new class

> will be sent to Haddon Heights until all of our students are phased into Haddon Heights.
>
> [R-1 (emphasis added).]

The Board states that this notice was on its website in April, and has been there continuously since that time. (R-11, Strong certif. para. 7.) Strong's certification points out that at the May 12, 2015, Board meeting, there was public discussion of possible attendance at Haddon Heights for upper-class students through the School Choice Program, where availability is determined by lottery. (Id., para. 11; R-7.)

With regard to the level of knowledge available to S.J.W., the Board raises credibility issues based on information that became available after oral argument on September 25. (R-12, Supplemental Wright certif.) Based on minutes from the Pennsauken Board of Education on five dates between January 2012 and January 2015, the Board contends that S.J.W. served as a member of the Pennsauken school board during the time that the districts were litigating before the OAL, and was vice president of the board in 2013. (R-10.) Therefore, the Board contends, she had more than an average citizen's knowledge about the litigation. In response, S.J.W. stated (P-2) that her status as a board member did not make her privy to the details of the transition plan being offered by Merchantville to the OAL. She further noted that the litigation was not concluded until April, well after she left office in December 2014, and so she had no better access to information than anyone else. She points out that the Board had four months to formulate a policy, and only began consideration of one after she challenged its absence.

LEGAL ANALYSIS

Under Crowe v. DeGioia, 90 N.J. 126 (1982), N.J.A.C. 6A:3-1.6(b), and N.J.A.C. 1:1-12.6, emergency relief may be granted if the judge determines that:

1. the petitioner will suffer substantial, immediate and irreparable harm if the relief is not granted;

2. the legal right underlying the petitioner's claim is settled within the principles of law;

3. the petitioner has a likelihood of eventually prevailing on the merits of the underlying claim; and

4. when the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

Emergent relief is not appropriate unless all four of the above requisites are satisfied. The burden of proving each of these factors rests with the party seeking emergent relief. Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013) (citation omitted). "Each of these factors must be clearly and convincingly demonstrated" by the moving party. Waste Mgmt. of N.J. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008). Thus, the burden here is upon S.J.W.

Irreparable Harm

"Irreparable harm" is defined as the type of harm "that cannot be redressed adequately by monetary damages." Crowe, supra, 90 N.J. at 132–33. In addition, the irreparable-harm standard contemplates that the harm be both substantial and immediate. Subcarrier Commc'ns v. Day, 299 N.J. Super. 634, 638 (App. Div. 1977). However, pecuniary damages may sometimes be inadequate because of the nature of the injury or the right affected. Crowe, supra, 90 N.J. at 133. For example, in Crowe the Court determined that neither an unwarranted eviction nor reduction to poverty could be compensated adequately by monetary damages awarded after a distant hearing. Ibid.

J.W. has missed the first three weeks of school, and that delay in starting the school year already has caused damage—he will start a new school already well behind in every class.

The Board contends that there is no evidence J.W. will suffer any harm from being enrolled at Pennsauken High School. It acknowledges that it is in the odd position of having expended great effort in winning approval to move its students to a different school, only to argue now that the education offered by the existing school is fine. It also argues that it was and is willing to direct J.W.'s enrollment at Pennsauken at any time.

Having missed the first three weeks in a new school, J.W. now faces the question of how to catch up. Missing school events such as graduation have been held to be "once in a lifetime opportunities" that qualify under the irreparable-harm standard (Nabel v. Bd. of Educ. of Hazlet, EDU 08026-09, Initial Decision (June 24, 2009), modified, Comm'r (June 24, 2009), <http://njlaw.rutgers.edu/collections/oal/> (Commissioner found irreparable harm where student prevented from attending graduation because there is no adequate after-the-fact remedy that can adequately redress the intangibles of a lost experience after the event is over and "dismissal of an emergent application on this criterion alone would effectively insulate a school district's actions in matters of this type from any meaningful review.") Therefore, I **FIND** that missing the first three weeks of the sophomore year of high school, which is also a once-in-a-lifetime event, meets the standard for irreparable harm.

Is Petitioner's Right to Claim Well-Settled and is Petitioner Likely to Prevail?

As the Board observes, it has broad general authority to set policy for the school district. When a local school board acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that the decision was arbitrary, capricious or unreasonable. Thomas v. Bd. of Educ. of Morris, 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581 (1966). Thomas involved an instance in which the Commissioner and the State Board of Education overturned a school board's action terminating a working-test-period contract and essentially granting a superintendent tenure, because it was done "without full and open consideration and discussion, with timely opportunity for all members of the board and the public to be heard," citing Cullum v. Bd. of Educ. of N. Bergen Twp., 15 N.J. 285 (1954)). Id. at 331.

Petitioner does not dispute the Board's general authority to set policy; rather, her argument centers on the absence of a policy. As of August 31, 2015, the date she sought to enroll her son, Strong did not provide her with a copy of the Board's policy, most likely because it had not voted on one. On September 8, the Board agenda shows an item to "formally approve the following high school student procedure for the 2015–2016 school year . . . . All Merchantville residents, whether existing or new, in 10th, 11th, or 12th grades will attend Pennsauken High School." On September 22, 2015, the Board voted to formally approve the policy. (R-9.) Board counsel conceded that even during the litigation over the sending-receiving district in 2014 and 2015, no one could locate a written agreement between Pennsauken and Merchantville, and apparently none exists even today. All that exists is an April 15, 2015, letter from Kerri A. Wright, Esq., advising counsel for Pennsauken that, "in accordance with the representations made during the [OAL] hearing, Merchantville will be phasing out its students from Pennsauken one grade-level at a time over the next four years." (R-3.)

The Board further argues that its decision to start freshmen in Haddon Heights, while leaving existing students in Pennsauken High to complete their high-school years, was part of the case that was approved by the Commissioner, even though his approval does not specifically address the transition process. (See R-2, the Statement of Undisputed Facts, submitted as part of the record to the Commissioner in Bd. of Educ. of Merchantville v. Bd. of Educ. of Pennsauken, EDU 01927-12, Initial Decision (March 2, 2015), adopted, Comm'r, April 10, 2015. The section of the Statement of Undisputed Facts that was Entitled "Proposed Educational Plan for Merchantville's 9–12 Students" states that Merchantville would phase its students "out of Pennsauken High School as follows: a. Year one: Grades 10, 11 and 12 remain at Pennsauken High School; grade 9 matriculates at Haddon Heights High School".)

As terminations of sending-receiving agreements are relatively rare, it cannot be said that cases involving the rights of students in transitioning districts are numerous and well-settled. Three of the more prominent examples, Bd. of Educ. of Twp. of Boonton v. Bd. of Educ. of Town of Boonton, 92 N.J.A.R.2d (EDU) 235, Bd. of Educ. of Winfield v. Bd. of Educ. of Rahway, EDU 7138-98, Initial Decision (Jan. 18, 2000),

adopted, Comm'r (March 2, 2000), <http://njlaw.rutgers.edu/collections/oal/>, and Saddle River Bd. of Educ. v. Ramsey Bd. of Educ. and N. Highlands Bd. of Educ., 1998 S.L.D. Aug 28, do not appear to have generated case law with regard to how particular subgroups of students were handled during transition.

Although here, petitioner argues that action without a policy that was thoroughly discussed at an open public meeting should be deemed arbitrary and capricious, the Board has demonstrated that at some point, it approved a representation to the Commissioner on how transition would be handled, should the Commissioner approve the termination of the Pennsauken agreement and the creation of a Haddon Heights agreement. The plain language of that representation was that students would be moved based on class year, with no mention of any special provision for students entering the district, either as new residents or as students returning from another placement. Nor did any of the subsequent public discussions or notices suggest that anyone but incoming freshman would be attending Haddon Heights. Thus, petitioner's insistence that a special provision should be inferred into the Board's statements is at odds with a plain reading.

Therefore, petitioner's arguments do not fall within well-settled case law, and it is not clear that there is a likelihood of success on the merits.

The Balance of Equities and Interests of the Parties

As for the fourth requirement for granting emergent relief, the petitioner avers that when the equities and interests of the parties are balanced, the petitioner will suffer greater harm than will the school district if emergent relief is not granted. The petitioner contends that having her two sons at different high schools when they live in the same sending district causes internal inequities in the family that cannot be resolved. She contends that treating new residents as part of the school population moving into Haddon Heights High School will cause no harm at all to the district, because new taxpayers were never part of any revenue calculation. She also points out that Pennsauken initially said it could not enroll her son, while Haddon Heights said it could, provided Merchantville agreed.

The Board argues that the need to avoid a flood of returning students played a large role in crafting the transition plan, because only 30 to 35 percent of Merchantville's high-school-age population has been attending Pennsauken High School; the rest have been schooled through other, private arrangements made by their parents. The district contends that a flood of returning students would make it virtually impossible to live within the required 2 percent cap on annual increases. The Board also pleads the equities for students district-wide, and asks why it should distinguish between long-time residents and new residents. It offers the argument that treating all students the same, with attendance based on high-school levels—freshman through senior—is the fairest. It also argues that petitioner has not shown any harm, as her son has exactly the same educational opportunity that all other Merchantville sophomores have available to them.

As the Board has noted, in matters involving the exercise of a local board of education's discretion, the scope of the Commissioner's review is "not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 296 (App. Div. 1960). "Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envt'l Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974).

It is unfortunate that S.J.W. received erroneous information from many quarters earlier this year, when she and her husband were making important decisions about buying a home, moving, and educating their sons. However, the standards for the award of emergent relief are high, and here, particularly with regard to the absence of well-settled case law making it likely she would prevail in a more lengthy hearing process, the petitioner has not met the four-pronged test for emergent relief.

ORDER

I hereby **ORDER** that the petitioner's request for an Order immediately placing her son J.W. in Haddon Heights High School pending a full hearing on the merits is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Laura Sanders

September 29, 2015
DATE

LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

/caa

LIST OF WITNESSES

For Petitioner

S.J.W.

For Respondent

None

LIST OF EXHIBITS

For Petitioner

P-1 Merchantville Board of Education Agenda, September 8, 2015

P-2 Response to Board's September 28, 2015, arguments, sent on September 28, 2015, and received on September 29, 2015

P-3 Merchantville Board of Education Agenda for April 14, 2015

P-4 Merchantville Board of Education Public Hearing on the 2015–2016 Budget and the Regular Monthly Meeting Agenda, dated April 28, 2015

P-5 Merchantville Board of Education Agenda for May 12, 2015

P-6 Merchantville Board of Education Agenda for May 26, 2015

P-7 Merchantville Board of Education Agenda for June 9, 2015

For Respondent

R-1 Copies of Merchantville Board of Education website pages, downloaded September 28, 2015

R-2 Statement of Undisputed Facts from Bd. of Educ. of Merchantville v. Bd. of Educ. of Pennsauken, EDU 01927-12

R-3 Letter from Kerri A. Wright, Esq., to Michael Sullivan, Esq., dated April 15, 2015

R-4 Certification of Kerri A. Wright, Esq.

R-5 Merchantville Board of Education Minutes dated April 14, 2015

R-6 Screen shot of Merchantville Board of Education website

R-7 Merchantville Board of Education Minutes dated May 12, 2015

R-8 Same as P-1

R-9 Resolution "that appears in the minutes of a (September 22, 2015) meeting of the Merchantville Board of Education"

R-10 Minutes of Meetings of Pennsauken Board of Education dated January 19, 2012; January 8, 2013; January 7, 2014; December 18, 2014; January 2, 2015

R-11 Certification of J. Scott Strong

R-12 Supplemental Certification of Kerri A. Wright, Esq., dated September 28, 2015

330-15

330-15

In the Matter of the Arbitration	:	
- between -	:	Agency Docket Nos. 342/11/14 & 379/12/14
THE STATE OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY	:	
"Complainant" or "District"	:	
v.	:	Opinion and Award
GILDA NICOLE HARRIS	:	
"Respondent" or "Harris"	:	

A tenure proceeding pursuant to
NJSA 18A: 16-2

APPEARANCES

For the District
Derlys M. Gutierrez, Esq., Attorney
Adam S. Herman, Esq., Attorney
Carlyne Turner-Beverly, Esq., Assistant General Counsel

For the Respondent
Gilda Nicole Harris, Pro Se

BEFORE: HOWARD C. EDELMAN, ESQ., ARBITRATOR

BACKGROUND

Respondent, Gilda Nicole Harris, a tenured Elementary teacher in the Jersey City Public Schools, was served with two sets of charges pursuant to N.J.S.A. 18.A. The first set of charges was served on Respondent on or about September 23, 2014; the second set on or about November 21, 2014. The charges were properly certified to the Commissioner of Education in accordance with appropriate regulations.

Another arbitrator was previously assigned to this matter and held a hearing on April 23, 2015. That arbitrator recused himself on April 28, 2015. Pursuant to the selection process under State law I was assigned to hear and decide the charges. Hearings were held before me on May 29, 2015, June 5, 11, and 23, 2015. Thereafter, the parties submitted briefs. I received the District's brief on or about August 14, 2015. Respondent's brief was received on or about August 21, 2015.[1] The District's Reply was received on or about August 28, 2015 whereupon I closed the record. This Opinion and Award follows.

THE CHARGES

I. The charges served on or about September 23, 2014 (342/11/14) read, in relevant part, as follows:

[1] Respondent's brief was submitted late. I accepted the brief over the District's objection, but allowed the District an additional week to respond.

CHARGE ONE: CONDUCT UNBECOMING

Ms. Harris is guilty of Conduct Unbecoming by way of the following:

a. Ms. Harris, a tenured teaching staff member, was hired by the District on or about September 1999. She has worked in the recent past as a Grammar School Teacher at the District's James F. Murray School (School #38) and as a head teacher at the Adult Evening Program located at PS#11.
b. During the 2013-14 school year, Ms. Harris was assigned to teach fourth grade students.
c. On April 4, 2014, Ms. Harris demanded that all her fourth grade students who were either struggling and/or receiving failing grades stand up in front of the entire class.
d. Ms. Harris' contemptible conduct served to humiliate and demean several fourth grade students in her class.
e. Ms. Harris improperly utilized her authority as a teacher to intimidate and disparage several fourth grade students in front of the entire class.
f. Ms. Harris' conduct was intentionally cruel and abusive.
g. Ms. Harris' deprived her students of the right to attend school without fear that their teacher will seek to bully and embarrass them.
h. As a teacher, Ms. Harris is entrusted with the care and custody of children with the hope that this trust will result in the maximum educational growth and development of children. However, Ms. Harris breached her obligations by engaging in intentional inappropriate, irresponsible and unprofessional behavior.
i. Ms. Harris' conduct violates District policy and law.
j. Ms. Harris' conduct violates the tenets and policies that the James F. Murray School and the Jersey City Public Schools uphold.
k. Ms. Harris' conduct placed her students at risk of harm.

l. Ms. Harris' completely unacceptable actions demonstrate that she is not fit to serve as a teaching staff member.
m. Ms. Harris' conduct was sufficiently flagrant and egregious to warrant termination.

Ms. Harris has engaged in conduct unbecoming that provides just causer to require that her employment with the District be terminated.

CHARGE TWO: CONDUCT UNBECOMING

Ms. Harris is guilty of Conduct Unbecoming by way of the following:

a. The District repeats and reiterates the allegations set forth above.
b. In addition to the conduct described in Charge One, Ms. Harris, on April 4, 2014, also required her fourth grade students to form two lines in the classroom.
c. Ms. Harris demanded that the African American and/or other students with dark skin to line up on one (1) side of the room.
d. Ms. Harris demanded that Caucasian and/or other students with light skin to line up on the other side of the room.
e. Ms. Harris then proceeded to make statements comparing both lines of students.
f. Ms. Harris' conduct in separating her class on the basis of race is outrageous and shocks the conscience.
g. Ms. Harris' conduct made her students feel humiliated and degraded because of their race, ethnicity and/or color of their skin,
h. Ms. Harris deprived her students of the right to attend school without the fear that their teacher will harass, intimidate or bully them on the basis of race, ethnicity or any other characteristic.
i. As a teacher, Ms. Harris is entrusted with the care and custody of children with the hope that this trust will result in maximum educational growth and development of

children. However, Ms. Harris breached her obligation by engaging in intentional inappropriate, irresponsible and unprofessional behavior.

j. Ms. Harris' conduct was intentionally cruel and abusive.

k. Ms. Harris conduct was repugnant and offensive.

l. Ms. Harris exercised exceptionally poor judgment and failed to act as a role model for her students.

m. Ms. Harris failed to exercise self-restraint and controlled behavior which is required and mandated for a teaching staff member entrusted with the care and custody of children.

n. Ms. Harris' deplorable and unprofessional conduct violates the District policy and law.

o. Ms. Harris' conduct violates the tenets and policies that the James F. Murray School and the Jersey City Public Schools uphold.

p. Ms. Harris' inappropriate and unprofessional conduct placed students at a risk of harm.

q. Ms. Harris' absolutely unacceptable actions demonstrate that she is not fit to serve as a teaching staff member.

r. Ms. Harris' conduct was sufficiently flagrant and egregious to warrant termination.

Ms. Harris has engaged in conduct unbecoming that provides just cause to require that her employment with the District be terminated.

CHARGE THREE: CONDUCT UNBECOMING

Ms. Harris is guilty of Conduct Unbecoming by way of the following:

a. The District repeats and reiterates the allegations in all the charges set forth above.

b. On April 4, 2014, Ms. Harris also yelled at her students and told them that they betrayed her.
c. Ms. Harris then proceeded to tell a student that she would be moved to another classroom.
d. Ms. Harris inappropriately spoke to her class about other District employees.
e. Ms. Harris' conduct served to embarrass her students.
f. Ms. Harris failed to exercise self-restraint and controlled behavior which is required and mandated for a teaching staff member entrusted with the care and custody of children.
g. Ms. Harris' inappropriate conduct violates District policy and law.
h. Ms. Harris' conduct violates the tenets and policies that the James F. Murray School and the Jersey City Public Schools uphold.
i. Ms. Harris' inappropriate and unprofessional conduct placed students at a risk of harm.
j. Ms. Harris' absolutely unacceptable actions demonstrate that she is not fit to serve as a teaching staff member.
k. Ms. Harris' conduct was sufficiently flagrant and egregious to warrant termination.

Ms. Harris has engaged in conduct unbecoming that provides just cause to require that her employment with the District be terminated.

CHARGE FOUR: CONDUCT UNBECOMING

Ms. Harris is guilty of Conduct Unbecoming by way of the following:

a. The District repeats and reiterates the allegations in all the charges set forth above.
b. District Policy 6121 provides that "[n]o student enrolled in the Jersey city School District shall be excluded from participation in, denied the benefit of, or

be subjected to discrimination in any educational program or activity of this district on the basis of race, color, creed, national origin, ancestry…"

c. Ms. Harris' deplorable and unprofessional conduct as set forth above violates District policy.
d. Ms. Harris' actions demonstrate that she is not fit to serve as a teaching staff member.
e. Ms. Harris' conduct was sufficiently flagrant and egregious to warrant termination.

Ms. Harris has engaged in conduct unbecoming that provides just cause to require that her employment with the District be terminated.

CHARGE FIVE: CONDUCT UNBECOMING

Ms. Harris is guilty of Conduct Unbecoming by way of the following:

a. The District repeats and reiterates the allegations in all the charges set forth above.
b. District Policy 5145.4 provides that the District "shall provide equal and bias-free access for all students to all school facilities, courses, programs, activities and services and give them the maximum opportunity to achieve their potential regardless of race, creed, color, national origin, ancestry…."
c. Ms. Harris' deplorable and unprofessional conduct as set forth above violates District policy.
d. Ms. Harris' actions demonstrate that she is not fit to serve as a teaching staff member.
e. Ms. Harris' conduct was sufficiently flagrant and egregious to warrant termination.

Ms. Harris has engaged in conduct unbecoming that provides just cause to require that her employment with the District be terminated.

CHARGE SIX: CONDUCT UNBECOMING

Ms. Harris is guilty of Conduct Unbecoming by way of the following:

a. The District repeats and reiterates the allegations in all the charges set forth above.
b. District Policy 51454.4 further provides that "[s]taff members shall maintain professional relationships with students at all times and develop wholesome and constructive relationships with them."
c. Ms. Harris' deplorable and unprofessional conduct as set forth above violates District policy.
d. Ms. Harris' actions demonstrate that she is not fit to serve as a teaching staff member.
e. Ms. Harris' conduct was sufficiently flagrant and egregious to warrant termination.

Ms. Harris has engaged in conduct unbecoming that provides just cause to require that her employment with the District be terminated.

CHARGE SEVEN: CONDUCT UNBECOMING

Ms. Harris is guilty of Conduct Unbecoming by way of the following:

a. The District repeats and reiterates the allegations in all the charges set forth above.
b. District Policy 5145.4 further provides that "[s]taff members shall be expected to regard each student as an individual and to accord each student the rights and respect that are his/her due.
c. Ms. Harris' deplorable and unprofessional conduct as set forth above violates District policy.
d. Ms. Harris' actions demonstrate that she is not fit to serve as a teaching staff member.

e. Ms. Harris's conduct was sufficiently flagrant and egregious to warrant termination.

Ms. Harris has engaged in conduct unbecoming that provides just cause to require that her employment with the District be terminated.

CHARGE EIGHT: CONDUCT UNBECOMING

Ms. Harris is guilty of Conduct Unbecoming by way of the following:

a. The District repeats and reiterates the allegations set forth above.
b. District Policy 5145.4 provides that "No one-including students, staff members, vendors, or visitors-shall commit an act of harassment/ discrimination of any kind against any member of the school community on any of the grounds prohibited by law."
c. District Policy 5145.4 defines "harassment" as "any gesture that is reasonably perceived as being motivated by an actual or perceived characteristic, such as race, color, religion, ancestry, national origin…that will have the effect (perceived or actual) of harming a student…"
d. District Policy 5145.4 also defines "harassment" as "any gesture that demeans or insults a student or group of students in such a way to cause substantial disruption or interference with the orderly operation of the school."
e. Ms. Harris' deplorable and unprofessional conduct as set forth above violates District policy.
f. Ms. Harris' actions demonstrate that she is not fit to serve as a teaching staff member.
g. Ms. Harris' conduct was sufficiently flagrant and egregious to warrant termination.

Ms. Harris has engaged in conduct unbecoming that provides just cause to

require that her employment with the District be terminated.

CHARGE NINE: CONDUCT UNBECOMING (EXCESSIVE ABSENTEEISM)

Ms. Harris is guilty of Conduct Unbecoming and Excessive Absenteeism by way of the following:

a. During the 2007-2008 school year, Ms. Harris was absent from her employment on approximately thirty-nine (39) occasions.
b. During 2008-2009 school year, Ms. Harris was absent from her employment on approximately twelve (12) occasions.
c. During the 2009-2010school year, Ms. Harris was absent from her employment on approximately fourteen (14) occasions.
d. During the 2010-2011 school year, Ms. Harris was absent from her employment on approximately thirteen (13) occasions.
e. During the 2011-2012 school year, Ms. Harris was absent from her employment on approximately thirteen (13) occasions.
f. During the 2012-2013 school year, Ms. Harris was absent from her employment on approximately seventeen (17) occasions.
g. During the 2013-2014 school year, Ms. Harris was absent from her employment on approximately ten (10) occasions.
h. Ms. Harris' conduct has negatively impacted her students by consistently interrupting the continuity of instruction.
i. Ms. Harris' conduct violates District Policy.
j. Despite warnings, memoranda and counseling, Ms. Harris' attendance has not improved.
k. Ms. Harris' conduct constitutes conduct unbecoming.

Ms. Harris' excessive absenteeism as described above has had a profoundly negative impact upon the James F. Murray School and the Jersey City Public Schools Community, and requires that her employment with the District be terminated.

CHARGE NUMBER TEN: OTHER JUST CAUSE

Ms. Harris is guilty of Other Just Cause by way of the following:

a. The District repeats and reiterates the allegation in all the charges set forth above.

Ms. Harris' conduct as described above has had a profoundly negative impact upon the James F. Murray School and the Jersey City Public Schools Community, and requires that her employment with the District be terminated.

II. The charges served on or about November 21, 2014 (379/12/14) read, in pertinent part, as follows:

CHARGE ONE: CONDUCT UNBECOMING

Ms. Harris is guilty of Conduct Unbecoming by way of the following:

a. Ms. Harris, a tenured teaching staff member, was hired by the District on or about September 1999. She has worked in the recent past as a Grammar School Teacher at the District's James F. Murray School (School #38) and as a head teacher at the Adult Evening Program located at PS#11.
b. During the 2013-14 school year, Ms. Harris was assigned to teach fourth grade students.
c. On September 23, 2014, Ms. Harris was served with Tenure Charges alleging Conduct Unbecoming and Other Just Cause.
d. The aforementioned Tenure Charges allege that on or about April 4, 2014, Ms. Harris demanded that all her fourth grade students who were either struggling and/or receiving failing class stand up in front of the entire class.

e. The aforementioned Tenure Charges also allege that on April 4, 2014, Ms. Harris required her forth grade students to form two lines in the classroom demanding that African American and/or other students wit dark skin line up on one (1) side of the room and that Caucasian and/or other students with light skin to line up on the other side of the room. The aforementioned Tenure Charges also allege that Ms. Harris proceeded to make statements comparing both lines of students.
f. The aforementioned Tenure Charges allege that Ms. Harris' conduct violated law and District policy, and that her absolutely unacceptable actions demonstrate that she is not fit to serve as a teaching staff member.
g. In accordance with N.J.S.A 18A:6-11, Ms. Harris submitted a Statement of Position in response to the Tenure Charges to the District on or about October 9, 2014.
h. Along with her Statement of Position in response to the Tenure Charges, Ms. Harris included an Appendix of Exhibits, which includes approximately forty-seven (47) documents.
i. Ms. Harris' Appendix of Exhibits improperly includes un-redacted confidential pupil records and public information.
j. The un-redacted confidential pupil records and pupil information included in Ms. Harris' Appendix of Exhibits sets forth, among other things, pupils' full names, pupil's grade levels and classes attended.
k. The un-redacted confidential pupil information included in Ms. Harris' Appendix of Exhibits includes documents dated between 2005 and 2014.
l. Ms. Harris intentionally misappropriated and disclosed pupil records and pupil information.
m. Ms. Harris did not obtain consent from any of the pupil's parents or guardians prior to utilizing the confidential pupil records and information in connection with her Tenure Charges.

n. Ms. Harris did not obtain consent from the District prior to utilizing the confidential pupil records and information in connection with her Tenure Charges.
o. The un-redacted confidential pupil records and pupil information included in Ms. Harris' Appendix of Exhibits are not even relevant to the allegations in the underlying Tenure Charges that she demanded that all her fourth grade students who were either struggling and/or receiving failing grades stand up in front of the entire class or that she required her fourth grade students to form two lines in the classroom, demanding that African American and o/or other students with dark skin line up on one (1) side of the room and that Caucasian and/or other students with light skin line up on the other side of the room.
p. Ms. Harris' intentional inappropriate and unprofessional conduct in submitting un-redacted confidential pupil records and pupil information violates Federal and State Law, including but not limited to, the Family Education Rights and Privacy Act, 20 U.S.C. sec. 1232G and the New Jersey Pupil Records Regulations, N.J.A.C. 6A:32-7.1, et.seq.
q. Ms. Harris violated the confidentiality of her pupils.
r. Ms. Harris' inappropriate and unprofessional conduct in submitting un-redacted confidential pupil records and pupil information violates District policy.
s. Ms. Harris' conduct was sufficiently flagrant and egregious to warrant termination.

Ms. Harris has engaged in conduct unbecoming that provides just cause to require that her employment with the District be terminated.

CHARGE TWO: CONDUCT UNBECOMING

Ms. Harris is guilty of Conduct Unbecoming by way of the following:

a. The District repeats and reiterates the allegations in all the charges set forth above.
b. Ms. Harris' Appendix of Exhibits includes several statements from pupils purportedly written on or about February 15, 2013.
c. Ms. Harris took significant time away from her pupils' educational day and had her pupils write negative statements about another teaching staff member with whom Ms. Harris was apparently having a conflict.
d. Ms. Harris elicited and/or encouraged her pupils to write that the other teaching staff member was gossiping, was unprofessional and was a bully.
e. Ms. Harris also elicited and/or encouraged her pupils to write that the other teaching staff member was constantly late, was not responsible, and did not teach the class anything.
f. Ms. Harris also elicited and/or encouraged her pupils to write that the other teaching staff member was spreading lies.
g. Ms. Harris even elicited and/or encouraged one pupil to write the following statement about the other teaching staff member: "I have to not do art. In stead, I have to hear all of that CRAP&TRASH she's talking to a bunch of 10 year olds about."
h. The aforementioned writing assignment was not part of the curriculum or any lesson plan approved by the District.
i. Ms. Harris failed to exercise self-restraint and controlled behavior which is required and mandated for a teaching staff member entrusted with the care and custody of children.
j. Ms. Harris' inappropriate and unprofessional conduct violates District policy and law.
k. Ms. Harris' inappropriate and unprofessional conduct placed students at risk of harm.
l. Ms. Harris' absolutely unacceptable actions demonstrate that she is not fit to serve as a teaching staff member.

m. Ms. Harris' conduct was sufficiently flagrant and egregious to warrant termination.

Ms. Harris has engaged in conduct unbecoming that provides just cause to require that her employment with the District be terminated.

CHARGE THREE: CONDUCT UNBECOMING

Ms. Harris is guilty of Conduct Unbecoming by way of the following:

a. The District repeats and reiterates the allegations in all the charges set forth above.
b. Ms. Harris' Appendix of Exhibits includes several statements from pupils purportedly written on January 8 2014.
c. Ms. Harris took significant time from her pupil's educational day and had her pupils write negative statements about their study habits and home life.
d. Ms. Harris had each of her pupils begin the written statements with the following paragraph: "We are halfway through the fourth grade. Since the beginning of the school year in September, you have stressed the importance of daily study habits and hard work. We have discussed the reasons why I get the grades I do in school. I want to be completely honest with you and explain my study habits at home."
e. Ms. Harris elicited and/or encouraged one student to write, "[w]hen I am home I get disturbed. The reason I get disturbed is my sister. My sister bothers me by ask (sp.) me for thing and I don't get help very much. This is why I don't' do homework."
f. Ms. Harris elicited and/or encouraged another student to write that "When I get home I want my mom to help me with my homework. But every other night she's talking on the phone or too busy for me.

And it takes hours to get off the phone. So I do homework alone…"

g. Ms. Harris elicited and/or encouraged another student to write that "[b]ut I just want to say I'm sorry I should have done my homework. I hope we can start all over. I didn't mean to not do homework."
h. Ms. Harris elicited and encouraged another student to write that "I don't do my homework because my dad has to work, my grandma has to help my sister, so I don't do homework because I have to do it by myself, my mom use to help me but now I have to do by myself."
i. Ms. Harris elicited and/or encouraged another student to write that "[a]t home I do not do my homework…..In my house it sometimes really noisie (sp.) My problem is that I have a hard time doing homework…"
j. Ms. Harris elicited and/or encouraged another student to write that"…the reason I don't do my homework before is my dad wouldn't help me with my homework he did not cheak (sp.) it…when my mom came all she did was yell about my room not being clean or the dishes were not clean and sometimes she would yell about everything and my sister would say are you done are you done. I wanted them to stop but they wouldn't…I have no door in my room so my mom would turn on the TV in my room they would not tell you this because it makes them look bad."
k. Ms. Harris elicited and/or encouraged another student to write that "[t]o be honest to you Ms. Harris I do not do my homework always. Because I'm to (sp.) lazy."
l. Ms. Harris elicited and/or encouraged another student to write that "[a]t home I don't do my homework…At home when I'm supposed to be doing homework I actually do on the I-Pad and use it."
m. Ms. Harris elicited and/or encouraged another student to write that "I do not do my homework daily…Sometimes I've lied to my mom that I was done with my homework but I really wasn't. I make excuses to my mom and

dad all the time about homework. When I get home I do not always so my homework immediately or pick up a book. Sometimes I just lay back and watch T.V."

n. Ms. Harris elicited and/or encouraged another student to write that "[n]o I don't do homework everyday. After school I go home do the stuff my mom say and then I sit down in the kitchen and do noting (sp.) but sit or go in the room and watch TV. That (sp.) what I do at home after school."
o. Ms. Harris elicited and/or encouraged another student to write that "[a]t home my grandma watches T.V..... and its to (sp.) loud and sometimes my mom and me watch Japanese anime...but my mom watches it more than me and both of them use there (sp.) phone instead of helping me..."
p. Ms. Harris provided numerous other examples of this improper writing assignment with her Appendix of Exhibits.
q. The aforementioned writing assignment was punitive in nature.
r. The aforementioned writing assignment made her students feel humiliated and embarrassed.
s. The aforementioned writing assignments made her students disclose private and personal information about their families.
t. The aforementioned writing plan was not part of the curriculum or any lesson plan approved by the District.
u. Ms. Harris failed to exercise self-restraint and controlled behavior which is required and mandated for a teaching staff member entrusted with the care and custody of children.
v. Ms. Harris' inappropriate and unprofessional conduct violates District policy and law.
w. Ms. Harris' inappropriate and unprofessional conduct placed students at risk of harm.
x. Ms. Harris' absolutely unacceptable actions demonstrate that she is not fit to serve as a teaching staff member.
y. Ms. Harris' conduct was sufficiently flagrant and egregious to warrant termination.

Ms. Harris has engaged in conduct unbecoming that provides just cause to require that her employment with the District be terminated.

CHARGE FOUR: NEGLECT OF DUTY

Ms. Harris is guilty of Conduct Unbecoming by way of the following:

a. The District repeats and reiterates the allegations in all the charges set forth above.
b. As a teaching and staff member, Ms. Harris is responsible for following the curriculum and her lesson plan to ensure that her pupils receive the best possible education.
c. Ms. Harris intentionally ignored her educational responsibilities and took significant time from her pupil's educational day while eliciting her pupils to write the statements detailed in Charge Two and Charge Three above.
d. In doing so, Ms. Harris neglected her teaching duties and responsibilities.

Ms. Harris has engaged in neglect of duty that provides just cause to require that her employment with the District be terminated.

CHARGE FIVE: CONDUCT UNBECOMING

Ms. Harris is guilty of Conduct Unbecoming by way of the following:

a. The District repeats and reiterates the allegations in all the charges set forth above.
b. N.J.S.A. 18A:36-34 governs the administration of student surveys.
c. N.J.S.A. 18A:36-34 mandates that written consent be obtained from the parents and/or guardian prior to students being asked about certain topics, such as "illegal, anti-social, self-incriminating and demeaning

behavior;" and "critical appraisals of other individuals with whom a Respondent has a close family relationship."

d. Although Ms. Harris asked her students to openly and outwardly answer questions concerning the aforementioned topics, Ms. Harris never obtained, nor attempted to obtain, written consent from her students' parents and/or guardians.
e. Ms. Harris willfully violated N.J.S.A 18A:36-34.
f. Ms. Harris' conduct could subject the District to monetary penalties by the New Jersey Commissioner of Education.
g. Ms. Harris failed to exercise self-restraint and controlled behavior which is required and mandated for a teaching staff member entrusted with the care and custody of children.
h. Ms. Harris' inappropriate and unprofessional conduct violates District policy and law.
i. Ms. Harris' inappropriate and unprofessional conduct placed students at risk of harm.
j. Ms. Harris' absolutely unacceptable actions demonstrate that she is not fit to serve as a teaching staff member.
k. Ms. Harris' conduct was sufficiently flagrant and egregious to warrant termination.

Ms. Harris has engaged in conduct unbecoming that provides just cause to require that her employment with the District be terminated.

CHARGE SIX: CONDUCT UNBECOMING

Ms. Harris is guilty of Conduct Unbecoming by way of the following:

a. The District repeats and reiterates the allegations in all the charges set forth above.
b. The Pupil Rights Amendment ("PPRA"), 20 U.S.C. sec. 1232h, also governs the

administration of student surveys and is intended to protect the rights of parents and students.

c. The PPRA mandates that written consent be obtained from parents and/or guardians prior to students being asked about certain topics, such as "illegal, anti-social, self-incriminating and demeaning behavior," and "critical appraisals of other individuals with whom a Respondent has a close family relationship."
d. Although Ms. Harris asked her students to openly and outwardly answer questions concerning the aforementioned topics, Ms. Harris never obtained, nor attempted to obtain, written consent from her students' parents and/or guardians.
e. Ms. Harris willfully violated PPRA.
f. Ms. Harris failed to exercise self-restraint and controlled behavior which is required and mandated for a teaching staff member entrusted with the care and custody of children.
g. Ms. Harris' inappropriate and unprofessional conduct violates District policy and law.
h. Ms. Harris' inappropriate and unprofessional conduct placed students at risk of harm.
i. Ms. Harris' absolutely unacceptable actions demonstrate that she is not fit to serve as a teaching staff member.
j. Ms. Harris' conduct was sufficiently flagrant and egregious to warrant termination.

Ms. Harris has engaged in conduct unbecoming that provides just cause to require that her employment with the District be terminated.

CHARGES NUMBER SEVEN: OTHER JUST CAUSE

Ms. Harris is guilty of Other Just Cause by way of the following:

a. The District repeats and reiterates the allegation in all the charges set forth above.

Ms. Harris' conduct as described above has had a profoundly negative impact upon the James F. Murray School and the Jersey City Public Schools Community, and requires that her employment with the District be terminated.

POSITIONS OF THE PARTIES

A. District

The District asserts that it has proven the first set of Tenure Charges, Docket 342-11/14, preferred against Respondent, Gilda Nicole Harris.

Charge One and Charge Two concern consecutive actions which took place in Respondent's classroom on or about April 3, 2014 when Respondent was returned to her fourth grade classroom after a three-month assignment to the Central Office stemming from an unrelated matter. The evidentiary record demonstrates that during the afternoon of April 3, 2014, Respondent did demand that her fourth grade students, who were either struggling and/or receiving failing grades, stand up in front of the class. Respondent then called the names of her students and had them stand in one of two lines. One line was for light skin or white students and the other for darker skin or black students. Respondent compared the two lines, indicating that the white or light skin line was going to pass fourth grade while the black or dark skin line would not pass.

In support of the charges, the District offered the testimony of student witnesses,[2] who it claims offered consistent and credible testimony detailing Respondent's inappropriate actions.

Student J.N. testified how on the day Respondent returned to the classroom, Respondent separated the class into two lines. "One line was like depending on the skin color, one line was black people and the other line was white people." (T. 4/23, 22:2-5). J.N. continued that Respondent told the class that "the white people has more better behavior than the black people." (T. 4/23, 22:7-8).

Student X.R. explained that Respondent "lined [the class] up in blacks and whites." (T. 4/23, 38:17). XR explained that Respondent "put people on the white side and she put people on the black side." (T. 4/23. 38:19-20). X.R. understood from Respondent's actions that historically "white kids or white people were always the richest, the black and other slaveries were like stupid or they couldn't like get higher grades [and] usually get left back." (T. 4/23, 39:8-11). Respondent's behavior and comments made X.R. feel " a little mad or sad because [his] skin color is black so [I] thought it was offensive." (T. 4/23. 39:17-19).

Student E.B. testified that Respondent directed the class to form two lines. E.B. testified, "There were people on my line that had the same skin tone as me. And on the other line, there were other people

[2] Due to the ages of the students, I did not swear them in. I determined through voir dire of each student that he/she had the capacity to differentiate what is the truth and is not the truth and was able to give competent testimony.

darker, like a lot darker than me. And [Respondent] was saying that a woman [E.B's] color to her to pass [E.B.] and her line because we work hard and the others don't." (T. 4/23, 51:1-6).

Student D.H testified that Respondent "…just came back and she put--she said everybody who was failing in the class to stand up and she said some people to sit down and they were doing better at the time. And she was putting us in two lines." (T.5/29, 90:19-23). D.H. explained there was one black line and one white line. D.H. was placed in the black line. (T. 5/29, 90:24-25 and 91:1-6). D.H. explained she felt "kind of sad" to be separated into one of the lines.(T. 5/29, 92:4-7).

Melissa Chismar (Chismar) was assigned to take over Respondent's class in January 2014 and again in April 2014. Chismar testified that when she was reassigned to Harris' classroom on April 4, 2014, the students immediately advised her that on the previous day Respondent "lined [the students] up according to race" and "told [the students] this is why black children fail." (T. 4/23, 115:7-25, 116:1-2). Chismar testified that there was never any list of students created based upon race and no list containing student names was placed on any classroom wall or bulletin board. (T. 4/23, 118:1-20). The District's Chief Academic Officer, Jason Bing (Bing), testified that it is never appropriate for a teacher to separate a class based on race. (T. 6/5, 15:7-10).

Respondent offered the testimony of student, J.M., whom she called as a witness. J.M. testified that Respondent had shown the class a video on April 3

and that they had discussed race as a result of the video (T. 6/5. 236:4-22). Respondent was not able to produce this video. The District argues that Harris' proffered excuse - that the students were separated by race as a result of watching the video - fails. The District contends Respondent did not present any credible evidence disputing the fact she lined students up by their race on that date.

The District argues that Respondent's outrageous conduct caused the students to feel humiliated and degraded because of their race and skin color. In light of the evidence it is clear that Respondent acted in an inappropriate and deplorable manner. Respondent's action of separating the children by skin color constitutes conduct unbecoming and removal from her tenure position is the only proper penalty.

The District argues this is not the first time Harris has separated students. In addition to the April 3, 2014 incident, the District contends that the credible evidence supports Respondent having seated the students based on their grades during the 2013/14 school year. Respondent organized the classroom into four groups of tables, which were named after various colleges, and the students were assigned based on their grades.

Chismar testified that upon arriving in Respondent's classroom in January 2014, she observed groups of desks, along with two desks facing the blackboard and one desk facing the window. The students advised Chismar that Respondent made student J. face the window and two boys face the blackboard (T. 4/23, 108:1-10). The students further advised

Chismar that they were seated according to their reading grade levels. (T. 4/23, 111:14-16). Chismar testified that children should not be seated according to their reading grade levels because it has a negative impact upon them, preventing them from helping each other and harming their self esteem. They would also know who was passing and failing. Chismar changed this arrangement so all the students could work together. (T. 4/23, 110:13-22). She explained that the students were afraid of Harris and thought every time the phone rang Respondent was going to return. (T. 4/23, 113:1-3).

Student J.N.'s testimony corroborates that Respondent organized the classroom into four (4) groups. The students were assigned to one of the groups based upon their grades, (T. 4/23, 19:5-10), with all the "A" students together, all of the "B" students together, the "C" students together and all of the "F" students together. (T. 4/23, 19:11-18). Respondent named the tables after colleges. The "A" table was Princeton University, the "B" table was Rutgers University, the "C" table was New Jersey City University and the "F" table was "Drew University." (T. 4/23, 19:21-25 and 20:1-6). J.N. was a "B" student and sat at the Rutgers Table. (T. 4/23. 19:19-20). Other students such as J, X and D, who received bad grades, sat at the "F" table. (T. 4/23. 20:12-20) One female student, J, was not in a group at all and was forced to face the wall. (T. 4/23. 23:9-20).

Student E.B. testified similarly that during the 2013-14 school year, Respondent organized the classroom into groups of tables named after universities (T. 4/23, 48:16-18). When Chismar took over the class, the students were assigned to rows with all students facing the front of the classroom and the smart-board. (T. 4/23, 49:17-23). When Harris returned on April 3, 2014, she rearranged the rows back to the university groups. (T. 4/23, 50:21-23).

The District argues that Respondent acted in an inappropriate and unwarranted manner. Her actions, which involved separating children by their academic performance, constitute conduct unbecoming. Respondent's actions served to embarrass the students and violate their privacy rights, as each student was aware if his/her classmates were "A", "B", "C" or "F" students.

In support of Charge Three, the District offers the Statement of Student T.N. (D2 and D4) who in addition to describing the separation of students based upon race, indicates that Harris had asked where the picture of President Obama that she kept in the class was placed. Respondent then yelled at the students and said they betrayed her. T.N. alleged Respondent told another student, J, she was going to be moved to another class.

The District asserts that Respondent's actions violated the District's non-discrimination and Equal Educational Opportunity Policies. Charge Four alleges violations of District Policy 6121, "Nondiscrimination/Affirmative Action", (D-6) which provides, "No student enrolled in the Jersey City

School District shall be excluded from participation in, denied the benefits of, or be subjected to discrimination in any educational program or activity of this district on the basis of race, color, creed, national origin..."

The District argues that Respondent is guilty of Charge Five, Charge Six, Charge Seven and Charge Eight, which constitute violations of District Policy 5145.4, "Equal Educational Opportunity." (D-7).

District Policy 5145.4 provides, "The Jersey City School District shall provide equal and bias-free access for all students to all school facilities, courses, programs, activities and services and give them maximum opportunity to achieve their potential regardless of race, creed, color, national origin, ancestry..."

The District contends that staff members are required to maintain wholesome and constructive relations with students, regard each as an individual and accord each student the rights and respect that are his/her due. Staff members are obligated to promote a learning environment that encourages fulfillment of each student's potential, consistent with district goals. The goals are achievable by adapting instruction to individual needs by insisting on standards of scholastic accomplishment for all students and creating a positive atmosphere in and out of the classroom, extending the same courtesy and respect expected of students and treating all students with fairness. (D-7).

Policy 5145.4 prohibits harassment by staff members against students which is defined as "any

gesture that is perceived as being motivated by an actual or perceived characteristic, such as race, color...that will have the effect (actual or perceived) of harming a student...or any gesture that demeans or insults a student or group of students in such a way as to cause substantial disruption in or interference with the orderly operation of the school. (D-7).

The District maintains Respondent's actions of separating the students into two lines based on race and skin color, and then advising them that the white students would pass and the black students would not, is shocking. The students attended Respondent's class to learn math and language arts, not to be discriminated against and humiliated by their teacher. Respondent made her students feel inferior, stupid and ashamed because of their race and skin color, it submits.

Bing testified Respondent's actions were a blatant violation of District Policy 6121 and 5145.4 (T. 6/5, 15:19-25 and 16:1-3). Respondent committed a discriminatory practice, which impeded educational improvement and also denied equal access to educational opportunities. (T. 6/5, 16:4-9). Respondent failed to create a positive classroom atmosphere and failed to treat all students with fairness. The District argues that Respondent's actions violated all aspect of Policies 6121 and 5145.4 and cannot be tolerated.

Respondent is guilty of Charge Nine, conduct unbecoming and excessive absenteeism according to the District. It insists that the Commissioner of Education has sustained tenure charges and ordered

dismissal when an employee is culpable of excessive tardiness and absenteeism, even where the absences are for legitimate medical or health reasons. Despite a teacher's performance being sufficient in the classroom and, even if the absences were approved leave or sick days, they may be considered material to the issue of excessive absenteeism and can justify removal of the teacher. Excessive or chronic absenteeism of a tenured employee, even if related to legitimate medical or health problems, has been held to constitute "incapacity," "unbecoming conduct," and/or "just cause," within the meaning of N.J.S.A. 18A:6-10, to warrant dismissal from employment, it urges.

The District contends there is no dispute that Respondent was absent on 118 occasions over the course of seven school years. (D-10). Respondent's absence records demonstrate she was absent as follow:

2007-2008, thirty-nine (39) occasions
2008-2009, twelve (12) occasions
2009-2010, fourteen (14) occasions
2010-2011, thirteen (13) occasions
2011-2012, thirteen (13) occasions
2012-2013, seventeen (17) occasions
2013-2014, ten (10) occasions

Respondent's poor attendance negatively impacted her students by consistently interrupting the continuity of instruction. Despite warnings, memoranda and counseling, her attendance has not improved (D-11). Respondent's excessive absenteeism between 2007 and 2014 had a negative impact upon the James F. Murray School and the Jersey City Public

Schools community and warrants termination, according to the District.

The District asserts that it has proven the second set of Tenure Charges preferred, Docket 379-12/14.

It argues Respondent was guilty of Charge One, conduct unbecoming, when she violated students' privacy rights by distributing un-redacted student records. In accordance with N.J.S.A. 18A:6-11, Respondent submitted to the District a Statement of Position in response to the First Tenure charges. Along with this document, Respondent included an Appendix of Exhibits, which included approximately forty-seven (47) documents with un-redacted confidential pupil records and information. (T. 6/23, 78:12-15). The information included in Respondent's Appendix contained documents dated between 2005 and 2014 and set forth pupils' full names, grade levels and classes attended (T. 6/23, 79:11-25).

Respondent intentionally misappropriated and disclosed these confidential records and information without consent from the students' parents or guardians, the District avers. Respondent did not obtain consent from the District prior to utilizing the records and information in connection with her Tenure Charges. A school board employee has a duty to safeguard these student documents and cannot share them with a third party. The District proffers that Respondent's intentional, inappropriate and unprofessional conduct in submitting un-redacted confidential pupil records and information violates Federal and State Law, including the Family Education

Rights and Privacy Act, 20 U.S.C. sec. 1232g (FERPA) and the New Jersey Pupil Records Regulations, N.J.A.C. 6A:32-7.1, et. Seq. FERPA protects the privacy of student education records and prohibits dissemination without written permission of the student's parent or guardian, except under limited circumstances involving legitimate educational interests, such as a school official reviewing the record to fulfill his/her professional responsibility. This was not the case with Respondent, whose disclosure of the records was to defend against her tenure charges. Respondent ignored her role and responsibility under FERPA to protect the records and uphold the parents' and students' right to privacy.

The District argues Respondent is guilty of Charge Two, conduct unbecoming, in that she encouraged and solicited her pupils to write letters about another teaching staff member alleging that this staff member was always late, spreading lies, did not teach the class anything, was gossiping and a bully. Respondent had one student write: "I have to not do art. Instead I have to hear all of that CRAP & TRASH, she's talking to a bunch of 10 year olds about." (emphasis in the original, D-8). These writing assignments were not part of the curriculum or lesson plan approved by the District. Bing testified that the letters, which seemed to be prompted by an adult, were not an appropriate exercise or activity for fifth grade students. (T. 6/5, 18:2-11 and 21:8-16).

Respondent denied prompting the students to write letters; yet, her own witness, Student S.Y.'s mother, N.M, testified concerning her own belief in writing

letters "when you feel you need to get something off your chest." N.M. was glad Respondent reinforced what N.M. taught her son. (T. 6/11, 88:12-21). This supports the conclusion that Respondent encouraged and/or solicited her students to write these letters.

Respondent is guilty of Charge Three, conduct unbecoming, for having students write negative letters concerning their study and home life. (D-9) Respondent had the students write similarly worded statements: "We are halfway thought the fourth grade. Since the beginning of the school year in September, you have stressed the importance of daily study habits and hard work. We have discussed the reasons why I get the grades I do in school. I want to be completely honest with you and explain my study habits at home." (D-9). The letters all contain various reasons or excuses concerning the students' failure to do homework such as, "I don't do my homework because my dad has to work, my grandma has to help my sister, so I don't do homework because I have to do it by myself, my mom use (sic) to help me but now I have to do by myself." (D-9). The District argues that the writing assignment made the students feel humiliated and embarrassed. The writing assignment also required Respondent's students to disclose negative, private and personal information about their families. The assignment was not part of the curriculum or any lesson plan approved by the District. Bing testified concerning the letters.(D-8). Bing proffered that these letters were not an appropriate exercise or activity as they lacked any educational value. (T. 6/5, 23:2-3).

The District argues that Respondent's actions of soliciting her students to write the negative letters for Respondent's personal use in Charge Two and the letters detailed in Charge Three took away from the students' educational day and are a breach of her professional responsibilities. Accordingly, Respondent is guilty of Charge Four.

The District did not address Charge Five or Charge Six in its brief, but did present evidence related to these charges concerning the content of the letters in Charge Three. The District argues that the letters were negative and contained critical appraisals of family members.

The District insists that conduct unbecoming is conduct that adversely affects the morale or efficiency of the agency of which the employee is a member, which has a tendency to destroy public respect for government employees and confidence in the operation of government services, or which violates an implicit standard of good behavior. Such a finding does not require that any specific rule or regulation has been violated but may be based on the violation of the standard of good behavior. Educators must be held to an enhanced standard of behavior. Teachers are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each child. This heavy duty requires a degree of self-restraint and controlled behavior not normally found in other types of employment.

The District argues that this case does not involve an isolated incident; but, rather, involves a pattern of unacceptable conduct culminating in a racially discriminatory incident. Respondent is not a role model or a mentor for the students of the Jersey City Public Schools. Her actions constitute conduct unbecoming and are sufficiently flagrant and egregious as to warrant termination. Respondent engaged in conduct which placed her students at undue risk of harm. The District concludes that it has proven by a preponderance of the evidence that there is just cause to terminate Respondent. One incident in the charges alone would warrant termination. The combination of charges demonstrates through un-refuted evidence offered by the District that Respondent is unfit to be a teacher and must be removed from her tenured teaching position.

B. Respondent

Respondent testified she is a tenured teacher in the Jersey City Public Schools and was hired as a Teacher Assistant in 1997. She is currently an Elementary Teacher assigned to the James F. Murray Elementary Public School No. 38, a position Respondent has held since 1999. Prior to these proceedings Respondent has had an unblemished disciplinary record. She recounts her career, which contains many notable achievements.[3] However, Respondent did not respond to most of the Charges in her brief. Her defenses are

[3] Respondent's career history was not in question. Respondent was advised multiple times during the hearing to address the facts of what happened, (T. 6/23, 27:21-23, 29:14-18) which she does not do in depth in her brief.

contained in the opening argument and testimony she gave during the Hearing.

Respondent testified as to her actions on April 3, 2014, which serve as her response to the allegations in Charges One through Eight of Tenure Charges, Docket 342-11/14. She maintains she did not do what the District claims and the charges should be dismissed.

Respondent testified that in January 2014, she was placed in an alternative assignment with the Jersey City Public Schools Human Resource Department. Respondent remained assigned to the Human Resources Department until April 3, 2014. Upon her arrival that day, Respondent was unexpectedly directed to report to School 38 and return to her previous assignment. Despite her belief that proper protocols were not followed, she left the Human Resources Department at approximately 8:30 A.M. and reported to PS 38. Between her arrival at PS 38 and 10:30 A.M. she waited in the main office. (T. 6/23, 31: 9-25 and 32:1-16). Respondent testified that she emailed several staff within the Jersey City Public School that she was no longer assigned to PS 38. She referred to emails to demonstrate the times she was not actually in the classroom. Respondent was not performing instructional duties when she returned. (T. 6/23, 33:14-18). During this time she had discussions with the Principal's Clerk, Camillo, about her direct deposit pay stub. She did not have a record of her salary. On April 4, Respondent testified she returned to the "rubber room" and was advised her payroll stubs were shredded. Respondent continued to detail issues that

she had with her pay stub, which she had discussed the morning of April 3. (T. 6/23 34:7-17). At approximately 10:30 A.M. on April 3, she was called into a meeting with Principal Jones, Ileya and Chismar. (T. 6/23, 35:3-6). Respondent was directed by Jones to complete marking period three electronic report cards by April 9. Respondent was to obtain the information from Chismar who advised the administrator that all grades for marking period three were completed and ready for report cards. (T. 6/23 35: 13-18).

Harris testified that she asked what information had been given to the students concerning her absence. Anticipating the students would query her as to her absence, she wanted her response to be consistent with what the students might have been told. She stated that after a contentious reply from Jones, the meeting concluded. She stated she was reprimanded for having her lunch in her hand when she exited the principal's office and responded she did not have time to unpack personal items or put things away. (T. 6/23, 36:1-11).

Approximately 10:45-11:00, Ileya escorted Respondent to Room 218, her fourth grade classroom. He introduced Respondent as a new teacher and reminded the students that he was available if they needed to talk to him and asked if they were ok. (T. 6/23 36:12-18). Ileya, and another teacher who was present, then left the room.

Respondent stated that other staff entered the room: Joseph Romano, the Fourth Grade teacher in the next room; Cassandra Bronson, the security guard with whom she worked and Chismar. Benjamin DiFranco

(DiFranco) was allegedly in the room and Respondent testified DiFranco discussed loyalty with the children as part of an early morning tutorial vocabulary. He wrote on the black board: Loyalty and Betrayal. (T. 6/23 36:23-25 and 37:1-12). Respondent testified that DiFranco informed the students he kept Respondent up-to-date on their progress. The students reacted to Respondent's return. Some cried, "Oh, my God, where have you been?" (T. 6/23 37:16-18). Student E.B. stated, "I'm going to have to transfer" (T. 6/23 37:18-19). Student D.H. said, "I am getting left back." (T. 6/23 37:20). Respondent testified some students hugged her and asked about her absence. The students allegedly told her that students E and J claimed to have gotten her fired and that another, who was at-risk, had been suspended. (T. 6/23 38:1-15). Harris denies this allegation. (T. 6/23 38:16-19). The children told Respondent they were upset because she failed them on their report cards and had not given them extra credit. Respondent advised the students she completed all the second marking period report cards but that the extra credit was still on the table. (T. 6/23, 39:5-16). They told her that they were passing now but had bad behavior and could not go to field day. Respondent testified how, during her absence, she tried to keep up with the students' activities during her reassignment and submitted anything she could to help them. She also told them she had continued to study for her doctorate.

Respondent stated, "I instructed the students to line up into two lines, girls and boys, common. Take coats and lunches in case we were running late." (T.

6/23 42:7-10). Respondent submitted her schedule with her evidence. The students had what was called a special activity, which would also be referred to as her teacher prep or lunch. Jones had assigned certain of her duties to DiFranco who was there again to walk with her and the students to the gym. (T. 6/23, 42:6-17).

Respondent testified DiFranco returned these students to the classroom. Respondent indicated she was disappointed in the students' progress and behavior during her absence. She stated she had organized them into cooperative group seating arrangements of which the District, as well as Jones, were aware. (T, 6/23, 44:1-12).

Respondent claimed to have named all of her students as scholars and told them they were all going to college. She testified she did not put them as tables one, two, three, four or use the terms "a", "b", "c" and "d" as all the students would not understand what this meant. She told them what the numerical grades related to during the time of report cards. (T. 6/23. 44:14-25). Respondent, upon her return, reorganized the cooperative groups' seating arrangement and reactivated what was called Peer Leader and Study Buddies, one of each at every table. Respondent inquired if the students had retained their on-line academic accounts, which the students said they did not use. (T. 6/23, 45:1-9).

Harris stated Ileya returned again to the classroom to ask the students if they need to tell him anything. The students did not; but Respondent wanted to know why a particular student was returned to the

classroom when Ileya had removed her. She was advised to inform him in writing of the issue. Respondent then testified she completed a Closed Reading activity in review for a test. (T. 6/23, 45: 10-22). Respondent had the students organize desks and restructure the classroom into what she believed to be a functional and organized environment that existed previously.

Respondent testified she then began to distribute school picture packets. Since she had not been there previously, she had to use a bunch of lists that remained in the classroom. She went through the shortest lists first. Some of the lists were those who ordered pictures, school T-shirt, who sold candy or student identified items. (T. 6/23, 46:17-23). Respondent stated there was a final list that was longer and was posted on the bulletin board, which was previously her Vision Board. Only positive things went on her Vision Board. (T. 6/23, 46:24-25 and 47:1).

Respondent stated, "With the last list, as we prepared for the close of the day, I announced that if-since it was a longer list-I announced that if I call your name, please stand, thinking it was another distribution list as well. I called the names on the list. And when I looked up, many students were standing. And I asked, what was this? And several students offered several explanations." (T. 6/23, 47:13-23).

Respondent testified she inquired of the students, "what was wrong with this picture?" as the students stated their reasons for the unknown list of

those with recurrent behavior problems. There were few students who were not on the list or who were not standing." (T. 6/23, 48:11-16). Respondent proffered that Student T.N., who is African American, repeatedly insisted that students who were listed were black. Respondent pointed out that not all were black and that simply because a person's complexion or skin color is brown does not make him or her black. The fact a person is fair-skinned complexion doesn't make him or her white. (T. 6/23, 48:19-25 and 49:1). Harris stated this was a theme she had to teach students in an urban school many times and she reiterated it that day. Every student in Respondent's Fourth Grade 2013/14 classroom was a person of color. (T. 6/23, 49:1-5). Respondent testified repeatedly on cross-examination that she did not line anybody up because of his or her race. (T. 6/23, 68:18-22). She did not tell African-American or darker skin students that they would not pass; nor did she tell lighter skin students they would pass. As an African American woman she was offended by the accusation. (T. 6/11, 68:8-16).

In support of this assertion, Harris offered the testimony of Teacher Assistant Corinne Decker-Gingles (Gingles). Gingles testified that she came into Respondent's classroom a few times during the 2013/14 year. When she entered, the children were always engaged and working. There was always something new on the bulletin board and the children were well mannered. (T. 6/11, 25:17-23). On the days she came into Respondent's classroom, she did not observe any

groups or lines in the classroom.(T. 6/11, 25:24-25; 26:1).

Respondent did not contest her absences in Charge Nine. Nor did she offer direct testimony on this charge. Respondent did argue that her use of contractual days throughout her tenure does not constitute excessive absenteeism. (T. 6/23, 20:10-12). She admitted taking a leave from the District in 2007 and 2008 for a medical procedure of which the District was aware weeks in advance. Respondent argued further that on many days she was absent, if she was not hospitalized and able to visit, she did return to the school at some point in the day even though she was marked absent. She communicated with the school staff on those days and used technology to communicate with the substitute teacher and the students.(T. 6/23, 21:8-16).

In Tenure Charges, Docket 379-12/14, Charge One, Respondent admitted submitting, as part of her defense, a 200-plus page packet of student letters. She acknowledges that none of the student names were crossed out. (T. 6/23 78:12-15). Her understanding was that these proceedings are private. Respondent argued she did not violate FERPA.

Respondent's former fifth grade student, S.Y., testified on her behalf concerning the February 2013 complaint involving letters sent about an art teacher, which is the subject of Charge Two of the second Tenure Charges. S.Y. felt that the manner the art teacher spoke of Respondent was unprofessional and he disagreed with what was being said. He testified he and the whole class decided to write to Principal

Jones. (T. 6/11, 69:20). He testified that the art teacher left him and the other students and she did not teach them anything. (T. 6/11, 70:14-16). When learning of this issue, Respondent asked her students what they did when they have a problem. They responded they write a letter and that's how they got the idea. (T. 6/11, 71:1-4). S.Y. testified Respondent did not force them to write a letter. (T. 6/11, 71:7-14).

S.Y.'s mother, N.M., also testified on Respondent's behalf. She confirmed that her son related the incident with the art teacher to her. (T. 6/11 84:1-17). She stated she loved that Respondent had a chance to teach her child and that Respondent taught the children skills as well as education and wished there were more teachers like her. (T.6/11 88: 6-12). N.M. believes that when someone does something wrong, it should be written down and documented. N.M. testified she was glad Respondent reinforced what N.M. taught her son. (T. 6/11, 88:14-22).

On cross-examination, Respondent maintained that she did not require the students to write the letters related to what another teacher said about her. She recalled that the Principal provided her with copies of the letters. (T. 6/23 82:18-19). She testified the students had reported that another teacher said bad things (T. 6/23 82:23-24). There was no evidence that the letters were written during school, Harris insisted. (T. 6/23 84:11-12). She saw no reason the students couldn't do journal writing or any other type of writing at any time if the statements are truthful. (T. 6/23, 84:16-19). Students can write during recess

and journal writing time. Since this occurred in February, the students would spend most of their free time indoors, which constitutes a denial of Charge Four as the letter writing did not take away from instructional time.

Respondent does not address Charges Three, Five or Six which are related to the letters concerning the students' writing about their home environment.

Respondent argued that she has been involved in community activities, chaired committees and embraced the servant leadership work ethic. (T. 6/23, 13-18) In her overall defense, Respondent stated, "To insist that the students fail, contribute to an environment in which they would fail, would be like suicide to me. As the District and the State now has a policy that students' progress is tied to teacher progress, it serves no benefit to undermine, humiliate, embarrass, or do anything to students." (T. 6/23, 22:10-16). Respondent insists that she has not done what the District alleges she did. (T. 6/23, 23:22).

Respondent argues the following as an appropriate remedy.[4]

1) All tenure charges brought against her by the District of the Jersey City Public Schools should be dismissed and/or denied; her suspension be permanently removed and expunged from the State of New Jersey and District's files and her personnel records; and,

[4] Respondent's brief contained lengthy discussion related to the settlement conferences. While one was held, issues and offers discussed at that conference are inappropriate for inclusion in the arbitration hearing or this decision.

2) She should be immediately reinstated to a tenured position in the Jersey City Public Schools with full back pay and seniority, including stipends and extra compensatory income that supplemented her regular income for the entirety of her employment as a tenured teacher and quasi-administrator for District programs, and made whole for any and all loss of benefits suffered during her suspension without pay from the District from November 19, 2014 to the present.

DISCUSSION AND FINDINGS

Several introductory comments are appropriate. Respondent has raised procedural issues in her brief and during the hearing related to due process, back pay concerns, and issues related to the removal of her attorney by the former arbitrator.

The former arbitrator did not remove Respondent's attorney. By letter dated April 8, 2015, Respondent's attorney advised the former arbitrator that the law firm was declining to represent her and that the original April 14, 2015 hearing should be adjourned for Respondent to obtain new counsel, with whom they would cooperate, before the April 23, 2015 hearing date.

On June 3, 2015, I answered Respondent's concerns related to due process issues which had been raised. I assured Respondent that her due process rights were not affected if I were to review the transcript, which I did, of the individuals who testified before the previous arbitrator, thus negating the need to start

the process over. Respondent was assured she had the same due process rights as she did with the previous arbitrator. She was advised she could call any witness who could give relevant testimony regarding the charges preferred against her.

On June 11, 2015, I issued an award in response to Respondent's motion for back pay and restoration to the payroll. I granted Respondent full pay for the period of April 28, 2015 through May 29, 2015. In all other respects, I denied Respondent's motion for restoration to the payroll.

Other issues Respondent raised in her brief concerning the Board's procedures are not relevant to this hearing. Accordingly, I turn to the merits of this dispute.

There are two sets of Tenure Charges which have been joined in this action. Tenure Charges 342-11/14 were served on or about September 23, 2014 and certified to the Board on November 19, 2014. Tenure Charges 379-12/14 were served on or about November 21, 2014 and certified to the Board on December 16, 2014. Each set will be analyzed independently.

Tenure Charges 342-11/14

Charges One and Two arise from the same events and are discussed together. The record reveals that Respondent did demand on April 3, 2014, that her fourth grade students, who were either struggling and/or receiving failing grades, stand up in front of the class. The record further indicates that Respondent then separated her students into two lines according to race. Students from Respondent's fourth grade class of 2013/14 testified credibly as to the

manner in which Respondent asked the students to stand up and form two lines based upon skin color. One line was for black or dark skinned students; and, the other line was for white and/or light skinned students. For example, Student D.H. described how Respondent said that everyone who is failing should stand up and she told certain others to sit down. (T. 5/29, 90:19-23). Respondent then separated the students into two lines, one line with black students and one line with white students. D.H. was placed in the line with black students.(T. 5/29, 90:19-25 and 91:1-5) D.H. testified further that everyone who got F's had to stand up. Respondent then separated the students into two lines.(T. 5/29, 91:10-14).

The students also testified consistently concerning Respondent's comments comparing the two lines, indicating that the white or light skin students would pass fourth grade while the black or dark skin students would not. The students expressed various forms of discontent and anger at Respondent's actions. Several students advised their parents which led to inquiries concerning the possible racial segregation of the class. Student D.H.'s comment characterizes the students' feeling when she stated she felt "kind of sad." (T. 5/29, 92:4-7). Student X.R. felt "a little mad or sad because skin color is black so [I] thought it was offensive." (T. 4/23, 39:17-19). I do not credit Respondent's testimony that the lines were formed based upon her reading of a large list posted on the classroom bulletin board. This testimony was contrary to testimony provided by Chismar that no list containing student names was

placed on any classroom wall or bulletin board. (T. 4/23, 118:1-20). I concur with the testimony of Chief Academic Officer Bing that it is never appropriate to separate a class based upon race, (T. 6/5, 15:7-10).

The April 3, 2014 incident was not the first time Respondent separated her students. The students' testimony also demonstrated that they were separated in class according to their academic ability. Respondent organized the classroom into four specific seating tables with the students assigned based upon their grades. The record supports the conclusion that she created "A", "B", "C" and "F" tables and named the tables Princeton University, Rutgers University, New Jersey City University and Drew University respectively. Melissa Chismar, Respondent's replacement during her reassignment to Human Resources, testified the classroom was separated into the aforementioned groups and that she returned them to rows. Chismar testified that Respondent's seating method did not provide an opportunity for students to work together or help each other out.

Such an arrangement affects the student's self-esteem, as all the students know who is passing or failing. The testimony of the students supports the potential negative effect of this arrangement on self-esteem. Respondent testified credibly that she believed she was forming cooperative groups and, when Respondent returned from the Human Resources assignment, she again restructured the classroom into what she believed to be a functional and organized environment that previously existed. Her testimony demonstrates she was not cognizant of the negative

impact such an arrangement might have on her students and did not seek to cause intentional harm. Respondent's action of separating students by their academic ability supports Charge One and Charge Two to the extent it demonstrates a continued pattern of separating students into categories by racial categories.

There is insufficient factual evidence to refute the students' testimony stated above. I concur with the District's argument that Respondent's conduct was inappropriate and demonstrated exceptionally poor judgment. I do not find, however, that Respondent's conduct was intentionally cruel and abusive or that she intended to create racial animus. Rather, I am convinced, she wanted students to feel the sting of discrimination so they would know how not to act in potentially racially charged situations.

Teachers often attempt to impart an understanding to their students concerning racial issues. Respondent testified that she explained to her students that simply because a person's complexion or skin color is brown does not make him or her black. The fact a person is fair-skinned complexion does not make him or her white. (T. 6/23 48:19-25 and 49:1). Respondent stated this was a theme she had to teach students in an urban school many times and she reiterated it that day. Every student in her Fourth Grade 2013/14 classroom was a person of color. (T. 6/23, 49:1-5). Respondent, an African American teacher, apparently was attempting to teach her students a lesson concerning race, but should have chosen a more suitable methodology.

Accordingly, based upon the record, I find Respondent culpable of Charge One, items c, d, e, g, h, i, j, and k; and, I find Respondent culpable of Charge Two, items b, c, d, e, f, g, h, i, k, l, m, n, o, and p.

The record does not support by a preponderance of the evidence that Respondent yelled at her students, saying they betrayed her, nor that she openly disparaged other teachers to the students. While one student, T.N., did include this in her written statement (D-2), there is insufficient testimony or other evidence to support the statement. Further, Respondent testified credibly that DiFranco had been discussing loyalty in an early morning vocabulary tutorial of April 3, 2014, and the words "loyalty" and "betrayal" were written on the board (T. 6/23, 37:5-12), which raises doubt as to Respondent's culpability. I find that Respondent is not culpable of Charge Three.

District Policy 6121 provides in part that no student may "...be subject to discrimination in any educational program or activity of this district on the basis of race, color, creed, national origin, ancestry..." The actions of Respondent in separating the students by race, as sustained in Charge Two, are discriminatory in nature and technically violate District Policy 6121. As such, I find Respondent culpable of Charge Four, items b and c.

Charge Five relates to that part of District Policy 5145.4 which provides for equal and bias-free access for all students to all school facilities, courses, programs, activities and services regardless

of race, creed, color, national origin, ancestry. The record does not establish by a preponderance of the evidence that Respondent's actions on April 3rd affected the students in such a manner. No child was deprived of access to any facility, course, etc., as a result of what she said. Thus, I find the Respondent is not culpable of Charge Five.

District Policy 5145.4 provides that "staff members shall maintain professional relationships with students at all times and develop wholesome and constructive relationships with them." The record does not support Charge Six by a preponderance of the evidence. The credible testimony suggests that some students were pleased to see Respondent return while others were fearful of not passing, suggesting only that Respondent might be very demanding of her students. N.M., the parent of student S.Y., testified she was pleased that Respondent taught her child and wished there were more teachers like her. (T. 6/11, 88:6-12) Teacher Aide Gingles testified that when she came into Respondent's classroom, the children were always engaged and working. There was always something new on the bulletin board and the children were well mannered. (T. 6/11, 25:17-23). The record does not contain credible evidence that the Respondent did not maintain a professional manner with her students. I find that Respondent is not culpable of Charge Six.

District policy 5145.4 states, "…staff members shall be expected to regard each student as an individual and to accord each student the rights and respect that are his/her due." Having sustained Charge

Two, I found Respondent culpable of separating her students into two lines based upon race on April 3, 2014. The students testified about their anger and humiliation at this action. Such action denies the students the rights and respect which are due him/her. Further, I find Respondent's separating students into university groups allowed students to know which were passing and which were failing, and did not protect students' right to privacy regarding grades. Respondent's actions, even if unintended, failed to treat all students with fairness. Hence, they violate this section. Accordingly, I find Respondent culpable of Charge Seven, items b and c.

District Policy 5145.4 prohibits any act of discrimination or harassment against any member of the school community. It further defines harassment in part as "any gesture that is reasonably perceived as being motivated by an actual or perceived characteristic, such as race, color, religion, ancestry, national origin…that will have the effect (actual or perceived) of harming a student." It is also defined as "any gesture that demeans or insults a student in such a way to cause substantial disruption or interference in orderly school operation." Students are members of the school community.

While the record does not reveal that Respondent intended to cause harm, Respondent's action of separating the students into two lines based on race, sustained in Charge Two, is a discriminatory act, which had a harmful effect. The students testified that it made them feel bad, sad or angry about themselves with the resulting effect of harming their

self-esteem. Respondent's misconduct demeaned the students, caused anger amongst the parents with a resulting investigation and reassignment of Respondent and another teacher assigned to perform her duties. I find Respondent culpable of Charge Eight, Items b, c, d, and e.

The Record supports the charge of excessive absenteeism. Respondent does not contest that she was absent on 118 occasions during the seven-year period. This amounts to an average of approximately seventeen (17) days per year which I find, is excessive. Respondent errs in her belief that because an absence is contractually permitted it cannot rise to the level of being excessive. I concur with the District's argument that it is well established that excessive or chronic absenteeism, even if related to legitimate or health problems, could be grounds for disciplinary action. Excessive absenteeism by a teacher can have a negative impact on the students by disrupting the continuity of instruction. Accordingly, I find the Respondent culpable of Charge Nine.

Charge Ten is a summary allegation and need not be addressed here.

I find, therefore, that Respondent is culpable of Charge One, Items c, d, e, g, h, i, j, k; Charge Two, Items b, c, d, e, f, g, h, i, k, l, m, n, o, p; Charge Four, Items b, c; Charge Seven, Items b, c; Charge Eight, Items b, c, d, e; and Charge Nine of the charges preferred against her on or about September 23, 2014. Respondent is not culpable of the remaining allegations and charges preferred against her on or about September 23, 2014.

Tenure Charges: 379/12/14

In response to the Tenure Charges 342/11/14, Respondent submitted a Statement of Position, which included approximately forty-seven (47) documents. Respondent's Appendix of Exhibits included documents that set forth the students' full names, grade levels and classes attended. The District maintains this violates Federal and State law, including the Family Education Rights and Privacy Act (FERPA) and the New Jersey Pupil Records Regulations.

Schools must have written permission from the parent or eligible student in order to release information from a student's records, except for legitimate educational interests, of which, the District argues, Respondent's defense of her tenure charge is not one. Respondent admits submitting the documents and admits she did not obtain consent from any of the students, students' parents or the District in transmitting these documents. She argued that her understanding of FERPA is that it is between the government and institutions. (T. 6/23 18:7-8.). Respondent believed that these proceedings are private and the use of the documents would be permissible.

While I find Respondent did provide the un-redacted information, based on Respondent's testimony, I do not find that Respondent intentionally misappropriated and disclosed confidential student records and information. Respondent's actions are still a technical violation, however. Accordingly, I find Respondent culpable of Charge One, Items g, h, i, j, k, m, n, q, and r.

The District argued that Respondent is culpable of Charge Two in that she encouraged or elicited her pupils to write letters complaining about another staff member. I concur with this position. There is sufficient evidence from students that the Respondent told them that if they had a complaint they knew what to do. Respondent's former student, S.Y., testified on behalf of Respondent. S.Y. testified it was the students in February of 2013 who informed Respondent that an art teacher was speaking inappropriately about her. He testified that the students took it on their own initiative, not as a homework assignment, to write the complaint letters. However, on direct and cross-examination, S.Y. admitted that Respondent asked the students what they usually do when they have a problem. S.Y. admitted that the students responded that they write a letter. (T. 6/11, 71:1-4 and 75:10-17). Testifying for the District, Bing stated the letters were inappropriate and looked as if prompted by an adult. (T.6/5, 182-11). I concur with the District's position that Respondent, as a teacher, plays a leadership role for her students. While she did not order the students directly to write the letters, through her actions she did elicit and encourage their production. I concur with the District's argument that, in this instance, Respondent acted unprofessionally and failed to exercise the restrain that is expected of a professional by using her students for her own devices. There are other methods Respondent could have utilized to bring another teacher's inappropriate comments to the school administration. However, the record does not reveal

that Respondent's conduct in having the students write these letters rises to a level of placing the students at risk of harm or causes her to be unfit to be a teacher. Accordingly, I find Respondent culpable of Charge Two, Items d, e, f, h, i, and j.

District Exhibit 9, which was accepted into evidence, contains a series of letters which Respondent's students wrote to explain why they did not complete their homework and is the basis of Charge Three. The letters do contain information regarding the students' home life. Respondent included these letters as part of her response to the Tenure Charges. Bing testified that he believed the letters lacked educational value and that such discussions of teachers having issues with a student and homework should be held with a parent present on a one-on-one basis. (T. 6/5, 23:2-11). The District argued that the letters are not part of the curriculum. I concur with the District's position that this writing assignment caused students to disclose private and personal information about their families and that this information was often negative. However, there has been no showing that students were placed at a risk of harm from these letters or were humiliated because of them. The record does not demonstrate that the letters were punitive in nature, that Respondent failed to exercise self-restraint and control behavior, or that the assignment made the students feel humiliated and embarrassed. Thus, to the extent discussed herein, I find that Respondent is culpable only of Charge Three, Items d through p, s, and t.

There has been no showing by a preponderance of the evidence that Respondent intentionally ignored her educational responsibilities and took significant time from her pupils educational day in their writing the letters which are the subject of Charges Two and Three. Nor is there evidence that Respondent neglected her teaching duties and responsibilities. Prior to the instant matter, the record contains no evidence of complaints concerning Respondent's ability. There is some evidence in the record to suggest that some parents were pleased with Respondent's educational approach. (Testimony of N.M., T. 6/11, 88:1-22). Further, Respondent testified on cross-examination that the February 2013 letters were written as part of journal writing and during recess. Since it was February, students would spend most of their free time in the classroom. (T. 6/23, 84:25 and 85:1-3). There is no evidence to the contrary. Accordingly, I do not find Respondent culpable of Charge Four.

Charge Five references N.J.S.A. 18A:36-34 and Charge Six references The Pupils Rights Amendment (PPRA), 20 U.S.C. section 1232h. The pertinent language of both mandates that written consent be obtained from parents and/or guardians prior to students being asked about certain topics such as "illegal, anti-social, self-incriminating and demeaning behavior" and "critical appraisals of other individuals with whom a respondent has a close family relationship." While not specifically arguing these sections in its brief, the District has demonstrated that Respondent required her pupils to write statements about their home life. Each letter began

with a similarly worded paragraph. (D-9). The students wrote about their home and family circumstance, resulting in the students providing negative information about their personal lives and family members. The record does not contain evidence that Respondent had the permission of a parent or guardian for this assignment. While technically violating both these sections, there is no evidence that Respondent's action was willful, placed the students at a risk of harm, or demonstrated she is unfit to be a teacher. In this light, I find Respondent technically culpable of Charge Five, Items b, c, d, g, h; and Charge Six, Items b, c, d, f, and g.

Charge Seven is a summary allegation and need not be addressed here.

As indicated above, I find Respondent culpable of Charge One, Items g, h, i, j, k, m, n, q, r; Charge Two, Items d, e, f, h, I, j; Charge Three, Items d through p, s, t; Charge Five, Items b, c, d, g, h; and Charge Six, Items b, c, d, f, g of the charges preferred against her on or about November 21, 2014. Respondent is not culpable of the remaining allegations and charges preferred against her on or about November 21, 2014.

Having found Respondent culpable of the charges on Agency Docket Numbers 342/11/14 and 379/12/14 to the extent stated above, I turn to the appropriate penalty for these infractions.

The District argued vigorously in its brief, and reiterated in its reply brief, that Respondent must be terminated. The District proffered that Respondent's conduct is sufficiently egregious that even one

incident in the charges is sufficient to warrant termination.

While I find a significant penalty is warranted, Respondent's termination is not. Respondent is a long-term employee who has no prior discipline. The record demonstrates that Respondent is a highly credentialed instructor and, prior to the instant matter, had participated in a myriad of positive school and community activities. The record does reveal she exercised poor judgment in her actions and is culpable of the charges to the extent discussed above. However, Respondent did not act in a manner that was willful, vindictive, or with malicious intent. The record does not support the allegation that Respondent is not capable of returning to her position as a teacher. There is testimony that parents are pleased Respondent taught children and that when entering Respondent's classroom, the students were always engaged and working and that the students seeming well mannered. I believe Respondent is aware of her mistakes and will conform to the District's rules and standards.

Concerning excessive absenteeism, while Respondent was warned concerning attendance, there is no indication in the record that Respondent previously received any discipline for this infraction. While some discipline is now warranted, termination is not the appropriate penalty. A lengthy suspension should sufficiently place Respondent on notice concerning her need to improve her attendance.

Accordingly, I find that Respondent shall be restored to her teaching position effective September

8, 2015. Respondent's record shall reflect a "time served" suspension from the period when she was first suspended on November 19, 2014 until her restoration to the payroll on September 8, 2015, less the period for which she was awarded back pay pursuant to my June 11, 2015 decision. Further, Respondent is given a final warning concerning time and leave violations. It is so ordered.

AWARD

(Agency Docket Nos. 342/11/14 and 379/12/14)

1. Respondent Gilda Nicole Harris is culpable of Charge One, Items c, d, e, g, h, i, j, k; Charge Two, Items b, c, d, e, f, g, h, i, k, l, m, n, o, p; Charge Four, Items b, c; Charge Seven, Items b, c; Charge Eight, Items b, c, d, e; and Charge Nine of the charges preferred against her on or about September 23, 2014.
2. Respondent is not culpable of the remaining charges preferred against her on or about September 23, 2014.
3. Respondent is culpable of Charge One, Items g, h, i, j, k, m, n, q, r; Charge Two, Items d, e, f, h, I, j; Charge Three, Items d through p, s, t; Charge Five, Items b, c, d, g, h; and Charge Six, Items b, c, d, f, g of the charges preferred against her on or about November 21, 2014.
4. Respondent is not culpable of the remaining charges preferred against her on or about November 21, 2014.
5. The appropriate penalty for Respondent's culpability in (1) and (3) above is a "time served" suspension for the period of November 19, 2014 until Respondent's restoration to the payroll on September 8, 2015, less the period for which she was

Awarded back pay pursuant to my June 11, 2015 award. Respondent is given a final warning concerning attendance.

DATED: October 2, 2015

Howard C Edelman

HOWARD C. EDELMAN, ESQ.,
ARBITRATOR

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

On this 2nd day of October 2015, before me personally came and appeared Howard C. Edelman to me known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

MARY WALBERSTADT
NOTARY PUBLIC, STATE OF NEW YORK
NO. 01WA6101786
QUALIFIED IN NASSAU COUNTY
COMMISSION EXPIRES NOVEMBER [redacted]

is

Mary Walberstadt

NOTARY PUBLIC

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

----------X

In the Matter of Tenure Hearing of
Nancy Mastriana and the
School District of the Township
of Hillsborough, Somerset County

Agency Docket No. 233-8/15

----------X

ARBITRATOR
Joseph Licata, Esq.

OPINION AND AWARD DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

APPEARANCES

FOR THE PETITIONER
Vittorio S. LaPira, Esq.
Fogarty & Hara

Issued: October 9, 2015

FOR THE RESPONDENT
Edward A. Cridge, Esq.
Mellk & O'Neil

NATURE OF DISPUTE

In accordance with N.J.S.A. 18A:6-10 et. seq. and N.J.A.C. 6A:3-5.1(b), on August 26, 2015, the Hillsborough Township Board of Education ("Petitioner" or "Board") filed with the New Jersey Department of Education, Bureau of Controversies & Disputes, tenure charges against Respondent, Nancy Mastriana, seeking to dismiss her from employment from her position as a Special Education/Resource Center Teacher at Hillsborough Middle School. The Charges were brought under N.J.S.A. 18A:6-17.3a(2) because Respondent received partially effective ratings in two consecutive years. On September 4, 2015, Respondent filed an answer to the Tenure Charges. On Wednesday, September 9, 2015, by overnight mail, the Director referred the case to the undersigned pursuant to N.J.S.A. 18A:6-16, as amended by *P.L. 2012, c. 26 and P.L. 2015, c. 109*. However, the referral letter, transmitted by the Director to the parties by way of regular mail, was not received by the Board Attorney until Friday, September 11, 2015 at approximately 3:00 p.m.

On September 11, 2015, at 4:23 p.m., less than 90 minutes after the Board received said correspondence from the Director, the Board provided Respondent with a list of witnesses together with summaries of their testimony. On September 23, 2015, Respondent filed the within motion, arguing that the Board allegedly failed to comply with the procedural requirements of N.J.S.A. 18A:6-17.1(b)(3) by failing to provide Respondent with a list of witnesses and summaries of their testimony upon referral of the matter from the Director to the undersigned on September 9, 2015. On October 2, 2015, Petitioner filed a letter brief in opposition to Respondent's motion for summary decision.

THE POSITIONS OF THE PARTIES

Respondent

Respondent argues that the District failed, "upon referral of the case to arbitration," to provide her with a list of its witnesses, and with a complete summary of the anticipated testimony of any such witness. As such, Respondent contends that the District is now statutorily precluded from proffering witness testimony at the hearing in this case. Respondent refers the undersigned to IMO Tenure Hearing of Charles Coleman, Agency Dkt. No. 169-7/14 (Arbitrator David Gregory). In that matter, Arbitrator Gregory opined: "the law is largely the history of procedure. It is indubitable----procedure matters." Respondent next summarizes the statutory scheme establishing the mandatory timeframes that govern TEACH NJ arbitration disputes. N.J.S.A. 18A:6-17.1(b)(3) provides that:

> Upon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses....[emphases added].

According to Respondent, N.J.S.A. 18A:6-17.1(f-h) reinforce the importance placed on these timelines:

> (f). Timelines set forth herein shall be strictly followed; the arbitrator or any involved party shall inform the commissioner of any timeline that is not adhered to.
>
> (g.). An arbitrator may not extend the timeline of holding a hearing beyond 45 days of the assignment of the arbitrator to the case without approval from the commissioner. An arbitrator may not extend the time line for rendering a written decision within 45 days from the start of the hearing without approval from the commissioner...
>
> (h.). The commissioner may remove an arbitrator from an arbitration case or an arbitration panel if an arbitrator does not adhere to the timelines set forth herein without approval from the commissioner.

In construing the aforementioned statutory provisions, Respondent asserts "the arbitrator has no discretion to extend timelines, and an arbitrator who unilaterally extends a timeline can be removed from the case by Commissioner of Education."

Perhaps most definitive, notes Respondent, the statute contains no provision allowing for the extension of Petitioner's obligation to provide a list of witnesses upon referral of the case to an arbitrator under N.J.S.A. 18A:6-17.1(b)(3), even with the Commissioner's approval. Although, according to Respondent, no reported decision has yet addressed the application of the statute or the definition of the phrase "upon referral" as used therein, the plain meaning rule must govern. That is, unless the legislative intent instructs otherwise, the words and language at issue must be given their plain and ordinary meaning. Citing, Township of Pemberton v. Berardi, 378 N.J. Super. 430, 437 (App. Div. 2005). "Upon" is a preposition which has substantially the same meaning as "on". Webster's New World Dictionary, Third College Edition, p. 1466. (1988). In the temporal sense, "on" is defined as "at or during the time of". Id. at 946.

Given the plain meaning of the word "upon" and the strict timelines mandated by the statute, it is clear that the language "upon referral" means "simultaneous to" or "at the time of" the referral. If this were not the case, the statute, as it does with every other timeline, would undoubtedly have included a fixed time after the referral date for the submission of the District's statement of evidence. As such, Respondent contends that the District cannot present any evidence that is not furnished "upon referral of the case for arbitration." Here, the parties were notified by correspondence dated September 9, 2015 that the case had been referred to arbitration as of that date. Notwithstanding this, the District did not provide its witness list or testimony summaries until September 11, 2015. Accordingly, the Respondent urges the Arbitrator to issue an order barring the District from proffering witness testimony in support of the tenure charges at any hearing in this matter.

Perhaps in anticipation of Petitioner's opposition, Respondent opines that its' interpretation of the statute is not unfair to the District, nor impossible for the District to anticipate. The District was aware, as of September 3, 2015, that Respondent had filed an Answer to the Tenure Charges. The District also knew that, pursuant to N.J.S.A. 18A:6-17.3(c), that the Commissioner of Education was required, "within five days immediately following the period provided for a written response to the charges, refer the case to an arbitrator and appoint an arbitrator to hear the case, unless he determines that the evaluation process has not been followed." As set forth in the referral letter from Director Duncan, the Commissioner received Respondent's Answer on September 4, 2015, and referred the case to arbitration in conformance with N.J.S.A. 18A:6-17.3(c).

Therefore, having received Respondent's Answer, the District knew that referral to arbitration was imminent, and was charged with providing its witness list and testimony summaries "upon" the September 9, 2015 referral date. It failed to do so.

Additionally, Respondent observes that the District is given as much time as it wants, prior to filing the tenure charges, to marshal its resources and prepare its evidentiary materials. If the District was not prepared to meet its obligations under the statute, it should have refrained from filing the tenure charges until it was prepared to do so. Conversely, notes Respondent, the statutory scheme provides an extremely limited window of time for the recipient of the tenure charges to prepare his or her defenses after receiving the District's statement of evidence. The statute cannot be interpreted to allow a board of education to shrink that window by failing to adhere to the strict timelines of N.J.S.A. 18A:6-17.1(b)(3). To do so would eviscerate the procedure which has been implemented to protect the due process rights of teaching staff members defending tenure charges under the extremely expedited timelines of the TEACH NJ Act.

In light of the foregoing, Respondent asks the Arbitrator to conclude that Petitioner is barred from presenting witness testimony. Since Petitioner has the burden of proof, Respondent further reasons that Petitioner cannot shoulder its burden in the absence of witness testimony. Therefore, Respondent seeks Summary Decision in its favor dismissing the tenure charges.

Petitioner

It is the Board's position that Respondent's interpretation of the statute is misguided as it fails to consider that "the fundamental requirement[] of procedural due process and administrative fairness... [is] adequate notice." In re Consider Distribution of Casino Simulcasting Special Fund (Accumulated in 2005), 398 N.J. Super. 7, 21 (App. Div. 2008) (emphasis added); see also High Horizons Dev. Co. v. Dep't of Transp., 120 N.J. 40, 53 (1990); George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8, 19–20 (1994); In re Dep't. of Ins.'s Order Nos. A89–119 & A90–125, 129 N.J. 365, 382 (1992); Cunningham v. Dep't of Civil Serv., 69 N.J. 13, 22 (1975). Essentially, Respondent argues that the Board failed to act when it had no notice whatsoever of its alleged obligation to act. If the Arbitrator were to interpret the statute in accordance with Respondent's contentions, the Board would be deprived of the fundamental requirement of procedural due process, which is "adequate notice."

The Board was first notified of the referral to an arbitrator at approximately 3:00 p.m. on September 11, 2015. Less than 90 minutes after the receipt of the referral for arbitration, the Board provided Respondent a list of witnesses and summaries of their testimony.[1] Although Respondent contends that the Board was required to furnish the list of witnesses and summary of their testimony on September 9, 2015, neither Respondent nor the Board were aware of the referral on September 9, 2015. Respondent's interpretation of the term "upon," as used in N.J.S.A. 18A:6-17.1(b)(3), would render the

[1] The Board does not concede that same-day transmission is even required after receiving notice, but did so simply because it was able and this issue has been discussed previously.

statute unconstitutional, as it would eviscerate the Board's fundamental right to due process.[2] As such, Respondent's interpretation of N.J.S.A. 18A:6-17.1(b)(3) is clearly erroneous and Respondent's motion should be denied, as the Board fully complied with the statutory requirement.

The Board respectfully requests the Arbitrator to employ "the oft-cited rule of statutory construction which holds that the purpose and reason for the legislation, considered as an integrated whole, should control rather than its literal terms." City of Newark v. Essex Cnty., 160 N.J. Super. 105, 113 (App. Div. 1978), aff'd, 80 N.J. 143 (1979); see also Loboda v. Clark Tp., 40 N.J. 424, 435 (1963); Schierstead v. Brigantine, 29 N.J. 220, 230-231 (1959); Westinghouse Elec. Corp. v. Board of Review, 25 N.J. 221, 226-227 (1957); Palkoski v. Garcia, 19 N.J. 175, 181 (1955); Caputo v. Best Foods, 17 N.J. 259, 264 (1955). In Alexander v. N. J. Power & Light Co., 21 N.J. 373 (1956), the Court aptly articulated the judicial role in interpreting legislative enactments:

> The statute is to receive a reasonable construction, to serve the apparent legislative purpose. The inquiry in the final analysis is the true intention of the law; and, in the quest for the intention, the letter gives way to the rationale of the expression. The words used may be expanded or limited according to the manifest reason and obvious purpose of the law. The spirit of the legislative direction prevails over the literal sense of the terms. The particular words are to be made responsive to the essential principle of the law. When the reason of the regulation is general, though the provision is special, it has a general acceptation. The language is not to be given a rigid interpretation when it is apparent that such meaning was not intended. The rule of strict construction cannot be allowed to defeat the evident legislative design. The will of the lawgiver is to be found, not by a mechanical use of

[2] Even assuming for the sake of argument that the Arbitrator would accept Respondent's interpretation of the statutory timeline requirement (which he should not), Respondent fails to provide a single justification as to how she was prejudiced by receiving the list of witnesses and summary of their testimony 42 days as opposed to 44 days prior to the date of the previously scheduled October 23, 2015 hearing date in the within matter (which will now not even take place on that date).

> particular words and phrases, according to their actual denotation, but by the exercise of reason and judgment in assessing the expression as a composite whole. The indubitable reason of the legislative terms in the aggregate is not to be sacrificed to scholastic strictness of definition or concept. Wright v. Vogt, 7 N.J. 1, 80 A.2d 108 (1951). It is not the meaning of isolated words, but the internal sense of the law, the spirit of the correlated symbols of expression, that we seek in the exposition of a statute. The intention emerges from the principle and policy of the act rather than the literal sense of particular terms, standing alone.[Id. At 378-379.]

Additionally, Petitioner observes that a statute should not be interpreted in a manner that leads to absurd results. See Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982). Here, Respondent's interpretation of N.J.S.A. 18A:6-17.1(b)(3) indisputably violates that fundamental canon of statutory construction, and leads to nothing other than an "absurd result." The Legislature could not have intended to deprive the Board of its fundamental right to due process by imposing upon it an obligation to act without notice. As such, the only sensible construction of N.J.S.A. 18A:6-17.1 that would serve the apparent legislative purpose would be to provide the Board with a reasonable opportunity to furnish the requisite documents to Respondent after notice of the case's referral to arbitration.

Additionally, Respondent's interpretation of the term "upon," as used in N.J.S.A. 18A:6-17.1(b)(3), becomes unequivocally erroneous upon closer examination of Title 18A of the New Jersey Statutes, which frequently provides for the use of "immediately upon" when the urgency of immediate or simultaneous action is required. Some of the numerous examples include:

> Notwithstanding any provision of P.L.1968, c. 410 (C.52:14B-1 et seq.) or any other law to the contrary, the commissioner may adopt, immediately

> upon filing with the Office of Administrative Law, such rules and regulations as the commissioner deems necessary. [N.J.S.A. 18A:37-32.1 (emphasis added)].
>
> Upon the appointment of a former police officer of an educational institution, the appointing educational institution, county or municipal law enforcement agency, State law enforcement agency or the New Jersey Transit Corporation shall notify the former educational institution immediately upon the appointment of a police officer formerly with that institution and shall reimburse the institution within 120 days of the receipt of the certified costs. [N.J.S.A. 18A:6-4.12 (emphasis added)].
>
> A member of the board of trustees appointed to the board of governors pursuant to subsection b.ii. of N.J.S.18A:65-14 shall cease being a member of the board of trustees immediately upon taking the oath of office as a member of the board of governors. [N.J.S.A. 18A:65-15 (emphasis added)].

According to Petitioner, the above statues demonstrate that when the Legislature intends for the action to be taken "at the time of" or "immediately" with another action, it explicitly provides for such a requirement. In contrast, N.J.S.A. 18A:6-17.1(b)(3) merely states "upon referral of the case to arbitration" and not "immediately upon referral to arbitration," thereby providing for a reasonable opportunity, upon notice, for the Board to furnish the list of witnesses and summary of their testimony once the case is referred to arbitration.

Notably, the United States Court of Appeals for the Third Circuit, in United States v. Carson, 969 F.2d 1480, 1487 (3d Cir. 1992), interpreted the phrase "immediately upon" as used in 18 U.S.C.A. 2518(8)(a)[3] to mean "'as soon as was practical' and not instanter." (citing United States v. Vastola, 915 F.2d 865, 875 (3d Cir. 1990)). The Court proceeded to reason that "[i]f tapes are not sealed immediately, i.e., as soon as

[3] 18 *U.S.C.A.* 2518(8)(a) requires electronic surveillance tapes be sealed *"[i]mmediately upon* the expiration of the period of the order, or extensions thereof."(emphasis added).

administratively practical, they must be suppressed at trial...." Carson, 969 F.2d at 1487 (citing Vastola, 915 F.2d at 870)(emphasis added). In Carson, the Court discounted weekend days where a taping order expired on a Wednesday and the tapes were sealed the next Monday, and where order expired on a Thursday and the tapes were sealed the next Wednesday; in both instances, the Court held that the tapes were sealed "immediately." Id. at 1498.[4] As such, a delay of three to four days was interpreted to be in compliance with the statutory requirement of "immediately upon." Herein any "delay" was arguably two days long, and the statute in question does not even contain the term "immediately." If the Court of Appeals permitted a three to four day delay—plus a weekend—in a criminal case, where an individual's liberty and freedom are in jeopardy, to be in compliance with the term "immediately upon," an arguable delay of two days in an administrative proceeding such as this should unequivocally satisfy the requirement of "upon" as set forth in N.J.S.A. 18A:6-17.1(b)(3).

Petitioner reasons further that the Legislature clearly intended to provide the Board with a reasonable opportunity to provide Respondent with a list of witnesses and summary of their testimony after the referral of the case for arbitration, without setting a strict time limitation. Again, the Legislature has shown that it uses the phrase "immediately upon" when it seeks immediate action and it did not do so here. It was more than diligent in its efforts to timely provide Respondent the list of witnesses and

[4] While there were other tapes that were suppressed, with significant delays, the relevant part of the ruling in Carson applies to the tapes where the delays were only a few days long.

summary of their testimonies on the same day of receipt, which is not even required, thereby warranting denial of Respondent's motion.

Respondent also argues that the Board should have anticipated the charges would be referred to arbitration by September 9, 2015, in light of the fact that Respondent's answer was filed on September 3, 2015. However, such an argument clearly disregards the language of the statute which provides that "[t]he commissioner shall, within five days immediately following the period provided for a written response to the charges, refer the case to an arbitrator and appoint an arbitrator to hear the case, unless he determines that the evaluation process has not been followed." N.J.S.A. 18A:6-17.3(c) (emphasis added). The language of the statute grants the Commissioner five days after the period provided for a written response, which is 10 days, not the time the answer was actually filed by Respondent. Since the 10th day for Respondent's answer fell on a Saturday, September 5, 2015, and September 7, 2015 was a national holiday, Respondent's answer was not due until September 8, 2015. See New Jersey Court Rule R.1:3-1. Therefore, the Commissioner was not obligated to refer the case to arbitration until September 14, 2015. It is disingenuous for Respondent to suggest that the Board should have anticipated that the Commissioner would refer this case for arbitration on September 9, 2015, when the Commission could have waited until September 14. Further, Respondent completely disregards the possibility (albeit remote) that the Commissioner might not have referred the case to arbitration,[5] and there can be no

[5] Which the Board believes would have been inappropriate given the weight of the evidence set forth in the Tenure Charges.

obligation to furnish the witness list or documents until referral actually takes place. Respondent has presented no valid argument that would warrant dismissal of this case, and therefore, Respondent's motion must be denied in its entirety.

Lastly, the Board submits that Respondent's attempt to have this case dismissed on alleged technicalities is against the public policy of this State. "Unquestionably it is the policy of our courts to decide cases on the merits." Essex Cnty. v. City of E. Orange, 214 N.J. Super. 568, 576 (App. Div. 1987); see also Dole v. Arco Chem. Co., 921 F.2d 484, 487 (3d Cir.1990)(discussing strong policy for deciding claims on the merits as opposed to technicalities); see generally, Wright & Miller, Federal Practice and Procedure: Civil §§ 2369, 2370 (1971). As such, in consideration of public policy and Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), the goal of which is to raise student achievement by improving instruction, the Board respectfully requests that the Arbitrator decide this case on the merits and deny Respondent's motion for summary decision.

OPINION

Initially, I have decided to address the motion in an exercise of discretion. The instant motion is treated as one for summary decision because an Answer, as opposed to a Motion to Dismiss, was filed. N.J.A.C. 6A:3-5.3. Additionally, N.J.S.A. 18A:6-16 allows for a motion for summary decision – filed with the Commissioner -- to be transmitted to an arbitrator or to be decided by the Commissioner. In this matter, Respondent did not meet the prerequisite filing with the Commissioner, but instead filed the motion after transmittal of the case to the undersigned. No relief is forthcoming from

the Labor Arbitration Rules of the American Arbitration Association, which does not provide a party with the right to file a dispositive motion. Lastly, in light of the relatively stringent restrictions imposed on arbitrators under N.J.S.A. 18A:6-17.1 b., it is evident that an arbitrator must cautiously exercise discretion in deciding whether to address any motion filed after referral of the case from the Commissioner. This notwithstanding, in this case, I have elected to exercise discretion in favor of deciding the motion due to the novelty of the challenge raised.

Summary decision may be granted if the pleadings, discovery and affidavits show "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.S.A. 1:1-12.5. Contini v. Bd. of Educ., 286 N.J. Super. 106 (App. Div. 1995). In ruling on summary-decision motions, administrative agencies follow substantially the same standard as the standard governing motions for summary judgment in civil litigation. The essence of the inquiry is whether the evidence presents a sufficient disagreement to require submission to the trier-of-fact or whether it is so one-sided that one party must prevail. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 536 (1995). I have carefully considered Respondent's moving papers and the opposition filed by the Petitioner. Because the parties' respective positions do not raise a genuine issue of material fact, I am satisfied that summary decision is appropriate. For the reasons that follow, however, I must deny Respondent's motion for summary decision.

In my opinion, an examination of the relevant statutory text does not unambiguously answer the question as to when an initial referral, appointment, or

assignment of an arbitrator is deemed effective in connection with a board of education's simultaneous obligation to provide the prescribed evidence to a respondent. It is true that certain timeframes clearly commence from a discrete point in time or the occurrence of an event (illustrated by *underlined italics* below). This includes timeframes commencing "upon receipt" of a document. Since that language is not attached to the introductory sentence of N.J.S.A. 18A:6-17.1(b)(3) there is support for Respondent's motion based on the premise that the Legislature knew how to express such an intent and did not do so here. However, not all triggering points of pertinent timeframes are clearly expressed by the text of the statute. Obviously, where the legislation does not unambiguously fix a triggering point in relation to other timeframes, in my view, there is room for judicial or arbitral interpretation based on traditional canons of statutory construction (all timeframes deemed to lack a precise triggering point are set forth in **boldfaced type**).

> N.J.S.A. 18A:6-16, "Proceedings before commissioner; hearing"
>
> *Upon receipt of such a charge and certification, or of a charge lawfully made to the commissioner, the commissioner or the person appointed to act in the commissioner's behalf in the proceedings shall examine the charges and certification.* **The individual against whom the charges are certified shall have 15 days to submit a written response to the charges to the commissioner**. Upon a showing of good cause, the commissioner may grant an extension of time. **The commissioner shall render a determination on the sufficiency of charges as set forth below within 10 days immediately following the period provided for a written response to the charges.**
>
> *If, following receipt of the written response to the charges*, the commissioner is of the opinion that they are not sufficient to warrant dismissal or reduction in salary of the person charged, he shall dismiss the same and notify said person accordingly. If, however, he shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to

section 22 of **P.L.2012, c. 26 (C.18A:6-17.1)** for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for purposes of deciding the motion.

N.J.S.A. 18A:6-17.3, entitled, "Filing with the secretary of the board of education notice of a charge of inefficiency; procedural requirements", states:

> a. Notwithstanding the provisions of N.J.S.18A:6-11 or any other section of law to the contrary, in the case of a teacher, principal, assistant principal, and vice-principal:
>
> (1) the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency whenever the employee is rated ineffective or partially effective in an annual summative evaluation and the following year is rated ineffective in the annual summative evaluation;
>
> (2) if the employee is rated partially effective in two consecutive annual summative evaluations or is rated ineffective in an annual summative evaluation and the following year is rated partially effective in the annual summative evaluation, the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency, except that the superintendent upon a written finding of exceptional circumstances may defer the filing of tenure charges until after the next annual summative evaluation. If the employee is not rated effective or highly effective on this annual summative evaluation, the superintendent shall promptly file a charge of inefficiency.
>
> b. *Within 30 days of the filing, the board of education shall forward a written charge to the commissioner, unless the board determines that the evaluation process has not been followed.*
>
> c. *Notwithstanding the provisions of N.J.S.18A:6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a. of this section, the commissioner shall examine the charge*. **The individual against whom the charges are filed shall have 10 days to submit a written response to the charges to the commissioner. The commissioner shall, within five days immediately following the period provided for a written response to the charges, refer the case to an arbitrator and appoint an arbitrator to hear the case, unless he determines that the evaluation process has not been followed. . .**

N.J.A.C. 6A:3-5.1 (c) states:

.....

c) If the tenure charges are charges of inefficiency pursuant to N.J.S.A. 18A:6-17.3, except in the case of building principals and vice principals in school districts under full State intervention, where procedures are governed by the provisions of N.J.S.A. 18A:7A-45 and such rules as may be promulgated to implement it, the following procedures and timelines shall be observed:

1. When the conditions described in N.J.S.A. 18A:6-17.3.a(1) or (2) have been satisfied, the superintendent shall promptly file with the secretary of the district board of education a charge of inefficiency.

2. *The charges of inefficiency shall be transmitted to the affected tenured employee and the employee's representative, if known, within three working days of the date they were filed with the secretary of the district board of education or the State district superintendent. Proof of mailing or hand delivery shall constitute proof of transmittal.*

3. *The affected tenured employee shall have an opportunity within 10 days of receipt to submit to the district board of education or the State district superintendent a written statement of position under oath demonstrating how the school district failed to comply with the evaluation procedures.*

4. *Within 30 days of the filing, the district board of education or State district superintendent shall forward a written charge to the Commissioner unless the district board of education or superintendent determines the evaluation process has not been followed.* Such determination shall be made by a majority vote of the district board of education's full membership or by the State district superintendent.

5. *Upon receipt of the charge, the Commissioner or his or her designee shall examine the charge*. The charge shall again be served upon the employee at the same time it is forwarded to the Commissioner and proof of service shall be included with the filed charges. **The individual against whom the charge is filed shall have 10 days to submit to the Commissioner a written response to the charge.**

6. Within five days of the individual's deadline to submit a written response to the charge, the Commissioner shall appoint an arbitrator to hear the case and refer the case to the arbitrator, unless he or she determines the evaluation process has not been followed.

N.J.S.A. 18A:6-17.1 states:

b. The following provisions shall apply to a hearing conducted by an arbitrator pursuant to N.J.S.18A:6-16, except as otherwise provided pursuant to P.L.2012, c. 26 (C.18A:6-117 et al.):

(1) **The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case**;

(2) The arbitrator shall receive no more than $1250 per day and no more than $7500 per case. The costs and expenses of the arbitrator shall be borne by the State of New Jersey;

(3) **Upon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative.** The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. *At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative*. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.

Discovery shall not include depositions, and interrogatories shall be limited to 25 without subparts.

c. The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

d. *Notwithstanding the provisions of N.J.S.18A:6-25 or any other section of law to the contrary, the arbitrator shall render a written decision within 45 days of the start of the hearing.*

e. The arbitrator's determination shall be final and binding and may not be appealable to the commissioner or the State Board of Education. The

determination shall be subject to judicial review and enforcement as provided pursuant to N.J.S.2A:24-7 through N.J.S.2A:24-10.

f. Timelines set forth herein shall be strictly followed; the arbitrator or any involved party shall inform the commissioner of any timeline that is not adhered to.

g. **An arbitrator may not extend the timeline of holding a hearing beyond 45 days of the assignment of the arbitrator to the case without approval from the commissioner**. *An arbitrator may not extend the timeline for rendering a written decision within 45 days of the start of the hearing without approval from the commissioner*. Extension requests shall occur before the 41st day of the respective timelines set forth herein. The commissioner shall approve or disapprove extension requests within five days of receipt.

h. The commissioner may remove any arbitrator from an arbitration case or an arbitration panel if an arbitrator does not adhere to the timelines set forth herein without approval from the commissioner. If the commissioner removes an arbitrator from an arbitration case, the commissioner shall refer the case to a new arbitrator within five days. The newly-assigned arbitrator shall convene a new hearing and then render a written decision within 45 days of being referred the case.

As can be gleaned, the statutory text governing the triggering date for important timeframes is clear in some respects, but not so clear in others. Additionally, while I agree from a practical standpoint with Respondent's suggestion that the Board could have supplied the information prior to receiving notice of the referral to arbitration, in my opinion, N.J.S.A. 18A:6-17.1(b)(3), though ambiguous in some respects, plainly does not require a board to act prior to the referral. As to the ambiguity noted in boldfaced type above, it is presumed that there likely exist decisions of the OAL, Commissioner and/or Courts clarifying the timelines in question. To the best of my knowledge, the instant challenge under TEACH NJ presents a case of first impression. Having said this, however, with respect to TEACH NJ, one would surmise that the Legislature intended for

both parties to be fully informed as to their respective rights and obligations under the relatively new law. One would also be specifically inclined to conclude that the Legislature intended for both parties to have clear notice of the triggering date or event for the commencement of intertwined or reciprocal procedural timelines.

For example, a respondent knows that within ten (10) days of the date of the hearing, he or she must provide all evidence to the board's representative. Since the initial hearing date can be adjourned within (or, at times, outside of) the initial 45-day timeframe it is not uncommon for the 10 day window to be adjusted as well, thereby providing a respondent with even greater notice and opportunity. As such, it is hard to imagine that the Legislature intended to keep a board of education in suspense as to the effective date of referral, especially when the board must act upon that date or else be precluded from introducing evidence at arbitration. As Petitioner aptly observes, a statute should not be interpreted in a manner that leads to absurd results. See Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982). Therefore, I am not inclined to conclude that the Legislature intended for a board of education 's obligations to provide evidence to commence on a date when it had no notice of the referral of the matter to arbitration.

The principle of reciprocity noted above would militate in favor of a conclusion that a board's obligation to provide the prescribed evidence must logically commence upon receipt of the notice of referral, especially where administrative practice is to mail the notice of referral (as opposed to facsimile or email) thereby making it impractical, if not impossible for a board to comply with N.J.S.A. 18A:6-17.1 (b)(3). To rule otherwise

would be tantamount to placing a ball and chain around the ankle of a board of education at the start of each and every case, making it even more difficult to remove a teacher for inefficiency under the new statutory schematic, as compared to the old -- which runs contrary to the core purpose of the new legislation. Thus, I find, an examination of the parties' respective arguments in light of the purpose of the new legislation supports the Board's interpretation.

Nonetheless, the lack of precise drafting concerning the language of 18A:6-17.1(b)(3) led to my examination of legislative history. As originally introduced on February 6, 2012 by Senator Ruiz, Senate Bill No. 1455 provided:

> Notwithstanding N.J.S.18A:6-17 or any other section of law to the contrary, any tenure charge transmitted to the Office of Administrative Law pursuant to N.J.S.18A:6-16 shall be adjudicated in an expeditious and timely manner as follows:
>
> a. The initial hearing on the charge shall commence within 30 days of its transmittal to the Office of Administrative Law.
>
> b. Upon transmittal of the charge, the employing board of education shall provide all evidence to the employee or the employee's representative. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely to the employing board of education or its representative. Both parties shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.
>
> c. Notwithstanding the provisions of N.J.S.18A:6-25 or any other section of law to the contrary, the final determination on the controversy or dispute shall be rendered within 30 days of the start of the hearing by the administrative law judge.

The preference for arbitrators in lieu of administrative law judges came about in a "The Senate Committee Substitute for Senate No. 1455" on June 18, 2012 (more than four (4)

months after introduction by Senator Ruiz and less than two (2) months before Governor Christie's signing of the Bill). The Substitute repeals section 1 of P.L.1998, c.42 (C.52:14B-10.1), which outlines the procedure when cases were referred to the Office of Administrative Law.

After reviewing the relevant legislative history, it is the opinion of this Arbitrator that the linguistic change from "upon transmittal of the charge" (to the Office of Administrative Law) to "upon referral of the case for arbitration" does not represent a legally significant change regarding the subject of notice or, as Petitioner phrases it, "due process." An examination of predecessor statutes and OAL regulations governing the transmittal of a contested case from the Commissioner of Education is suggestive of the legislative intent concerning the exchange of discovery in this matter, i.e., that "upon referral" was intended to mean upon receipt of the notice of referral. N.J.S.A. 52:14B-10.1. "Adjudication of cases under the Tenure Employees Hearing Law" is directly on point:

> Any statute, rule or regulation to the contrary notwithstanding, all contested cases, as defined in section 2 of P.L.1968, c. 410 (C.52:14B-2), except those cases in which criminal charges are also filed, arising under the Tenure Employees Hearing Law, article 2 of chapter 6 of Title 18A of the New Jersey Statutes, and referred to the Office of Administrative Law shall be adjudicated pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B-1 et seq.), in an expeditious and timely manner except as follows:
>
> > a. *The discovery process shall begin immediately upon the notice of the referral of the case to the Office of Administrative Law and a discovery request shall be initiated by transmitting the request to a receiving party within 30 days of receipt of the notice of referral*. Answers to a discovery request shall be made within 30 days of the receipt

> of the request, except that if the discovery is available only by motion, the answer shall be due within 30 days of receipt of an order granting the motion. Additional discovery shall be permitted by motion or upon the consent of the parties, but shall be filed with the administrative law judge within 10 days of the filing of the answers to interrogatories. The administrative law judge may extend discovery time by no more than 30 days for disputes over sufficiency, completion or other just cause.

N.J.A.C. 1:6B-10.1, the time period for exchanging discovery, commences upon "receipt" of the notice of referral.

> (a) *The parties shall commence discovery immediately upon receipt of the notice of referral.*
>
> (b) A party may notify another party to provide discovery by one or more of the following methods: written interrogatories; production of documents or things; permission to enter upon land or other property for inspection or other purposes; and requests for admissions. *These discovery requests shall be initiated by transmitting the request to the receiving party within 30 days of receipt of the notice of referral.*

As the predecessor statute and regulation implicitly recognize, a party cannot assume responsibility for meeting a legally significant discovery timeline absent notice of the event that triggers the timeline. Therefore, it is not the Commissioner's referral of the case to the OAL that triggers the timeframes governing the parties' respective discovery obligations, but rather it is the receipt of notice of referral that governs. Because nothing in the legislative history underlying N.J.S.A. 18A:6-17.1(b)(3) suggests that the drafters would have had a reason to obliterate such a fundamental principle of due process, I am inclined to conclude that the predecessor notice requirement was intended to continue in the new legislation. Therefore, logic, statutory purpose, and legislative history favor the

Board's interpretation that it was not obligated to comply with its discovery obligations until it received notice of the September 9, 2015 referral letter on September 11, 2015.

Finally, I take notice that the Commissioner or Director can always change the method of transmittal of the notice of referral to both the arbitrator and the parties from regular mail to email and/or facsimile in order to reconcile any discrepancy between the operative statutory language and internal administrative practice. Certainly, the Legislature could not have intended to severely handicap a board of education's ability to present its case to an arbitrator based on the method of transmittal used by the Commissioner. In contrast, if the delay in compliance with N.J.S.A. 18A:6-17(b)(3) could be attributable to a board representative, then an opposite conclusion would be warranted. In the case before me, however, it is not disputed that the Board acted immediately upon its' September 11, 2015 receipt of the Director's September 9, 2015 notice of referral.

Based on the foregoing, I deny Respondent's motion to bar Petitioner from presenting the evidence that it submitted to Respondent on September 11, 2015.[6] I correspondingly deny Respondent's Motion for Summary Decision.

[6] In light of the facts of this matter, I need not determine whether a board of education is entitled to an additional "reasonable period of time" following receipt of the notice of referral to comply with N.J.S.A. 18A:6-17.1 (b)(3).

AWARD

Based on the foregoing, I deny Respondent, Nancy Mastriana's motion to bar Petitioner, Hillsborough Board of Education from presenting the evidence that it submitted to Respondent on September 11, 2015. I correspondingly deny Respondent's Motion for Summary Decision.

Respectfully submitted,

Joseph Licata

Dated: October 9, 2015

State of New Jersey)
) :SS
County of Bergen)

On the 9th day of October, 2015, before me personally came and appeared Joseph Licata, to me known and known to me to be the person described herein who executed the foregoing instrument and he acknowledged to me that he executed the same.

Notary Public

JOSEPH KIM
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES AUGUST 22, 2016

344-15

OAL DKT. NO. EDU 13999-15
AGENCY DKT. NO. 260-9/15

C.H., on behalf of minor child, L.H.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF TRUSTEES OF THE NEWARK PREP CHARTER SCHOOL ESSEX COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENTS.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. In this case, the petitioner is appealing the decision of the Board of Trustees of the Newark Prep Charter School (Newark Prep) to expel L.H. from Newark Prep Charter School for causing an extensive computer outage at the school. The petitioner is also seeking an Order requiring Newark Prep to immediately admit L.H. while the matter is pending at the OAL. The ALJ denied the petitioner's request for emergent relief.[1]

Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. Pursuant to *N.J.A.C.* 6A:3-1.6(b), a grant of emergent relief is considered an extraordinary remedy that can only be issued upon a finding that petitioner has met the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). The party seeking such relief must demonstrate the existence of each of the following: 1) the movant will

[1] The recommended Order does not indicate why the request for emergent relief was denied; however the ALJ did provide the reasons for his determination on the record following the hearing at the OAL. The ALJ found that the petitioner did not satisfy any of the requirements necessary for emergent relief.

suffer irreparable harm if the requested relief is not granted; 2) the legal right underlying the movant's claim is settled; 3) the movant has a likelihood of prevailing on the merits of the underlying claim; and 4) when the equities and interests of the parties are balanced, the movant will suffer greater harm than the other party if the requested relief is not granted. *N.J.A.C.* 6A:3-1.6(b).

In the instant case, the petitioner has failed to show that L.H. will suffer irreparable harm if he is not immediately permitted to attend Newark Prep. It is undisputed that L.H. is entitled to attend school in the Irvington School District, which is L.H.'s home district. Therefore, in light of the fact that all of the *Crowe* prongs must be met in order for emergent relief to be granted, it is not necessary to analyze the three remaining factors.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 10/15/15

Date of Mailing: 10/15/15

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 13999-15
AGENCY DKT. NO. 260-9/15

C.H. ON BEHALF OF MINOR CHILD L.H.,
Petitioner,
v.
BOARD OF EDUCATION OF TRUSTEES OF THE NEWARK PREP CHARTER SCHOOL, ESSEX COUNTY,
Respondent.

C.H., on behalf of her child, **L.A.**, appearing pro se

Jennifer Roselle, Esq., for respondent (Genova Burns, LLC, attorneys)

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

THIS MATTER having been brought before this tribunal by C.H. on behalf of her minor child L.H., upon motion for emergent relief; and having considered the papers submitted in support of and in opposition to the motion; and having heard oral argument; and having concluded that petitioner failed to demonstrate any of the standards for emergent relief; and for good cause having been shown;

It is on this 25th day of September 2015,

ORDERED that petitioner's application for emergent relief is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

BARRY E. MOSCOWITZ, ALJ

BEM/dr

345-15

AGENCY DOCKET NO. 2-4/15A
SEC DOCKET NO. C16-14

COREY LOWELL,	:	
COMPLAINANT,	:	
v.	:	COMMISSIONER OF EDUCATION
GENEVA SMALLWOOD AND FELICIA SIMMONS, ASBURY PARK BOARD OF EDUCATION, MONMOUTH COUNTY,	:	DECISION
RESPONDENTS.	:	

This matter involves appeals of the School Ethics Commission's March 24, 2015 determination that respondents – Geneva Smallwood, Board President, and Felicia Simmons, Board Member, Asbury Park Board of Education – violated *N.J.S.A.* 18A:12-24.1(c) and (e) of the Code of Ethics for School Board Members when they conducted a site visit to assess a candidate for interim Superintendant, without Board authority and without approval of the State Monitor, and by advancing the possibility of his employment.[1] The Commission recommended a penalty of censure for the violation. Having carefully reviewed the Commission's decision and the record in its entirety, the Commissioner finds that the Commission's decision is supported by sufficient, credible evidence, and that respondents failed to establish that the decision is arbitrary, capricious or contrary to law. *N.J.A.C.* 6A:4-1.1(a). Additionally, the Commissioner finds that a penalty of censure is appropriate.

In her appeal to the Commissioner, respondent Smallwood argues that the Commission's decision was arbitrary, capricious and contrary to law because the evidence presented to the Commission does not support a finding that she violated *N.J.S.A.* 18A:12-

[1] The Commission dismissed the allegations that respondents violated *N.J.S.A.* 18A:12-24.21(a), (d), and (g).

demonstrated that she was in attendance during executive session at the March 18, 2014 Board meeting. [2] (Complainant's brief at 1) While reflecting their obvious disagreement with the Commission's findings and conclusions, respondents' arguments on appeal are unpersuasive.

Upon a comprehensive review of the record, the Commissioner finds that the decision of the Commission as to a determination of a violation of *N.J.S.A.* 18A:12-24.1(c) and (e) is supported by sufficient credible evidence, and the respondents have not established that the Commission's decision is arbitrary, capricious or contrary to law.[3] *N.J.A.C.* 6A:4-4.1(a). First, as to the violation of *N.J.S.A.* 18A:12-24.1(c), the evidence in the record fully supports the Commission's determination that respondents took action beyond the scope of their authority when they conducted a site visit without Board approval. The complainant testified as to her personal knowledge of the March 18, 2014 Board meeting – which was found to be credible by the Commission – during which respondent Smallwood made statements that she and respondent Simmons attended a site visit with administrators and the Board of the Pleasantville School District to discuss the candidate's qualifications for employment.[4] (Testimony of Corey Lowell, T at 30-31)[5] Complainant's testimony was supported by respondent Smallwood's email and respondent Simmons' Answer, in which both, respectively, admit to attending the site visit.

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[2] Complainant references her testimony in *Lesinsky v. Smallwood, Asbury Park Board of Education, Monmouth County*, SEC Dkt. No. C14-14, October 28, 2014, and included an un-redacted copy of the executive session Board minutes from March 18, 2014. (Complainant's brief at 1-2) Respondents objected to the inclusion of this additional documentary evidence. Although the transcript of the September 23, 2014 School Ethics Commission hearing for docket number C14-14 is included in the Statement of Items Comprising the Record, it has no impact on the Commissioner's decision. The un-redacted minutes of the executive session of the Board's March 18, 2014 meeting was not entered into evidence at the hearing and is not a part of the record on appeal. Accordingly, it will not be considered by the Commissioner. *N.J.A.C.* 6A:4-2.5.

[3] The Commissioner is also in accord with the Commission's determination that the respondent did not violate *N.J.S.A.* 18A:12-24.1(a), (d) and (g).

[4] Such statements are exceptions to the hearsay rule, as they are admissions of respondent Smallwood. *N.J.R.E.* 803(b).

[5] This citation refers to a transcript of a hearing held before the School Ethics Commission on February 24, 2015.

(Complainant's Exhibit C-1; Respondent Simmons' Answer) Additionally, complainant offered testimony that she did not authorize respondents to conduct a site visit and the Board directed the personnel committee to meet with the State Monitor to discuss the possibility of hiring an interim superintendant. (Testimony of Corey Lowell, T at 29) The fact that three other Board members confirmed to complainant that they did not authorize respondents to conduct a site visit, and that the State Monitor did not object at the meeting, offer support for complainant's testimony, which went uncontradicted.[6] (*Id.* at 31; *SEC' Decision* at 15) For the reasons expressed in the Commission's comprehensive decision, respondents' conduct was in violation of *N.J.S.A.* 18A:12-24.1(c).

Second, as to the violation of *N.J.S.A.* 18A:12-24.1(e), the evidence in the record fully supports the Commission's determination that respondents took action beyond the scope of their authority – with the potential to compromise the Board – when they attended the site visit, and that the promise of future employment was also a personal promise that had the potential to compromise the Board. In addition to respondents conducting the site visit, respondent Smallwood also participated in an email exchange with the candidate in which she said, "I'm doing everything I can to resolve this CSA [Chief School Administrator] situation." (Complainant's Exhibit C-1) Both the site visit and the email exchange had the potential to compromise the Board because they implied that respondents where acting on behalf of the Board when there was no authorization for a site visit or to communicate with the candidate about the position. For the reasons expressed in the Commission's comprehensive decision, respondents' conduct violated of *N.J.S.A.* 18A:12-24.1(e).

[6] In administrative matters, the trier of fact is permitted to draw an adverse inference from the silence of a party who declines to testify. *State Dep't of Law and Public Safety v. Merlino*, 216 *N.J. Super.* 579 (App. Div. 1987), *aff'd* 109 *N.J.* 134 (1988).

The Commissioner also accepts the Commission's recommendation – for the reasons expressed in the Commission's decision – that a censure is the appropriate penalty in this matter. In so ruling, the Commissioner finds that issuance of a censure here is consistent with penalties in prior cases involving violations of *N.J.S.A.* 18A:12-24.1(c) and (e).

Accordingly, IT IS ORDERED that Geneva Smallwood and Felicia Simmons each be censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 10/16/15

Date of Mailing: 10/20/15

[7] This decision may be appealed to the Superior Court, Appellate Division, pursuant to P.L. 2008, c. 36. (*N.J.S.A.* 18A:6-9.1)

COREY LOWELL	:	
	:	**BEFORE THE SCHOOL**
v.	:	**ETHICS COMMISSION**
	:	
GENEVA SMALLWOOD AND	:	
FELICIA SIMMONS	:	**SEC DOCKET NO. C16-14**
ASBURY PARK BOARD OF EDUCATION,	:	**DECISION**
MONMOUTH COUNTY	:	
	:	

PROCEDURAL HISTORY

This matter arises from a complaint, filed on April 7, 2014, by Asbury Park Board of Education (Board) member Corey Lowell, alleging that Board President Geneva Smallwood and Board member Felicia Simmons violated the School Ethics Act (Act). N.J.S.A. 18A:12-21 et seq. By letter of April 28, 2014, the complainant was advised that her submission was deficient. On May 5, 2014, the complainant filed an amended complaint, correcting all deficiencies. Specifically, the complainant alleged that the respondents violated N.J.S.A. 18A:12-24.1(a), (c), (d), (e), and (g) of the Code of Ethics for School Board Members (Code). The Commission served the respondents with the Complaint on May 6, 2014 by certified and regular mail, advising them that they had 20 days from receipt of the Complaint to file a responsive pleading.

Newly retained counsel for Respondent Smallwood requested and received an extension of time until June 13, 2014 to file a responsive pleading. Respondent Smallwood filed her Answer to the Complaint on June 10, 2014. On May 22, 2014, Respondent Simmons requested and received an extension of time until June 18, 2014 to file her responsive pleading. On June 18, 2014, newly retained counsel for Respondent Simmons requested and received an additional extension of time until July 8, 2014 to file an Answer on her behalf, and on July 7, 2014, Respondent Simmons filed her Answer, alleging that the Complaint was frivolous, pursuant to N.J.S.A. 18A:12-29(e). In accordance with N.J.A.C. 6A:28-7.2(b), Complainant Lowell filed her response to the frivolous allegation on July 30, 2014.

By letter dated July 31, 2014, the parties were notified that the Commission would review this matter at its August 26, 2014 meeting. At its meeting on August 26, 2014, pursuant to N.J.A.C. 6A:28-10.8(a), the Commission determined the Complaint was not frivolous and voted to retain the complaint, docketed as C16-14, for a hearing at a later date.

The Commission notified the complainant and respondents by letter of December 2, 2014 that at its meeting on January 27, 2015, it would conduct a plenary proceeding to hear testimony and consider evidence in support of their respective positions. Prior to the hearing, the Commission denied the adjournment request of counsel for Respondent Simmons, who advised the Commission that due to a new appointment, he would not be able to fulfill his obligations to represent Respondent Simmons. When new counsel requested a delay, the Commission adjourned the matter for one month.

On January 23, 2015, the Commission confirmed that the matter was scheduled for plenary hearing on February 24, 2015 and so advised the parties. Prior to the hearing, on February 3, 2015, counsel for both respondents sought a stay of the hearing, pending the outcome of an appeal before the Commissioner of Education on a related matter, Lesinski v. Smallwood, SEC Dkt. No.C14-14. By letter of February 11, 2015, the Commission denied the request, ruling that the gravamen of the instant matter, i.e., the site visit, was not before the Commission at the time it heard Lesinski. In that matter, the Commission heard testimony from Respondent Smallwood and admitted documents, which evidenced that she and Ms. Simmons conducted the site visit without approval of the State Monitor. The Commission determined that Complainant Lesinski met her burden to prove the violations alleged in her complaint, for which Respondent Smallwood was sanctioned for disclosing confidential Executive Session discussions to third parties and for making those disclosures without Board approval in violation of N.J.S.A. 18A:12-24.1 (e) and (g) of the Code. Knowledge of the site visit was raised before the Commission by Respondent Smallwood; however, the site visit was not at issue in the Lesinski matter. The site visit was part of the Commission's decision solely because it demonstrated that Respondent Smallwood engaged in greater disclosure of confidential matters than she admitted. The Commission did not find Respondent Smallwood in violation of any provisions of the Code based on the site visit.

On February 18, 2015, prior to the day of the hearing, counsel for Respondent Simmons filed a Motion for Interlocutory Appeal on Emergent Relief for a Stay before the Commissioner of Education asserting, as he had before to the Commission, that it had previously made certain findings of fact and certain conclusions arising from the site visit which is the subject of this complaint as part of the Lesinski matter. The Commissioner denied counsel's request for a stay of the Lowell matter finding, *inter alia*, that the request failed to satisfy all of the standards set for in Crowe v. DeGioia, 90 N.J. 126 (1982), which require a showing of irreparable harm, that the legal right underlying claim is well settled, the probability of prevailing on the merits, and a balance of hardships. On March 6, 2015, the Commissioner affirmed the Commission's findings and conclusions of law in Lesinski and accepted the recommended penalty of reprimand. Lesinski v. Smallwood, Asbury Park Board of Education, Monmouth County, (10/28/14), SEC Dkt. No.C14-14 (Lesinski). (See Barbara Lesinksi v. Geneva Smallwood, Board Member, Board of Education of the City of Asbury Park, Monmouth County, 3/6/15, (#83-15A).

Following the Commissioner's denial of the stay, the matter of Corey J. Lowell v. Geneva Smallwood and Felicia Simmons, Asbury Park Board of Education, Monmouth County, SEC Dkt. #C16-14 was heard as scheduled by the Commission at its February 24, 2015 meeting.

The complainant, Corey Lowell, appeared *pro se*. Respondent Smallwood appeared with her attorney, Joshua S. Sklarin, Esq., and Respondent Simmons appeared with her attorney, Carl N. Tripician, Esq. The Commission heard only Complainant Lowell's testimony on all Counts of the complaint on direct and cross examination, and the Commission further questioned the complainant and accepted the documentary evidence she presented, as well as the documentary evidence presented by Respondent Simmons' counsel. Respondents Smallwood and Simmons decided not to testify or call any witnesses after the complainant rested. Based on the testimony and evidence, as summarized below, the Commission determined that the complainant had

established a *prima facie* case and met her burden of proof by a preponderance of the credible, uncontested evidence. The tribunal voted during the public portion of its meeting on February 24, 2015 to find a violation of N.J.S.A. 18A:12-24.1 (c) and (e) of the Code of Ethics for School Board Members (Code), and to dismiss the allegations that the respondents violated N.J.S.A. 18A:12-24.1(a), (d) and (g) of the Code and to recommend the penalty of censure for Respondent Smallwood and Respondent Simmons.

SUMMARY OF THE RECORD

Before opening statements, counsel for the respondents renewed their Motion for a Stay of the proceedings, pending the outcome of the appeal of the Lesinski matter before the Commissioner, or to refer the matter to the Office of Administrative Law, asserting that the determination of the matter on appeal may affect the case at bar. Counsel for Respondent Smallwood affirmed that the language in the case on appeal regarding the site visit was heard before the Commission in the earlier matter. The complainant maintains that the matter should not be stayed as she was not at the Board meeting on February 25, 2014 when the telephone call, which was the issue in Lesinski, was discussed, and maintains that the matter involving the site visit is a separate matter, and subject to a subsequent complaint which includes an additional respondent who was not a party to the Lesinski matter.

As it held previously, the Commission determined that this matter was not before it in the earlier matter and the allegation was, therefore, not adjudicated at that time. The Commission denied respondents' Motion for a Stay.

OPENING REMARKS AND PROCEDURAL ISSUES

In her opening remarks, Complainant Corey Lowell stated that her Complaint concerns five Code violations involving the respondents' personal actions without Board authorization and disclosure to third parties of confidential material discussed in Executive Session. Complainant Lowell further states that the respondents acknowledge that they did attend this site visit but argue that the Board had authorized them to do so. She maintains that as a Board member, she was not advised of this site visit for a potential Assistant Superintendent candidate nor did she grant her approval. Moreover, three other Board members have told her that they too did not have such knowledge nor did they authorize Respondent Smallwood and Respondent Simmons to schedule and attend the visit.

The complainant maintains that the Board minutes, submitted by respondents' counsel, did not indicate by motion or action that it authorized the respondents to conduct such a visit. Thereafter, complainant Lowell objected to the calling of Gregory Allen as respondents' witness as he should have no knowledge of confidential Executive Session discussions and his presence before the Commission could compromise the Board. When asked by counsel for the Commission the identity of Gregory Allen, Respondent Smallwood's counsel explained that he was the candidate whose selection the State Monitor overturned. Respondent Smallwood's attorney then explained, over the complainant's objection, what Mr. Allen's testimony would be, and stated that he would ask Mr. Allen what occurred at the visit and if any confidential matters

were discussed. Since Mr. Allen had not yet appeared for the hearing with the other subpoenaed witnesses, the Commission tabled the objection until Mr. Allen was called by the respondents.

In his opening remarks, Mr. Sklarin, counsel for Respondent Smallwood, stated that this matter before the Commission is just one of several matters brought by Complainant Lowell's faction on the Board against Respondent Smallwood's faction, and that the repetitive nature of these filings is tantamount to harassment of the respondents. As to the present case, he argued that Complainant Lowell would not be able to meet her burden under the Act and that the evidence will not support a finding against Respondent Smallwood.

In his opening remarks, Mr. Tripician, counsel for Respondent Simmons, recommended that the Commission limit the issues to the "four corners" of the complaint and no more. In doing so, he maintained that complainant's testimony and evidence will not be sufficient to support the complaint's burden of proof in light of the residuum rule, which requires that hearsay testimony be supported by competent, credible evidence. He also advised that he would make a motion for sanctions against the complainant since the allegations are not based on fact or any reasonable law.

Mr. Tripician also made the complainant and Commission aware that he had not received any documentation or the Verification of Attendance for the complainant's list of witnesses. Mr. Sklarin also claimed that he too did not receive the complainant's Verification of Attendance nor could he be certain that he received her total information packet. Complainant produced the certified mail receipt and the green cards reflecting prior counsels' receipt of complainant's documents. Although respondents' counsel did not oppose introduction of the complainant's documents, they did oppose the calling of her witnesses since she did not provide a certification of mailing to counsel and the Verification of Attendance. In the interest of fundamental fairness and due process requirements, the Commission barred the complainant's witnesses on direct, but she would be allowed her to call them on rebuttal.

COMPLAINANT: Corey Lowell—Board Member

Corey Lowell was sworn in and testified that in November 2013, prior to joining the Board as a member, she kept abreast of the Board's activities regarding the search and selection of Mr. Gregory Allen's appointment as Superintendent and the reversal of the appointment by the fiscal State Monitor assigned to the District on the grounds that Mr. Allen was not qualified for the position. The Board then sued the Monitor for her action in overturning the appointment. The suit was subsequently withdrawn in September 2014. Complainant Lowell further testified that, having joined the Board as a member, she was present at the Board meeting on February 11, 2014, when Respondent Smallwood discussed with the Board her idea of appointing Mr. Allen as Assistant Superintendent "to see if he would work out." The Board then directed her and the Personnel Committee, comprised of Respondent Smallwood, Respondent Simmons and Ms. Angela Abhez-Anderson, to meet and to discuss her plan with the State Monitor, who had the statutory authority to hire and fire within the District. (CD File 2, 02:05—02:30)

At the Board meeting of March 18, 2014, Complainant Lowell laid the foundation that she was in attendance that night as recorded in the minutes, and that during Executive Session

that evening she personally heard Respondent Smallwood state that she and Respondent Simmons conducted a site visit on Mr. Allen's behalf and met with several Pleasantville school officials and co-workers to discuss Mr. Allen's work ethic, qualifications for performance, and his candidacy for the position of Assistant Superintendent in Asbury Park. Respondent Smallwood also stated that although Mr. Allen's contract was not renewed in Pleasantville because the fiscal State Monitor, assigned to the Pleasantville School District, had pulled his name from consideration, the Business Administrator spoke highly of him. Complainant Lowell further maintains that the visit took place without her knowledge, and when she asked three other Board members—Connie Breech, Barbara Lesinski and Angela Abhez-Anderson—whether they knew of the visit, they told her that they did not nor did they give their consent to the visit. Complainant Lowell asserts that Respondent Smallwood stated that the meeting was scheduled over the weekend of March 8, 2014.

Complainant Lowell states as fact that, based on Respondent Smallwood's discussion at the Board meeting of March 18, 2014, the site visit took place, without the knowledge of the full board or during a meeting of the Board and that no the authorization was given to meet with the Superintendent candidate and his past employers. Moreover, there was no evidence in the Executive Session minutes or regular meeting minutes of March 18, 2014 to demonstrate that a site visit was ever discussed, who should be present at this visit, or what the appropriate criteria or rubric would be to conduct the visit.

Ms. Lowell affirmed that she was in attendance at the Board meeting in February when Respondent Smallwood was advised that she and the Personnel Committee had the Board's authority only to contact the State Monitor regarding her plan and in attendance at the March 18, 2014 meeting when Respondent Smallwood disclosed that she and Respondent Simmons conducted the site visit on behalf of Mr. Allen, whose appointment had already been overturned by the State Monitor.

On cross examination, counsel for Respondent Simmons introduced R-1(Simmons), the Executive Session minutes for the meeting of March 18, 2014, for the purpose of demonstrating that Ms. Lowell's name was not recorded among the names of those in attendance. She firmly stated in response that she definitely was in attendance during Executive Session that evening and the full minutes of the meeting support her attendance and role in the proceedings that evening.

Ms. Lowell did admit that she had no first-hand knowledge of what took place during the site visit, that she had no idea who else was present besides the respondents, and that she had no knowledge of the substance of the conversations which were exchanged during the visit. All that she learned about the visit came from Respondent Smallwood's account of the session. Upon further cross examination, Ms. Lowell also admitted that she had produced no documentary evidence yet to prove the violations she alleged, or to support her testimony regarding her first-hand knowledge of Executive Session discussions, the entire March 18, 2014 minutes, or respondents' Answers.

On cross-examination by counsel for Respondent Smallwood, Ms Lowell said that she has not produced documentary evidence that would prove a violation of N.J.S.A. 18A:12-

24.1(a), (c), (d), (e), and (g), but she stated that for some allegations documentary evidence was not available, but that she expected to prove the alleged violations on redirect. In consideration of the Commission's time, counsel ended his cross-examination as it would have repeated the same issues raised by Respondent Simmons' counsel.

When questioned by the Commission, Ms. Lowell testified that she was present during Executive Session at the Board meeting on March 18, 2014 and that at the Public Session after the closed portion of the meeting only two member of the audience remained, one of whom was a security guard and that to the best of her recollection the meeting ended between 9 pm and 10 pm, but could not remember how many Board members were present. Ms. Lowell was not able to confirm whether the March 18, 2014 minutes in evidence were the same as those at the March 25, 2015 meeting. In responding to a question regarding the State Monitor during the February 11, 2014 meeting[1], the Ms. Lowell confirmed that the Board asked the Personnel Committee to meet with the State Monitor to discuss the notion of creating an Assistant Superintendent position, but nothing more.

Ms. Lowell settled the question that the current State Monitor is the same Monitor who overturned the appointment of Mr. Allen, and that she was present at the March 18, 2014 meeting. When Ms. Lowell was asked how she responded to the revelation that the respondents conducted a site visit without authorization, she testified that she said, "You did what? That's an ethics violation!" To which Board counsel responded, "Now hold on now. You're not qualified to make that statement."

When questioned if she had any documentary evidence to support her assertions that the site visit took place sometime before the March 18, 2014 meeting, Ms. Lowell responded that she learned of the meeting from Respondent Smallwood at the meeting of March 18, 2014 and that based on the dates in an email exchange between Respondent Smallwood and Mr. Allen which she acquired from Respondent Smallwood's then counsel during the hearing of Lesinski v. Smallwood, C14-14. Based on the email, Ms. Lowell calculated that the meeting took place on the Thursday after the weekend of March 8-9, 2014 but before the meeting of March 18, 2014.

Counsel for Respondent Simmons objected to the admission of the email into evidence on the grounds that Ms. Lowell did not establish the proper foundation, nor could she attest to its authenticity, even though it was Respondent Smallwood's own document. In response to counsel, Ms. Lowell countered that both respondents acknowledged that the visit did take place, asserting that they had the Board's authorization. Counsel for the Commission asked if Simmons' counsel believed that the email exchange did not take place. He said his only objection was that Ms. Lowell did not lay the proper foundation for its admission. After deliberation, the Commission overruled the objection and admitted the Smallwood-Allen email as Complainant's Exhibit C-1.

Thereafter, a lengthy conversation ensued regarding R-1, the redacted Executive Session minutes, including a discussion about the process of minute distribution to the Board members. The minutes, both public and closed session, are distributed to the members at the meeting for

[1] A review of the Asbury Park Board of Education meeting minutes reveals that Ms. Lowell was present for the February 11, 2014 meeting but not the February 25, 2014 meeting. http://www.asburypark.k12.nj.us/site

adoption, but the Executive Session minutes are returned to the Business Administrator for safekeeping. Ms. Lowell stated that if a Board member were absent for the meeting at which the minutes were adopted, the public session minutes would be emailed to the member, but not the closed session minutes.[2] Thus, she had to make an OPRA request for the closed session minutes, which were intentionally redacted to preserve the confidentiality of the Executive Session discussions. After examining the various copies of R-1, the parties and the Commission agreed that they were all dealing with the same redacted document.

While still under oath and before she rested her case, Ms. Lowell testified that she did not recall Respondent Simmons making statements at the March 18, 2014 meeting regarding the site visit, but she did recall Respondent Smallwood statement that Respondent Simmons accompanied her on the visit. Ms. Lowell then requested that the full minutes of the March 18, 2014 meeting be admitted into evidence as Complainant's Exhibit C-2. The Commission so admitted the document and Ms. Lowell rested.

Counsel for Respondent Simmons made a Motion to Dismiss based on Ms. Lowell's lack of first-hand knowledge of the Executive Session discussions as the minutes of that session reflect that she was not present, and that she was not present at the site visit. Counsel relied on the determination in Steven Hoh v. C.B., Mine Hill Board of Education, Morris County, C50-10, 7/26/11, in which the Commission found that the complainant did not sustain his burden of proof as he failed to factually establish the violations alleged in his complaint. More to counsel's point here, the complainant in the Hoh matter shaped his entire case on hearsay evidence, having no personal knowledge of the facts to support his allegations. Although N.J.A.C. 1:1-15.5 allows for the admission of hearsay evidence, there must be some residuum of competent credible evidence to support the hearsay evidence. Without actual proof, the hearsay evidence cannot stand alone. Counsel argues that such is the case in the Lowell matter. He asserts that the complainant here lacks personal knowledge of the facts and has only hearsay to support the claims that the respondents violated the Code. He further argues that the complainant was not present at the meeting on March 18, 2014, or at the site visit, or had knowledge of the exact day the meeting took place. Counsel concluded that because the complainant's case relies strictly on hearsay evidence and has not provided the residuum proof to support her allegations, the Commission must dismiss her complaint.

Counsel for Respondent Smallwood then addressed the Commission to join in the Motion to Dismiss and remarked that the complainant has offered no proof that either respondent violated the Code "one way or the other." He further re-argues the application of the residuum rule and affirms that Ms. Lowell did not present any witnesses with personal knowledge of the facts or documentary evidence to successfully meet her burden of proof.

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[2] The Commission has determined that Executive Session minutes are confidential and would not be available to any third party who would not be admitted to the Executive Session. It would seem appropriate that Executive Session minutes would not be distributed by email as the confidentiality of their contents would be breached. See Messner & Condo v. Gray, Deptford Twp. Board of Education, Gloucester County, C16-13, 12/19/13 and Berglund v. Gray, Deptford Twp. Board of Education, Gloucester County, C22-13, 12/19/13 (Consolidated), Commissioner of Education Decision No. 243-14ASEC, decided June 9, 2014.

In response, the complainant contends that the Smallwood-Allen email exchange set the schedule for the site visit, the topics to be discussed, and who would be present. Moreover, she argues that both respondents in their respective Answers state that they did attend the site visit and with the full knowledge of the Board. The complainant again states that she, as a member of the Board, had no knowledge of the site visit and that three other members told her that they had no knowledge of it either. Finally, the complainant maintains that these documents are sufficient, competent, documentary evidence to meet the requirements of the residuum rule, pursuant to N.J.A.C. 1:1-15.5, and as such she has met her burden of proving the allegations in her complaint.

After a short recess to deliberate, the Commission advised the parties that it will reserve on the decision on the Motion to Dismiss until the respondent's present their case.

Upon return from the lunch recess, both counsel for the respondents elected not call witnesses and rested.

In summation, counsel for Respondent Simmons contends that the Smallwood-Allen email does not mention Respondent Simmons at all, that her Answer does not admit to a violation in any way, and further reiterated his arguments as he did in his Motion to Dismiss, directed that the Commission consider only the "four corners" of the complaint. Counsel concluded that the Commission would have to "twist itself into a pretzel" to decide other than to dismiss the complaint for failure to establish a violation of the Code.

Similarly, counsel for Respondent Smallwood contends that there is no documentary evidence or testimony from anyone with first-hand knowledge to establish a violation of the Code as alleged in the Complaint. He avers that there is no testimony whether the site visit was or was not authorized by the Board, and that the site visit was not in and of itself a violation. He maintains that the holding in Hoh requires first-hand knowledge to prove a violation of confidentiality and that the Commission would have to "go through some significant legal gymnastics" to find a violation of the Code. Moreover, he argues that the respondents where members of the Personnel Committee and that Respondents Smallwood's Answer did not admit any violation of the Code.

In her summation, Complainant Lowell contends that the lack of documentary evidence is telling that the visit was not planned or authorized. As a Board member she was not presented with any notes regarding the site visit and the Board never developed a list of questions or a scoring rubric, and three other Board members told her that they had no knowledge of the site visit. She reiterated the fact that the respondents took private action without authorization from the Board when they arranged for and conducted a site visit, which had the potential to compromise the Board, and demonstrates that the respondents violated the Code.

Finally, counsel for Respondent Simmons made a Motion for Sanctions against Ms. Lowell for filing a frivolous claim, pursuant to N.J.S.A. 18A:12-29(e) and the determination in Valdes v. Morejon, Union Cty. Bd. of Ed., Hudson County, C39-10 (February 22, 2011.

Complainant's Exhibits

C-1	Respondent Smallwood's E-mail of March 12, 2014 to Gregory Allen Scheduling a Meeting
C-2	Minutes of the Public Session of the March 18, 2014 Board Meeting

Respondent Simmons' Exhibit

R-1	Minutes of the Executive Session of the March 18, 2014 Board Meeting

FINDINGS OF FACT

As the trier of fact in this matter, the Commission had the opportunity to observe the demeanor of the witness and to judge her credibility. As such, the Commission found Corey Lowell to be a credible witness who offered consistent testimony which was not weakened by an often contentious cross-examination. When faced with the loss of her ability to call witnesses,[3] Ms. Lowell did not falter or waver, and was able to testify convincingly, with conviction and honesty. Her testimony was further supported by the documentary evidence upon which she relied. As neither Respondent Smallwood nor Respondent Simmons offered testimony or documentary evidence in their defense, except for R-1, the testimony of Complainant Lowell stands undisputed and unopposed. The Commission found the complainant's testimony to be credible and uncontroverted.

Accordingly, based on the pleadings, documents in the record, and credible, relevant testimony, the Commission makes the following factual findings on the issues of whether the Asbury Park Board Education authorized Respondents Smallwood and Simmons to conduct a site visit for the position of Assistant Superintendent on behalf of a candidate whose appointment had already been overturned by the fiscal State Monitor and whether they actually attended the visit.

1. At all times relevant to this matter, the complainant and respondents were members of the Asbury Park Board of Education (Board).

2. The Board has been subject to the oversight of a fiscal State Monitor, pursuant to N.J.S.A. 18A:7A-54 *et seq.*, since September 2013.

3. The Board's search for a new Superintendent since early 2013 has been unsuccessful.

4. In November 2013, the State Monitor overturned the Board's appointed candidate, Gregory Allen, for Superintendent citing, *inter alia,* his lack of experience and concerns about his qualifications for the position.

5. The Board meetings at the center of the controversy were held on February 11, 2014 and March 18, 2014.

6. The minutes of the February 11, 2014 meeting, published on the Asbury Park website reveal that Complainant Lowell was in attendance at that meeting.

[3] Although the complainant produced the green cards proving delivery of her documents on the prior attorneys, succeeding counsel for both respondents prevailed in striking her witnesses, limiting her only to questions on rebuttal. Since counsel for the respondents rested after the complainants case, Ms. Lowell had no opportunity to question witnesses.

7. At the meeting of February 11, 2014, the Board authorized the Personnel Committee, comprised of Respondent Smallwood, Respondent Simmons and Angela Abhez-Anderson, to only contact the State Monitor to discuss the plan to create a position of Assistant Superintendent.

8. Between March 9, 2014 and March 12, 2014, Respondent Smallwood engaged in an email exchange with Gregory Allen, the candidate for Superintendent whose appointment was overturned by the State Monitor, for the purpose of arranging a site visit to support his candidacy for the Assistant Superintendent position.

9. After the meeting, Mr. Allen and Respondent Smallwood again emailed each other stating that the meeting went well and that Respondent Smallwood would report to the Board on Tuesday night.

10. In that same email, Respondent Smallwood wrote to the unsuccessful candidate saying, "I'm doing everything I can to resolve this CSA situation." (Complainant's Exhibit C-1)

11. At the Board meeting on March 18, 2014, Respondent Smallwood reported that she and Respondent Simmons conducted a site visit on behalf of Gregory Allen.

12. Respondent Simmons' Answer admits to attending the site visit but states the she did so with the full knowledge of the Board,

13. The Public Session minutes of the March 18, 2014 meeting clearly show that Complainant Lowell attended the entire meeting.

14. The redacted minutes of the March 18, 2014 meeting are not competent to demonstrate that Complainant Lowell was not at the meeting. (R-1)

15. The complainant testified that she heard Respondent Smallwood's account of the site visit and was surprised that it had taken place, as were three other Board members who told Complainant Lowell that they never authorized the visit. One of the three was a member of the Personnel Committee—Angela Abhez-Anderson.

16. The State Monitor attended the March 18, 2014 meeting.

17. There is no evidence, by either testimony or documentation, that the State Monitor corrected Ms. Lowell's objection upon learning of the site visit.

18. At the August 26, 2014 meeting, the Commission reviewed Respondent Simmons' allegation of frivolous complaint and voted to find this complaint not frivolous.

19. Respondent Geneva Smallwood rested without testifying or calling witnesses to rebut Complainant Lowell's testimony and documentary evidence.

20. Respondent Felicia Simmons rested without testifying or calling witnesses to rebut Complainant Lowell's testimony and documentary evidence.

21. Complainant Lowell's testimony and documentary evidence are unchallenged and uncontroverted by any competent, credible evidence by either respondent, and she has established her *prima facie* case against the respondents.

22. Respondent Smallwood and Respondent Felicia Simmons conducted the site visit without Board approval in violation of the Code of Ethics for School Board Members, N.J.S.A. 18A:12-24.1 et seq.

ANALYSIS

MOTION TO DISMISS

Pursuant to N.J.A.C. 6A:28-8.1(d), upon completion of the complainant's case, and prior to the respondent's testimony, counsel for Respondent Simmons moved to dismiss the Complaint.[4] After hearing arguments from counsel, the Commission asked the parties to leave the room so that it could deliberate. It is the complainant's burden to factually establish violation(s) of the Code of Ethics for School Board Members. In considering a motion to dismiss, the Commission considers the facts in the light most favorable to the non-moving party. The question before the Commission was whether the complainant alleged facts and provided testimony which, if true, could support a finding that the respondent violated N.J.S.A. 18A:12-24.1(a), (c), (d), (e), and (g) of the Code of Ethics for School Board Members. The Commission determined to reserve its decision on the Motion pending presentation of respondents' respective cases.

Both respondents elected not to testify or call witnesses on their behalf and rested.

During his closing arguments, counsel for each respondent renewed the earlier Motion to Dismiss on the grounds that the complainant had failed to meet her burden to prove the allegations in her Complaint by a preponderance of credible evidence. In support of their joint motion, counsel rely on the determination in Steven Hoh v. C.B., Mine Hill Board of Education, Morris County, C50-10, 7/26/11 (Hoh). In that matter, the complaint was dismissed for failure of the complainant to meet his burden since his complaint was based on hearsay and he had no personal knowledge of the incident which gave rise to the filing. He learned of the event at issue from someone else and was not present when the episode occurred. Counsel for the respondents argue that Ms. Lowell's Complaint should suffer the same fate since her testimony is all based on hearsay as demonstrated by her nonattendance of the Executive Session portion of the March 18, 2014 Board meeting as shown in the March 18, 2014 Minutes of Executive Session, and she has not provided the residuum proof in support of her hearsay testimony as required under N.J.A.C. 1:1-15.5. They proffered Respondent Simmons' Exhibit R-1 to show that Complainant Lowell was not in attendance during Executive Session when Respondent Smallwood revealed to

[4] N.J.A.C. 6A:28-6.9(c) provides that all hearings shall be conducted in accordance with the rules of the OAL. Such rules permit a party to make an oral motion during a hearing and to state the grounds for the motion. N.J.A.C. 1:1-12.1(a)1 and 2.

the Board members that she and Respondent Smallwood conducted a site visit on behalf of the same candidate whose appointment the State Monitor overturned. Counsel assert that Complainant Lowell could have no first-hand knowledge of the disclosure. According to the Executive Session minutes, the seven members in attendance were Ahbez-Anderson, Hall, Harris, Lesinski, Saunders, Simmons, and Smallwood. Also present was the State Monitor.

In response, Complainant Lowell asserted that she was present for the entire meeting and proffered Complainant's Exhibit C-2, the minutes of the entire Public Session, which reflect that she was present at roll call to open the meeting, and was mentioned in two other agenda items as either seconding a motion or voting "nay" on the Motion to go into Executive Session. Thus, Ms. Lowell asserts that she was present for the entire meeting.

The Commission agrees and determines that application of Hoh is inapposite to the facts in the instant matter. When R-1 and C-2 are read *in pari material*, R-1, the Executive Session minutes, reflects two critical inconsistencies when compared with C-2, sufficient to render R-1 unreliable to prove Ms. Lowell was absent from Executive Session.

First, the Public Session minutes show Ms. Lowell present for roll call at the outset of the meeting and specifically mentioned in the activity of two other agenda items, including the vote to go into Executive Session. There is no entry that she departed. However, Mr. Saunders is marked "absent" at initial roll call; yet, his name appears on the Executive Session minutes as in attendance, but Ms. Lowell's name notes she is absent. There is no entry that Mr. Saunders arrived late to the meeting nor is his name mentioned on any other Board initiative that evening. Further, there is no indication that Ms. Lowell left.

Second, at the opening roll call, eight Board members were in attendance and every vote thereafter reflected eight members voting; however, Executive Session roll call shows Mr. Saunders present when he was not before, and the number of members reduced to seven. While there may be some explanation for these irregularities, none were offered at the hearing by the respondents; therefore, R-1 is unreliable to prove that Ms. Lowell was not present during Executive Session, and the Commission accords it no weight. In contrast, C-1 demonstrates that Ms. Lowell was in attendance that evening, and when coupled with her credible testimony that she was present at all times, the Commission accorded greater weight to C-1 as evidence to prove that Ms. Lowell was present to hear Ms. Smallwood's account of the site visit, which she and Ms. Simmons conducted.

The Commission further determines that there is also independent evidence that the site visit took place. First, Ms. Smallwood's email conversation (Complainant's Exhibit C-1) with Mr. Allen is evidence that after he contacted Ms. Smallwood she planned the visit, gathered the necessary participants, and emailed Mr. Allen concerning the perceived success of the visit after the fact and advised him that she would report to the Board that Tuesday and that she would do "everything I can to resolve this CSA situation". Second, Ms. Simmons' Answer to the Complaint in which she admits that she attended the site visit with the full knowledge of the Board.

For the reasons stated above and based on the Findings of Fact, *supra*, the Commission determines that the residuum rule requirement does not apply in this setting as Ms. Lowell has met her burden of proof by providing credible evidence, which does not rely on hearsay, that Respondent Smallwood and Respondent Simmons violated the Code. The joint Motion to Dismiss is hereby denied.

MOTION FOR SANCTIONS

After closing argument, counsel for Respondent Simmons made a motion to impose a monetary sanction on Ms. Lowell for filing a frivolous complaint, pursuant to N.J.S.A. 18A:12-29(e). To succeed at such a request, the movant must show that that the complainant filed the Complaint in bad faith solely for the purpose of harassment, delay or malicious injury. Counsel has provided no evidence of bad faith nor has he provided information to suggest that the complainant should have known that the Complaint was without any reasonable basis in law or equity, or that it could not be supported by a good faith argument for an extension, modification or reversal of existing law. N.J.A.C. 6A:28-1.2. Moreover, at its August 26, 2014 meeting, the Commission reviewed Respondent Smallwood's allegation of frivolous complaint as alleged in her Answer and voted to find this Complaint not frivolous. The allegation once decided cannot be raised again, pursuant to N.J.A.C. 6A:28-7.2(b)(1). Consequently, based on the foregoing, the Commission denies counsel's request for sanctions.

CODE VIOLATIONS

The relevant, credible testimony in the case now before the Commission revealed that the respondents took board action beyond the scope of their authority and in violation of the Code when, without Board authority and without the approval of the State Monitor, they conducted a site visit to assess a candidate for Assistant Superintendent. They further violated the Code when they made personal promises to the candidate by advancing the possibility of his employment with the District, and promising to resolve the CSA issue for the Asbury Park District, which had the potential to compromise the Board. Respondent Smallwood and Respondent Simmons conducted a site visit without necessary approval. Consistent with this foregoing reasoning, the Commission reviewed these actions to determine the manner in which the respondents violated the Code.

The Commission again notes that the complainant bears the burden of factually proving any violations of the Code of Ethics for School Board Members in accordance with the standards set forth at N.J.A.C. 6A:28-6.4(a). See also, N.J.S.A. 18A:12-29(b). The complainant asserts that the respondent violated N.J.S.A. 18A:12-24.1(a), (c), (d), (e), and (g) of the Code of Ethics for School Board Members.

The Commission first considers the allegation that the respondent violated N.J.S.A. 18A:12-24.1(a), which states:

> I will uphold and enforce all laws, rules and regulations of the State Board of Education, and court orders pertaining to schools.

> Desired changes shall be brought about only through legal and ethical procedures.

The Commission's regulations require that:

> Factual evidence of a violation of N.J.S.A. 18A:12-24.1(a) shall include a copy of a final decision from any court of law or administrative agency of this State demonstrating that the respondent(s) failed to enforce all laws, rules and regulations of the State Board of Education, and/or court orders pertaining to schools or that the respondent brought about changes through illegal or unethical procedures. N.J.A.C. 6A:28-6.4(a)1.

The complainant did not produce a copy of a final decision from a court of law or administrative agency of this State which demonstrates that this respondent failed to enforce all laws, rules and regulations of the State Board of Education, and/or court orders pertaining to schools or that the respondents brought about changes through illegal or unethical means. See, David Hollander v. Judith Millman, et al., Springfield Twp. Board of Education, Union County, C33-07 (January 22, 2008); Denise Bouyer v. Rita Owens and Oscar McCoy, Willingboro Board of Education, Burlington County, C37-09 (December 15, 2009); Martha Oramas-Shirey v. Peter Gallo et. al., Bethlehem Twp. Bd. of Ed., Hunterdon County, C43-10 (March 22, 2011). Accordingly, the complainant failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(a).

The Commission next considers the allegation that the respondent violated N.J.S.A. 18A:12-24.1(c), which states:

> I will confine my board action to policymaking, planning, and appraisal and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

The Commission's regulations require that:

> Factual evidence of a violation of N.J.S.A. 18A:12-24.1(c) shall include evidence that the respondent(s) took board action to effectuate policies and plans without consulting those affected by such policies and plans, or took action that was unrelated to the respondent's duty to:
>
> > i. Develop the general rules and principles that guide the management of the school district or charter school;
> > ii. Formulate the programs and methods to effectuate the goals of the school district or charter school; or
> > iii. Ascertain the value or liability of a policy. N.J.A.C. 6A:28-6.4(a)3.

The complainant alleges that the respondents took action beyond the scope of their authority when they conducted the site visit without Board approval and without authorization of the State Monitor. Ms. Lowell testified that at the Board meeting of February 11, 2014, the Board gave approval to the Personnel Committee only to contact the State Monitor to discuss the notion of creating a new Assistant Superintendent position. At that time, the Personnel Committee was comprised of Respondent Smallwood, Respondent Simmons, and Angela Abhez-Anderson. Four times during the course of her testimony, Ms. Lowell stated that three other Board members told her that they did not authorize the respondents to conduct a site visit, and those statements were never once challenged by the respondents. Most importantly, one of the three who advised Ms. Lowell that she did not approve the visit was Ms. Anderson, the third member of the Personnel Committee. She was left out of the decision.

Moreover, the State Monitor was in attendance at Executive Session on March 18, 2014 when Respondent Smallwood recount hers and Ms. Simmons' experiences on the site visit and would have heard Ms. Lowell respond, "You did what? That's an ethics violation!" To which Board counsel responded, "Now hold on now. You're not qualified to make that statement." It is reasonable to conclude that had the respondents actually discussed the creation of the new position and received authorization to conduct the site visit, the State Monitor would have taken this opportunity to defuse the situation to avoid litigation or for any of the other Board members who were present, who could have explained that authority was previously granted at the earlier February 25, 2014 meeting which Complainant Lowell was not in attendance. But that did not happen because the respondents neither sought approval nor received authorization. Instead, the respondents acted unilaterally to plan and arrange the site visit. Moreover, if they had the requisite approvals, they would have included that fact in their respective Answers, but they did no. Further, they would have testified to that fact or had others testify on their behalf, which they did not. Accordingly, based on the preponderance of the credible testimony and evidence, the Commission finds that because Respondent Smallwood and Respondent Simmons failed to secure the necessary Board approval and/or State Monitor authorization prior to conducting the site visit, they violated N.J.S.A. 18A:12-24.1(c).

The Commission next considers the allegation that the respondent violated N.J.S.A. 18A:12-24.1(d), which states:

> I will carry out my responsibility, not to administer the schools, but together with my fellow board members, to see that they are well run.

The Commission's regulations require that:

> Factual evidence of a violation of N.J.S.A. 18A:12-24.1(d) shall include, but not be limited to, evidence that the respondent(s) gave a direct order to school personnel or became directly involved in activities or functions that are the responsibility of school personnel or the day-to-day administration of the school district or charter school. N.J.A.C. 6A:28-6.4(a)4.

Based on the testimony and in accordance with the Commission's findings of fact, the Commission finds insufficient evidence to conclude that the respondents gave a direct order to school personnel or became directly involved in activities or functions that are the responsibility of school personnel or the day-to-day administration of the school district. Accordingly, the complainant failed to establish that the respondents violated N.J.S.A. 18A:12-24.1(d).

The Commission next considers the complainant's allegation that the respondent violated N.J.S.A. 18A:12-24.1(e), which provides:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

The Commission's regulations require that:

> Factual evidence of a violation of N.J.S.A. 18A:12-24.1(e) shall include evidence that the respondent made personal promises or took action beyond the scope of his or her duties such that, by its nature, had the potential to compromise the board. N.J.A.C. 6A:28-6.4(a)5.

In finding a violation of N.J.S.A. 18A:12-24.1(e), it is not necessary for the Commission to find that the respondent's action, in fact, compromised the Board. Rather, it is sufficient that the action was of such a nature that it might have compromised the Board. See, Tony John et al. v. Ken Gordon, Willingboro Bd. of Ed., Burlington County, C34-08 (October 27, 2009), *aff'd* Commission of Education Decision No. 102-10ASEC, decided March 30, 2010.

Respondent Smallwood continued to pursue Mr. Allen as a candidate for the Assistant Superintendent position and enlisted the assistance of Respondent Simmons to attend and conduct the site visit. The Commission determines that actually conducting a site visit on behalf of and in the presence of Mr. Allen, whose appointment the State Monitor overturned in November 2013, was the next step in the hiring process for which the respondents had no approval. As such, the action they took in attending and conducting the site visit was private action beyond the scope of their authority. This site visit had the ability to compromise the Board. In further violation of the Code, Respondent Smallwood held out a promise to Mr. Allen in her email reply to him when she stated, "I'm doing everything I can to resolve this CSA[5] situation." This promise of future employment also had the potential to compromise the Board, despite the fact that she had no authority to bring the promise of employment with the District to fruition.

Accordingly, the Commission finds that based on the preponderance of the relevant, credible evidence, Respondents Smallwood and Simmons took private action and made a personal promise of possible future employment with the District, when they attended the

[5] CSA is the acronym for the Chief School Administrator or Superintendent.

meeting. These actions were of such a nature that they had the potential to compromise the Board in violation of N.J.S.A. 18A:12-24.1(e).

The Commission last considers the allegation that the respondent violated N.J.S.A. 18A:12-24.1(g), which provides:

> I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.

The Commission's regulation requires that:

> Factual evidence of a violation of the confidentiality provision of N.J.S.A. 18A:12-24.1(g) shall include evidence that the respondent(s) took action to make public, reveal or disclose information that was not public under any laws, regulations or court orders of this State, or information that was otherwise confidential in accordance with board policies, procedures or practices. Factual evidence that the respondent violated the inaccurate information provision of N.J.S.A. 18A:12-24.1(g) shall include evidence that substantiates the inaccuracy of the information provided by the respondent(s) and evidence that establishes that the inaccuracy was other than reasonable mistake or personal opinion or was not attributable to developing circumstances. N.J.A.C. 6A:28-6.4(a)7. The purpose of executive session is to allow the Board to openly deliberate on select issues without the public being privy to those discussions. It is clear that the topics discussed during that portion of the meeting were confidential and it fell upon those individuals present in executive session ensure those discussions remain confidential.

The Commission confines its review to the first portion of this regulation, which requires evidence that the respondent took action to make public, reveal or disclose information that was not otherwise public. The complainant has provided no testimony or evidence that either respondent actually disclosed confidential information to the individuals attending the site visit. Although Ms. Lowell testified that Ms. Smallwood referred to Mr. Allen's "candidacy" in her discussion with the group, there is no corroborating evidence to support the allegation that she shared confidential information. Complainant's Exhibit C-1, the Smallwood-Allen email[6], does

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[6] The Smallwood-Allen email was admitted into evidence by Respondent Smallwood in a prior matter as R-3 and was only used in that matter to corroborate that Ms. Smallwood divulged Executive Session conversations and shared far more information, including her "out of the box" proposal in her telephone call in greater detail than simply gauging the candidates' interest and disclosed confidential matters discussed in Executive Session in

not demonstrate that Respondent Smallwood or Respondent Simmons disclosed confidential information to the group during the visit. While it is reasonable to conclude that a discussion regarding Mr. Allen's candidacy could only mean Ms. Smallwood's intention to appoint Mr. Allen to the Assistant Superintendent position, a finding that she had actually breached the Code would be based solely on conjecture. Accordingly, the complainant failed to establish that respondents violated N.J.S.A. 18A:12-24.1(g).

DECISION

The Commission finds that the complainant has proved by a preponderance of the relevant, credible evidence that Respondent Geneva Smallwood and Respondent Felicia Simmons violated N.J.S.A. 18A:12-24.1(c) and (e) of the Code of Ethics for School Board Members, and the Commission dismisses the allegations that the respondent violated N.J.S.A. 18A:12-24.1(a), (d), and (g) of the Code.

PENALTY

The Commission recommends a penalty of censure of each respondent, as it did in matters where similar violations of N.J.S.A. 18A:12-24.1(c) and (e) were found and a comparable violation was endorsed. In recommending the penalty, the Commission notes that a censure was the appropriate penalty when it found that a Board member violated (c) and exceeded her authority to appraise the resumes of candidates for Superintendent when she went in search of the resumes for her review. I/M/O Marlene Polinik, Wayne Township Board of Education, Passaic County, C45-06 1/22/08, Commissioner of Education Decision No. 112-08 SEC, decided March 10, 2008. A censure was also the penalty for a violation of N.J.S.A. 18A:12-24(e) *inter alia* for taking private action by attending a meeting the Board had not authorized the member to attend. Brown, et al. v. David Matthews, City of Englewood Bd. of Education, Bergen County, C13-07, 10/27/08, Commissioner of Education Decision No 123-09A, decided April 14, 2009. Here, where the respondents were found to have violated both N.J.S.A. 18A:12-24.1(c) and (e), the Commission finds that the penalty of censure is appropriate.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the School Ethics Commission's recommended sanction. Parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of violation may file, within **13 days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention:

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violation of N.J.S.A. 18A:12-24.1(g). The Commission did not have the issue of the propriety of the site visit before it at that time.

Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal, pursuant to the standards set forth at N.J.A.C. 6A:4, within **30 days** of the filing date of the decision from which the appeal is taken. The filing date shall be three days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (13 days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: March 26, 2015

Resolution Adopting Decision – C16-14

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof, and the testimony of the parties from its hearing on February 24, 2015; and

Whereas, at its meeting on February 24, 2015, the Commission denied respondents' request for reconsideration its denial of their Motion for a Stay; and

Whereas, at its meeting on February 24, 2015, the Commission found that the complainant established that the respondents violated N.J.S.A. 18A:12-24.1(c) and (e) of the Code of Ethics for School Board Members, but dismissed the allegations that the respondent violated N.J.S.A. 18A:12-24.1(a), (d), and (g); and

Whereas, at its meeting on February 24, 2015, the Commission voted to recommend to the Commissioner of Education a penalty of censure of each respondent; and

Whereas, at its meeting on March 24, 2015, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on March 24, 2015.

Joanne M. Restivo
Acting Executive Director
School Ethics Commission

346-15LM

346-15

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

October 16, 2015

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Re: *In the Matter of the Tenure Hearing of Shelia Slappy, State-Operated School District of the City of Newark, Essex County, Agency Dkt. No. 137-6/15, Commissioner Decision No. 242-15*

Dear Counsel:

Ms. Slappy's July 29, 2015 motion to "reconsider, vacate and reopen" this matter has been reviewed, along with the District's opposition brief and movant's reply thereto.

By way of background, this matter was opened before the Commissioner of Education on June 19, 2015 through tenure charges of conduct unbecoming certified by the State District Superintendent of the State-Operated School District of the City of Newark, together with supporting evidence against Ms. Slappy, a teaching staff member in the District's employ. The charges and supporting evidence indicated that Ms. Slappy engaged in a pattern of chronic and excessive absenteeism since the 2011-2012 school year that adversely affected students, and was absent without leave ("AWOL") for months at the time of the filing – despite having been deemed fit to return to work by a physician as of December 4, 2014.

On June 19, 2015, the Commissioner directed Ms. Slappy – via both certified and regular mail – to file an answer to the charges. This communication clearly provided notice that, pursuant to

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N.J.A.C. 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*" and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. Although the certified mailing sent to Ms. Slappy was never claimed, the letter sent to her via regular mail was not returned to the Bureau of Controversies and Disputes. Ms. Slappy failed to file a timely answer to the tenure charges, and failed to request an extension of time to file an answer during the 15-day answer period.

Subsequently, the Commissioner deemed the allegations against Ms. Slappy to be admitted pursuant to *N.J.A.C.* 6A:3-5.3(c) and found that the charges of conduct unbecoming a teaching staff member were proven and warranted Ms. Slappy's dismissal from employment. Summary decision was granted to the District on July 16, 2015 and Ms. Slappy was dismissed from her tenured position.

Later that same day, on July 16, 2015, counsel for Ms. Slappy submitted an untimely answer to the tenure charges and requested "an extension of time under *N.J.A.C.* 6A:3-5.3(b)1 to make this filing." Following notification from the Bureau of Controversies and Disputes that the matter had been decided and was closed, the instant motion to "reconsider, vacate and reopen" was filed on July 29, 2015.

Upon review, the Commissioner finds that Ms. Slappy is not entitled to reconsideration of the July 16, 2015 final decision. Pursuant to *N.J.A.C.* 6A:3-1.15(b)2, a motion for reconsideration shall be considered by the Commissioner based upon the following:

i. Claim(s) of mistake, provided, however, that disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake" for purposes of this section;
ii. Newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence;
iii. Newly ascertained misrepresentation or other misconduct of an adverse party, where such misrepresentation could not have been previously known; or
iv. Reversal of a prior judgment on which the present matter is based.

In her motion, Ms. Slappy does not argue that she has satisfied any of the prerequisites set forth in *N.J.A.C.* 6A:3-1.15(b)2; rather, she expresses disagreement with the Commissioner's granting of the District's motion for summary decision. Additionally, Ms. Slappy indicates that her inability to answer in a timely manner resulted primarily from her husband's release from an acute care facility on June 29, 2015 and her attendant ongoing responsibilities as his in-home caregiver. The District notes in its brief opposing Ms. Slappy's motion that, sadly, her husband's

serious health issues are recurrent and have affected her ability to report to work. Faced with those circumstances, however, Ms. Slappy provides no specific reason as to why she was unable to request an extension of time to file an answer pursuant to *N.J.A.C.* 6A:3-5.3(b) at any point prior to July 6, 2015 (the expiration of the 15-day answer period); no request for an extension of time was made until submission of the untimely answer on July 16, 2015.[1]

As to the request to vacate the Commissioner's July 16, 2015 decision and reopen the matter, the Commissioner finds Ms. Slappy's arguments to be unpersuasive. The Tenure Act authorizes the Commissioner to extend timelines in the tenure charge process "upon a showing of exceptional circumstances." *N.J.S.A.* 18A:6-17.4. As stated above, Ms. Slappy was provided an opportunity to respond to the tenure charges, but failed to do so in a timely manner. Furthermore, *N.J.A.C.* 6A:3-5.3(b)(1) provides that "A request for extension that is received *after* the 15-day period allotted for answer to tenure charges...will be considered *only* in the event of demonstrated emergency or other unforeseeable circumstance *such that the request could not have been made within the requisite filing period.*" Although Ms. Slappy's ongoing challenging personal circumstances related to the care of her husband and five year-old child are noted, there is no specific reason given why those circumstances would have prevented her from requesting an extension of time to file her answer prior to expiration of the 15-day answer period if she intended to respond to the tenure charges and required additional time.

Accordingly, the Commissioner is constrained to deny the motion in its entirety.

IT IS SO ORDERED.[2]

Sincerely,

David C. Hespe
Commissioner of Education

c: County Superintendent
State Law Library
DCH/MKD/DCS

[1] Mr. Stewart, Esq. provided an affidavit indicating that – although he met Ms. Slappy on or about May 7, 2015 – he was not formally retained to represent her in this matter until July 11, 2015. Mr. Stewart's affidavit further indicates that Ms. Slappy had been unable to provide him with the information necessary to prepare an answer to the tenure charges "because of her overarching need to manage the medical situation of her husband...and care for her five year old son."

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

348-15

AGENCY DKT. NO. 66-3/15

IN THE MATTER OF THE PETITION FOR	:	
AUTHORIZATION TO ENTER INTO A	:	
SENDING-RECEIVING RELATIONSHIP	:	COMMISSIONER OF EDUCATION
WITH THE BOARD OF EDUCATION OF THE	:	DECISION
BOROUGH OF LAVALLETTE,	:	
OCEAN COUNTY.	:	

For Petitioner, Board of Education of the Borough of Seaside Park:
Vito A. Gagliardi, Jr., Esq. (Porzio, Bromberg & Newman, P.C.)

For Respondent, Board of Education of the Borough of Lavallette:
Joseph F. Betley, Esq. (Capehart & Scatchard, P.A.)

For Respondent, Board of Education of the Toms River Regional Schools:
Stephan R. Leone, Esq. (Carluccio, Leone, Dimon, Doyle & Sacks, LLC)

Petitioner, the Board of Education of the Borough of Seaside Park ("Seaside Park") – a non-operating, elementary school district – having applied pursuant to *N.J.S.A.* 18A:38-13 and *N.J.A.C.* 6A:3-6.1[1] to the Commissioner of Education for authorization to enter a sending-receiving relationship with the Board of Education of the Borough of Lavallette ("Lavallette"), while maintaining its already established sending-receiving

[1] The proposed change in allocation of Seaside Park students could, if authorized, result in at least a partial withdrawal – if not a complete withdrawal – of Seaside Park students from Toms River. Therefore, the requirements of *N.J.S.A.* 18A:38-13 and *N.J.A.C.* 6A:3-6.1 are applicable. See *Board of Education of the Township of Mine Hill v. Board of Education of the Town of Dover*, Commissioner's Decision No. 510-04, decided December 15, 2004, at 9 (Commissioner determined standards for evaluating requests to withdraw from high school sending-receiving relationships are applicable when evaluating requests to withdraw from elementary school sending-receiving relationships).

relationship with the Board of Education of the Toms River Regional School District ("Toms River");[2] and

The Commissioner having recognized that the ultimate creation of a dual sending-receiving relationship would allow Seaside Park's Kindergarten through Grade 6 students to continue attending school at Toms River (Washington Street Elementary through Grade 5 and Toms River Intermediate East for Grade 6)[3] or to attend at Lavallette (Lavallette Elementary through Grade 6) instead; and

The Boards of Education of Lavallette and Toms River not having opposed Seaside Park's request;[4] and

Seaside Park having conducted a feasibility study in accordance with *N.J.S.A.* 18A:38-13 and *N.J.A.C.* 6A:3-6.1, analyzing the educational, financial and racial impact – on all affected districts – of establishing a dual sending-receiving relationship between Seaside Park and the Boards of Education of Toms River and Lavallette;[5] and

The feasibility study having recommended that Seaside Park be permitted to enter into a dual sending-receiving relationship, as its establishment would not have a substantial negative educational, financial or racial impact on any of the districts involved; and

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[2] In or around 2009, Seaside Park closed its elementary school and entered into a sending-receiving relationship with the Toms River Regional School District, wherein Toms River agreed to educate Seaside Park's elementary students. Seaside Park's Grade 7 through 12 students are educated at the Central Regional School District, along with students from Berkeley Township, Island Heights, Ocean Gate, and Seaside Heights.

[3] As of March 2015, 22 out of 387 students enrolled at Washington Street Elementary were from Seaside Park, and just 2 sixth-grade students out of over 1350 students enrolled at Toms River Intermediate School East were from Seaside Park.

[4] Lavallette expressed its support for establishment of the dual sending-receiving relationship – and passed a Board resolution indicating its readiness to receive and educate students from Seaside Park in Grades K through 6. Toms River did not file a formal objection to the petition.

[5] The Toms River Regional School District, a K-12 school district, educates students from Seaside Park, Toms River Township, Beachwood Borough, Pine Beach Borough, and South Toms River Borough. The Lavallette School District educates its Pre-K through 8 students at its only school, Lavallette Elementary.

The parties having complied with the public notice and comment provisions outlined in *N.J.A.C.* 6A:3-6.1(b); and

There being no dispute amongst the parties as to certain relevant facts, including that no substantial negative educational, financial or racial impact will incur to any of the school districts upon establishment of the proposed sending-receiving relationship between Seaside Park and Lavallette; and

The feasibility study having established to the Commissioner's satisfaction that the withdrawal of some or all of Seaside Park's students from Toms River, and the entry of those students into Lavallette, would cause no substantial negative impact on the educational programs of the school districts or on the quality of education received by the pupils in each of the school districts; and

The feasibility study having further established to the Commissioner's satisfaction that establishment of a sending-receiving relationship between Seaside Park and Lavallette would benefit the residents and students of Seaside Park from an educational perspective by allowing parents and guardians to select from two educational programs which provide students with a thorough and efficient education; and

The feasibility study having further established to the Commissioner's satisfaction that there would be no substantial negative impact on the financial conditions of the affected school districts, even if all Seaside Park students who currently attend school in Toms River decide to enroll at Lavallette at the same time; and

The feasibility study having further established to the Commissioner's satisfaction that there would be no substantial negative impact on the racial composition of any of the school

districts, and that there exists no evidence of any aggravating circumstances that would exacerbate any minimal change in racial composition at the affected districts;[6] and

The Commissioner having also considered the public comments[7] received pursuant to *N.J.A.C.* 6A:3-6.1(b); now, therefore

IT IS ORDERED on this 20th day of October, 2015 that – pursuant to *N.J.S.A.* 18A:38-13 and *N.J.A.C.* 6A:3-6.1 – Seaside Park's application for authorization to enter into a sending-receiving relationship with Lavallette while also continuing its sending-receiving relationship with Toms River, as set forth in its petition of appeal, is APPROVED, thereby establishing a dual sending-receiving relationship that will permit Seaside Park students in Grades Kindergarten through Six to attend school at either district.

IT IS SO ORDERED.[8]

COMMISSIONER OF EDUCATION

Date of Decision 10/20/15
Date of Mailing: 10/21/15

[6] The feasibility study indicated that the racial composition of students at Toms River and Lavallette is similar and would remain so even if Seaside Park's petition is granted. If all Seaside Park students had been removed from Washington Street Elementary between 2010 and 2014, the percentage of white students enrolled would have decreased by 0.26 to 1.66 percentage points over the four-year time period; and, if all Seaside Park students had been removed from Toms River Intermediate School East during the same time period, the percentage of white students enrolled would have decreased by only 0.03 to 0.18 percentage points. Finally, if all Seaside Park students had attended Lavallette between 2010 and 2014 (a district which had only 137-168 students enrolled during this time period), the percentage of white students enrolled at Lavallette would have decreased by 2.42 to 4.80 percentage points over four years. It is considered unlikely that all Seaside Park students would enroll at Lavallette at the same time if given the opportunity; thus, any resultant change in racial composition to the districts could be even less than those hypothesized above. Due to Seaside Park's relatively small K-6 student population (Seaside Park Elementary School "graduated" six students in its last year of operation), a decrease or an increase in Seaside Park's population in either Toms River or Lavallette will not result in a negative impact on any of the students.

[7] The Commissioner received written comments from the following individuals: 1) William Akers, Mayor of the Borough of Seaside Heights (opposed); 2) Triantafillos Parlapanides, Superintendent of Schools, Central Regional School District (opposed); 3) Kevin O'Shea, Business Administrator and Board Secretary, Central Regional School District (opposed); and 4) Walter G. LaCicero, Mayor of the Borough of Lavallette (in favor).

[8] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

J.C., ON BEHALF OF MINOR CHILD, J.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent Board that her daughter, J.C., is not domiciled in the Linden School District and therefore not entitled to a free public education in Linden schools. The respondent Board contended that petitioner and J.C. reside at a home in Roselle, New Jersey, which petitioner and her husband purchased in 1993, and consequently owe tuition for the period of J.C.'s ineligible attendance in Linden schools. Petitioner asserted that she is no longer domiciled at the Roselle house because she is separated from her husband. A hearing in the matter was conducted on September 9, 2014, and an Initial Decision was issued on May 29, 2015, in which the ALJ concluded that petitioner and her daughter are not domiciled in the respondent's school district; the ALJ ordered the petitioner to reimburse the Board at the per diem rate of $85.67 for the period of J.C.'s ineligible attendance in its schools. Subsequently, the Commissioner remanded the matter to the OAL for calculation of the exact amount of tuition due and supplementation of the record as warranted.

On remand, the ALJ determined that the petitioner owes the respondent Board a total sum of $ 20,453.44 in tuition costs for the period of J.C.'s ineligible attendance in the district's schools during the 2013-2014 and 2014-2015 school years.

The Commissioner adopted the recommended decision of the OAL with modifications to correct typographical errors in the Initial Decision's calculation of the tuition due to the respondent Board. The petitioner was directed to reimburse the Board in the amount of $20,453.44 for tuition costs incurred during the period of J.C.'s ineligible attendance in Linden schools.

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

Issued 10/22/15

OAL DKT. NO. EDU 10599-15
(EDU 7290-14 ON REMAND)
AGENCY DKT. NO. 136-5/14

J.C., ON BEHALF OF MINOR CHILD, J.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record in this matter – including the Initial Decision of the Office of Administrative Law (OAL) dated May 29, 2015, as well as the Initial Decision of the OAL dated September 17, 2015, issued pursuant to the Commissioner's remand – has been reviewed. The parties did not file exceptions.

On July 8, 2015, the Commissioner determined that petitioner failed to sustain her burden of establishing that she was a domiciliary of Linden during the 2013-2014 school year; thus, the minor child was not entitled to a free public education in the District's schools. As a result, the Commissioner remanded the matter to the OAL for calculation of tuition due to the Board. *See Board of Education of the Township of Cranford v. A.McG. and L.McG.*, 95 *N.J.A.R.* 2d (EDU) 74, aff'd 96 *N.J.A.R.* 2d (EDU) 140, rev'd and remanded, App. Div., February 10, 1998, A-4742-95, slip opinion at pp. 8-10 (initial decision requires, where applicable, calculation of tuition due).

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in Linden. *N.J.A.C.* 6A:22-6.2 indicates that – where an appeal has been filed – tuition may be assessed "for the period during which the hearing and decision on appeal were pending, and for up to one year of a student's ineligible attendance in a school district *prior* to the appeal's filing and including the 21-day period to file an appeal."

The Board notified petitioner on May 7, 2014[1] of its determination that the minor child was ineligible to attend school in Linden, as it appeared petitioner resided elsewhere. Petitioner appealed the Board's determination on June 2, 2014. According to the record, the minor child continued to attend school in Linden subsequent to the Board's determination and during the appeal's pendency, *i.e.,* for the remainder of the 2013-2014 school year and for the entire 2014-2015 school year.

On remand, the Administrative Law Judge (ALJ) ordered petitioner to pay tuition costs in the amount of $20,453.44. Pursuant to *N.J.S.A.* 18A:38-1b and *N.J.A.C.* 6A:22-6.2, tuition is hereby assessed to petitioner in the amount of $20,453.44 for the following days of ineligible attendance:

- May 7, 2014 through May 30, 2014 (*ineligible attendance prior to the filing of petitioner's appeal)* and June 2, 2014 through June 20, 2014[2] *(period during which the hearing and decision on appeal were pending):*

  (32 school days *in 2013-2014* x $85.67/day[3] = $2,741.44)

- September 3, 2014 through June 23, 2015 (*period during which the hearing and decision on appeal were pending):*

  (180 school days *in 2014-2015* x $98.40/day = $17,712.00)

  TOTAL: $2,741.44 + $17,712.00 = **$20,453.44**

[1] Although the May 7, 2014 Final Determination of Ineligibility states that tuition would be charged to petitioner at a *per diem* rate of $80.21, the Certification of Kathleen Gaylord, Business Administrator/Board Secretary contained in the record indicates that the *per diem* tuition rate for students in grades 9-12 for the 2013-2014 school year was $85.67.

[2] While the ALJ found on Page 2 of the Initial Decision that June 2, 2015 was the last day of school for the District's students – perhaps due to reliance upon the Affidavit of JoAnn Hamilton, Director of Pupil Personnel Services/Guidance, which appears to contain several typographical errors – the school calendar contained in the record confirms that the last day of school was June 20, 2015.

[3] While the ALJ found on Page 2 of the Initial Decision that the *per diem* rate of $85.67/day was applicable to the 2012-2013 school year – again, likely due to reliance upon the Affidavit of JoAnn Hamilton – the aforementioned Certification of Kathleen Gaylord and supporting exhibits confirm that this *per diem* rate actually applied to the 2013-2014 school year.

Accordingly, the recommended Initial Decisions of the OAL are adopted, as modified herein. The Board's claim for payment of tuition is granted, and the petition of appeal is hereby dismissed. Petitioner is directed to reimburse the Board in the amount of $20,453.44 for tuition costs incurred during the time period that the minor child was ineligible to attend school in Linden.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 10/22/15

Date of Mailing: 10/22/15

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10599-15
AGENCY DKT. NO. 13605/14
ON REMAND
OAL DKT. NO. EDU 07290-14

J.C. o/b/o minor child, J.C.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY

J.C., petitioner, pro se

Margaret A. Miller, Esq, for respondent Linden Board of Education, Union County (Weiner Lesniak, attorneys)

Record Closed: August 28, 2015 Decided: September 17, 2015

BEFORE **IRENE JONES,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals the decision of the respondent that determined that her daughter was not eligible to attend the Linden Public Schools because she is not a resident of the District. A hearing was held and concluded on September 9, 2014. An

Initial Decision issued on May 29, 2015. On July 8, 2015, the Commissioner of Education issued a Final Decision which affirmed the findings and conclusions as set forth in the Initial Decision, but remanded the matter for calculation of tuition due.

On August 28, 2015, the respondent provided the affidavit of Joanne Hamilton, Director of Pupil Personnel Services/Guidance for the Linden School District at which time the record closed.

FINDINGS AND CONCLUSIONS

I **FIND** the following undisputed **FACTS**:

1. On May 7, 2014, J.C. was sent a "Final Determination of Ineligibility for Residency" advising that the District determined that her daughter, J.C. was ineligible to attend school in the District. The notice further advised petitioner of her appeal rights and that tuition would be assessed for each day that J.C. improperly attended school in the District. (Exhibit A)

2. The Certification of the District's School Business Administrator, Kathleen A. Gaylord, provides the District's 2012-13 annual per pupil tuition rate was $15,421 or $85.67 per day.

3. Between May 7, 2014 and June 2, 2014, (the last day of school for the District's students there were thirty-two (32) school days for which J.C. was ineligible to attend school in the District. Therefore, J.C. is assessed $2,741.44 in tuition for the 2013-14 school year. (Exhibit B).

4. J.C. attended school in the District for the entire 2014/15 school year.

5. The per pupil annual tuition rate for the 2014/15 school year was $17,712.

Therefore, I **CONCLUDE** that the petitioner owes the District, $2,741.44 for the 2013/14 school year and $17,712 for the 2014/15 school year.

And it is hereby **ORDERED** that petitioner shall pay the District a total sum of $20,453.44.

It is so **ORDERED** that the District's claim for payment of tuition for 2013/14 and 2014/15 is hereby **GRANTED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

September 17, 2015

DATE

IRENE JONES, ALJ

Date Received at Agency: September 17, 2015

Date Mailed to Parties: SEP 21 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JU...

sej

EXHIBITS

For Petitioner

None

For Respondent

A Final Determination of the Linden Board of Education regarding J.C.'s Ineligibility for Residency

B. Affidavit of Joanne Hamilton, Director of Pupil Personnel Services/Guidance for the Linden Board of Education Certifying the Applicable Per Diem Tuition Rates.

352-15

B.P., on behalf of minor child, N.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent Board that his daughter, N.P., did not reside within the school district, and was therefore not entitled to a free public education in Burlington Township schools. The Board contended that N.P. was not residing at the Burlington Township address provided by the petitioner, and sought repayment of tuition for the period of N.P.'s ineligible attendance. Petitioner claimed that his daughter lives with him at his apartment in Burlington Township. The Board asserted that a residency investigation confirmed that N.P. lives with her mother, R.P., in Willingboro. A hearing in the matter was conducted on August 11, 2015.

The ALJ found, *inter alia*, that: it is undisputed that R.P. is a resident of Willingboro; although B.P. has clearly been a resident of Burlington Township since February 2015, and may have shared joint legal custody of N.P., the evidence demonstrated that N.P. continues to live with her mother in Willingboro; a significant amount of surveillance was conducted during the residency investigation, and failed to observe N.P. spending even one night at B.P.'s apartment. The ALJ concluded that, based on the credible testimony and documentary evidence, N.P. is not domiciled in Burlington Township, and must be considered as having been domiciled with her mother, R.P., in Willingboro for purposes of school attendance from March 17, 2015 to June 18, 2015. Accordingly, the ALJ affirmed the Board's determination that N.P. was not eligible for a free public education in Burlington Township, and ordered that petitioner reimburse the Board for the cost of tuition in the amount of $9,230.38.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, but determined that the matter must be remanded to the OAL for the proper development of the record with respect to the amount of tuition due, as there are inconsistencies in the record regarding the last day of school for the 2014-2015 school year, and the Board failed to submit an affidavit outlining the tuition costs. Accordingly, Commissioner remanded the case to the OAL for calculation of tuition due and supplementation of the record as warranted.

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

October 23, 2015

OAL DKT. NO. EDU 8697-15
AGENCY DKT. NO. 119-5/15

B.P., on behalf of minor child, N.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, B.P., and the Board of Education's reply thereto.[1]

Upon a review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) – for the reasons stated in the Initial Decision – that N.P. was not domiciled with her father in the Burlington Township School District (District) between February 2, 2015 and the end of the 2014-2015 school year. The Commissioner finds the petitioner's exceptions unpersuasive, largely reflecting arguments previously raised before the ALJ and taken into account by her in weighing the testimony and in concluding that N.P. resides with her mother in Willingboro, New Jersey. The Commissioner also finds no basis in the record to reject the ALJ's determinations of witness credibility. The ALJ had the opportunity to assess the credibility of the various witnesses who appeared before her and made findings of fact based upon their testimony.

With respect to the amount of tuition owed to the District for N.P.'s ineligible attendance, the Commissioner finds that this matter must be remanded to the OAL for the proper

[1] The record does not include a transcript of the hearing held at the OAL on August 11, 2015.

development of the record. Although it appears from the record that N.P.'s ineligible attendance in the District began on February 2, 2015, the ALJ ordered tuition to be reimbursed in the amount of $9,230.38 for the period from March 17, 2015 through June 22, 2015. It should be noted, however, that if the per-diem tuition rate was $107.33 for the 2014-2015 school year, the total tuition amount order by the ALJ in the Initial Decision could not possibly add up to $9,230.28 for the period of March 17, 2015 through June 22, 2015.[2] There are also inconsistencies in the record regarding the last day of school for the 2014-2015 school year. The Initial Decision indicates it was June 18, 2015, but then went on to order tuition costs through June 22, 2015. The District's submissions provide no clearer indication as the one correspondence in the record that was authored by the District references tuition costs through June 30, 2015. In light of the fact that the District did not submit an affidavit outlining the tuition costs and the record does not contain a transcript from the hearing at the OAL where the Business Administrator testified to the tuition costs, it is impossible to ascertain the correct tuition amount that is owed to the District.

Accordingly, this matter is remanded to the OAL for the calculation of tuition costs owed to the District for N.P.'s ineligible enrollment in the District during the 2014-2015 school year.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 10/23/15

Date of Mailing: 10/26/15

[2] On page 9 of the Initial Decision it states that "the respondent testified that the per-diem rate for the school year 2013-2014 was $107.33". It can only be assumed that the Business Administrator testified to the per-diem rate for the 2014-2015 school year at the OAL hearing.

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 08697-15
AGENCY DKT. 119-5/15

B.P., ON BEHALF OF MINOR CHILD, N.P,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY,
Respondent.

B.P., on behalf of N.P., petitioner, pro se

David M. Serlin, Esq., for respondent

Record Closed: August 11, 2015 Decided: September 10, 2015

BEFORE **SARAH G. CROWLEY**, ALJ:

STATEMENT OF THE CASE

Petitioner, B.P., the father of the minor child N.P., appeals the determination of the Burlington Township (Burlington County) Board of Education (the District) that N.P. did not reside within the District and that tuition reimbursement was required. The District alleges that the minor child N.P. was not residing at the Burlington Township

address provided by the petitioner and seeks repayment of tuition. At issue is whether N.P. is entitled to be enrolled in the District for purposes of receiving a thorough and efficient public education free of charge pursuant to N.J.S.A. 18A:38-1.

PROCEDURAL HISTORY

On March 17, 2015, the district notified B.P., the father of N.P., that the child was ineligible to continue to attend school within the Burlington Township school district. The petitioner filed a timely notice of appeal on or about May 27, 2015. The District filed an answer on June 10, 2015. On June 15, 2015, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The hearing was held on August 11, 2015, 2014, and the record closed at that time.

FACTUAL DISCUSSION

R.P. and B.P, are married, but separated and shared custody of N.P., although there is no formal agreement with respect to the child's residential custody. Prior to January 8, 2015, N.P. lived with her mother, R.P. in Willingboro, N.J., and was enrolled in school in that district. The parents have been separated for a number of years, and B.P. has lived in Brooklyn, N.Y. or Monmouth County, N.J. B.P. works in New York City as an electrician for the union. B.P. moved to Burlington Township in January of 2015. He rents a one bedroom apartment at 413 Dominique Court, in Burlington, New Jersey. B.P. claims that N.P. lives with him at his apartment. B.P. leaves Burlington at 4:30 a.m. every day to get to work in New York City. He claims that he drops his daughter off at his wife's home in Willingboro at 4:00 a.m. every day, and she drives her from there to his home to get the bus to school. The district claims that the child continues to live with her mother in Willingboro and that their residency investigation confirmed that she lives in Willingboro.

TESTIMONY

B.P. is the father of N.P. He testified that he and R.P. have been separated for many years. B.P. testified that after they were separated, he moved to New York City, where he is employed. He is employed as an electrician for the union. He testified that in January 2015, he moved to Burlington Township to be could be closer to N.P. He realized he was missing so much of her childhood and that R.P. agreed that N.P. would live with him, and attend school in Burlington. He signed a lease on January 26, 2015, and enrolled N.P. in school in Burlington on January 29, 2015.

B.P. testified that he catches a 4:35 a.m. bus to New York City every day for work. He wakes R.P. up at approximately 4:00 a.m. and drives her to her mother's house in Willingboro. He testified that she goes back to sleep and her mother gets her back to the bus at his house in Burlington. He testified that she gets off the bus at his house and he arrives shortly after she does. She has a key and lets herself into the apartment. His work hours are from 8:00 a.m. to 2:00 p.m. He testified that he is in the city by 6:15 a.m., and usually starts work by 7:00 a.m. His foreman lets him leave in time to get a bus that gets him home by 3:30 p.m. and N.P. is only there by herself for a short time. He identified some photographs of his home and indicated that he sleeps on the couch in the living room every night and N.P. has the bedroom. He testified that he believes that the residency challenge is related to the IEP for his daughter. He provided a copy of the lease which listed N.P. as an occupant of the residence.

R.P. is the mother of N.P. She testified that she and B.P. have been separated for several years. She testified that N.P. had been living with her in Willingboro until January 2015, when N.P.'s father moved to Burlington Township. She testified that they agreed that N.P. would live with him, since he has not seen her much in the last few years. She also testified that she is going back to school and she will not be home after work for N.P. R.P. testified that B.P. gets home from work in time to get N.P. off the bus in the afternoon. She testified that B.P. is home when N.P. gets off the bus. This is inconsistent with B.P.'s testimony that the bus from New York gets him home after N.P. and she has to let herself into the apartment. R.P. testified that she thinks she is being "targeted" because people didn't like her when she was on the school board in

Willingboro. She further testified that she thinks the request for an IEP for their daughter in Burlington Township prompted their investigation into her residency. She testified that she does not think one district is better than the other, but that N.P. is living with her father in Burlington Township. However, R.P. claims N.P. as a dependant on her federal tax return.

Alfred Nagle is been employed by the District as a residency investigator. He took over the investigation into the residency of N.P. after Robert Cox retired. He went through the notes from the surveillance that was conducted on N.P. He testified that the District received an anonymous tip that N.P. lived with her mother in Willingboro. The surveillance began in February 2015. The surveillance notes from February and March, which included at least thirteen separate days of surveillance, indicated that the mother drove N.P. from her home in Willingboro to the bus stop in Burlington or directly to school from her home in Willingboro. He testified that the foregoing surveillance was conducted by his predecessor and he picked-up on the investigator at the end of April. He testified that they had difficulty contacting either R.P. or B.P. and they sent notes home in the N.P.'s backpack since the letters regarding the residency issues were not being responded to. Eventually, he spoke to B.P. and he was advised of the Board of Education meeting regarding the residency issue which was scheduled for May 20, 2015

R.P. and B.P. appeared at Burlington Township Board of Education meeting on May 20, 2015. Mr. Nagle testified that the parents claimed that the child slept in Burlington and was driven to the mother's house early in the morning since B.P. had to get an early bus to work. Mr. Nagle conducted additional surveillance in the evening and in the early morning to see if the child was being transported early in the morning from B.P.'s home. Mr. Nagy testified that on June 2, 2015, he conducted surveilance at 413 Dominique Court, in Burlington Township. He testified that at approximately 9:40 p.m. he observed B.P. arrive home and enter the resident alone. There was no sign on N.P. he continued his surveillance that evening and between the hours of 3:00 a.m. and 4:00 a.m. no one entered or exited the home. Mr. Nagy testified that at 8:00 a.m. R.P. arrived at the bus stop with N.P. where she proceeded to board the school bus. The child was not observed at the Burlington home the next day and the child was dropped

off for the bus again by R.P. at 8:00 a.m. Mr. Nagle noted that she was not transported by her father earlier in the morning. He further observed that B.P. appeared to be in the home by himself. The following day, N.P. she got off the school bus at approximately 3:25 p.m. and was greeted by her father. They got into B.P.'s car and left the area. Later that evening B.P returned alone and entered the apartment. The next day, between 3:00 a.m. and 4:00 a.m. no one entered or exited the home and R.P. was observed dropping the child off at the bus stop at the end of Dominique Court. Mr. Nagy concluded from his observations during his surveillance that N.P. did not live at the residence at 413 Dominique Court, Burlington, N.J.

MaryAnn Bell is the Interim Superintendent of Burlington Township School as well as the Business Administrator. She testified that the per diam tuition in Burlington township is $107.33 per day. The notice was sent to the district on March 17, 2015 and the last day of school was June 18, 2015, for a total of $9,230.38.

FINDINGS OF FACT

Based on the credible testimonial and documentary evidence, I **FIND** the following as **FACTS** in this matter:

1. The Burlington Township Board of Education had good cause to question the residency of N.P. after receiving an anonymous tip regarding the child residing in Willingboro.

2. B.P. and N.P. were provided notice of the District challenge to residence on March 17, 2015.

3. Surveillance of B.P.'s home at 413 Dominique Court in Burlington Township revealed that N.P. did not reside with her father in the apartment. The surveillance and the testimony demonstrated that the child was transported by her mother to and from the bus stop in Burlington Township.

4. N.P. resides with her mother in Willingboro, N.J.

LEGAL ANALYSIS AND CONCLUSIONS

The issue in this matter is whether N.P. was entitled to a free education under N.J.S.A. 18A:38-1(a), which provides that public schools shall be free to persons over five and under twenty years of age who are "domiciled within the school district." See V.R. ex rel A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (1980), aff'd, State Bd., 1981 S.L.D. 1533, rev'd on other grounds sub nom. Rabinowitz v. N.J. State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, in order for a student to receive a free education). A student may attend school in a district in which he is a non-resident, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2.

The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374–76 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed.2d 518 (1999). A person may have many residences but only one domicile. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001).

N.J.A.C. 6A:22-3.1(a) provides that a student is considered eligible to attend a school district if he or she is domiciled within the school district. A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district. N.J.A.C. 6A:22-3.1(a)(1). The regulation further provides:

> i. When a student's parents or guardians are domiciled within different school districts and there is no court order or written agreement between the parents designating the school district of attendance, the student's domicile is the school district of the parent or guardian with whom the student lives for the majority of the school year. This

subparagraph shall apply regardless of which parent has legal custody.

ii. When a student's physical custody is shared on an equal-time, alternating week/month or other similar basis so the student is not living with one parent or guardian for a majority of the school year and there is no court order or written agreement between the parents designating the school district of attendance, the student's domicile is the present domicile of the parent or guardian with whom the student resided on the last school day prior to the October 16 preceding the application date.

(1) When a student resided with both parents or guardians, or with neither parent or guardian, on the last school day prior to the preceding October 16, the student's domicile is that of the parent or guardian with whom the parents or guardians indicate the student will be residing on the last school day prior to the ensuing October 16. When the parents or guardians do not designate or cannot agree upon the student's likely residence as of that date, or if on that date the student is not residing with the parent or guardian previously indicated, the student shall attend school in the school district of domicile of the parent or guardian with whom the student actually lives as of the last school day prior to October 16.

iii. When a student is living with a person other than a parent or guardian, nothing in this section is intended to limit the student's right to attend school in the parent or guardian's school district of domicile pursuant to this chapter.

[N.J.A.C. 6A:22-3.1(a)(1).]

The acts, statements and conduct of the individual, as viewed in light of all circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959). The parent/petitioner has the burden of proving domicile by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)(2).

Where a person has more than one residence, the following factors are useful in determining his domicile: the physical characteristics of each place, the time spent and

the things done in each place, the other persons found there, the person's mental attitude towards each place, and whether there is or is not an intention, when absent, to return. Mercadante v. City of Paterson, 111 N.J. Super. 35, 39–40 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). "[A] choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile." In re Unanue, supra, 255 N.J. Super. at 374.

In this matter, an analysis must be applied to the residency and domicile of the child and each parent. It is undisputed that R.P. is a resident of Willingboro. B.P. is clearly a resident of Burlington Township, where he commenced living in February 2015. While B.P. may have shared joint legal custody of the child with R.P., the evidence demonstrated that N.P. continues to live with her mother in Willingboro. There was a significant amount of surveillance that was conducted and the child was never observed spending even a single night at B.P.'s apartment. Indeed the parents were aware of the investigation and the allegation by the Township that she was not residing there, and even after notice of such investigation, N.P. was not observed at her father's home overnight. While B.P. may have moved to Burlington to spend more time with N.P., clearly she did not reside in Burlington Township on a full-time basis, nor could she be considered a domiciliary of Burlington Township.

Accordingly, I **CONCLUDE** that N.P. is not domiciled in Burlington Township, and must be considered as having been domiciled at the residence of her mother, R.P., in Willingboro for purposes of school attendance from March 17, 2015 to June 18, 2015.

Tuition Reimbursement

The Board asserts that it is entitled to be reimbursed for tuition for the period of N.P.'s ineligible enrollment in its schools. Where, as here, the evidence does not support the claims of the resident, the Commissioner of Education is authorized to assess tuition pursuant to N.J.A.C. 6A:22-6.2(a). Tuition shall be assessed as follows:

> If in the judgment of the commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced.
>
> [N.J.S.A. 18A:38-1(b)(1).]

In this matter, the respondent testified that the per-diem rate for school year 2012–2013 was $107.33. Ms. Bell calculated the amount due to the board to be $9,230.38.

Based upon the evidence and testimony presented in this matter, I **CONCLUDE** that the petitioner, B.P., failed to carry her burden of proof that his daughter, N.P., is domiciled in the Burlington Township, thereby entitling her to a free public education in the district during the relevant time periods. I further **CONCLUDE** that the respondent is entitled to reimbursement from the petitioner for the costs of audited tuition in the amount of $9,230.38, representing the amount due from March 17, 2015, through June 22, 2015, based upon her daily attendance record.

ORDER

It is hereby **ORDERED** that the respondent's determination that N.B. is not domiciled with her father, B.P. in Burlington Township, New Jersey, and was not so domiciled within its school district during the period of March 17, 2015, through June 22, 2015, is hereby **AFFIRMED**. It is further **ORDERED** that respondent is entitled to reimbursement from petitioner for the cost of audited tuition in the amount of $9,230.38, representing the period from March 17, 2015 through June 22, 2015.

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

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

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

September 10, 2015
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: September 10, 2015 (emailed)

Date Mailed to Parties: 9/11/15

SGC/mel

WITNESSES

For petitioner:

B.P.

R.P.

For respondent:

Alfred Nagle

MaryAnn Bell

EXHIBITS

For petitioner:

None

For respondent:

R-1 Pro Se Residency Appeal

R-2 Union Contract of B.P.

R-3 Willingboro-Westhampton Bus Schedule

R-4 Local Union No. # Letter re employment dates of B.P.

R-5 B.P. lease for 413 Dominique Court, Burlington, N.J.

R-6 Photographs

R-7 Email

R-8 Residency Investigation Notes

354-15

354-15L

State of New Jersey

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

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

DAVID C. HESPE
Commissioner

October 26, 2015

John Branigan, Esq.
Oxfeld Cohen, P.C.
60 Park Place, Suite 600
Newark, New Jersey 07102

Kara S. Beaufort, Esq.
Hunt, Hamlin & Ridley
Military Park Building
60 Park Place, 16th Floor
Newark, New Jersey 07102

Re: *In the Matter of the Tenure Hearing of Patrick Joseph, School District of the Township of Irvington, Essex County, Agency Dkt. No. 305-10/15.*

Dear Counsel,

I have reviewed the record in the contested case entitled *In the Matter of the Tenure Hearing of Patrick Joseph, School District of the Township of Irvington, Essex County, Agency Dkt. No. 305-10/15.* The record includes the District's request to withdraw the tenure charges filed in this matter, as well as the respondent's formal resignation filed with the District on October 2, 2015. In light of this information, I find that no purpose would be served by further proceedings in this matter.

Accordingly, I approve the dismissal of the tenure charges with prejudice and dismiss the matter as a contested case before me. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library

DCH/MKD/JKH

358-15L

355-15

State of New Jersey

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

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

October 30, 2015

O[redacted] B[redacted]
[redacted]
Hamilton, New Jersey 08619

D[redacted] L[redacted]
[redacted]
Trenton, New Jersey 08618

Sanmathi Dev, Esq.
Capehart & Scatchard, P.A.
8000 Midlantic Drive, Suite 300S
P.O. Box 5016
Mount Laurel, New Jersey 08054-5016

Re: *Board of Education of the Township of Hamilton, Mercer County v. O.B. and D.L., on behalf of minor children, N.B. and K.L., Agency Dkt. No. 284-11/13.*

Dear Parties:

Upon review of the Petition of Appeal filed in connection with the above captioned matter, and based upon the respondents' failure to submit an Answer to the petition that complies with *N.J.A.C.* 6A:3-1.5, I have determined to grant summary decision in favor of petitioner.

On November 18, 2013, petitioner filed a Petition of Appeal pursuant to *N.J.A.C.* 6A:3-8.1 *et seq.* claiming that minor children N.B. and K.L. were not entitled to attend school in the District in accordance with *N.J.S.A.* 18A:38-1 *et seq.* A copy of the Petition of Appeal was served upon both O.B. and D.L. on November 19, 2013, together with an acknowledgment of filing and notice that an Answer to the petition was due within 20 days. *N.J.A.C.* 6A:3-1.5.

Because O.B. and D.L. failed to respond to the initial notice, on December 12, 2013 a second notice was sent to the respondents – via certified and regular mail – clearly indicating that, absent receipt of an Answer to the Petition of Appeal within 10 days, each count in the petition would be deemed admitted and this matter may be decided on a summary decision basis pursuant to *N.J.A.C.* 6A:3-1.5(e). The certified mail return receipt card indicates that the December 12, 2013 notice was delivered to O.B. on December 23, 2013. The certified mail return receipt card for D.L. was returned because the certified mail form contained the wrong zip code for D.L.[1] The December 12, 2013 notice that was sent via regular mail with the same zip code was not returned.

[1] The Office of Controversies and Disputes used the zip code for D.L. that was provided by counsel for the petitioner.

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Based on the fact that the certified mail return receipt card for D.L. indicated that the wrong Trenton zip code was used, the office of Controversies and Disputes directed the petitioner to re-serve the petition of appeal on D.L. at 16 Oak Lane, Trenton, New Jersey 08618. On April 15, 2014, the petitioner served the petition of appeal on D.L. via regular mail. On April 22, 2014 an Amended Acknowledgement was sent to the parties providing notice that an Answer to the petition was due within 20 days. *N.J.A.C.* 6A:3-1.5.

Because D.L. failed to respond to the April 22, 2104 notice, on May 19, 2014 a second notice was sent to D.L. – via certified and regular mail – clearly indicating that, absent receipt of an Answer to the Petition of Appeal within 10 days, each count in the petition would be deemed admitted and this matter may be decided on a summary decision basis pursuant to *N.J.A.C.* 6A:3-1.5(e). Although the copy sent via certified mail was returned indicating that the notice was unclaimed, the notice sent via regular delivery was not returned as undeliverable.

In the meantime, on December 30, 2013, O.B. personally delivered a handwritten letter to the Office of Controversies and Disputes in connection with this matter. This letter did not include proof of service on the petitioner in accordance with *N.J.A.C.* 6A:3-1.5(d), nor did O.B. provide a phone number where he could be reached. In the December 30, 2013 letter, O.D. stated that D.L. – the mother of N.B. and K.L. – lives at 16 Oak Lane in Trenton.

On January 6, 2014, a letter was sent to O.B. informing him that he was required to provide proof of service on the petitioner, and that he had to provide a phone number where he could be reached. O.B. did not respond to the January 6, 2014 notice. Because he failed to respond to this notice, the Office of Controversies and Disputes sent another notice to O.B. on January 30, 2014, informing him that he was required to provide proof of service on the petitioner and that he had to provide a phone number where he could be reached; further, if he failed to supply that information within 10 days, each count in the petition would be deemed admitted and this matter may be decided on a summary decision basis pursuant to *N.J.A.C.* 6A:3-1.5(e).

To date, no Answer has been filed on behalf of D.L., and O.B. has failed to file an Answer that is in compliance with *N.J.A.C.* 6A:3-5.3. Accordingly, petitioner's claim that N.B. and K.L. were not entitled to attend school in the District in accordance with *N.J.S.A.* 18A:38-1 *et seq.* is deemed admitted. It is hereby ordered that O.B. and D.L. reimburse the petitioner $16,407.60 in tuition costs for N.B.'s and K.L.'s ineligible attendance in the District from December 12, 2012 to June 20, 2013.[2]

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library

CDC/MKD/JKH

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

359-15

AGENCY DKT. NO. 265-9/15

IN THE MATTER OF THE TENURE	:	
HEARING OF BARBARA SHANLEY,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK,	:	
ESSEX COUNTY.	:	
	:	

The record of this matter, the parties' proposed Settlement Agreement, and the signed acknowledgment of respondent that the Commissioner may refer this matter to the State Board of Examiners, have been reviewed.

The Commissioner finds that the proposed Agreement – a term of which is respondent's resignation from employment in petitioner's district – is consistent with the established standards governing settlement of tenure matters contained within *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846, and as incorporated in *N.J.A.C.* 6A:3-5.6.

In light of the foregoing, the Commissioner adopts the proposed Settlement Agreement as the final decision in this case – with one caveat. Several sections of the Agreement indicate that certain actions by the parties may have already taken place and, therefore, preceded consideration of the settlement by the Commissioner. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

Accordingly, the Commissioner's adoption of the proposed Settlement Agreement as the final decision in this case is contingent upon the parties' successful implementation of the

settlement terms, or their agreement to mutually satisfactory alternate dates for the effectuation of same. Assuming the foregoing, the matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision and its underlying record shall be forwarded to the State Board of Examiners for review and action as that body deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/30/15

Date of Mailing: 11/02/15

360-15L

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

November 5, 2015

Kevin McCann, Esq.
Chance & McCann
201 West Commerce Street
Bridgeton, New Jersey 08302

G[redacted] P[redacted]
[redacted]
Bridgeton, New Jersey 08302

Re: *In the Matter of the Tenure Hearing of Geoffry Portale, School District of the City of Bridgeton, Cumberland County, Agency Dkt. No. 285-9/15.*

Dear Parties:

I have reviewed the record in the contested case entitled *In the Matter of the Tenure Hearing of Geoffry Portale, School District of the City of Bridgeton, Cumberland County, Agency Dkt. No. 285-9/15.* The record includes the District's request to withdraw the tenure charges filed in this matter based upon the fact that the respondent pled guilty to possession of paraphernalia, and has been disqualified from employment with the District. In light of this information, I find that no purpose would be served by further proceedings in this matter.

Accordingly, I approve the dismissal of the tenure charges with prejudice and dismiss the matter as a contested case before me. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library
Ned P. Rogovoy, Esq.

DCH/MKD/JKH

OAL DKT. NO. EDU 15887-14
AGENCY DKT. NO. 328-11/14

K.P., on behalf of minor child, N.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/30/15
Date of Mailing: 11/02/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 15887-14

AGENCY DKT. NO. 328-11/14

K.P., ON BEHALF OF MINOR CHILD, N.C.,

Petitioner,

v.

BOARD OF THE TOWNSHIP OF EWING,

MERCER COUNTY,

Respondent.

Kendall S. Murphy, for petitioner (Kendall S. Murphy, Esq., P.C., attorneys)

Joseph L. Roselle, Esq., for respondent (Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: September 3, 2015 Decided: September 24, 2015

BEFORE **JOHN F. RUSSO, JR.**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 4, 2014, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

September 24, 2015
DATE

JOHN F. RUSSO, JR., ALJ

Date Received at Agency: September 25, 2015 (emailed)

Date Mailed to Parties: 9/28/15
/mel

SCHENCK, PRICE, SMITH & KING, LLP
220 Park Avenue
P.O. Box 991
Florham Park, New Jersey 07932
(973) 539-1000
Attorneys for Respondent
Ewing Board of Education

K.P. o/b/o minor child N.C., Petitioner, v. BOARD OF EDUCATION OF EWING TOWNSHIP, MERCER COUNTY, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION OAL Dkt. No. EDU 15887-14 Agency Ref. No. 328-11/14 **SETTLEMENT AND RELEASE**

This Agreement is made by and between Petitioner, Kirk Ponton, and the Respondent, Ewing Board of Education ("Board").

RECITALS

WHEREAS, in or about October of 2014, Respondent Ewing Board of Education determined that, based on the results of a residency investigation, minor student N.C. was not domiciled in the Ewing School District ("District") and thus not entitled to a free, public education in the District and passed a resolution ordering the removal of the students from the District; and

WHEREAS, Petitioner thereafter commenced an administrative action to challenge the Board's residency determination with regard to N.C.; and

WHEREAS, this administrative action is captioned K.P. o/b/o N.C. v. Ewing Board of Education, and is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 15887-14, Agency Dkt. No. 328-

11/14 ("the Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, in order to avoid the expense, inconvenience, distractions and inherent uncertainties associated with continuation of this dispute, and the fees and expenses that inevitably would result therefrom, the Parties, by this Agreement, herein agree to adopt a full and final settlement of any and all claims, lawsuits, complaints, and/or disputes between Petitioners and Respondent in connection with any and all damages and losses arising from the Litigation; and

WHEREAS, by this Agreement, Petitioner will voluntarily dismiss the Litigation with prejudice, without costs to any party as against the other;

NOW, THEREFORE, in consideration of good and valuable consideration, the sufficiency and adequacy of which is acknowledged, the parties to this Agreement agree as follows:

1. The Parties mutually agree that, during the pendency of the residency investigation, N.C. was found by the Board not to be domiciled in Ewing, but rather, in Trenton, New Jersey.
2. Petitioners shall pay the Board the sum of One Thousand Dollars ($1,000.00), representing back tuition due and owing for the period of N.C.'s ineligible attendance in the District during the 2013-2014 and 2014-2015 school years and which shall constitute a full and final settlement of the claim for back tuition asserted against Petitioners by Respondent Board of Education in the Litigation.
3. The amount of $1,000 is to be paid in the form of a check made payable to the "Ewing Board of Education," hand-delivered or mailed to the office of Dennis Nettleton, School

Business Administrator/Board Secretary, at the District Administration office, 2099 Pennington Road, Ewing, New Jersey 08618.

4. The payment shall become due immediately, and will be paid within 30 days of the date of this Agreement, or upon approval of the Agreement by the Administrative Law Judge and Commissioner of Education, whichever is later. Payments received by the School Business Administrator after the 30th day following the payment due date shall incur a late fee of $50.00. Any payment and late fee not received by 30 days thereafter shall constitute a default by Petitioner and a breach of this Agreement. Petitioner will receive receipts for the payment from the School Business Administrator.

5. Petitioner, in consideration of this Stipulation of Settlement and Release, and in full, final, and complete settlement of the matter, hereby agree to a withdrawal and/or dismissal, with prejudice, of their Petition of Appeal in this matter.

6. Petitioner further understands and agrees that, if they fail to make a payment in accordance with this Agreement, the entire remaining unpaid amount shall immediately become due and owing, payable in a single lump sum.

7. Petitioner further agrees to indemnify Respondent for any and all costs, including court costs and attorneys fees, associated with any action instituted by Respondent to enforce the terms of this Agreement should Petitioner breach the Agreement and/or fail to adhere to the agreed-upon payment plan.

8. The terms of this Agreement shall in no way constitute acceptance or assent by the Board that N.C., nor any other child of Petitioner, as may be applicable, is automatically entitled to a free public education in the District at any point in the future, and the Parties understand and agree that Respondent reserves the right to investigate N.C.'s

and/or Petitioner's residency status in the District at any time should same become necessary to do so, in order to determine whether or not Petitioner and/or his child(ren) remain domiciled in the District.

9. This Agreement is subject to approval by the Ewing Board of Education. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.

10. In exchange for the above consideration, Respondent Ewing Board of Education agrees to release Petitioner from any and all claims, cross-claims, counterclaims, demands, liabilities, damages, indebtedness, costs, attorneys' fees, actions or obligations of any nature, which solely arise out of or are related in any way to this Litigation, through the date of this Agreement and agrees to the withdrawal/dismissal of any counter-claim for tuition payments, through the date of this Agreement.

11. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

12. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

13. Petitioners hereby represent that he is freely entering into this Agreement, that he was advised of his right to obtain counsel of his choosing and has knowingly waived that requirement, and that he has read and fully understand the contents and effects of this Agreement.

14. This Settlement may be subject to the approval of the Office of Administrative Law and the Commissioner of Education. In the event that such approval is necessary, the terms of this Agreement shall not be binding until said approvals are received.

15. This Agreement shall be binding upon all parties hereto, and shall inure to the benefit of each of them, as well as their respective estates, heirs, legal representatives, successors, predecessors, parent companies, subsidiaries, affiliates, owners, directors, officers, shareholders, members, employees, agents and assigns.

16. This Agreement constitutes the entire understanding and agreement by the parties with respect to the subject matter of this Agreement, and there are no agreements, undertakings, restrictions, representations or warranties as between the parties other than those set forth herein. This Agreement supersedes all previous arrangements or understandings, whether written or oral, and contains the entire agreement of the parties with respect to its subject matter. This Agreement may be modified or amended only by written agreement jointly executed by the Petitioners and Respondent.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, consisting of six pages, effective on the day and year first above written.

PETITIONER

Date: 8/10/15

Kirk Ponton, Petitioner

FOR RESPONDENT,
EWING BOARD OF EDUCATION

Date: 8-31-15

Anthony Messina, Board President

EWING TOWNSHIP BOARD OF EDUCATION
District Administrative Offices
2099 Pennington Road
Ewing, NJ 08618

(609) 538-9800 Ext. 1302—(609) 538-0041 (Fax)

CERTIFIED BOARD RESOLUTION

I, Dennis J. Nettleton, CPA, RSBA, SFO, Board Secretary of the Ewing Township Board of Education, hereby certify that this is a true copy of the Resolution adopted at a regularly scheduled Board of Education meeting held on

August 31, 2015.

Following is the Board vote on this Resolution

On motion by Ms. Benedetti seconded by Mrs. Staub, the Board approved this Resolution by the following role call vote:

YEAS:	Mr. Franks, Ms. Benedetti, Mr. Benedetti, Mrs. McKeon, Mr. White, Mrs. Staub and Mr. Messina
NAYS:	None
ABSTENTION:	None
ABSENT:	Mr. Bradley and Mr. Ewell

Dennis J. Nettleton, CPA, RSBA, SFO
Board Secretary

SEAL

SCHENCK PRICE SMITH & KING, LLP
ATTORNEYS AT LAW
~ Founded 1912 ~

Serving Our Clients and Community
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OFFICE OF ADMINISTRATIVE LAW

September 1, 2015

Via Fax (609-689-4100) and Regular Mail
Hon. John F. Russo, Jr., ALJ
Office of Administrative Law
9 Quakerbridge Plaza
Mercerville, New Jersey 08619

Re: **K.P. o/b/o N.C.. v. Ewing Board of Education**
OAL Dkt. No. EDU 15887-14
Agency Ref. No. 328-11/14

Dear Judge Russo:

This firm represents the Respondent, Ewing Board of Education, in the above-referenced matter. As Your Honor is aware, the parties reached a tentative settlement in this matter, which was subject to the approval of the Board. At its August 31, 2015 meeting, the Board approved the settlement agreement by a vote of 7-0. Accordingly, please find enclosed a copy of the certified Board resolution approving same, as well as an original copy of the fully executed settlement agreement for Your Honor's reference.

Thank you for your attention to this matter. Should you have any questions or require any additional information, please do not hesitate to contact me.

Respectfully submitted,
SCHENCK, PRICE, SMITH & KING, LLP

Joseph L. Roselle

/Encl.

cc: Kendall S. Murphy, Esq. (via fax)

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362-15

STATE BOARD OF EXAMINERS DOCKET NO. 1314-208
AGENCY DOCKET NO. 3-4/15A

IN THE MATTER OF THE SUSPENSION	:	
OF THE CERTIFICATES OF	:	COMMISSIONER OF EDUCATION
JENNIFER CORNINE BY THE	:	DECISION
STATE BOARD OF EXAMINERS.	:	

Order of Suspension by the State Board of Examiners, March 12, 2015

For the Respondent-Appellant, Stephen B. Hunter, Esq.

For the Petitioner-Respondent State Board of Examiners, Frederick H. Wu, Deputy Attorney General (John Jay Hoffman, Acting Attorney General of New Jersey)

Appellant challenges the determination of the New Jersey State Board of Examiners (Board) that her actions warranted the suspension of her Teacher of Television Production Technology Certificate of Eligibility and Teacher of Television Production Technology certificate for three years. On appeal, the appellant maintains that the Board's decision to suspend her certificates was arbitrary, capricious and unreasonable. Specifically, the appellant argues that the Board acted in an arbitrary and capricious manner when it failed to consider mitigating factors, as set forth in *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967). (Appellant's brief at 2-14) For example, the appellant contends that if her teaching certificates are suspended, she "is facing the loss of her employment career because of the effects of a bipolar disorder that was not diagnosed until several months after the February 15, 2013 incident that resulted in the [a]ppellant being charged with endangering the welfare of a child by driving under the influence of alcohol." (*Id.* at 9-10) Appellant offers a comparison between herself and another case that she contends is analogous to hers, in which the Board withdrew its Order to

Show Cause upon completion of probation – thus imposing no punishment on the teaching staff member. (*Id.* at 10-13) Additionally, the appellant asserts that she had never previously been the subject of any disciplinary action and consistently received excellent evaluations and observations during her fifteen-year teaching career. (*Id.* at 8-9) Appellant further points out that Timothy McCorkell, Superintendant of Monmouth County Vocational School District, submitted a certification that praised the quality of appellant's teaching and supported the continued employment of appellant within the District. (*Id.* at 14)

Moreover, the appellant argues that if she had been afforded a hearing before the Office of Administrative Law (OAL), she would have had the opportunity to present testimony as to the mitigating circumstances related to her arrest and mental health condition, as well as to the status of her probationary period. (*Id.* at 15-19) Therefore, the appellant maintains that the Board's decision to suspend her certificates for three years should be reversed, or in the alternative, the Commissioner should remand the matter for a full hearing before the OAL. (*Id.* at 20)

In opposition, the Board maintains that the decision to suspend the appellant for three years was not arbitrary, capricious or unreasonable, and it should be affirmed by the Commissioner. (Board's brief at 15-19) The Board stresses that its decision to suspend appellant's teaching certificates for three years was grounded in competent evidence and warrants deference. (*Ibid.*) The Board further maintains that the appellant was afforded due process, as appellant's underlying conduct was not in dispute, and she was given the opportunity to present evidence as to her sanction both in writing and in person. (*Id.* at 9-15) Moreover, the Board contends that the appellant's appeal is untimely and should be dismissed.[1] (*Id.* at 8-9)

[1] Following the Board's meeting on January 23, 2015, appellant became aware that her teaching certificates would be suspended for three years, and subsequently filed a motion for a stay and an appeal on February 12, 2015. *See*

In reply, the appellant submitted new information indicating that after the Board issued its decision, her three year probationary period ended in July 2015 – approximately a year and a half early – and that her charges had since been dismissed. (Appellant's reply brief at 1-2) Appellant also explains that she was selected to represent the State of New Jersey at a program held by the National Council for Behavioral Health. (*Id.* at 2) Appellant asserts that this additional information should be considered in addition to the mitigating circumstances that were previously presented to the Board. (*Id.* at 3)

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute his judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious or unreasonable. *N.J.A.C.* 6A:4-4.1(a).

Initially, the record reflects that the appellant was afforded the necessary due process throughout the proceedings before the Board. Although the matter was not transmitted to the OAL,[2] the appellant was given an opportunity to submit a written brief for the Board's consideration and she also appeared before the Board to present evidence on mitigating circumstances in accordance with *N.J.S.A.* 52:14B-9(c).

After full consideration of the record and all submissions, the Commissioner concurs with the Board that the appellant engaged in unbecoming conduct. It is undisputed that the appellant drove while intoxicated with her minor daughter in the car, hit a parked car, and

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N.J.A.C. 6A:4-3.3. The Board's decision was issued and stayed on March 12, 2015. Although the appeal preceded the Board's March 12, 2015 written decision – rather than being filed within thirty days after issuance of the Board's decision pursuant to *N.J.A.C.* 6A:4-2.2 – the notice of appeal necessarily accompanied appellant's motion for a stay, which appellant sought to file prior to the implementation of the Board's decision. Considering the circumstances, a relaxation of the rules is warranted, and the Commissioner will consider the instant appeal. *See N.J.A.C.* 6A:4-4.4.

[2] The Board exercised its discretion under *N.J.A.C.* 6A:9B-4.7 and determined that it was not necessary to transmit the matter to the OAL because there were no material facts in dispute.

was accepted into a Pretrial Intervention program after being charged with endangering the welfare of a child. The Board's determination in connection with the characterization of appellant's behavior as unbecoming conduct is fully supported by the record and consistent with applicable law. There is nothing in the record to suggest that the Board's decision was arbitrary, capricious or unreasonable, and as a result the Commissioner finds no basis upon which to disturb the decision Board's decision that appellant is guilty of unbecoming conduct.

With respect to the appropriate penalty, the Commissioner remands the matter to the Board for consideration of the additional information provided by appellant, specifically the early completion of appellant's probation. Such information is relevant to the Board's determination of the appropriate sanction, but was not available at the time of the Board's decision.

Accordingly, the decision of the State Board of Examiners is affirmed in part for the reasons expressed therein and remanded to the Board for the limited purpose of determining the appropriate penalty, as indicated herein.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 11/02/15
Date of Mailing: 11/02/15

[3] This decision may be appealed to the Superior Court, Appellate Division, pursuant to P.L. 2008, c. 36 (*N.J.S.A.* 18A:6-9.1), and applicable Appellate Division rules.

DECISION STAYED

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF	:	STATE BOARD OF EXAMINERS
JENNIFER A. CORNINE	:	ORDER OF SUSPENSION
_____	:	DOCKET NO: 1314-208

At its meeting of July 15, 2014, the State Board of Examiners (Board) reviewed information received from the Criminal History Review Unit (CHRU) and the Monmouth County Prosecutor's Office regarding Jennifer A. Cornine. In December 2013, Cornine was accepted into a Pretrial Intervention program (PTI) for three years after having been charged with Endangering the Welfare of a Child-Duty for driving under the influence of alcohol with a child in her car. Cornine currently holds a Teacher of Television Production Technology Certificate of Eligibility, issued in December 1997 and a Teacher of Television Production Technology certificate, issued in August 2002. Upon review of the above information, at its meeting of July 24, 2014, the Board voted to issue Cornine an Order to Show Cause as to why her certificates should not be revoked.

The Board sent Cornine the Order to Show Cause by regular and certified mail on July 24, 2014. The Order provided that Cornine must file an Answer within 30 days. The certified copy was returned as "Undeliverable as Addressed" and the regular mail copy was not returned. After securing a new address for Cornine, the Board re-sent the Order by regular and certified mail on August 14, 2014. Cornine responded on September 15, 2104. In that Answer, Cornine stated that she taught Television Production in the Matawan-Aberdeen Regional School District from 2000 until 2006 and had been a teacher in the Monmouth County Vocational School District since September 2006. (Answer, ¶¶ 2, 3). She noted that she had received consistently positive observations and performance evaluations and had many accolades as a television production educator. (Answer, ¶¶ 3, 4). Cornine recounted that, in the fall of 2012, she began to experience severe agitation and depression. (Answer, ¶ 6). She sought out treatment and began seeing a doctor who diagnosed her with depression and prescribed Zoloft. (Answer, ¶ 8). Cornine noted her condition worsened and the doctor continued to increase the dosages of her medication and also

prescribed something to calm her. (Answer, ¶ 9). She was hospitalized on February 11, 2013 as she was trying to find another doctor to treat her. (Answer, ¶ 9). Cornine noted that the combination of the two medications seriously affected her health and judgment. On February 15, 2013 she stated that she was severely agitated and had consumed several alcoholic beverages to calm her nerves. She decided to exercise hoping to alleviate her anxiety and drove to the Manasquan River Reservoir to go running with her 12-year-old daughter. (Answer, ¶ 10). Cornine admitted that this was an act of "gross negligence" and added that she now recognizes she was in "a hypomania state." (Answer, ¶ 10). On the drive home, Cornine turned into a side street and hit a parked car. She had her daughter call home and while waiting for her husband to arrive, Cornine said a man came out of his house and called the police to report the accident. (Answer, ¶ 11). Cornine failed the field sobriety test and was brought to the police station. She was later transferred to the hospital and then released to her husband later that night. (Answer, ¶ 12). Cornine then entered a residential treatment facility and later directly enrolled in outpatient treatment where she was correctly diagnosed with Bipolar 2 and placed on medication that completely alleviated her symptoms. (Answer, ¶¶ 12-14). She added that she was admitted into the Pretrial Intervention program (PTI) and added that she has abided by all of the terms of PTI, including visits with her psychiatrist for medication management and her community service, which she also continued even after the PTI requirements were satisfied. (Answer, ¶¶ 16-17). Cornine took full responsibility for her actions and offered the extenuating circumstances for her lapse in judgment. (Answer, ¶ 19). She added that her Superintendent allowed her to continue teaching and she did so without incident for the remainder of the 2012-2013 school year and the 2013-2014 school year as well. (Answer, ¶ 14). Cornine noted that the revocation or suspension of her certificates would have a devastating financial impact on her family and be disruptive to her students. (Answer, ¶¶ 23, 24). Cornine also submitted letters of support/reference with her Answer.

Thereafter, pursuant to *N.J.A.C.* 6A:9B-4.7(e), on October 3, 2014, the Board sent Cornine a hearing notice by regular and certified mail. The notice explained that it appeared that no material facts

were in dispute. Thus, Cornine was offered an opportunity to submit written arguments on the issue of whether the conduct addressed in the Order to Show Cause constituted conduct unbecoming a certificate holder, as well as arguments with regard to the appropriate sanction in the event that the Board found just cause to take action against her certificates. It also explained that upon review of the charges against her and the legal arguments tendered in her defense, the Board would determine if her offense warranted action against her certificates. Thereupon, the Board would also determine the appropriate sanction, if any. Cornine submitted a Hearing Response on November 3, 2014.

In her response, Cornine argued that one incident, which did not involve her employment and was the product of a previously undiagnosed psychological disability that had since been properly treated and remediated, should not form the basis for adverse action against her certificates. (Hearing Response, p. 8). Cornine added that she had not been convicted of any criminal offense and was not required to surrender her teaching certificate as a precondition to entering PTI. She added that she had had an exemplary teaching career and had the full support of her Superintendent and her family. (Hearing Response, p. 11). Accordingly, Cornine asked that the Board take no adverse action against her certificates. Cornine also asked to appear before the Board and offer testimony.

In testimony before the Board, Cornine's attorney stated that in the summer of 2012, before the incident happened. Cornine was happy with her life: she had outstanding teacher evaluations and wonderful relationships with her students. He added that a childhood trauma had affected her relationships with family members, but it was remarkable how she had responded. In her testimony, Cornine noted that in October 2012 she developed anxiety and depression as her daughter reached the same age she had been when she was sexually assaulted as a child. She reiterated much of her history as noted in her Answer and Hearing Response regarding the incident at issue. Cornine acknowledged that she could not go back in time but she could learn from this and help others. She claimed she was a better educator with more empathy. Cornine added that she had students depending on her guidance for college applications and that the television studio was under renovation. She also noted that health insurance was

vital to her condition and a suspension or revocation of her certificates would end her career. She argued that "when we make mistakes we can choose another path and make amends-it is never too late to start over."

The threshold issue before the Board in this matter, therefore, is whether the conduct underlying Cornine's admission into PTI constitutes conduct unbecoming a certificate holder. At its meeting of January 23, 2015, the Board considered the allegations in the Order to Show Cause, Cornine's Answer, her Hearing Response and her testimony. The Board determined that no material facts related to Cornine's offense were in dispute since she never denied that she had engaged in the conduct charged. Thus, the Board determined that summary decision was appropriate in this matter. *N.J.A.C.* 6A:9B-4.7(h). It is therefore ORDERED that the charges in the Order to Show Cause are deemed admitted for the purpose of this proceeding.

The Board must now determine whether the conduct underlying Cornine's charges, as set forth in the Order to Show Cause, represents just cause to act against her certificates pursuant to *N.J.A.C.* 6A:9B-4.5. The Board finds that it does.

The Board may revoke or suspend the certification of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher or other just cause. *N.J.A.C.* 6A:9B-4.5. "Teachers... are professional employees to whom the people have entrusted the care and custody of ... school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. Moreover, the Commissioner has long held that teachers serve as role models for their students. Cornine's conduct in driving while intoxicated and medicated with her daughter in the car demonstrates behavior that falls short of the role model status expected of teachers.

Furthermore, a teacher's behavior outside the classroom may be relevant in determining that person's qualifications and continued fitness to retain her certificate. *In re Grossman*, 127 *N.J. Super.* 13, 30 (Sup. Ct. 1943), *aff'd.* 131 *N.J.L.* 326 (E & A 1944). Moreover, unfitness to hold a position in a

school system may be shown by one incident, if sufficiently flagrant. *Redcay v. State Bd. of Educ.*, 130 *N.J.L.* 369, 371 (Sup. Ct. 1943), *aff'd*, 131 *N.J.L.* 326 (E & A 1944). Accordingly, the Board finds that Cornine's indictment for Endangering the Welfare of a Child-Duty provides just cause to take action against her certificates. However, because the court saw fit to allow Cornine entry into PTI, with a resulting dismissal of her conviction upon its successful completion, the Board believes that a suspension of her teaching certificate, rather than revocation, is appropriate. Nonetheless, due to the serious nature of Cornine's actions, a three-year suspension of her certificates is warranted here.

Accordingly, on January 23, 2015, the Board voted to suspend Cornine's certificates for a period of three years. On this 12th day of March 2015 the Board formally adopted its written decision to suspend and it is therefore ORDERED that Jennifer Cornine's Teacher of Television Production Technology Certificate of Eligibility and her Teacher of Television Production Technology certificate be suspended effective this day. It is further ORDERED that Cornine return her certificates to the Secretary of the State Board of Examiners, Office of Licensure and Certificates, PO Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

Robert R. Higgins, Secretary
State Board of Examiners

RRH/MZ/th
Date of Mailing:

Appeals may be made to the Commissioner of Education pursuant to the provisions of *N.J.S.A.* 18A:6-38.4.

363-15

OAL DKT. NO. EDU 14813-15
AGENCY DKT. NO. 294-9/15

A.S., on behalf of minor child, M.S.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
v.	:	DECISION ON
BOARD OF EDUCATION OF THE SOMERSET HILLS REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This case shall proceed at the OAL to a plenary hearing, or such other proceedings as the ALJ and the parties determine, to resolve the underlying claim on the merits.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 11/02/15
Date of Mailing: 11/02/15

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON
EMERGENT RELIEF
OAL DKT. NO. EDU 14813-15
AGENCY DKT. NO. 294-9/15

A.S. ON BEHALF OF MINOR CHILD M.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE SOMERSET HILLS REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,
Respondent.

A.S., petitioner, pro se

Cherie Adams, Esq., for respondent (Adams, Gutierrez & Lattiboudere, LLC, attorneys)

BEFORE **ROBERT BINGHAM II**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner A.S. applies for emergent relief seeking a stay and reversal of the decision of respondent, Somerset Hills Regional School District, Somerset County, (the District) to move his son, M.S., from eighth-grade algebra to seventh-grade algebra. On September 22, 2015, petitioner filed an appeal of the District's action with the

Commissioner of Education, along with an application for emergent relief. On September 23, 2015, the emergent-relief application was filed with the Office of Administrative Law. On September 29, 2015, the parties filed written briefs and proposed exhibits.[1] On September 30, 2015, oral arguments were heard and the record for petitioner's emergent-relief application was closed.[2]

FACTUAL DISCUSSION

M.S. is newly enrolled in the District (2015–16 school year) and currently attends seventh grade at the District's Bernardsville Middle School, having attended sixth grade in the Warren Township School District (Warren), where he was enrolled in a pre-algebra math course.[3] At or about the time of enrollment, petitioner requested that M.S. be placed in an eighth-grade algebra course because he had done exceptionally well, receiving straight A's, in the sixth-grade pre-algebra course (P-4; P-11)[4] and there was no need for him to repeat pre-algebra in seventh grade.[5] On or about September 2, 2015, petitioner met with the District's superintendent and assistant superintendent relative to M.S.'s placement. Consequently, it was understood between the parties—if not agreed—that (1) M.S. would begin matriculating in the eighth-grade algebra course, (2) he would be administered a math assessment to determine his math proficiency and preparedness for the eighth-grade algebra course, and (3) he would be "dropped down" or placed in a seventh-grade honors math course if he did not receive a score of at least 80 percent. (R-1; Resp. Cert. of Jennifer Shouffler.)

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[1] In submitting his legal brief, petitioner combined his legal argument with a notarized statement of facts (styled Amended Petition and Motion for Emergent Relief, and referred to here as "Pet. Cert. of A.S."), which was accepted in lieu of a certification in support of his (original) emergent-relief application.

[2] Petitioner submitted a pre-marked exhibit packet, organized by page numbers, which was appended to his notarized statement of facts/legal brief. All of petitioner's exhibits were entered in evidence but references were to the actual page numbers. The exhibits, as marked and referenced herein, correlate to those page numbers, as reflected in the Appendix.

[3] Petitioner became a resident of the District in or about July 2015 and, despite an initial issue regarding enrollment and petitioner's notice of potential legal action (P-5), M.S. was enrolled in the District in September 2015.

[4] P-4 and P-11 are at pages 5 and 21, respectively, of petitioner's exhibit packet.

[5] According to documentation in the record, the District does not offer algebra in the seventh grade.

On or about September 15, 2015, after being granted a week to prepare (R-1), M.S. took the assessment and received a score of 74.4 percent.[6] Therefore, the District decided to place M.S. in seventh-grade honors math, effective September 24, 2015. On or about September 16, 2015, petitioner again met with the superintendent, who indicated that the District "would be willing to move [M.S.] back up [into eighth-grade algebra]" if he does well in seventh-grade honors math. Based upon the meeting, petitioner had the view that the parents could submit written input as to "how to move forward." (Pet. Cert. of A.S.)

On Sunday, September 20, 2015, the parties exchanged emails regarding M.S.'s status. (P-8.)[7] On that morning, Superintendent Wood notified the parents that M.S. would be placed in seventh-grade honors math beginning Tuesday, September 22, based upon his score of 74.4 percent, rather than the 80 percent needed for placement in the algebra class. Later that afternoon, petitioner responded, advocating (1) continued placement in eighth-grade algebra, with tutoring if necessary, (2) additional testing for eighth-grade standards to best determine any supplemental education required, and (3) monitoring of M.S.'s performance in eighth-grade algebra through the first semester, with a downgrade to seventh-grade math and supplemental instruction if there was insufficient performance. On September 21, 2015, petitioner received confirmation that the seventh-grade honors math placement would occur the next day.

Accordingly, on that evening petitioner explained to M.S. that he would be moved into the seventh-grade math class. By the following morning, petitioner observed that M.S. was tired and quite upset, and petitioner decided to take him to a hospital emergency room.[8] But there is no evidence that he required medical treatment, either

[6] Petitioner questions the objectivity and accuracy of the testing and has not yet had the opportunity to have the test evaluated by a mathematics expert.

[7] P-8 is at page 17 of petitioner's exhibit packet.

[8] According to petitioner, M.S. had slept poorly, felt nauseous and anxious, and petitioner perceived that M.S.'s heart was "racing." Out of an abundance of caution, petitioner took him to the emergency room.

as a result of his academic status or otherwise. On the same day, September 22, petitioner filed his appeal and the instant application for emergent relief.

In the current placement, seventh-grade honors math, M.S. is exposed to both seventh- and eighth-grade math skills through a "differentiated instruction" methodology, used in advanced-level and honors courses, that offers pedagogical flexibility to afford more sophisticated levels of instruction according to students' respective levels of learning. (Resp. Cert. of Jennifer Shouffler.) As indicated above, the District is willing to review M.S.'s progress in the current class and advance him to matriculate in algebra if he demonstrates adequate mathematical proficiency.

Having reviewed and assessed the documents in evidence, I **FIND** the above relevant **FACTS**.

Petitioner challenges the Board's placement decision and seeks placement in eighth-grade algebra, together with costs and fees. The issue is whether, based upon the evidence in the record, petitioner is entitled to the emergent relief sought, namely, placement in eighth-grade algebra, together with costs and fees.

LEGAL ANALYSIS AND CONCLUSIONS

Pursuant to N.J.A.C. 1:1-12.6, emergency relief may be granted "[w]here authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case." Further, the standard for emergent relief was set forth by our Supreme Court in Crowe v. DeGioia, 90 N.J. 126, 132–35 (1982): The judge may order emergency relief if the judge determines from the proofs that (1) the petitioner will suffer irreparable harm if the requested relief is not granted, (2) the legal right underlying the petitioner's claim is settled, (3) the petitioner has a likelihood of success on the merits of the underlying claim; and (4) when the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the relief is not granted. The moving party must satisfy all four prongs of the Crowe v. DeGioia standard to establish an entitlement to emergent relief.

The New Jersey Constitution guarantees a fundamental right to a free public education, Abbott v. Burke, 119 N.J. 287 (1990). The Commissioner has consistently held that local boards of education may promote or place students in public-school grade levels according to their own rules and regulations. Shenkler v. Ho-Ho-Kus Bd. of Educ., 1974 S.L.D. 772, aff'd, 1975 S.L.D. 1157; Boulogne v. Bd. of Educ. of Jamesburg, 1964 S.L.D. 107.

Petitioner contends that he meets all of the criteria for emergent relief. As to the first prong, M.S. will be irreparably harmed if allowed to "languish" in seventh-grade math class because his health, social status (freedom from ridicule), self-esteem, and once-in-a-lifetime opportunity for adequate education will be adversely impacted. Second, the legal right underlying his claim is well-settled because (1) M.S. is entitled to a thorough and efficient education, (2) transfer students must be treated the same as "similarly situated pupils" and (3) regulations governing the education of gifted-and-talented students require the provision of "appropriate instructional adaptations and services." Third, there is a substantial likelihood of prevailing on the merits because (1) the District's decision was arbitrary, capricious, unreasonable, and improperly motivated,[9] (2) policy and practice equitably estops the District's action,[10] and (3) M.S.

[9] On this point, petitioner first contends that the District unreasonably disregarded pertinent facts regarding: M.S.'s demonstrated excellence in math, including pre-algebra grades and "perfect" N.J. ASK scores; unavailability of a natural progression to algebra in seventh grade; teacher input; and the ability of petitioner's older daughter to naturally progress in the District without repeating pre-algebra. Second, the District's action is retaliatory based upon on related legal and ethical proceedings, including petitioner's notice of claim for intentional infliction of emotional distress, as well as a proposed ethics complaint against Board members. Third, the District's treatment is based upon improper motive because, in addition to the foregoing: (1) the District rushed to demote M.S. rather than wait a few days until the outcome of the instant proceeding; (2) the District demoted M.S. without an educational enrichment plan; (3) District staff made inappropriate comments relative to petitioner's residency status and requested his tax-return information from the Board; (4) District investigators generated a report that was intentionally misleading or grossly negligent regarding his residency status; (5) the District improperly considered the anticipated reaction of other parents; (6) the District likely sought to avoid compensatory education for its lack of programming in the seventh and eighth grades; and (7) the math assessment test taken by M.S. was graded by the assistant superintendent who, essentially, was subjective, and the District has not afforded an opportunity for petitioner to have the test graded by his own math expert.

[10] On this point, petitioner contends that transfer students (like M.S.) must be treated the same as similarly situated pupils, citing school policy/practice based on the experience of his other children, who were not tested on enrollment after having previously taken pre-algebra. Additionally, transfer students seeking to enroll in algebra after successful completion of pre-algebra do not take a test, as evidenced by the District's initial placement of M.S. in the eighth-grade algebra class.

is entitled to academic enrichment as a "gifted and talented" student.[11] Fourth, in balancing the equities, M.S. would sufferer the greater harm if not granted the relief requested because of the harm to M.S. stated above versus the fact that there is no cost or adverse impact to the District.

Respondent contends that there is no likelihood of irreparable harm if the requested relief is not granted. Further, petitioner can establish neither a well-settled legal right underlying his claim, nor a likelihood of prevailing on the merits, because (1) the District has broad discretion and authority to develop curricula and determine the appropriate program and placement for its students, and (2) regulations governing the District's responsibility to provide "gifted and talented" students with appropriate instructional adaptations and services is irrelevant to the relief sought, and, in any event, the current placement does not violate that requirement. Finally, a balance of the equities and interests of the parties does not weigh in favor of petitioner.

Irreparable harm

Harm is irreparable when there can be no adequate after-the-fact remedy in law or in equity, and monetary damages cannot adequately restore a lost experience. Nabel v. Bd. of Educ. of Hazlet, EDU 8026-09, Final Decision (June 24, 2009), <http://njlaw.rutgers.edu/collections/oal/>; Tomlin v. Lower Cape May Reg'l Bd. of Educ., EDU 4952-09, Final Decision (June 22, 2009), <http://njlaw.rutgers.edu/collections/oal/>. Notably, the irreparable nature of the harm and the degree or severity of the harm are two separate factors. See, e.g., M.L. v. Bd. of Educ. of Ewing, EDU 4949-09, Final Decision (June 15, 2009), <http://njlaw.rutgers.edu/collections/oal/>.

Petitioner contends that M.S. will be irreparably harmed if allowed to "languish" in seventh-grade algebra because time spent there cannot be recouped. Any compensatory instruction in a subsequent grade would impede him even more at that

[11] On this point, petitioner asserts that M.S. is indubitably gifted and talented, and is thus entitled to academic enrichment, which the District has not provided.

point and disrupt the natural progression of his education. Further, there is an emotional harm and injury to self-esteem, as M.S. takes great pride in his work and has been the target of ridicule by school peers. Additionally, his health suffered when, after sleeping poorly, he felt nauseous and anxious on the morning that he was to begin honors math, and petitioner—who perceived that that M.S.'s heart was "racing"—cautiously took him to the emergency room. However, petitioner admits that "the extent of harm remains unknown." (Pet. Cert. of A.S.) What is more, the District has indicated that if M.S. shows sufficient proficiency in seventh-grade honors math, he can be placed back into the eighth-grade algebra class.

Clearly, the degree to which M.S. has suffered any harm at all does not foretell the irreparable nature of any such harm, proof of which must be imminent and concrete, not speculative. I therefore **CONCLUDE** that the evidence is insufficient to show that M.S. will suffer irreparable harm if the relief sought is not granted.

Settled law underlying petitioner's claim and likelihood of success on the merits

The law is well-settled that the District has broad discretion to take the actions needed to effectively operate its public schools. Indeed, "the well established rule [is] that action of the local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives." Kopera v. Bd. of Educ. of W. Orange, 60 N.J. Super. 288, 294 (App. Div. 1960) (citations omitted). Thus, the Commissioner will not overturn the decision of a local board in the absence of a finding that the action below was arbitrary, capricious or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008), <http://lawlibrary.rutgers.edu/oal/search.html> (citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966)). Our courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Thus, the petitioner must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it. T.B.M.

v. Moorestown, supra, EDU 2780-07, Initial Decision (February 6, 2008), <http://lawlibrary.rutgers.edu/oal/search.html>.

Petitioner has failed to show that M.S. has a legal right to be placed in the eighth-grade algebra class or that he has a likelihood of prevailing on the merits of this claim, because the District has broad discretion and there is insufficient evidence that it acted in an arbitrary, capricious, or unreasonable manner in exercising its discretion not to place M.S. in the eighth-grade algebra class. As noted above, generally, a school district "may promote or place pupils enrolled in the public schools for its district according to the prescription of its own rules." Shenkler v. Ho-Ho-Kus, supra, 1974 S.L.D. at 776–77 (citations omitted). While it is unclear whether the Board has a specific written policy regarding the promotion of a student to a particular course of study at a higher grade level, the exhibits show that petitioner acceded to the Board's decision to base M.S.'s math placement on the outcome of his performance on a "Math Grade 7 – End of Course Assessment," and that both parties further understood that M.S. would be placed "in Algebra for the start of school with the understanding that he will be dropped down [to pre-Algebra] if he does not properly assess" at 80 percent or above. (Resp. Cert. of Jennifer Shouffler; R-1.)

Petitioner has not proved that the District improperly exercised its discretion in declining to promote M.S. when he scored a 74.4 percent on the math assessment. Instead, petitioner makes numerous speculative allegations, without competent corroborative evidence, regarding the arbitrariness of the Board's decision to place M.S. in the seventh-grade math class due to his failure to attain a score of at least 80 percent on the assessment.

Likewise, petitioner has failed to establish a likelihood of success on the merits based upon his equitable-estoppel claim because he has not presented sufficient evidence of an established District policy or practice to promote students to a higher-grade math class, without a test, or that he relied on this alleged practice to his detriment. In order "[t]o establish a claim of equitable estoppel, the claiming party must show that the alleged conduct was done, or representation was made, intentionally or under such circumstances that it was both natural and probable that it would induce

action," and "the conduct must be relied on, and the relying party must act so as to change his or her position to his or her detriment." Miller v. Miller, 97 N.J. 154, 163 (1984) (citations omitted). With respect to this claim, petitioner again makes a number of allegations without competent evidential support. For example, he has not offered any proof beyond mere assertion that the District's policy or practice allows higher-grade placement.[12]

Finally, petitioner has failed to establish a likelihood of success on the merits based upon his claim that M.S. is entitled to enrichment as a gifted-and-talented student and the District merely placed him in an honors math class based on an assessment of his math skills. Again, there is insufficient proof that M.S. is entitled to placement in eighth-grade algebra and that the District's decision was arbitrary, capricious, or unreasonable.

Accordingly, I **CONCLUDE** that petitioner has established neither a well-settled legal right underlying his claim, nor a likelihood of success on its merits.

Balancing of the equities

Finally, a balancing of the equities militates against granting the relief sought by the petitioner. Though M.S. clearly has a fundamental right to a free public education, the District bears a heavy responsibility for the design and delivery of appropriate educational curricula and instruction. That responsibility includes working to ensure that, considering State educational standards, there are no gaps in a student's education. Indeed, M.S. will have the opportunity to take eighth-grade algebra next year, or perhaps even this year. Further, the parties had a clear understanding—if not an agreement—that M.S. would be placed in seventh-grade honors math if he did not achieve a score of 80 percent. Where, as here, the student has not yet clearly demonstrated the proficiency required to sustain matriculation in a higher-grade's course, it cannot be said that a balance of the equities weighs in favor of granting the relief sought by petitioner, particularly when he acceded to an arranged demotion for an

[12] Petitioner's assertion is that his other children were similarly situated to M.S. and were placed in a higher-grade math class without having to test prior to that placement.

insufficient score. Under these circumstances, the District stands to suffer the greater harm because it has a strong and legitimate interest in the effective operation of its schools and the delivery of appropriate educational services with which it is tasked.

Accordingly, I **CONCLUDE** that a balance of the equities and interests of the parties does not indicate that petitioner will suffer the greater harm if the requested relief is not granted.

Based upon all of the above, and considering that petitioner must meet all four of the applicable criteria for emergent relief, I **CONCLUDE** that petitioner's motion for emergent relief must be **DENIED**.

ORDER

Therefore, it is hereby **ORDERED** the petitioner's request for emergent relief is **DENIED**.

This Order disposes of only the issues raised in petitioner's application for emergent relief.

The matter will be scheduled for a telephone prehearing in the near future regarding the plenary hearing. Notices will be sent to the parties under separate cover.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

October 2, 2015
DATE

ROBERT BINGHAM II, ALJ

/lam

APPENDIX

LIST OF EXHIBITS

For Petitioner:

Notarized statement of A.S., dated September 28, 2015

P-1 Email, dated September 3, 2015 (pg. 1)

P-2 Email, dated August 31, 2015 (pgs. 2, 3)

P-3 Email, dated September 16, 2015 (pg. 4)

P-4 Letter, dated May 22, 2015 (pg. 5)

P-5 Email, dated August 17, 2015, with attachment (pgs. 6–11)

P-6 Exhibit 1, Immediate Enrollment Rules (pg. 12)

P-7 Email, dated July 28, 2015 (2 pgs.) (pgs. 13–14)

P-8 Email exchange, dated September 20, 2015 (4 pgs.) (pgs.15–18)

P-9 Email, dated September 23, 2015 (pg. 19)

P-10 Email, dated May 18, 2015 (pg. 20)

P-11 Warren Middle School 2014–2015 grades for M.S. (pg. 21)

For Respondent:

Certification of Jennifer Shouffler, dated September 29, 2015

R-1 Email, dated September 8, 2015

368-15L

368-15

State of New Jersey

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

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

November 6, 2015

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Dear Counsel:

I have reviewed the papers filed in connection with the Petition for Declaratory Ruling in the matter captioned *Clara Brito Herrera v. Board of Education of the Town of West New York, Hudson County and Monica Tone, Interim Executive County Superintendent, Hudson County,* Agency Dkt. No. 296-9/15. Therein, petitioner seeks: a declaratory ruling that a lifetime tenured assistant superintendent cannot have her salary reduced upon promotion to superintendent in the same school district; an order directing the Executive County Superintendent to approve a new contract for petitioner with an annual salary equivalent to the one she had as assistant superintendent; and an order directing the Board to restore petitioner's annual salary to the prior amount.

Please be advised that I have determined not to consider this matter as one for declaratory ruling, pursuant to my discretionary authority under *N.J.A.C.* 6A:3-2.1(a). I find, instead, that this matter should proceed as a Petition of Appeal.

Accordingly, this matter will be transmitted to the Office of Administrative Law for hearing consistent with *N.J.A.C.* 6A:3-1.1 *et seq.*

Sincerely,

David C. Hespe
Commissioner of Education

DCH/MKD/DCS

369-15

369-15E

OAL DKT. NO. EDU 16445-15
AGENCY DKT. NO. 313-10/15

L.C. and P.C., on behalf of minor child, L.C.,	
PETITIONERS,	COMMISSIONER OF EDUCATION
v.	DECISION ON
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioners have failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. To the extent that the ALJ conducted additional analysis and made further conclusions of law, any such findings are only appropriate after a plenary hearing on the merits.

Accordingly, the recommended Order of the OAL – to the extent that it denies petitioners' application for emergent relief – is adopted for the reasons expressed therein. This case shall proceed at the OAL to a plenary hearing – or such other proceedings as the ALJ and the parties deem necessary – to resolve the underlying claim on the merits.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 11/09/15

Date of Mailing: 11/09/15

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 16445-15
AGENCY REF. NO. 313-10/15

L.C. AND P.C. ON BEHALF OF L.C.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,
Respondent.

Kristie M. Howard, Esq., and **Kevin Flood**, Esq. appearing for petitioners

David B. Rubin, Esq., for respondent

Record Closed: October 26, 2015 Decided: October 28, 2015

BEFORE **JOHN P. SCOLLO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, L.C. and P.C. are the parents of L.C., a teenager, who while attending Sayreville Memorial High School, was charged with various criminal offenses, which eventually resulted in an adjudication of delinquency, with L.C. being found guilty

of downgraded charges of simple assault [N.J.S.A. 2C:12-1 (a) (1)] and disorderly conduct [N.J.S.A. 2C:33-2 a].

Petitioners, L.C. (father) and P.C. (mother) previously filed a petition for emergent relief, challenging the actions of the Sayreville Board of Education for failing to hold a hearing regarding L.C.'s long term suspension from the Sayreville Public School System. That petition (EDU-13570-2015) was heard and decided by Michael Antoniewicz, ALJ on September 10, 2015. On September 28, 2015 the Commissioner of Education adopted Judge Antoniewicz Order and found that the parties should proceed at the OAL to a plenary hearing, or such other proceedings as the ALJ and the parties may determine, to resolve that claim on the merits.

In the petition before the court at this time the Petitioners, whose son, L.C., has transferred into Piscataway High School, seek emergent relief by way of a proposed Order compelling the Piscataway Board of Education to immediately rescind its decision to preclude L.C. from participating in sports at Piscataway High School.

The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on October 15, 2015 for emergent relief. Oral argument was held on October 26, 2015, at which time the record closed.

FINDINGS OF FACT

Based on the underlying facts as set forth in the pleadings, certifications and supporting documents filed for and in opposition to the application, I **FIND**:

(1) L.C. is currently living with his uncle, Jeffrey C., in Piscataway, NJ under a Custody Order wherein L.C.'s parents remain as custodians of L.C., but with the addition of Jeffrey C. as an additional custodian of L.C. By virtue of being a resident of his uncle's household in Piscataway, L.C. attends Piscataway High School.

(2) On October 10, 2014, L.C., along with at least five other teenage boys, was charged with Conspiracy to Commit Aggravated Criminal Sexual Contact, Aggravated Assault and Hazing by the Middlesex County Prosecutor's Office. On August 7, 2014 L.C. was found guilty of downgraded charges of Simple Assault [N.J.S.A. 2C: 12-1(a)(1)] and Disorderly Conduct [N.J.S.A. 2C: 33-2a] by Superior Court, Chancery Division, Juvenile Part Judge James F. Hyland, J.S.C.

(3) During the process of L.C. transferring from Sayreville Memorial High School to Piscataway High School, officials (Assistant Superintendent Frank Ranelli and Superintendent Teresa M. Rafferty] of Piscataway High School became aware that an incoming transfer student named L.C. was a former Sayreville Memorial High School football player. When the normal two-week time for L.C.'s academic and discipline records was exceeded, Superintendent Rafferty conferred with Piscataway High School's legal counsel, David Rubin. Attorney Rubin contacted the legal counsel for Sayreville Memorial High School and learned from Sayreville's legal counsel that L.C.'s disciplinary records sent by Sayreville to Piscataway were not the complete records. Subsequently Sayreville's legal counsel sent Rubin a copy of an October 14, 2014 letter by which Sayreville informed L.C.'s parents that L.C. was on suspension from school and from extracurricular activities and sports due to allegations of various criminal behavior against fellow students, including assault.

(4) On September 30, 2015 Superintendent Rafferty issued her decision to enroll L.C. as a student at Piscataway High School, but to preclude L.C. from participation in Piscataway High School's sports programs. Superintendent Rafferty's decision was based on a number of factors, including possible action against Piscataway High School's NJSIAA eligibility in light of L.C.'s convictions on charges of Simple Assault and Disorderly Conduct. To date, L.C. remains precluded from participation in sports at Piscataway High School.

(5) As a result of Superintendent Rafferty's September 30, 2015 decision, the Petitioners requested a hearing before the Piscataway Board of Education.

(6) During an exchange of e-mails on October 1, 2015 between Petitioners' counsel and Respondent's counsel regarding the format of the upcoming October 8, 2015 hearing, Petitioners' counsel were told that they "will be given an opportunity to present whatever information you wish the Board to consider". There were no restrictions written in the e-mails regarding witnesses and the ability to ask questions.

(7) On October 8, 2015 L.C.'s attorneys presented arguments on his behalf as to why he should be permitted to participate in the school's sports program. L.C. himself made a brief presentation to the Board. Superintendent Rafferty was present at the hearing.

(8) Petitioners, in seeking to lift the preclusion of L.C.'s participation in Piscataway High School sports, also rely in part upon an August 1, 2015 letter from the football coach of Temple University, which grants an athletic football scholarship to L.C. I **FIND** that the scholarship grant contains conditions, which go beyond the issues of this case.

PETITIONERS' CONTENTIONS AGAINST PISCATAWAY B.O.E.

Petitioners' counsels' contentions against the Piscataway Board of Education and its officials (notably Superintendent Teresa M. Rafferty) [hereinafter "Piscataway", "BOE", or "Rafferty"] are, for the most part, as follows:

(A) Petitioners are entitled to emergent relief from Rafferty's September 30, 2015 decision, which precluded L.C. from participation in high school sports.

(B) Piscataway was wrong to preclude L.C. from participation in high school sports on account of accusations made against him while a student in Sayreville, especially since Sayreville was apparently willing to sign transfer papers.

44(C) Piscataway's decision to preclude L.C. from high school sports was a decision that was arbitrary and capricious because it was based on speculation, innuendo and was otherwise lacking in reliable, factual support.

(D) Piscataway's preclusion of L.C. from high school sports was a penalty which went beyond the penalties prescribed in Piscataway's Code of Conduct, and thus was unreasonable.

(E) Piscataway's decision to preclude L.C. from high school sports directly interferes with L.C.'s ability to obtain an athletic scholarship for college.

(F) The October 8, 2015 Piscataway BOE Hearing did not afford L.C. due process in that L.C. bore the burden of proving his innocence rather than Piscataway bearing the burden of proving that its decision was reasonable.

RESPONDENT'S CONTENTIONS

(A) Respondent contends that in order for the Petitioners to be granted emergent relief, they must satisfy all four "Crowe" prongs. See Crowe v. DiGioia, 102 N.J. 50 (1986).7

(B) Respondent challenges the factual and legal underpinnings of Petitioners' arguments.

(C) Piscataway's decision to preclude L.C. from participating in high school sports is permissible under Piscataway's Code of Conduct due to L.C.'s conviction on an assault charge.

(D) Petitioners are collaterally estopped from re-litigating the issues of irreparable harm and interference with L.C. ability to obtain a college athletic scholarship.

LEGAL ANALYSIS AND CONCLUSION

The applicable standard for the grant of emergent relief was summarized by Judge Bass in L.A., o/b/o R.A. v. Board of Education of the Township of Wayne, OAL Dkt. No. EDU 14241-11, Agency Dkt. No. 347-11/11 (Order Denying Emergent Relief, December 1, 2011), a case that also involved exclusion from participation in high school football. In that case Judge Bass said:

> In accordance with N.J.A.C. 1:1-12.6, emergency relief may be granted "where authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case . . . ."

I will deal first with the issue of whether this case calls for emergent relief. This case is governed by the standard for emergent relief set forth by the New Jersey Supreme Court in Crowe v. DeGioia, 102 N.J. 50 (1986). Again referring to her decision in L.A., Judge Bass said:

> The judge may order emergency relief . . . if the judge determines from the proofs that:
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted.
>
> 2. The legal right underlying the petitioner's claim is settled.
>
> 3. The petitioner has a likelihood of success on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the relief is not granted.

The moving party must satisfy all four of the above-listed "prongs" of Crowe v. DeGioia in order to establish an entitlement to emergent relief. Id. at 132-35.

In regard to the first of the Crowe "prongs", harm is irreparable when there can be no adequate after-the–fact remedy in law or in equity; or where monetary damages cannct adequately restore a lost experience. Nabel v. Board of Education of the Township of Hazlet, EDU 8026-09 (June 24, 2009); Tomlin v Lower Cape May Regional Board of Education, EDU 4952-09. Petitioners view L.C.'s participation in high school sports as interfering with his ability to obtain a college athletic scholarship. As Judge Antoniewicz observed in Petitioner's prior application for emergent relief, L.C. and P.C. on behalf of L.C. v. Board of Education of the Borough of Sayreville, Middlesex County, filed under OAL Docket Number EDU-13570-2015, the Petitioners could assert a monetary claim to recoup the loss of a scholarship. Thus the harm, if any, is not irreparable.

In regard to the second of the Crowe "prongs", petitioners must demonstrate that the law is settled in their favor. In this case there are competing merits (i.e. issues of fact) that prevent petitioners from demonstrating that they are entitled to a ruling in their favor. At the hearing an oft-made accusation from the petitioners against Piscataway was that Superintendent Rafferty made her September 30, 2015 decision based on innuendo, on unreliable accounts of alleged misconduct by Sayreville football players gleaned from newspapers. Petitioners also took Rafferty to task for having Piscataway's legal counsel contact Sayreville's legal counsel rather than contacting Sayreville school personnel herself. Petitioners also took Rafferty to task over her alleged refusal to speak directly with L.C.'s family. The Respondent took issue with the petitioner's allegations, factually and legally, leaving the matter unsettled.

In regard to the third of the Crowe "prongs", the petitioners must demonstrate that there is a likelihood, not merely a chance, that they will succeed on the merits of their underlying claim. At the hearing, however, the petitioners produced little factual evidence to support their allegations that Superintendent Rafferty reached her decision because she wanted to punish L.C. for his alleged involvement in criminal conduct in Sayreville, or that Rafferty had no reasons grounded in fact to preclude L.C. from participation in high school sports in Piscataway. Respondent, for its part put forth the protection of Piscataway's athletic program from possible accusations of NJSIAA eligibility rule violations as her primary reason for precluding L.C. from participation in

Piscataway High School's sports program. Superintendent Rafferty also stated, as a reason for precluding L.C., that L.C.'s family claimed that L.C. had been "fully exonerated" of all criminal charges, only to find out that he was, in fact, found guilty of Disorderly Conduct and Simple Assault. Rafferty stated that if a Piscataway student had been found guilty of an assault arising out of his participation in Piscataway High School's sports program, she would have precluded him from participation. All this indicates that the petitioners cannot assuredly say at this time that they have a likelihood of success on the merits.

In regard to the fourth of the Crowe "prongs", the equities and interests of the parties must be weighed. In order for the petitioners to prevail on their claim for emergent relief, they must show that they will suffer greater harm than the respondent will suffer if the emergent relief is not granted. The petitioners produced an August 1, 2015 letter from the Temple University football team's head coach conditionally offering L.C. an athletic scholarship and they emphasized that the coach needed to know more about L.C. actual playing experience in order to fulfill the conditions placed on the scholarship offer. Petitioners' claim for emergent relief largely hinges on this point. Petitioners made their point that if L.C. doesn't get the opportunity to play football during the current, ongoing season and to participate in other sports later on, L.C. loses his opportunity to obtain the athletic scholarship. Over against this argument is the respondent's argument that if Piscataway were to let L.C. participate in sports, the danger can and would arise that the NJSIAA might find Piscataway in violation of its rules and thus the school's entire school sports program could be penalized and with it the hopes and dreams of other Piscataway High School athletes would be jeopardized.

From all of the foregoing, I **CONCLUDE** that the Petitioners have not satisfied the four "prongs" of the Crowe case. First, petitioners have not demonstrated irreparable harm since they may recover monetarily and thus the harm would not be irreparable. Second, the petitioners have not demonstrated that the legal rights underlying their claims are settled. Rather, there is sufficient evidence that the facts are unresolved. Third, both sides have honest differences to put forth and it cannot be said that there is a likelihood, not a mere chance, that petitioners will succeed on the merits. Fourth, while both sides seek to safeguard their own respective interests, the petitioners have not

demonstrated that the potential for harm is greater for L.C. than it is for the Piscataway sports program as a whole. It cannot be said at this time that the petitioners have established that Piscataway acted arbitrarily or capriciously or with improper motives when Superintendent Rafferty issued her September 30, 2015 decision. I further **CONCLUDE** that emergent relief cannot be granted at this time.

The petitioners contend that L.C. has been denied due process in that at the October 8, 2015 hearing, L.C. had the burden of proving his innocence rather than the BOE having the burden of providing reasons for his preclusion from the sports program. In order to establish a violation of due process claim, the petitioner would first have to establish that a fundamental right exists. The respondent points to well-settled case law that stands for the proposition that playing interscholastic sports is not a constitutionally-protected right. Angstadt v. Midd-West School Dist., 377 F.3d 338, 344 n.2 (3d Cir. 2004); Palmer v. Merluzzi, 689 F. Supp. 400, 405-412 (D.N.J. 1988), af'd, 868 F.2d 90 (3d Cir. 1989); Hardy v. University Interscholastic Athletic League, 759 F.Supp. 1233 (5th Cir. 1985). Moreover, Respondent asserts that there is no right to a prior hearing before a school board. Dennis v. Holmdel Board of Education, 1977 S.L.D. 388 (1977). I **CONCLUDE** that the petitioners have failed to set forth a valid violation of due process claim.

The petitioners contend that Superintendent Rafferty's September 30, 2015 decision was arbitrary, capricious, unreasonable and punitive. As mentioned above, the respondent set forth its reasons underlying Rafferty's decision. Again referring to the L.A. case, Judge Bass, in denying emergent relief to another set of high school football players, said:

> The law is well settled in favor of the Board, which has broad discretion to take the actions needed to effectively operate its public schools. The Commissioner will not overturn the decision of a local board in the absence of a finding that the action below was arbitrary, capricious or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU278007, Initial Decision(February6,2008)<http://lawlibrary.rutgers.edu/oal/search.html>, citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966). The Commissioner will not substitute his

> judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960).

I **CONCLUDE** that the main reason stated by Superintendent Rafferty for precluding L.C. from the sports program, namely her concern that L.C.'s participation in the sports program could affect the school's NJSIAA eligibility, was a valid factor in her decision-making process. It was not arbitrary, capricious, unreasonable, nor punitive.

The petitioners contend that under the Piscataway BOE's Code of Conduct, L.C.'s convictions for violation of N.J.S.A. 2C: 12-1(a) (1) (Simple Assault) and N.J.S.A. 33-2a (Disorderly Conduct) warrant only "a one-week suspension and up to a fifteen-day suspension from the athletic program." [Attorney Howard's Reply Certification, dated October 22, 2015] Attached to that Reply certification are Exhibit 'A' and Exhibit 'C', which are taken from the Piscataway BOE's Code of Conduct.

A review of the aforementioned sections of the Code of Conduct reveals that for a first Disorderly Conduct offense by a high school student the consequences include only "Parent notification" and "Detention".(See Exhibit "A".) However, for a first Assault offense by a high school student the consequences include "Parent notification", "Long-term suspension", "Police notification", and "Possible expulsion". (See Exhibit "C".) Moreover, at the top of Exhibit "C" we read the following:

> "These consequences are the minimum for the infraction listed; however, the building principal or Administration may enhance the penalty as necessary, in the reasonable exercise of their discretion, to reflect the severity of the offense. In exercising discretion whether to enhance the minimum penalty, the Administration may consider the entirety of a student's disciplinary record throughout his or her enrollment in the school system, to the extent relevant to the proper consequence for the infraction at hand."

I see, therefore, that the Code of Conduct contemplates more than what counsel has asserted. It is also noteworthy that the language of the Piscataway BOE's Code of

Conduct reaches to the student's disciplinary throughout the school system. It would be only logical, in the case of students who transfer-in from another district, that records from the sending district would be used in the disciplinary process of the receiving school. Therefore, the Code of Conduct contemplates officials of the receiving school to take into consideration a student's prior conduct at a prior school. Applied to the case at bar, Piscataway would be within its rights to consider L.C.'s disciplinary record from Sayreville High School when exercising its discretion regarding his participation in the school's sports program.

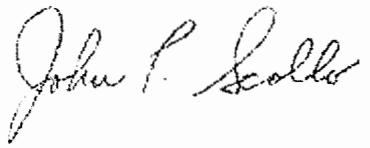
I **CONCLUDE** that Piscataway could validly consider L.C.'s disciplinary record from Sayreville High School when deciding whether he could or could not participate in the Sports program at Piscataway High School.

For the reasons set forth above, I **CONCLUDE** that the petitioner's request for emergent relief, namely the immediate recession of the September 30, 2015 decision of Superintendent Rafferty, must be denied.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that petitioners' request for emergency relief is hereby **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.



October 28, 2015

DATE

JOHN P. SCOLLO, ALJ

S 71-15

CAROL FEINSTEIN AND JUNIUS CARTER III,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

The petitioners in this matter – members of the Board of Education of the City of Englewood, elected in April 2013 – filed an appeal challenging both a July 2013 advisory opinion from the School Ethics Commission (SEC) that asserted the existence of various conflicts of interest based upon the petitioners' current and former employment, and the alleged actions of the Board in restricting the petitioners from participating in various Board-related activities subsequent to the issuance of the SEC advisory opinion. Petitioners filed their appeal with the Commissioner in September 2013, but were notified in October 2013 that the petition was deficient as it failed to name a respondent. Subsequently, petitioners filed an amended petition on September 23, 2014 – approximately one year after filing the original petition. The Board contended that the petition was late filed, and no reasonable explanation exists that would warrant the relaxation of the 90-day limitation period for the filing of an appeal.

The ALJ found, *inter alia*, that: pursuant to *N.J.A.C.* 6A:3-1.3, an appeal must be filed within ninety days day from the receipt of the notice of a final agency action; petitioners argument that their amended petition "relates back" to the original petition, thus tolling the ninety-day rule, is without merit; on its face, the amended petition filed in September 2014 continues to be defective as it speaks only to the fact that petitioners disapprove of the Advisory Opinion of the SEC, but contains no specific allegations against the Board; and if petitioners wish to submit another petition, only alleged instances of actions taken by the Board within the previous ninety days from the filing date of the new petition may be pleaded. The ALJ concluded that the within appeal was untimely, and accordingly granted the respondent Board's motion to dismiss. Further, the ALJ ordered that any new petition filed by petitioners must contain "specific allegations" and "essential facts" pursuant to *N.J.A.C.* 6A:3-1.4, and focus only on acts that occurred within 90 days of the petition.

Upon full consideration, the Commissioner concurred with the ALJ that the instant petition is appropriately dismissed as untimely pursuant to *N.J.A.C.* 6A:3-1.3(i), and found that the issue raised by the ALJ in his Initial Decision regarding the sufficiency of the factual allegations within the petition – and any amendments thereto – need not be ruled upon in the final decision. Accordingly, the petition was dismissed.

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

November 9, 2015

371-15

OAL DKT. NO. EDU 1446-15
AGENCY DKT. NO. 293-9/14

CAROL FEINSTEIN AND JUNIUS CARTER III,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	
RESPONDENT.	:	

The record in this matter, the Initial Decision of the Office of Administrative Law (OAL), and the parties' exceptions – filed in accordance with *N.J.A.C.* 1:1-18.4 – have been reviewed.

Upon full consideration of the record and the parties' submissions, the Commissioner concurs with the Administrative Law Judge that the instant petition is appropriately dismissed because it was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i). The regulation provides, in pertinent part: "The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education...which is the subject of the requested contested case hearing."

In *Kaprow v. Board of Education of Berkeley Township*, the Supreme Court discussed the importance of the 90-day rule as a means to prevent litigation of stale claims, to penalize late claims, and to lend a sense of "security and stability to human affairs." *Kaprow v. Bd. of Educ.*, 131 *N.J.* 572, 587 (1992). The Court further emphasized: "When a plaintiff knows

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

Feinstein and Carter filed a Petition of Appeal naming the Board as a respondent[1] in September 2014 - thirteen months after the alleged Board action at issue – *i.e.*, the restriction of petitioners' participation at Board meetings[2] – first occurred. (Feinstein Certification in Opposition to Motion to Dismiss, ¶ 8, March 11, 2015 and Carter Certification in Opposition to Motion to Dismiss, ¶ 9-10, March 11, 2015.) Here, it is not the School Ethics Commission's release of Advisory Opinion A13-13 that triggered the beginning of the 90-day filing period, but rather the first instance of Board action adverse to petitioners. According to petitioners' own certifications, the alleged restriction of petitioners' participation by the Board began in August 2013.

Petitioners deemed their September 2014 submission an "Amended Petition of Appeal" in a long overdue attempt to relate it back to a defective petition first received September 17, 2013; however, the 2013 petition was never opened or docketed, as it failed to name a respondent.[3] Instead, petitioners were notified of the filing deficiency via letter from the Director of the Bureau of Controversies and Disputes dated October 7, 2013 and advised of the need to amend their petition to include a respondent. Contrary to what is asserted in petitioners'

[1] Petitioners also named Robert W. Bender, Chairperson of the School Ethics Commission, as a respondent. However, prior to transmittal of this matter to the OAL, the Commissioner granted Bender's motion to dismiss the allegations against him for lack of jurisdiction.

[2] The Board denies the allegations.

[3] The defective Petition took issue with the substance of Advisory Opinion A13-13, issued by the School Ethics Commission at the request of respondent Board.

exceptions, the Director had no obligation to remind counsel of the applicability of *N.J.A.C.* 6A:3-1.3(i) to these circumstances. Since the instant Petition naming the Board as a respondent was not received until almost a year after the deficiency letter was sent, it is appropriately viewed as a stand-alone, new petition without any relation back to the defective 2013 submission. *See Gringeri v. Bd. of Educ. of Ramapo-Indian Hills Reg. High Sch. Dist.*, 88 *S.L.D.* 158 (1988). Therefore, the Commissioner finds the instant Petition to be untimely.

The Commissioner further finds that petitioners failed to set forth any compelling reason for relaxation of the timely filing requirement pursuant to *N.J.A.C.* 6A:3-1.16. Although petitioners asserted before the ALJ – and again in their exceptions – that the continuing violation doctrine is applicable here, the Commissioner disagrees as the instant matter does not concern a statutory or contractual entitlement. *Bd. of Educ. of Borough of Alpha v. Alpha Educ. Ass'n*, 190 *N.J.* 34, 43-48 (2006). Furthermore, petitioners offer no explanation for the failure to amend their defective 2013 petition in a timely manner. And while petitioners' exceptions posit that – as a matter of public policy – the voters of Englewood who elected petitioners are also suffering harm in light of petitioners' alleged inability to participate in certain Board activities, and that, therefore, the Commissioner should be dissuaded from dismissing the petition, said argument is undercut by petitioners' inexplicable delay in filing a petition naming the Board as a respondent. In addition, *any* person – including a concerned voter – may file a complaint with the School Ethics Commission if he or she believes that a Board member's conduct has violated the School Ethics Act. *N.J.S.A.* 18A:12-21 *et seq.*; thus, the public is not without an appropriate remedy.

Finally, petitioners misinterpret the applicability of *N.J.A.C.* 6A:3-1.7 to the present circumstances; that regulation does not grant petitioners *carte blanche* to amend their petition at any point in time – and in complete disregard of *N.J.A.C.* 6A:3-1.3(i) – nor does it

require the Commissioner to deem dilatory amendments as "relating back" to defective petitions filed twelve months earlier.[4] *See Gringeri, supra,* 88 *S.L.D.* 158 (1988).

Accordingly, the Initial Decision is adopted as modified, only insofar as the issue of timeliness is concerned.[5] Consequently, respondent's motion to dismiss is granted, and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: 11/09/15

Date of Mailing: 11/09/15

[4] Had petitioners chosen to amend the defective petition within a reasonable timeframe, the Commissioner could have exercised discretion in permitting the amendment to relate back to the original submission for purposes of determining a filing date. Nonetheless, the circumstances presented here do not warrant such a result.

[5] Because the Commissioner has determined to dismiss the Petition of Appeal for failure to comply with *N.J.A.C.* 6A:3-1.3(i), the issue raised by the ALJ in his Initial Decision concerning the sufficiency of the factual allegations within the petition, and any amendments thereto, need not be ruled upon herein.

[6] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1) and applicable Appellate Division rules.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 01446-15
AGENCY REF. NO. 293-9/14

CAROL FEINSTEIN AND JUNIUS CARTER III,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,
Respondent.

Sanford R. Oxfeld, Esq., for Petitioners (Oxfeld Cohen, attorneys)

Mark A. Tabakin, Esq., for Respondent (Weiner, Lesniak, attorneys)

BEFORE **LELAND S. MCGEE**, ALJ:

PROCEDURAL HISTORY

This matter was originally transmitted to the Office of Administrative Law (OAL) on January 29, 2015, as a contested case. This matter arises from an appeal filed by petitioners with the State of New Jersey Commissioner of Education (Commissioner). Petitioners were both elected to the Englewood Board of Education (Board) by the citizens of the district. Upon being sworn in, the Board requested an advisory opinion from the School Ethics Commission (SEC), in an attempt to detect any conflicts of

interest that may exist, given petitioners' current and former employment. An advisory opinion was subsequently issued, asserting that various conflicts of interest did in fact exist, and that petitioners should therefore be barred from participating in a multitude of essential Board-related activities.

Petitioners filed an appeal challenging both the advisory opinion and the actions of the Board, who had allegedly restricted petitioners from participating in various Board-related activities, subsequent to receiving the advisory opinion. The Director of the New Jersey Bureau of Controversies and Disputes (Director) notified petitioners that their appeal was procedurally deficient and required that it be modified prior to being processed. Petitioners did not file an amended petition until a year later. Both the Board and the SEC moved to dismiss the amended petition. The Commissioner granted the SEC's motion to dismiss for lack of jurisdiction. However, the Commissioner transmitted the Board's motion to the Office of Administrative Law on January 29, 2015, for a hearing pursuant to N.J.S.A. 52:14B-1 to -15.

On February 23, 2015, the Board filed a Motion to Dismiss, on the grounds that the petition violates the ninety-day rule pursuant to N.J.A.C. 6A:3-1.3(i). On March 17, 2015, petitioners filed a Brief in Opposition to the Motion. On July 10, 2015, the undersigned directed the parties to submit supplemental briefs specifically addressing the issue of jurisdiction, and directing petitioners to state where in the Amended Petition specific claims were alleged against the Board pursuant to N.J.A.C. 6A:3-1.4, or to provide a legal basis for the undersigned to retain jurisdiction.

FACTS

The following facts are undisputed: petitioners Carol Feinstein (Feinstein) and Junius Carter (Carter) were both elected to serve three-year terms on the City of Englewood Board of Education (Board), and they were sworn in as board members in April 2013. At the time of her swearing in, Feinstein was employed by the New Jersey Education Association (NJEA), and she currently holds the position of "field representative." Additionally, Feinstein had taught for several years in the Englewood school system, and is a past president of the Englewood Teachers Association. At the

time of his swearing in, Carter was employed by Bergen County Special Services (BCSS), and he retains the position presently. In April 2013, petitioners were allowed to participate fully in all Board-related matters.

On June 14, 2013, the general counsel for the Board contacted the Chairperson of the SEC and requested that they issue an advisory opinion in an attempt to identify any possible conflicts of interest that may exist, given both Feinstein's and Carter's employment. Both Feinstein and Carter were aware of this request. The SEC then issued an advisory opinion, which recommended, *inter alia*, that both Feinstein and Carter should be forbidden from being involved in numerous school board functions, given their employment status. The SEC determined that:

> [T]he new members' employment positions may severely diminish the Board's ability to conduct much of its business. In many ways, we cannot now know all of the conflicts the Board may confront. For the present, however, the new Board members' involvement in the ongoing negotiations while still employed by the NJEA and BSS, respectively, violate N.J.S.A. 18A:12-24(a), (c), (d) . . . . Even if the new Board members were to resign from their positions and divest themselves of all connection with their employers, they would still be prohibited from involvement in the instant negotiations and a great deal of future activity. The prohibition includes, but is not limited to, labor relations, issues with the Association, grievances, teacher contracts, salary guides, and development.
>
> [Advisory Opinion, Tabakin Cert. Ex. D.]

The parties disagree, however, as to what the effects of the advisory opinion actually were. Petitioners argue that during subsequent Board meetings they have been forced to leave the room on numerous occasions, and have been restricted from voting on several Board-related issues. (Feinstein Cert. ¶ 10; Carter Cert. ¶ 10.) The Board vehemently denies these allegations, and insists that "[T]he board has not in any way acted to exclude petitioners." (Resp't's Br. 7:10-11 (March 20, 2015).)

In September 2013, petitioners appealed both the SEC's advisory opinion and the Board's alleged actions to the New Jersey Commissioner of Education. Petitioners

aver that "the opinion is fundamentally unconstitutional and undemocratic." (Petition of Appeal, Tabakin Cert. Ex. E.) They therefore requested that "the Commissioner reverse the opinion of Chairperson Bender dated July 31, 2013, and authorize both Feinstein and Carter to participate fully in all discussions and voting, unless there exist a specific, direct and current violation of N.J.S.A. 18A:12-24." (Ibid.)

On October 7, 2013, the Director informed petitioners that the petition was deficient, since it failed to clearly name a respondent. ("Letter of Dispute," Tabakin Cert. Ex. F.) Although no deadline for filing the appeal was given, the Director informed Petitioners, via the letter, that "[T]his matter will not move forward until the requested amended petition is received." (Ibid.)

On September 23, 2014, petitioners filed an amended petition approximately one year after filing the original petition. The amended petition against the advisory opinion was dismissed by Commissioner, who explained that "advisory opinions are only opinions and do not amount to final agency decisions that are appealable," and therefore even if the Board did act upon the recommendations of the advisory opinion, that act "does not render such opinion a final decision of the School Ethics Commission which is appealable to the Commissioner." (Ibid.) The Board's Motion to Dismiss, which claims a violation of the ninety-day rule, was not granted nor addressed, though the Commissioner confirmed that the matter is in fact litigable, by stating that:

> With respect to the claims made against the Board in the petition of appeal, I find that those claims are properly before the Commissioner of Education. It is clear from the record that there is a factual dispute as to whether the Board is limiting the petitioning board members' ability to participate in certain Board discussions and votes. Therefore, those claims arise under the school laws – which are squarely within the jurisdiction of the Commissioner of Education . . . the motion to dismiss filed by the Board is hereby denied and that portion of the case will be transferred to the Office of Administrative Law.
>
> [Commissioner's Letter, Tabakin Cert. Ex. H.]

DISCUSSION AND CONCLUSIONS

Generally, pursuant to N.J.S.A. 18A:6-9, the Commissioner of Education has the authority to hear and determine "all controversies and disputes arising under school laws." Prior to the Commissioner deciding a contested issue however, a petitioner must create a petition of appeal that meets specific requirements, which are delineated in N.J.A.C. 6A:3-1.4. The petitioner must additionally serve the petition upon each named respondent, as per N.J.A.C. 6A:3-1.3(a). Critically, the petitioner must file the appeal within ninety days "from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing." N.J.A.C. 6A:3-1.3. This rule has become colloquially known as the "90 Day Rule," the application of which has been asserted in the instant matter.

Ninety-Day Rule

The Board contends that the lack of the word "timely" or a specific stated deadline in the letter of deficiency is not dispositive, and that petitioners are still bound by, and have violated, the ninety-day rule. The Board argues further that the Supreme Court of NJ held that there is a two-pronged public policy approach regarding the ninety-day rule. First, the ninety-day rule is meant to "stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims." Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 587 (1993) (quoting Ochs v. Federal Ins. Co., 90 N.J. 108, 112 (1982)). Further, the ninety-day rule is intended "to penalize dilatoriness and serve as a measure of repose by giving security and stability to human affairs." Kaprow, supra, 131 N.J. at 587 (quoting Farrell v. Votator Div., 62 N.J. 111, 115 (1973)). The Board argues that not applying the ninety-day rule here will violate both of these public policy purposes, since allowing the amended motion to proceed will in turn allow the litigation of "stale claims" to occur, and it will additionally fail to penalize the petitioner's "dilatoriness," in filing the amended petition.

The Board additionally references E.G.M. ex. rel J.M. v. Board of Education of Mahwah, EDU 02119-13, Initial Decision (April 9, 2013), affirmed, (Commissioner of Education May 21, 2013), http://njlaw.rutgers.edu/collections/oal/, and De Mario v. New Jersey State Board of Examiners, EDU 6991-10 Initial Decision (April 17, 2013), affirmed, (Commissioner of Education May 11, 2013), http://njlaw.rutgers.edu/collections/oal/, to support its contention that petitioners should be barred from filing the amended petition, as per the ninety-day rule. In both cases, Petitioners initially filed a deficient appeal, and failed to submit the perfected appeals within the requisite ninety days, as per N.J.A.C. 6A:3-1.3(i). Both petitions, respectively, were summarily dismissed for being untimely, and the Board contends that the instant matter should therefore be dismissed as well.

Petitioners in the instant matter contend that this case is factually unique, and thus their amended petition should not be subject to the ninety-day rule. Petitioners attempt to distinguish the present facts from E.G.M. and De Mario since when the respective petitioners in those cases were notified that their initial petitions were deficient, the letters of notification each stated that "the necessary filings must be ***timely*** submitted." E.G.M., supra, EDU 02119-13; De Mario, supra, EDU 6991-10(emphasis added). In the instant matter, in the October 7, 2013, letter from the Director informing petitioners of their deficient appeal, there was no mention of the appeal being "timely," nor was there any deadline given for a proper submission. Petitioners therefore assert that this fact distinguishes those cases from the instant matter, and thus exempts them from the ninety-day rule.

The Board opines that no reasonable explanation exists which would warrant a relaxation of the rules. In regard to school law, the Commissioner of Education has discretion, and has the ability to "relax" the rules, if he/she feels that applying them in a particular set of circumstances might be unjust, as per N.J.A.C. 6A:3-1.16. The Board contends that since the original and subsequent amended petitions are nearly identical, aside from a few insignificant words, and request indistinguishable prayers for relief, that a relaxation of the rules in this case is not appropriate.

Petitioners counter, inter alia, that given the facts of the case, the procedural history, and the "absence of any prejudice to the board," relaxation of the ninety-day rule is warranted in this circumstance. Petitioners additionally reference the Supreme Court's decision in Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 N.J. 144 (1978), which exhibited the importance of the public's involvement in running successful public schools. Petitioners claim that the Board is interfering with this vital system, and that a relaxation of the rules is therefore necessary, due to pressing public policy concerns.

The Board contends that the instant matter is analogous to Gringeri v. Board of Education of Ramapo-Indian Hills, 88 S.L.D. 158, 166 (1987), and thus the amended petition cannot "relate back" to the original petition. In Gringeri, a citizen of a particular county was attempting to bring tenure charges against the school's superintendent, filed a deficient petition, and failed to file the amended petition for 128 days, which violated the ninety-day rule. Gringeri argued that his amended petition "relates back to his earlier submissions," and therefore the ninety-day rule was not violated. Administrative Law Judge Weiss dismissed that argument, and explained that although courts should be liberal regarding amendments, the "relate-back" doctrine "should not be used to overcome deficiencies which are patent on their face." Id. at 166. The Board therefore argues that petitioners should also therefore be barred from use of the relate-back doctrine.

Petitioners insist however that their amended petition "relates back" to the original petition, thus tolling the ninety-day rule. Petitioners additionally distinguish the precedent set by Gringeri, arguing that it "does not contain a general bar on amended pleadings 'relating back,'" and that the instant matter is distinguishable. (Pet'r's Br. 6:2-3 (March 16, 2015.).)

Lastly, the Board fervently denies ever taking any action to prevent petitioners from fully participating in the Board meetings, and alleges that the "petitioners have failed to advance even one scintilla of proof to corroborate their self-serving statements." (Resp't's Br. 6:10-11 (March 20, 2015.).) The Board additionally posits that Board of Education of Alpha v. Alpha Education Association, 190 N.J. 34 (2006),

cited by petitioners, is distinguishable from this case, since the former dealt exclusively with issues involving collective bargaining, and has no relation to the instant matter.

In their brief, petitioners contend that ever since the SEC's advisory opinion was issued, the Board has forcibly removed them from every meeting that has taken place, and additionally prohibits them from voting on Board-related issues. Since these actions have allegedly taken place at nearly every board meeting, petitioners argue that such actions constitute a "continuing violation," and thus the ninety-day clock is in essence "reset" after every board meeting. Petitioners cite to Alpha, which they say provides the precedent for the "continuing violation" doctrine.

The Board posits that given both of the public policy considerations in Kaprow and the cases that strictly apply the ninety-day rule, petitioners' amended appeal should be dismissed, despite the letter of deficiency which lacked the word "timely," and failed to provide a deadline for submission. Generally, the ninety-day-rule clock is set in motion by a "ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing." N.J.A.C. 6A:3-1.3(i). The Board's alleged actions which prohibited petitioners from participating in numerous Board meetings would therefore likely have triggered the ninety-day countdown. However, since the petition fails to reference a specific occasion or date upon which such alleged behavior occurred, the ninety-day rule was never triggered.

Under the relevant school laws, petitioners have generally been allowed to freely amend their pleadings

> Unless precluded by law or constitutional principle, pleadings may be freely amended when, in the judge's discretion, an amendment would be in the interest of efficiency, expediency and the avoidance of over-technical pleading requirements and would not create undue prejudice.
>
> [N.J.A.C. 1:1-6.2(a)]

This principle was additionally evident in Roberts v. Keansburg Board of Education, 5 N.J.A.R. 208, 250 (1983) in which Administrative Law Judge Glickman

held that "it is clear that under our own rules, a pleading may be amended at anytime, even after presentation of proofs." .

In this matter, the Commissioner of Education did not rule on the Board's motion to dismiss the amended petition as a violation of the ninety-day rule. The Commissioner dismissed the part of the petition which appealed the SEC's advisory opinion. Further, the Commissioner opined that "[w]ith respect to the **claims made against the Board in the petition of appeal**, I find that those claims are properly before the Commissioner of Education . . . those claims arise under the school laws – which are squarely within the jurisdiction of the Commissioner of Education." (Commissioner's Letter, Tabakin, Ex. H. (emphasis added).)

I **CONCLUDE** that no specific allegations were claimed in the petition against the Board. I further **CONCLUDE** that if petitioners wish to submit a new petition following this Order, only alleged instances of actions taken by the Board that occurred within the previous ninety days may be pleaded. This follows the Kaprow directives, by ensuring that no "stale claims" will be litigated, and that blatant "dilatoriness" will not go unpunished. This course will additionally be consistent with the directive of the Commissioner.

Pleadings

On its face, the Amended Petition of Appeal filed by petitioners continues to be defective. A proper petition of appeal has several required elements, all of which must be completed for the matter to proceed. One of these criteria is that the petitions provide "a statement of the specific allegation(s) and the essential facts supporting them which have given rise to a dispute under the school laws." N.J.A.C. 6A:3-1.4. Within the four corners of both the original and amended appeals, however, petitioners failed to identify any "specific allegations" against the Board. At no point in the petition of appeal do petitioners expressly allege that the Board prohibited them from participating in any Board-related matter, nor does it state that the Board forcibly removed petitioners from a board meeting, as asserted in their brief. However, the petitioner's brief does contain these allegations:

> The Board relied on this opinion in taking action to severely restrict the participation of Feinstein and Carter in Board activities and discussions, starting with the first meeting after the opinion was issued, in August 2013. Whereas prior to the advisory opinion Feinstein and Carter were able to fully participate in Board matters, subsequent to the opinion they have been required to leave the room and are prohibited from participating or voting on all personnel matters and negotiation issues, among other topics . . . . The most recent regular Board meeting during which the Board prohibited Feinstein and Carter from participating fully and required them to leave the meeting during personnel and other discussions was held on February 12, 2015.
>
> [Pet'r's Br., 2:12-17; 3:9-11 (March 16, 2015).]

The rules however require the petition to have these "specific allegations," and "essential facts." See N.J.A.C. 6A:3-1.4. The fact that the allegations are listed in the brief is legally irrelevant. Thus, the petition is not grounded in anything substantive, as there are no specific allegations listed. Even the petition's specific request for relief makes no mention of the allegations against the Board:

> Wherefore, it is prayed that the Commission reverse the opinion of Chairperson Bender dated July 31, 2013, and authorize both Feinstein and Carter to participate fully in all discussions and voting, unless there exist a specific, direct and current violation of N.J.S.A. 18A:12-24.
>
> [Petition of Appeal, Tabakin Cert. ¶ 6, Ex. E.]

The entire petition speaks only to the fact that petitioners disapprove of the Advisory Opinion penned by School Ethics Commission Chairperson Robert Bender. At no point does it reference any of the specific actions allegedly taken by the Board, or dates on which such actions were taken. This is mirrored in the closing prayer for relief, in which no specific action of the Board is mentioned, much less dates on which any such action was taken.

Attached to petitioners' supplemental brief filed on July 28, 2015, was a "Proposed Second Amended Petition of Appeal," which fails to allege specific actions taken by the Board to prohibit them from participating in Board-related activities. They

continue to assert that "[a] key issue that must be understood about this matter is that the harm suffered by petitioners due to the Board's prohibition on petitioners' participating in certain Englewood Board of Education ("Board") matters flows directly from the advisory opinion issued by the School Ethics Commission and Chairperson Robert W. Bender dated July 31, 2013." (Pet'r's. Br., July 24, 2015.) The fact is that if the Board sought and received an "opinion" from a contracted attorney, and thereafter rendered a decision based upon that opinion, there is no automatic claim against attorneys pursuant to rules governing the Commissioner of Education's authority to hear and determine "all controversies and disputes arising under school laws." A claim would have to be made against the Board based upon specific factual allegations asserted in the petition of appeal. Petitioners' focus on the SEC opinion is misplaced. Further, they may not circumvent the decision of the Commission dismissing their claim against the SEC by asserting that the decision of the Board is inextricably connected to the SEC opinion.

Finally, I am persuaded by respondent's argument that petitioners should not be allowed to benefit from the "relate-back" doctrine because the deficiencies in the original petition of appeal, the amended petition of appeal, and the proposed second amended petition of appeal were and are patent on their face.

For the foregoing reasons, I **CONCLUDE** that respondent's Motion to Dismiss should be granted.

ORDER

I hereby **ORDER** that respondent's Motion to Dismiss is hereby **GRANTED**.

I further, **ORDER** that if petitioners file a new petition regarding these facts, it must contain "specific allegations" and "essential facts" pursuant to N.J.A.C. 6A:3-1.4, and it must be limited to acts that occurred within ninety days of the petition.

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

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

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

August 20, 2015
DATE

LELAND S. McGEE, ALJ

Date Received at Agency: August 20, 2015

Date Mailed to Parties: August 20, 2015

lr

372-15

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

---X

In the Matter of the TENURE Charges Against

PATRICK C. HOWELL, JR.

Agency Dkt. No.
163-7/15

By: ORANGE SCHOOL DISTRICT, ESSEX COUNTY

---X

Before **MELISSA H. BIREN, Esq.**, Impartial Arbitrator

ORDER

The Orange Township Board of Education ("Board") certified tenure charges against the Respondent, Dr. Patrick C. Howell, Jr., a tenured assistant principal in the Orange Township School District, on June 29, 2015. Jessika Kleen, Esq. (Machado Law Group, LLP) filed the tenure charges with the Commissioner of Education of the State of New Jersey on July 8, 2015. On August 31, 2015, the charges were referred to the undersigned Arbitrator pursuant to *N.J.S.A.* 18A:6-16, as amended by *P.L.* 2012, c. 26. A timely request for an extension of time for the hearing and decision was granted. Respondent, Dr. Patrick Howell, appeared pro se.

A hearing was scheduled for October 22, 2015. By letter dated October 19, 2015 to the Board, Dr. Howell advised the Board that he was resigning his position with the Orange School District, effective October 31, 2015.

By reason of the foregoing, the tenure charges against the Respondent, Dr. Patrick Howell, are moot.

Dated: November 8, 2015

Melissa H. Biren, Esq., Arbitrator

State of New Jersey)

County of Essex)

On this 8th day of November 2015 before me personally came and appeared MELISSA H. BIREN, to me known to be the individual described in and who executed the foregoing instrument and acknowledged to me that she executed the same.

Robert D'Agree, Notary Public

ROBERT D'AGREE
ID # 2423635
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires February 8, 2018

MACHADO
LAW GROUP

CLARK PARKWAY PLAZA 136 CENTRAL AVENUE, SECOND FLOOR CLARK, NJ 07066 732.540.8276 FAX 732.540.8296 WWW.MACHADOLAWGROUP.COM

Jessika Kleen, Esq.
Email: jkleen@machadolawgroup.com

October 19, 2015

Vial Electronic Mail
Melissa H. Biren
Arbitrator and Mediator
81 Parker Avenue
Maplewood, NJ 07040

Re: Tenure Hearing of Patrick Howell, Jr.; Orange School District
Essex County, Agency Docket No. 163-7/15

Dear Ms. Biren:

As you are aware this firm represents the Orange School District in regards to the above referenced matter. Mr. Howell has given the District his resignation, therefore we would like to cancel the Tenure Hearing scheduled for October 22, 2015.

If you have any questions please feel free to contact me. Thank you.

Sincerely

Jessika Kleen, Esq.

cc: Ronald Lee, Superintendent (via email)

3 Ternberry Court

Turnersville, NJ 08012

October 31, 2015

Human Resources

Orange Board Of Education

451 Lincoln Avenue,

Orange, NJ 07050

Dear Mrs. Belinda Scott-Smiley,

I am writing to notify you that I am resigning my position from the Orange School District, effective October 31, 2015.

I appreciate the opportunities I have been given with the Orange School District.

Best Regards,

Dr. Patrick C. Howell

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OCT 1 4 2015

OPERATIONS/H.R. SVCS

374-15

AGENCY DKT. NO. 263-9/15

IN THE MATTER OF THE TENURE	:	
HEARING OF JAMAR JOSEPH,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF PATERSON,	:	
PASSAIC COUNTY.	:	
	:	

The record of this matter, along with the parties' proposed Settlement Agreement and General Release, have been reviewed. The Commissioner finds that the proposed Agreement – a term of which is respondent's resignation from employment in petitioner's district – is consistent with the established standards governing settlement of tenure matters contained within *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846, and as incorporated in *N.J.A.C.* 6A:3-5.6.

To the extent that Paragraph 13 of the Agreement provides for strict confidentiality, the parties are reminded that the Settlement Agreement may be subject to disclosure pursuant to the Open Public Records Act, *N.J.S.A.* 47:1A-1, *et seq.*

Accordingly, the parties' settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11/12/15

Date of Mailing: 11/12/15

575-15

OAL DKT. NO. EDU 5906-15
AGENCY DKT. NO. 73-4/15

D.R. and M.R., on behalf of minor children, A.R. and V.R.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF MENDHAM, MORRIS COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11/12/15

Date of Mailing: 11/12/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION APPROVING SETTLEMENT
OAL DKT. NO. EDU 05906-15
AGENCY DKT. NO. 73-4/15

D.R. and M.R. ON BEHALF OF MINOR CHILDREN A.R. and V.R.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF MENDHAM, MORRIS COUNTY,
Respondent.

Harriet K. Gordon, Esq. for petitioner

John G. Geppert, Jr., Esq., for respondent (Schwartz, Simon, Edelstein & Celso, LLC, attorneys)

Record Closed: September 10, 2015 Decided: September 30, 2015

BEFORE **EVELYN J. MAROSE**, ALJ:

This case arises under the Individuals with Disabilities Education Act, 20 U.S.C.A. §§1400 to 1482. The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached document.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached document, and as evidence by the attached Board resolution.

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

Therefore, I **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

Sept. 30, 2015
DATE

EVELYN J. MAROSE, ALJ

kep

Attachment

SCHWARTZ SIMON EDELSTEIN & CELSO LLC
100 South Jefferson Road, Suite 200
Whippany, New Jersey 07981
T: (973) 301-0001; F: (973) 993-3152
Attorneys for Respondent, Mendham Borough Board of Education

RECEIVED
2015 SEP 10 P 4: 32
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATION

DAVID RAINIS and MELISSA RAINIS o/b/o A.R. and V.R.,	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
	:	DOCKET NO.: 73-4/15
Petitioners,	:	RESIDENCY APPEAL
v.	:	
MENDHAM BOROUGH BOARD OF EDUCATION,	:	**SETTLEMENT AND RELEASE**
Respondent.	:	

This Agreement and General Release (the "Agreement") is made this ___ day of August, 2015, by and between the Mendham Borough Board of Education (the "Board") and David Rainis and Melissa Rainis o/b/o A.R. and V.R. ("Petitioners") (collectively, the "Parties").

WHEREAS, a residency investigation conducted by the Mendham Borough Board of Education concluded that pupils A.R. and V.R. were not legally domiciled in Mendham Borough; and

WHEREAS, a residency hearing concerning pupils A.R. and V.R. was held before the Mendham Borough Board of Education on March 16, 2015; and

WHEREAS, on that date the Board of Education determined that pupils A.R., and V.R. were ineligible to attend the public schools in the District; and

WHEREAS, Petitioners, the parents of pupils A.R. and V.R., filed a Petition of Appeal with the Commissioner of Education, Agency Docket No. 73-4/15; and

WHEREAS, the Mendham Borough Board of Education filed an Answer and a Counterclaim; and

8. This settlement is subject to formal approval by the Board at its next regular meeting.

IN WITNESS WHEREOF, the Parties hereto have duly executed this Settlement Agreement and Release as of the dates indicated.

MENDHAM BOROUGH BOARD OF EDUCATION

Date: 8/25/2015 **By:** _____
John Vitale, Board President

Date: 8/25/2015 _____
James Rollis, Business Administrator/Board Secretary

PETITIONERS

Date: 8/23/15 _____
David Rainis, Individually and o/b/o A.R. and V.R.

Date: 8/25/15 _____
Witness

Date: 8/23/15 _____
Melissa Rainis, Individually and o/b/o A.R. and V.R.

Date: 8/23/15 _____
Witness

EXTRACT OF MINUTES
OF A MEETING OF THE BOARD OF EDUCATION
OF THE BOROUGH OF MENDHAM, MORRIS COUNTY, NEW JERSEY
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Borough of Mendham in the County of Morris, New Jersey convened in Regular Meeting on Tuesday, August 16, 2015 at 6:14p.m., in the Hilltop School Cafeteria, 12 Hilltop Road, Mendham, New Jersey.

The following members of the Board of Education were present:
Mr. Paul Fechhelm, Mr. Steven Andrew, Mr. William Corbett, Miss AnneMarie Hornyak, Mr. John Jennings, Mrs. Raechelle Raimondo, and Mr. John Vitale

The following members of the Board of Education were not present:
Mrs. Beth Cocuzza, Mr. Fred Schoenbrodt,

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2015 SEP 10 P 1:32
STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

Moved by W. Corbett and seconded by S. Andrew:

12. FINANCIAL BUSINESS

12.13 BE IT RESOLVED, that the Mendham Borough Board of Education (hereinafter referred to as the "Board") that the terms, stipulations and conditions as established in the Settlement Agreement and Release, and any other documents necessary to effectuate the Settlement Agreement and Release between the Board and the Parents of student #19000157 and student #1500158, whose names are on file in the Superintendent's office, which is annexed to this Resolution, are hereby adopted and approved by the Board. The Board President and the Business Administrator/Board Secretary are hereby authorized and directed to execute the Settlement Agreement and Release, and any other documents necessary to effectuate the settlement.

ROLL CALL VOTE –

AYES – Steven Andrew, Paul Fechhelm, William Corbett, AnneMarie Hornyak, John Jennings, Raechelle Raimondo, and John Vitale.
NOES-

ABSENT- Beth Cocuzza, Fred Schoenbrodt,

MOTION CARRIED

STATE OF NEW JERSEY
(COUNTY OF MORRIS)
I, James C. Rollo, Secretary of the Board of Education of the Borough of Mendham in the County of Morris, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on August 25, 2015, has been compared by me with the original minutes as officially recorded in my office in the Minute Book of said Mendham Borough Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract. In witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 25th day of August.

AFFIX SEAL

James C. Rollo
Board Secretary

SEP 03 2015

376-15

376-15R

OAL DKT. NO. EDU 06858-15
(EDU 13729-14 ON REMAND)
AGENCY DKT. NO. 311-10/14

M.R., on behalf of minor child, M.R.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record, the proposed settlement agreement and release, and Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed – mindful of the Commissioner's May 12, 2015 determination that the prior settlement agreement did not comply with *N.J.A.C.* 6A:3-1.13, as it was neither signed by the Board's attorney, nor contained a copy of the Board's resolution approving the settlement and designating the Interim Superintendent to sign the settlement agreement on its behalf. Since the settlement agreement now contains the signature of the Board attorney, the Commissioner can approve the within settlement agreement in its present form.

To the extent that Paragraph 7 of the settlement agreement provides for strict confidentiality, the parties are reminded that the settlement agreement may be subject to disclosure pursuant to the Open Public Records Act, *N.J.S.A.* 47:1A-1, *et seq.*

Subject to the foregoing, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11/12/15

Date of Mailing: 11/12/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 06858-15

AGENCY DKT. NO. 311-10/14

M.R., ON BEHALF OF MINOR CHILD, M.R.R.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON,

Respondent.

George J. Singley, Esq., for petitioner (Singley & Gindele, attorneys)

Joseph F. Betley, Esq., for respondent (Capehart & Scatchard, P.A., attorneys)

Record Closed: October 5, 2015 Decided: October 15, 2015

BEFORE **JOHN F. RUSSO, JR.**, ALJ:

This matter was transmitted to the Office of Administrative Law on May 13, 2015, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

(J-1) Also, attached is a letter from the Board of Education attorney dated October 1, 2015 regarding the need for Board Resolution. (R-1)

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

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

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

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

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

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

October 15, 2015
DATE

JOHN F. RUSSO, JR., ALJ

Date Received at Agency: October 22, 2015 (emailed)

Date Mailed to Parties: October 22, 2015 (emailed)
/mel

CAPEHART SCATCHARD
ATTORNEYS AT LAW

Daniel J. Rosenthal
856.914.2096
drosenthal@capehart.com
Fax: 856.439.3168

October 1, 2015

Via Facsimile and Regular Mail

The Honorable John Russo, ALJ
Office of Administrative Law
Quakerbridge Plaza, Bldg. 9
P.O. Box 049
Mercerville, NJ 08625-0049

Re: **M.R. o/b/o minor child, M.R. v. Board of Education of the Township of Washington, Gloucester County**
OAL Docket No. EDU ~~13729-2014~~ 06858-15
Agency Reference #: 311-10/14
Our File No. 9240-89146

Dear Judge Russo:

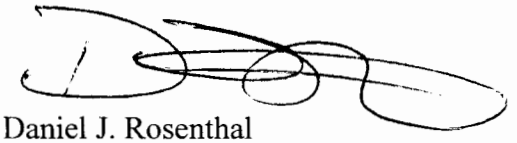
This office represents the Washington Township Board of Education ("Board") in the above matter. Please allow this correspondence to serve as a follow up to the recent conversation between my office and your chambers concerning the Settlement Agreement submitted on August 27, 2015. In response to your chambers' inquiry, please be advised that the Board has not issued a resolution concerning this Settlement Agreement, and therefore none was included with the revised Settlement Agreement filed on August 27, 2015.

The Commissioner of Education's Decision issued on May 12, 2015 states that the previous Settlement Agreement could not be entered because "neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating the Interim Superintendent to sign the agreement on its behalf, ***nor, in the alternative, is the agreement signed by the Board attorney – who is the Board's duly authorized representative in litigation***...." (emphasis added). The Settlement Agreement submitted on August 27, 2015 is signed by the Board's attorney, which is one of the two options outlined by the Commissioner. The Commissioner's concerns regarding the Board's approval of the Settlement Agreement have been obviated by the inclusion of the Board's attorney's signature.

I trust that the above clarifies any issues that you may have had concerning the documents submitted. Pursuant to the Settlement Agreement, the parties request that this Petition of Appeal be dismissed with prejudice. George Singley, Esq., counsel for the Petitioner, and I jointly thank you for your time and consideration.

Very truly yours,

CAPEHART & SCATCHARD, P.A.



Daniel J. Rosenthal

DJR/djr
3945945
cc: George J. Singley, Esq. (via facsimile and regular mail)
Joseph N. Bollendorf, Esq. (via regular mail)
Joseph F. Betley, Esq.

CAPEHART SCATCHARD
ATTORNEYS AT LAW

Daniel J. Rosenthal
856.914.2096
drosenthal@capehart.com
Fax: 856.439.3168

August 27, 2015

VIA FACSIMILE (609) 689-4100
and OVERNIGHT MAIL

The Honorable John Russo, ALJ
Office of Administrative Law
Quakerbridge Plaza, Bldg. 9
P.O. Box 049
Mercerville, NJ 08625-0049

Re: **M.R. o/b/o minor child, M.R. v. Board of Education of the Township of Washington, Gloucester County**
OAL Docket No. ~~EDU 13729-2014~~ EDU 06858-15
Agency Reference #: 311-10/14
Our File No. 9240-89146

Dear Judge Russo:

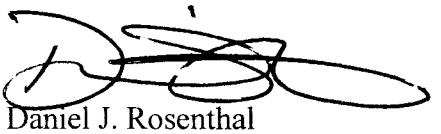
This office represents the Washington Township Board of Education in the above matter. On March 26, 2015, Your Honor entered an Initial Decision recognizing and approving a Settlement Agreement jointly entered by the parties. On May 12, 2015, the Commissioner of Education entered a Decision in which he did not approve the Settlement Agreement because there was no indication that the Board of Education had authorized the settlement. The Commissioner advised that the Board either had to pass a resolution permitting the Interim Superintendent to act on its behalf, or the agreement itself must be signed by the Board's attorney, who may act on its behalf. The Commissioner remanded the matter to the Office of Administrative Law, and instructed the parties to enter a modified agreement. I am enclosing copies of both Your Honor's Initial Decision, and the Commissioner's Decision for your reference.

Attached for Your Honor's consideration is a new Settlement Agreement and Release that meets the Commissioner's criteria. The Settlement Agreement is signed by the Petitioner, M.R. o/b/o minor child, M.R., Interim Superintendent Thomas Flemming, and Joseph F. Betley, Esq., the Board's attorney. The terms of the Settlement Agreement, which had met with Your Honor's approval when previously submitted, are unchanged. The enclosed Settlement Agreement represents the full and complete agreement of the parties. Pursuant to the Agreement, the parties request that this Petition of Appeal be dismissed with prejudice.

George Singley, Esq., counsel for the Petitioner, and I jointly thank you for your time and consideration.

Very truly yours,

CAPEHART & SCATCHARD, P.A.



Daniel J. Rosenthal

DJR/djr
3887312
Enclosures
cc: George J. Singley, Esq. (w/enclosure; via facsimile and regular mail)
Thomas Flemming, Interim Superintendent (w/enclosure; via regular mail)
Joseph F. Betley, Esq.

CAPEHART & SCATCHARD, P.A.
A Professional Corporation
Laurel Corporate Center, Suite 300S
8000 Midlantic Drive
Mount Laurel, New Jersey 08054
(856) 234-6800
Attorneys for Respondent, Washington Township Board of Education

M. R., individually and on behalf of M. R. Jr., Petitioners, vs. WASHINGTON TOWNSHIP BOARD OF EDUCATION, Respondent.	:	NEW JERSEY DEPARTMENT OF EDUCATION OFFICE OF ADMINISTRATIVE LAW DOCKET NO.: EDU 13729-2014S AGENCY REFERENCE NO.: 311 10/4 **SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release ("Agreement") is entered into by and between M. R., individually and on behalf of his son, M. R. Jr. (collectively referred to as "Petitioners") and the Washington Township Board of Education ("Board") to resolve and settle all outstanding issues involved in this matter between the Petitioners and the Board.

WHEREAS, the Board is a local public board of education organized under Title 18A of the New Jersey Statutes with its principal offices located at 206 E. Holly Avenue, Sewell, Gloucester County, New Jersey 08080; and

WHEREAS, M. R., Jr. ("the Student") attended the Washington Township High School as a freshman for the 2013-2014 school year; and

WHEREAS, the Student's father is M. R., senior; and

WHEREAS, as a result of a July 29, 2014 disciplinary hearing before the Board arising from the Student's violation of the Washington Township High School Student Code of Conduct, the Board placed the Student in an alternative educational setting, specifically the Gloucester County Alternative School ("GCAS"), for the 2014-2015 school year; and

WHEREAS, on or about September 9, 2014 Petitioners filed a Petition of Appeal and Request for Emergent/Expedited Hearing ("September 9, 2014 Petition of Appeal") challenging the Board's placement of the Student at GCAS; and

WHEREAS, on or about September 18, 2014 Petitioners withdrew the September 9, 2014 Petition of Appeal; and

WHEREAS, on or about September 23, 2014 Petitioners reinstated the September 9, 2014 Petition of Appeal and Request for Emergent/Expedited Hearing, bearing Agency Docket No. 311-10/14 and OAL Docket No. EDU-13729-2014S (the September 9, 2014 Petition of Appeal and September 23, 2014 Petition of Appeal, along with the requests for Emergent/Expedited Hearings, are hereinafter collectively referred to as "Petition of Appeal"); and

WHEREAS, on or about November 24, 2014 the Board filed an Answer to the Petition of Appeal; and

WHEREAS, after extensive negotiations, and in order to resolve any and all disputes between the Parties without resorting to time-consuming and costly litigation, the Petitioners and the Board have agreed to a full and final settlement of all claims and matters asserted in the Petition of Appeal and any claims that could have been asserted in a state or federal court proceeding that relate directly or indirectly to the Petition of Appeal; and

WHEREAS, this Agreement, and the execution and implementation of same, shall not be construed or considered an admission of liability by the Board, its present and former Board members, officers, employees, agents and servants, and said liability being expressly denied.

NOW, THEREFORE, in consideration of the mutual promises and agreements contained herein, the Petitioners and the Board **AGREE AS FOLLOWS**:

1. The Student will continue in his placement at GCAS for the remainder of the 2014-2015 school year. Consistent with the terms of his removal from the Washington Township High School and his placement in the GCAS, the Student will not be allowed to participate in or attend any extra-curricular activities at the Washington Township Public Schools, nor will the Student be allowed on Washington Township Public Schools property, during his placement at the GCAS. Provided, however, that the Student will be allowed on School District property upon proper notice and approval of the High School administration for purposes of securing any documentation related to his anticipated re-entering Washington Township Highs School, including his participation in extra-curricular activities.

2. The Student will be eligible to return to the Washington Township High School for the 2015-2016 school year, and the Board's Administration shall recommend such return, at the conclusion of his placement at the GCAS if:

   a. The Student successfully completes his coursework at GCAS for the 2014-2015 school year;

   b. The Student successfully completes final examinations at GCAS for the 2014-2015 school year;

   c. The Student has no major attendance or disciplinary issues at GCAS during the 2014-2015 school year; and

d. The Student receives a positive recommendation from the staff at GCAS for his return to the Washington Township High School.

It is the understanding of the Parties that if the Student continues to perform at his current level of functioning at GCAS, he will meet the criteria for return to the Washington Township High School as set forth in this Agreement.

3. If the conditions set forth in Paragraph 2 of this Agreement are satisfied, the Student will have access to and be eligible to participate in summer activities at the Washington Township High School leading up to any fall sports for the 2015-2016 school year.

4. During the Student's placement at GCAS, he can submit medical and other documentation/information to the Washington Township High as required for his anticipated participation in any extracurricular activity offered by the Washington Township High School for the 2015-2016 school year.

5. **Release and Waiver**: The Petitioners agree to the following **RELEASES AND WAIVERS:**

a. For good and valuable consideration, the Petitioners **RELEASE, WAIVE AND FOREVER DISCHARGE** the Board (its former, present and future board members, officers, employees, agents, and servants) from any and all claims and causes of action, in law or in equity, whether known or unknown, whether asserted or unasserted, contingent or otherwise, arising from or relating directly or indirectly to M. R.'s education, placement, proposed placements, discipline, counseling, safety, and/or attendance within the Washington Township School District and any out-of-district placement. This Release and Waiver shall run from the beginning of time through the date of full execution of this Agreement.

This Release and Waiver includes, but is not limited to: (a) any and all claims asserted or which could have been asserted in the Petitioners' Petition of Appeal; (b) any and all claims asserted or which could have been asserted under the New Jersey Anti-Bullying Bill of Rights Act; (c) compensatory education; (d) reimbursement of any medical, behavioral, or education evaluations; (e) transportation; (f) expert witness fees; and/or (g) attorney's fees.

b. By way of further illustration, this Release and Waiver also includes, but is not limited to, any claim relating to the education of the Student in the Washington Township Public Schools and/or alleging a denial of FAPE, a denial of his safety, discrimination, state or federal constitutional rights violations, state or federal civil rights violations, monetary damages, pain and suffering, personal injury, property damage, reimbursement, attorney's fees and costs, and expert fees, claims or causes of action arising under state or federal statutes, regulations, or common law, including but not limited to the New Jersey statutes and regulations pertaining to special education, including N.J.A.C. 18A:46-1 et seq. and N.J.A.C. 6A:14 et seq., the New Jersey Law Against Discrimination, N.J.A.C. 10:5-1 et seq., the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., Section 504 of the Rehabilitation Act, 29 U.S.C. §701 et seq., the American with Disabilities Act, 42 U.S.C. §12101 et seq., the New Jersey Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2 et seq., the New Jersey Constitution, the United States Constitution, and the Civil Rights Act, 42 U.S.C. §1983, §1985, and §1988, the New Jersey Civil Rights Act, and the New Jersey Tort Claims Act N.J.S.A. 59:1-1 et seq.

c. This Release and Waiver does not limit any rights or obligations herein or bar an action to enforce the terms of this Agreement.

6. Within five (5) days of full execution of this Agreement, Petitioners agree to submit said Agreement to the New Jersey Office of Administrative Law and/or the Bureau of Controversies and Disputes for dismissal of the Petition of Appeal with prejudice.

7. **Miscellaneous:**

a. The Parties agree to refrain from taking any actions or making any statements, oral or written, critical or otherwise, in any medium whatsoever, relating to or concerning this dispute, which have the purpose of injuring each other's reputations or causing any person or entity to refrain from or cease any employment or business relationship with each other.

b. The Parties hereby verify, affirm and represent that they have each had the opportunity to discuss the terms of this Agreement with counsel, that they understand its contents and are entering into this Agreement voluntarily and with a full understanding of its meaning.

c. M. R. represents that he has the sole authority to enter into this Agreement, and that it shall be binding as if entered into by any other parent and/or guardian of the Student not a party hereto.

d. The terms and conditions of this Agreement shall be kept strictly confidential and will not be disclosed to any individual that is not acting directly on behalf of any party.

e. The provisions of this Agreement are severable and, if any part is found to be unenforceable, the other portion shall remain fully valid and enforceable.

f. This Agreement shall be governed and construed under the laws of the State of New Jersey.

g. This Agreement constitutes the full and complete agreement of the Parties and may not be changed or modified absent mutual written agreement of the Parties.

h. This Agreement is binding upon the Parties and their respective heirs, assigns or successors in interest.

7/8/15

Michael Rau, individually and on behalf of Michael Rau, Jr. — Date

6/5/15

Joseph F. Betley, Esq. on behalf of the Washington Township Board of Education — Date

8/25/15

Thomas Flemming, Interim Superintendent Washington Township Board of Education — Date

382-15

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges

ELIZABETH BOARD OF EDUCATION, UNION COUNTY,

Petitioner,

-and-

NIKITA CLARKE-HUFF,

Respondent.

AGENCY DOCKET NO.: 290-9/15

DECISION AND AWARD ON MOTIONS TO DISMISS CHARGES I-IV

BEFORE: RUTH MOSCOVITCH, Arbitrator

Appearances:

For the Petitioner:

John G. Geppert
Schwartz Simon Edelstein & Celso, LLC
100 South Jefferson Road, Suite 200
Whippany, NJ 07931

For the Respondent:

Sheldon H. Pincus
Bucceri & Pincus
300 Broadacres Dr, Suite 210
Bloomfield, NJ 07003

This matter comes before me on the Respondent's twin motions to dismiss with prejudice respectively Charge II and Charges I, III and IV, which, together, represent all of the tenure charges pending against Respondent. The tenure charges at issue here were filed with the Bureau of Controversies and Disputes on September 22, 2015. I was appointed the arbitrator to adjudicate this matter on October 16, 2015.

The Respondent filed two Briefs in support of its motions on October 5, 2015; Petitioner filed a Brief in opposition on November 2, 2015; and Respondent filed a Reply Brief on November 6, 2015. In the preparation and issuance of this Decision and Award I have given careful consideration to the extensive briefing by the parties including the legal authorities cited therein. For the reasons set forth below, Respondent's Motion to Dismiss Charge II is denied. Her Motion to Dismiss Charges I, III and IV is granted in part and denied in part.

MOTION TO DISMISS CHARGE II

In Charge II, consisting of two Counts, the Board charges Respondent with "Neglect, Misbehavior or Other Offense, Including But Not Limited To Unbecoming Conduct Or Other Just Cause Related to Respondent Falsifying Her Child's Residency." Specifically, in Count 1, the Board charges Respondent with falsely declaring, including in a document she executed under penalty of perjury, that during the period from July 1, 2014 to July 30, 2015 she placed her child in the care of a temporary guardian residing within the City of Elizabeth when, in fact, she and her child resided together in a home in Edison. In Count 2, the Board charges that the same facts constituted theft by deception of tuition costs in an approximate amount of $17,283.00.

Respondent moves to dismiss these charges on the basis that the Commissioner and this Arbitrator have no jurisdiction to adjudicate charges regarding student residency because the legislature provided an exclusive administrative procedure to determine these issues in N.J.S.A. 18A:38-1. In her briefs, Respondent makes the following additional points: (1) By failing to follow

the mandatory procedures in residency cases, the Board has deprived Respondent of due process of law; further, since the process mandated by the statute provides greater procedural protections than TEACHNJ, the Board was required to provide those procedural protections to Respondent; (2) The Board failed to exhaust its administrative remedies regarding the residency violations and thus is barred from filing tenure charges based upon those issues; (3) The Board abandoned and waived its right to pursue residency claims against Respondent when it chose not to pursue statutory charges; (4) The Board admits that it exercised its discretion not to pursue residency charges against Respondent and her child because the child was in the senior year of high school; the Board has accordingly waived its rights and is estopped from taking any action against Respondent now; (5) Having decided not to invoke the state residency process, the Board cannot claim that Respondent has deprived it of tuition; the theft of service charge based upon a charge of obtaining free educational services she was not entitled to must therefore be dismissed.

In response, the Board argues that it is entitled to pursue tenure charges for conduct unbecoming for filing false statements and for theft of services, because those charges are separate and distinct from the issues of whether the Board had a right to remove Respondent's child from the school or obtain tuition for the child's year of education. In its brief, the Board makes the following additional points: (1) The statute invoked by Respondent deals with the process for determining whether a child is entitled to a free education in a particular district and, if not, whether the child will be removed or whether tuition must be

collected; the statute does not concern the question at issue here, which is whether a tenured employee lied to the District, an act which is conduct unbecoming a tenured employee; further, there was no obligation on the part of the Board to pursue or exhaust administrative remedies regarding the residency issue before pursuing these entirely separate tenure charges; (2) Respondent has not been deprived of any property interest with regard to the residency issue without due process; rather, the Board exercised its discretion not to pursue those charges and permitted Respondent's child to complete its senior year without charge; (3) Respondent is now receiving all of the process to which she is due as a tenured employee; the Board never abandoned its right to bring tenure charges based upon false declarations; the Commissioner and this Arbitrator have full authority to decide whether there were false declarations and, if so, whether they constitute unbecoming conduct meriting removal of tenure.

Having considered all of these arguments and having reviewed the residency statute and the other authorities cited by the parties, I must agree with the Board that the issue of whether Respondent made false statements – and whether those false statements constitute conduct unbecoming – is properly before me. While there is certainly some factual overlap between the question of whether Respondent's child actually lived in Elizabeth and hence was entitled to a free education, and whether Respondent falsely made such a claim, the legal issues are separate and distinct. I have no jurisdiction over the question of the child's residency for the purpose of determining if it was entitled to complete its senior year without tuition. Yet, certainly the Board is entitled to pursue tenure

charges based upon any tenured employee making false declarations, particularly false declarations related to the business of the Board. Here, the alleged false declaration concerned where the child resided, but whatever the subject matter of the declaration, the Board may consider that the making of false declarations is conduct unbecoming. Whether she in fact made a false statement and whether that conduct warrants the termination of her tenure are issues clearly within my purview. Accordingly, I deny Respondent's motion with respect to Charge Two, Count 1.

The count related to theft of service provides a similar, but not identical, issue. The Board appears to claim that if it proves Respondent filed a false declaration, it will also be proving that she was stealing services in the form of tuition. However, the Board actually must take some additional steps: it must prove that Respondent received services to which she was not entitled and that she did so knowingly. Theft of services could constitute conduct unbecoming an employee. It might also be a criminal offense, as, of course, filing a false statement might be. But it may require more proof than simply whether Respondent made a false declaration.

I am reluctant to dismiss any charge at this early stage if proofs may be yet presented to sustain it. Accordingly, I will not dismiss Count 2 of Charge I. Respondent may renew her motion to dismiss either or both of the counts of Charge I if the Board fails to sustain its burden going forward.

MOTION TO DISMISS CHARGES I, III AND IV

In Charges I, III and IV, the Board charges Respondent with acts of "insubordination, neglectful, flagrant and defiant refusal to comply" with Board policies, regulations and directives from supervisors over a ten-year period "commencing with the 2001-2002 school year and through the 2010-2011 school year." (Board Charges, Background Information Common to All Charges, p. 3.) In addition, the Board charges Respondent with a "longstanding pattern of chronic absenteeism and tardiness." (Id. p. 4.) Specific instances of these behaviors is set forth in the Charges over the course of ten pages, the earliest dating from November 2001 (p. 4) and the latest from June 2011 (p. 13). In June 2011 the Board adopted a Resolution adjusting Respondent's salary by withholding the 2011-2012 increment for "performance and/or attendance." Respondent filed a grievance on November 8, 2011 challenging the Board's decision to withhold her increment; the grievance was assigned to Arbitrator Jeffrey Tener for binding arbitration. However, the parties reached a settlement of this grievance, and the Board restored Respondent's increments and adjusted her salary to make her whole at its meeting on October 17, 2013.

In Charge I, the Board charges Respondent with "Neglect, Misbehavior or Other Offense, Including But Not Limited To Unbecoming Conduct or Other Just Cause Related to Repeated Acts of Dishonesty Arising From Respondent Falsifying a Document and Altering a District Records Without Authority." The specifics are spelled out in two counts: Count 1 recites an incident on or about November 4, 2010; and Count 2 an incident on or about March 18, 2011. Both of

these incidents pre-date and were part of the June 2011 increment withholding decision.

In Charge III, the Board charges Respondent with "Chronic Absenteeism." There are 18 Counts within Charge III, all specifying absenteeism. Counts 1 through 14 cover the years 1996 through 2011 and were part of the June 2011 increment withholding decision. Counts 15 through 18 concern absences during the 2011-12, 2012-13, 2013-14 and 2014-15 school years. Those matters were not addressed in the 2011 increment withholding.

In Charge IV, the Board charges Respondent with "Insubordination, Neglect, Misbehavior and/or Other Just Cause for Dismissal, Related to a Pattern of Conduct." This charge incorporates all of the facts and charges in Counts I, II, III and IV and asserts that the conduct alleged "manifests a pattern of numerous infractions over an extended period of time" and therefore warrants a termination of Respondent's tenure and employment.

The Respondent argues that all of the charges that were addressed prior to and as part of the increment withholding in 2011 may not be the subject of further disciplinary action because (1) the doctrine of double jeopardy applies in labor relations and bars penalizing an employee for incidents that were previously the subject of discipline; (2) the Board's subsequent decision to revoke the increment withholding is an admission that the conduct did not constitute misconduct; further the revocation constitutes a waiver of the right to impose discipline; the Board is now barred and estopped from seeking discipline based on the matters raised in its pursuit of an increment withholding; the doctrines of

waiver and estoppel apply in labor relations matters; (3) the principle of res judicata bars the Board from seeking further discipline based upon matters it previously settled. As to the charges of misconduct in Count III that allegedly occurred after 2011, Respondent argues that those "are extension of the recycled allegations" previously made by the Board: they are "nothing more than the Board's attempt to veil its intent to impose a double punishment" upon Respondent. (Respondent's Reply Brief, p. 13.)

The Board, on the other hand, argues that it is not barred from seeking discipline for the matters that were the subject of the increment withholding because: (1) the concept in industrial relations of double jeopardy does not preclude this tenure proceeding; as the NJ Commissioner of Education has previously held, the Board is not precluded from certifying tenure charges based upon the same conduct for which an increment was withheld; (2) the Board never issued written reprimands for the conduct referred to in Counts I, III or IV, it merely sought to withhold an increment; hence the Board may proceed with tenure charges based upon that conduct now; (3) the older charges demonstrate that Respondent's behavior did not improve after the increment withholding, that is, she has not responded to progressive discipline; (4) the decision to reverse the increment withholding was a business decision, made to avoid the expense and uncertainty of litigation; it was not a disavowal of the Board's position; accordingly it does not constitute waiver or estoppel; (5) the concept of res judicata does not apply, since there was never a final adjudication of Respondent's grievance protesting the increment withholding; (6) certain of the

allegations, in any event, occurred after the increment withholding and cannot be barred; the events prior to that show a pattern of continuing misconduct meriting the loss of tenure.

I cannot agree that the Board is entitled to pursue tenure charges based upon misconduct allegations that formed the basis of an increment withholding that was subsequently settled and withdrawn. I hold the Board is barred from seeking discipline now for any of the matters that predate June 2011 and were the subject of the original decision to withhold Respondent's increment. The Board asserts that it made a business decision to settle those charges, which does not preclude it from pursuing the same factual allegations now. But that is not how settlement works. I do not know, nor am I entitled to know, why the Board settled those charges – perhaps it was a business decision, as the Board now asserts, or perhaps it was because the Board expected to lose the arbitration and wanted to save face, or perhaps some other factors came into play. The nature of a settlement is that the reasons each side has for entering into settlement are off limits in future proceedings.

Nor do I accept the Board's argument that because it sought an increment withholding, rather than wrote up formal reprimands for the same conduct, the conduct may now be the subject of tenure charges. The Board sought to discipline Respondent in 2011 for ten years worth of alleged misconduct, including insubordination, incompetence and poor attendance. The vehicle chosen for the discipline was an increment withholding. When the Respondent challenged the discipline by filing a grievance, the Board decided to settle, rather

than litigate. By so doing, the Respondent was deprived of the opportunity to clear her name. Of course, the Respondent, too, could have refused to settle, but in the event, both parties, as they were entitled to do, chose settlement. That closed the matter.

Accordingly, I dismiss with prejudice all of Charge I, and those counts of Charge III, namely Counts one through 14, that predate and were included in the increment withholding proceeding of 2011. I will take judicial notice that the earlier charges put the Respondent on notice that her conduct was judged unsatisfactory by her supervisors in the matters alleged in 2011. However, I will not entertain any evidence regarding the events and charges themselves: I will not allow the Board to prosecute those claims, nor will the Respondent be required to defend herself against them. As to Count IV, to the extent that it restates and incorporates matters prior to 2011, it is also dismissed.

To be clear, the Board may proceed with Charge II, counts 1 and 2, and Charge III, counts 15 through 18. To the extent that the Board is able to prove a pattern of conduct over time based upon the remaining charges, it may proceed with Charge IV as well.

AWARD

For the reasons set forth above, the Respondent's Motion to Dismiss Charge II is denied. The Respondent's Motion to Dismiss Charges I, III and IV is granted in part and denied in part. Charge I is dismissed in its entirety, as is Charge III, counts one through 14. Respondent's Motion to Dismiss Charge III, counts 15 through 18 is denied, as is its Motion to Dismiss Charge IV as to those matters subsequent to June 2011.

Ruth Moscovitch, Arbitrator

Dated: November 16, 2015

ACKNOWLEDGMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On November 16, 2015, RUTH MOSCOVITCH, whom I know, came before me and acknowledged that she executed the foregoing as and for her Opinion and Award in the above-captioned matter.

Notary Public
My Commission expires 03/21/2019

LAKESHA N BELL
Notary Public - State of New York
NO. 01BE6237285
Qualified in Queens County
My Commission Expires Mar 21, 2019

383-15

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

BUREAU OF CONTROVERSIES AND DISPUTES

TENURE HEARING

In the Matter of the Arbitration Between STATE-OPERATED SCHOOL DISTRICT CITY OF NEWARK, NJ	)	
PETITIONER	)	**DECISION ON**
And	)	**MOTION TO**
SHERLENE THOMAS	)	**DISMISS**
RESPONDENT	)	**TENURE CHARGES**
Agency Docket 257-9/15	)	

ARBITRATOR — GERARD G. RESTAINO, ASSIGNED BY NEW JERSEY DEPARTMENT OF EDUCATION IN ACCORDANCE WITH CHAPTER 26, P.L. 2012, AND 18A:6-17.1

APPEARANCES:

FOR THE PETITIONER

JERROLD WOHLGEMUTH, ESQ.	COUNSEL FOR PETITIONER
ADAM HERMAN, ESQ.	COUNSEL FOR EMPLOYER

FOR THE RESPONDENT

NICHOLAS POBEREZHSKY	COUNSEL FOR RESPONDENT

PROCEDURAL BACKGROUND

On August 11, 2015, Edwin Reyes, Principal of Technology High School, in the State-Operated School District of the City of Newark, filed a Notice of Inefficiency, (tenure charges) against the Respondent. That Notice of Inefficiency included thirty-five (35) separate counts of an inability of the Respondent to "completely and responsibly execute her duties as a teacher" for the period of September 2013 to the present. Those charges were filed pursuant to N.J.S.A. 18A:6-11, and N.J.S.A. 18A:6-17.3. On or about August 14, 2015, the above charges were served on the Respondent.

On September 8, 2015, Christopher Cerf, Superintendent of the State-Operated School District of the City of Newark, filed a Certification of Determination in support of the Tenure Charges filed by Principal Edwin Reyes. That Certification was filed in accordance with N.J.S.A. 18A:6-11 and N.J.S.A. 18A:6-17.3 Superintendent Cerf also determined that, in accordance with N.J.S.A. 18A:7A-39 and N.J.S.A. 18A:6-14, the Respondent is to be suspended without pay for one hundred-twenty (120) days effective September 9, 2015.

On September 25, 2014, Jerrold Wohlgemuth, counsel for the Petitioner, filed the tenure charges with David Hespe, Commissioner of Education. That filing included Notice of Charges, Statement of Evidence in Support of Charges, Supporting Documents, Certification of Determination and Proof of Service.

On September 21, 2015, the Respondent filed an answer to the tenure charges. On September, 28, 2015, M. Kathleen Duncan, Director of New Jersey Department of Education's Bureau of Controversies and Disputes, sent a letter to Messrs. Wohlgemuth and Poberezhsky in which she indicated that the tenure charges and Respondent's

answer were reviewed pursuant to N.J.S.A. 18A:6-17.3 c, and upon review *"the Commissioner is unable to determine that the evaluation process has not been followed. The arbitrator's decision with regard to those charges shall be made pursuant to N.J.S.A. 18A:6-17.2, subject to determination by the arbitrator of Respondent's defenses and any motions which may be filed with the arbitrator." Additionally, Ms. Duncan stated that the arbitrator* "shall review those charges brought pursuant to *N.J.S.A. 18A:6-16 which are not dismissed as a result of a motion – under the preponderance of evidence standard."*

Accordingly, on this date, the case is being referred to Arbitrator Gerard G. Restaino. On October 16, 2105, a conference call was held to establish a briefing schedule. Both parties indicated they would need two (2) days to present their case in chief. On October 21, 2105, Respondent, with supporting letter memoranda, Certification and exhibits, submitted a motion to the arbitrator seeking to have the tenure charges dismissed because they were improperly derived, filed pursuant to incompatible provisions of the TEACHNJ Act, as well as the N.J.A.C. thereby rendering them defective.

On November 6, 2015, Petitioner submitted a letter brief in Opposition to Respondent's Motion to Dismiss the tenure charges accompanied with Certification and numerous exhibits. On November 10, 2015, Respondent submitted a reply letter to Petitioner's brief in Opposition to the Respondent's Motion to Dismiss.

On November 13, 2015, Petitioner submitted a letter in opposition the Respondent's November 6, 2013, reply letter alleging that the parties did not agree that any reply letters, briefs would be filed. Petitioner also addressed why the Motion to

Dismiss should be rejected. However, during the October 16, 2015, conference call the Arbitrator asked if there were going to be any reply briefs. Mr. Herman co-counsel for Petitioner stated he did not see a need for a reply brief. Mr. Poberezhsky stated he was not sure if he would file a reply brief, but at that time he did not want to preclude the filling of a reply brief.

Therefore, reply briefs are acceptable and will be made part of the record.

RELEVANT STATUTORY PROVISIONS:

N.J.S. 18A:6-11 is amended to read as follows:

Written charges, statement of evidence; filing; statement of position by employee; certification of determination; notice.

***18A:6-11**. Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statement of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. The board of education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address. In the event the board find that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner for a hearing pursuant to N.J.S. 18A:6-16, together with a certificate of such determination. The consideration and actions of the board as to any charge shall not take place at a public meeting.*

8. N.J.S. 18A:6-16 is amended to read as follows:

Proceedings before commissioner; written response; determination.

***18A:6-16**. Upon receipt of such a charge and certification, or of a charge lawfully made to the commissioner, the commissioner or the person appointed to act in the commissioner's in the proceedings shall examine the charge and certification. The individual against whom the charges are certified shall have 15 days to submit a written*

response to the charges to the commissioner. Upon a showing of good cause, the commissioner may grant an extension of time. The commissioner shall render a determination on the sufficiency of charges as set forth below within 10 days immediately following the period provided for a written response to the charges.

If, following receipt of the written response to the charges, the commissioner is of the opinion that they are not sufficient to warrant dismissal or reduction in salary of the person charged, he shall dismiss the same and notify said person accordingly. If however, he shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section 22 of P.L. 2012, c.26 (C.18A:6-17) for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for purposes of deciding the motion.

18A:6-17.2 Considerations For Arbitrators In Rendering A Decision.

23.a In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:

(1) the employee's evaluation failed to adhere substantially to the evaluation process, including to, but not limited to providing a corrective action plan;

(2) there is a mistake of fact in the evaluation;

(3) the charges would not have been brought but for consideration of political affiliation, nepotism, union activity, discrimination as prohibited by federal and state law, or other conduct prohibited by state or federal laws; or

(4) the District's actions were arbitrary and capricious."

b. In the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.

c. The evaluator's determination as to the quality of any employee's classroom performance shall not be subject to an arbitrator's review.

d. The board of education shall have the ultimate burden of demonstrating of the arbitrator that the statutory criteria for tenure charges have been met.

18A:6-17.3 Evaluation Process, Determination Of Charges.

25. a. Notwithstanding the provisions of N.J.S. 18A:6-11, or any other section of law to the contrary, in the case of a teacher, principal, assistant principal and vice principal:

(1) the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency whenever the employee is rated ineffective or partially effective in an annual summative evaluation and the following year is rated ineffective in the annual summative evaluation;

(2) If the employee is rated partially effective in two consecutive annual summative evaluations or is rated ineffective in an annual summative evaluation and the following year is rated partially effective in the annual summative evaluation, the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency, except that the superintendent upon a written finding of exceptional circumstances may defer the filing of tenure charges until after the next annual summative evaluation. If the employee is not rated effective or highly effective on this annual summative evaluation, the superintendent shall promptly file a charge of inefficiency.

b. Within 30 days of the filing, the board of education shall forward a written charge to the commissioner, unless the board determines that the evaluation process has not been followed.

c. Notwithstanding the provisions of N.J.S. 18A:6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a. of this section, the commissioner shall examine the charge. The individual against whom the charges are filed shall have 10 days to submit a written response to the charges to the commissioner. The commissioner shall, within five days immediately following the period provided for a written response to the charges, refer the case to an arbitrator and appoint an arbitrator to hear the case, unless he determines that the evaluation process has not been followed.

d. The only evaluations which may be used for purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L. 2012, c.26 (C. 18A:6-117, et al).

18A:6-123 Review, Approval Of Evaluation Rubrics

17. a. The Commissioner of Education shall review and approve evaluation rubrics submitted by school districts pursuant to section 16 of P.L. 2012, c.26 (C. 18A:6-122). The board of education shall adopt a rubric approved by the commissioner.

d. Beginning no later than January 31, 2013, a board of education shall implement a pilot program to test and refine the evaluation rubric.

e. Beginning with the 2013-2014 school year, a board of education shall ensure implementation of the approved, adopted evaluation rubric for all educators in all elementary, middle and high schools in the district. Results of evaluations shall be used to identify and provide professional development to teaching staff members. Results of evaluations shall be provided to the commissioner, as requested, on a regular basis.

SUBCHAPTER 5. CHARGES UNDER TENURE EMPLOYEES' HEARING ACT

N.J.A.C. 6A:3-5.1 Filing of written charges and certificate of determination

(a) N.J.A.C. 6A:3-1.3, Filing and service of petition of appeal, shall not apply in a case of tenure charges filed with the Commissioner against an employee of a district board of education or of a school district under full State intervention. In place of the usual petition, the district board of education or the State district superintendent shall file written charges and the required certificate of determination with the Commissioner, together with the name of the attorney who it is anticipated for administrative purposes will be representing the district board of education or State district superintendent and proof of service upon the employee and the employee's representative, if known. Such service shall be at the same time and in the same manner as charges are filed with the Commissioner.

(c) If the tenure charges are charges of inefficiency pursuant to N.J.S.A 18A:6-17.3, except in the case of building principals and vice-principals in school districts under full State intervention, where procedures are governed by the provisions of N.J.S.A. 18A:7A-45 and such rules as may be promulgated to implement it, the following procedures and timelines shall be observed:

1. When the conditions described in N.J.S.A. 18A:6-17.3.a(1) or (2) have been satisfied, the superintendent shall promptly file with the secretary of the district board of education a charge of inefficiency.

2. The charges of inefficiency shall be transmitted to the affected tenured employee and the employee's representative, if known, within three working days of the date they were filed with the secretary of the district board of education or the State district superintendent. Proof of mailing or hand delivery shall constitute proof of transmittal.

3. The affected tenured employee shall have an opportunity within 10 days of receipt to submit to the district board of education or the State district superintendent a written statement of position under oath demonstrating how the school district failed to comply with the evaluation procedures.

4. Within 30 days of the filing, the district board of education or State district superintendent shall forward a written charge to the Commissioner unless the district board of education or superintendent determines the evaluation process has not been followed. Such determination shall be made by a majority vote of the district board of education's full membership or by the State district superintendent.

5. Upon receipt of the charge, the Commissioner or his or her designee shall examine the charge. The charge shall again be served upon the employee at the same time it is forwarded to the Commissioner and proof of service shall be included with the filed charges. The individual against whom the charge is filed shall have 10 days to submit to the Commissioner a written response to the charge.

6. Within five days of the individual's deadline to submit a written response to the charge, the Commissioner shall appoint an arbitrator to hear the case and refer the case to the arbitrator, unless he or she has determined that the evaluation process has not been followed.

7. Pursuant to N.J.S.A. 18A:6-11, all deliberations and actions of the district board of education with respect to such charges shall take place at a closed meeting.

***N.J.A.C* 6A:10-2.1 Evaluation Of Teaching Staff Members**

(a) A district board of education annually shall adopt evaluation rubrics for all teaching staff members. The evaluation rubrics shall have four defined annual ratings: ineffective, partially effective, effective, and highly effective.

(b) The evaluation rubrics for teachers, principals, vice principals, and assistant principals shall include all other relevant minimum standards set forth in N.J.S.A. 18A:6-123 (P.L. 2012, c. 26, § 17c).

(c) Evaluation rubrics shall be submitted to the Commissioner by June 1 for approval by August 1 of each year.

***N.J.A.C* 6A:10-2.2 Duties of district boards of education**

(a) Each district board of education shall meet the following requirements for the annual evaluation of teaching staff members, unless otherwise specified:

1. Establish a District Evaluation Advisory Committee to oversee and guide the planning and implementation of the school district board of education's evaluation policies and procedures as set forth in this subchapter;
2. Annually adopt policies and procedures developed by the chief school administrator pursuant to N.J.A.C. 6A:10-2.4, including the evaluation rubrics approved by the Commissioner pursuant to N.J.A.C. 6A:10-2.1(c);

***N.J.A.C.* 6A:10-2.4 Evaluation Procedures For All Teaching Staff**

a. This section's provisions shall be the minimum requirements for the evaluation of teaching staff members.

c. The annual summary conference between designated supervisors and teaching staff members shall be held before the written performance report is filed. The conference shall occur on or before June 30 of each year and shall include, but not be limited to, a review of the following:

3. Available indicators of scores of student achievement or growth, when applicable such as student growth objective scores and student growth percentile scores; and

4. The preliminary annual written performance report.

d. If any scores for the teaching staff member's evaluation rubric are not available at the time of the annual summary conference due to pending assessment results, the annual summative evaluation rating shall be calculated once all component ratings are available.

N.J.A.C **6A:10-4.2 Student Achievement Components**

(e) Student growth objectives for teachers shall be developed and measured according to the following procedures:

5. Adjustments to student growth objectives may be made by the teacher in consultation with his or her supervisor only when approved by the chief school administrator or designee. Adjustments shall be recorded in the teacher's personnel file on or before February 15.

POSITIONS OF THE PARTIES

For the Respondent

Respondent argues that for the following three (3) reasons the Tenure Charges of Inefficiency must be dismissed:

1. Respondent's summative evaluation for the 2014-2015 school year was improperly derived, thereby rendering the tenure charges defective. Respondent contends the *"Petitioner woefully failed to meet its legal obligations with respect to the Respondent's 2014-2105 summative evaluation by not factoring in the appropriate SGO[1] into her final evaluation."* Moreover, she also states that *"it appears that Petitioner skewed the evidentiary record to make it appears as if these obligations were met, which is remarkable".* Respondent further alleges *"that Petitioner fabricated the evidentiary record to overcome its shortcomings."*

Respondents CAP[2] for the 2014-2015 school year, *"which was implemented on October 8, 2015, listed diagnostic test as the assessment metric, and even provided the results of the diagnostic exam when it was administered at the start of the school year.*

[1] SGO Student Growth Objective
[2] CAP Corrective Action Plan

Unbeknownst to Respondent, the CAP was apparently edited by an administrator to include the words April 2015 following diagnostic test."

Respondent acknowledges that Petitioner submitted a version of the October 8, 2014, CAP with handwriting on it as part of its record of evidence. Nevertheless, on page 3 of the CAP, someone circled the words "*diagnostic exam and wrote post April 2015 above it, drawing a line connecting the two phrases.* (see Respondent's Certification, Exh. F)

Respondent further argues that *"[L]ow and behold, the CAP that was included with the Statement of Evidence attached to the instant charges listed [diagnostic test] April 2015 as its assessment metric in regular print with no handwriting."* (see Respondent's Certification, Exh. F). Respondent asserts that the data used by the Petitioner to factor her SGO was *"based on classroom quiz results, not the diagnostic exam."* In fact, *"the documents containing the students" grades were actually labeled as quizzes."* (see Respondent's Certification, Exh. G)

Respondent contends that the *"implication is clear. In an effort to correct the deficiency in her summative evaluation – namely, failing to factor the appropriate, agreed to SGO scores, therein – Petitioner may have retroactively changed the assessment metric in her CAP to justify the otherwise premature issuance of her 2014-2015 summative evaluation."* Most importantly, Respondent never had the opportunity to re-administer the diagnostic exam to her students, which is the *"appropriate assessment metric to determine whether she met her SGOs."*

Respondent alleges that even if Petitioner was not acting in bad faith and the CAP was not retroactively changed *"following her annual summative conference, the*

instant tenure charges are facially effective and must be dismissed." Respondent argues that the *"Partially Effective overall rating she received in 2014-2015 is not valid and without two (2) consecutive ineffective or partially effective summative ratings, tenure charges based on inefficiency may not be filed."* Moreover, in accordance with 18A:6-17.3 et al, Petitioner may not submit any additional evidence to correct this deficiency.

In her Certification (see ¶ 7) Respondent stated *"[I] never requested to adjust my CAP, including the SGOs and corresponding assessment metrics, at any point during the 2014-2015 school year. It was always my understanding that the terms of my CAP would not be changed unless I personally requested adjustments to it. I signed the CAP during the follow-up meeting on October 14, 2014, but it was not explained to me that adjustments were made to the original CAP terms we agreed to."*

2. Respondent asserts that Petitioner may argue that *"even if the 2014-2015 summative evaluation was erroneously derived, thereby rendering the tenure charges based on inefficiency (N.J.S.A. 18A:6-17.2 and 6-17.3) defective, they may still be heard on the basis of conduct unbecoming (N.J.S.A. 18A:6-11). Even though Petitioner filed its tenure charges pursuant to both provisions of TEACHNJ Act, the inefficiency provision (N.J.S.A. 18A:6-17.2 and 6-17.3) commonly referred to as Section 25 of the Act, is the only appropriate basis here."* Furthermore, there was *"absolutely no rational for Petitioner to being the charges under the conduct unbecoming provision (N.J.S.A. 18A:6-11).* That section of the statute refers to *[a} charge made against any employee of a board of education under tenure during good behavior and efficiency."*

Respondent questions *"[H]ow can Petitioner justify bringing tenure charges under N.J.S.A. 18A:6-11, which is only applicable to efficient employees, and also Section 25 which is predicated on inefficiency".*

In support of her argument, Respondent references the arbitration awards of arbitrators Stephen Bluth, I/M/O Tenure Hearing of Sandra Cheatham, State-Operated School District, City of Newark, Agency Docket No, 68-3/15 and Daniel Brent I/M/O Tenure Hearing of Jodi Thompson, State-Operated School District, City of Newark, Agency Docket 240-8/14 and 16-1/15. Arbitrator Bluth dismissed the tenure charges filed under *N.J.S.A. 18A:6-11 because* "they were based on the same facts that gave rise to charges previously filed under Section 25. Arbitrator Brent dismissed the Petitioner's tenure charges because *"there was no valid basis in the statute to afford the District two separate, sequential opportunities to litigate identical charges arising from the same set of facts by citing different sections of the stature in two sets of tenure charges."*

3. Respondent also contends that Petitioner violated the terms of N.J.A.C. 6-10-2.4(4)(d), and her 2014-2015 summative evaluation was legally defective. That provision of the Administrative Code prevents the Petitioner from factoring *"Respondent's annual summative rating until her student assessment results were available."* Petitioner's Framework for Effective Teaching (see Petitioner Exh. 1) states that the *"annual evaluations for teachers on a CAP should be completed by May 15th, but also notes that the required state deadline to complete annual evaluations is the end of the school year."*

Therefore, *"Petitioner was not required, even by its own policies, to calculate Respondent's summative rating for the 2014-2015 school year by May 15, 2015."* Petitioner never afforded Respondent an opportunity to re-administer the diagnostic exam, *"even at the time of the annual conference. By then, she was told that her evaluation rating was already calculated, and she was deemed ineffective."*

Accordingly, Respondent strongly argues that the 2014-2015 annual summative rating was legally defective, improperly obtained and cannot be used in these proceedings. Most importantly, because there are not two (2) consecutive partially effective or ineffective annual summative ratings, the instant tenure charges must be dismissed.

For the Petitioner

Respondent was assigned as a math teacher at Technology High School for the 2013-1014 and 2014-2015 school years. For the 2013-2014 school year her annual summative evaluation rating was "partially effective." (see Exh. 1, ¶ 3). Therefore, Respondent was placed on a CAP for the 2014-2015 school year. (see Exh. 1, ¶ 4) On September 30, 2014, Respondent met with her supervisor, Vice Principal Milagros Ortiz, for a goal setting conference to discuss Respondent's CAP for the 2014-2015 school year. (see Ortiz Certification ¶ 4, and Exh. A) The goal setting conference had to be adjourned and re-scheduled for October 8, 2014, because Respondent failed to submit her CAP form by September 26, 2014. (see Ortiz Certification ¶¶ 5-7, and Exh. A)

During the October 8, 2014, meeting, Vice Principal Ortiz gave Respondent a draft CAP *"along with Ms. Ortiz's handwritten notes and comments, so that Respondent*

could incorporate same into her final CAP." (see Ortiz Certification ¶ 8). One of Vice Principal Ortiz's handwritten note on the CAP form stated that *"Respondent was to administer a follow up diagnostic math test to her students in April 2015."* (see Ortiz Certification ¶ 9, and Exh. B) The Respondent had already administered a diagnostic math test to her students in September 2014, and the follow up was to measure student growth. (see Ortiz Certification ¶ 10). Petitioner strongly argues that subsequent to the October 8, 2014, meeting, Ms. Ortiz emailed the draft CAP with her handwritten notes to Respondent along with various suggested action steps, and Respondent was asked to update her CAP on the Bloom Board system. (see Ortiz Certification ¶ 12)

As a tenured teacher a CAP Respondent's annual evaluation was required to be completed by May 15, 2015. (see Ortiz Certification ¶ 11, and Exh. C). Moreover, the "Framework For Effective Teaching, Newark Public Schools Teacher Performance Evaluation, A Guidebook for Teachers & Administrators, 2014-2014" specifically states that for tenured teachers on a CAP, annual evaluations should be completed by May 15, 2015. (see Ortiz Certification ¶ 11, and Exh. C)

Only teachers such as Respondent have the ability to modify and finalize their actual CAP document through the Bloom Board system. Accordingly, on October 14, 2015, Respondent made her final edits to the CAP for the 2014-2015 school year on the Bloom Board system. (see Ortiz Certification ¶¶ 13-14, and Exh E and F). One of the edits made by the Respondent to her 2014-2015 CAP *"was to specify that the diagnostic test was to be given in April as required. Thus, on the third page of the CAP under the heading [Assessment/Metric] Respondent herself typed ...Diagnostic test - April 2015."* (see Ortiz Certification ¶ 15, and Exh. E). After Respondent made her final

edits to the CAP on October 14, 2015, including the insertion of the phrase *"...diagnostic test April 2015,"* Respondent and Vice Principal Ortiz signed the CAP that same day. (see Ortiz Certification ¶ 16, and Exh. E)

Petitioner argues that *"no adjustments were made to the CAP after October 14, 2015."* (see Ortiz Certification ¶ 20).

Respondent did not administer the diagnostic tests to her students in April, May, and June 2015. (see Ortiz Certification ¶ 19). Petitioner acknowledges that during the May annual evaluation conference Respondent submitted quiz results, but *"those quiz results could not, and were not utilized as part of her SGO."* (see Ortiz Certification ¶ 21). Petitioner was *"unable to determine Respondent's SGO because she failed to administer the diagnostic test to her students in April 2015 as required."* (see Ortiz Certification ¶ 22). As Respondent was rated partially effective in 2013-2014 and ineffective in 2014-2015, the two (2) consecutive school years standard as set forth in N.J.S.A.*18A:6-17.3* was implemented by Petitioner.

Respondent failed to comply with the requirement in her CAP that she was to administer the diagnostic math test to her students in April 2015. Petitioner strongly asserts that Respondent's argument that Petitioner failed to meet its obligations by not factoring in the appropriate SGO scores into her 2014-2015 annual evaluation is fundamentally flawed for the reasons set forth above and below.

As previously indicated, Respondent administered a diagnostic math test to her students in September 2014 *"in which 23 of her 26 students were unable to answer questions about circles, and in which 20 of her 26 students were unable to make geometric constructions and express geometric properties with equations. As such, as*

a result of the goal setting conference, Respondent's CAP identified two student learning goals for the 2014-2015 school year: (a) understanding and applying theorems about circles; and (b) make geometric constructions and express geometric properties with equations. (see Ortiz Certification ¶ 16, and Exh. E) Moreover, *"Respondent's CAP made clear that she was to administer the same diagnostic test in April 2015, as a measure of student growth in these two areas."* (see Ortiz Certification ¶ 16 and Exh. E)

Petitioner asserts that Respondent acknowledged Vice Principal Ortiz's recommendation, and the Respondent herself incorporated and typed the April 2015 date into her CAP using the Bloom Board system. Once signed by both Respondent and Vice Principal Ortiz, Respondent was *"expected to ensure that her students met their learning objectives, which were then to be measured when Respondent's students retook the follow up diagnostic test in April 2015."*

Furthermore, Petitioner argues that it *"is without any knowledge as to why Respondent ignored her responsibilities and decided not to retest her students. To the extent the Respondent had fallen behind with her lesson plans, Respondent had the ability to adjust her SGOs by February 15, 2015. (see N.J.A.C. 6a:10-4.2(e)4. Respondent, however, never requested or made any attempt to adjust her SGOs."*

Petitioner contends that the Respondent's summative evaluation was not issued before she had an opportunity to re-administer the diagnostic test. More importantly, the Respondent's argument that the Petitioner *"did not factor the appropriate SGO scores into her final evaluation, incredibly overlooks the fact the she did not re-administer the assessment within the time unequivocally set forth in the October 14, 2014, CAP."*

Additionally, Petitioner *"did not surreptitiously speed up the date of Respondent's final evaluation. Respondent was fully aware of the fact that she was on a CAP, that her CAP stated she was to administer the diagnostic test in April 2015."*

Petitioner strongly argues that the record clearly and unequivocally establishes that in October 2104, *"Respondent was made aware of her SGOs and her obligations to retest her students in April 2015 in order to determine if her class experienced growth in its knowledge of circle theorems and geometric constructions and properties."* It certainly appears to the Petitioner that Respondent intentionally disregarded the unambiguous and agreed-upon obligations in her CAP.

Petitioner asserts that Respondent completely ignores the reality of how her CAP for 2014-2015 school year was created. She conveniently overlooks the fact that she herself put into her Cap using the Bloom Board system "April 2015." The record clearly established that only Respondent can edit, delete, or make changes to her CAP using the Bloom Board system. Administrators or supervisors cannot make any changes to a teachers CAP in the Bloom Board system.

Petitioner asserts that Respondent's motion to dismiss is baseless, must be denied and the hearing on the tenure charges should proceed as scheduled.

OPINION AND ANALYSIS

Respondent's arguments in support of her Motion to Dismiss Tenure Charges are based upon three (3) significant components. Preliminarily, Respondent has a high level of comfort in her arguments that Petitioner violated N.J.A.C. 6A 10. 2.1, 2.2, 2.4, N.J.S.A.18A:6-123, and Petitioner's Framework for Effective Teaching, Newark Public Schools Teacher Performance Evaluation concerning her May 14, 2015, annual

summative evaluation. As set forth below, that comfort level has a short life expectancy.

Respondent judiciously avoids addressing the Certifications of Vice Principal Ortiz and the progeny of events that developed after the October 8, 2014, conference. It is important to recall that in September 2014, Respondent had already administered a diagnostic math test to her students, and the follow up was to measure student growth. (see Ortiz Certification ¶ 10). The results of that diagnostic test revealed 23 of Respondent's 26 students were unable to answer questions about circles, and in which 20 of her 26 students were unable to make geometric constructions and express geometric properties with equations. As such, as a result of the goal setting conference, Respondent's CAP identified two student learning goals for the 2014-2015 school year: (a) understanding and applying theorems about circles; and (b) make geometric constructions and express geometric properties with equations. (see Ortiz Certification ¶ 16, and Exh. E) Moreover, Respondent's CAP made clear that she was to administer **the same diagnostic test in April 2015**, as a measure of student growth in these two areas. (see Ortiz Certification ¶ 16 and Exh. E) (emphasis supplied)

Respondent's bold assertions concerning the development of her CAP and her signature dated October 14, 2014, clearly and unequivocally establish for the arbitrator that her arguments are part of Harry Potter type of wizardry.

At the October 8, 2014, goal setting conference to establish Respondent's CAP, the uncontradicted certifications of Vice Principal Ortiz, show without blemish that Ms. Ortiz gave Respondent a draft cap with her handwritten notes and comments to incorporate into Respondent's CAP. Additionally, subsequent to the October 8, 2014,

meeting, Vice Principal Ortiz emailed Respondent the draft CAP with various recommended performance steps and asked Respondent to update her CAP via the Bloom Board system.(see Ortiz Certification ¶ 8, 9, 12,and Exh. D)

The record lucidly shows that only Respondent can make any additions, deletions to her CAP via the Bloom Board system. Yet somehow after Respondent signed her CAP, the same day Vice Principal Ortiz signed it, an unknown individual used the Bloom Board system and changed the CAP to insert April 2015. Candidly, that position of the Respondent defies credulity.

Respondent is a professional individual who has been employed approximately twenty-three (23) years as a math teacher in the Newark Public Schools and signed her 2014-20105 CAP without reading and/or objecting to specifics in the CAP and insists Petitioner *"skewed and fabricated the evidentiary record to overcome its shortcomings*"

To advance such an argument and expect the arbitrator to accept it expands the boundaries of believability to beyond any recognizable limit. Respondent has not offered any proof that she was coerced, forced or manipulated into signing her 2014-2015 CAP on October 14, 2014. Her entire argument on the CAP and April 2015 is nothing more than bold assertions without any substance.

Respondents' argument on the improper application of Petitioner's Framework for Effective Teaching, Newark Public School, belies the following excerpts from that document:

Frequently Asked Questions

Why do we have to participate in a goal-setting conference?

"The goal-setting conference ensures that ***goals are established collaboratively between teachers and administrators****. Once the teacher and*

administrator have finalized the teacher's student learning goals and IPDP or CAP, the goal-setting process is complete....The IPDP or CAP provide teachers and administrators with a shared tool for consistently communicating about goals and anticipating growth areas, and they will serve as a reference document for other evaluation conferences, feedback discussions, and professional development over the course of the year." (emphasis supplied) *(see page A11)*

What is the responsibility of a teacher on a CAP?

"A teacher on a CAP is responsible for the development of goals outlined in his or her CAP with the principal." (see page A12)

The above cited sections give the arbitrator a ringside seat at the goal setting conference. The key word collaboratively renders all of Respondent's arguments about the development of 2014-2015 CAP ludicrous to say the least. If there is one clear absolute in the record, it is that Respondent developed the 2014-2015 CAP collaboratively or in concert with Vice Principal Ortiz. To deny that the CAP was created in collaboration with Vice Principal Ortiz is to deny reality.

Respondent contends that Petitioner violated the May 15, 2015, date found on page A 12 of the Framework for Effective Teaching, Newark Public School for the annual evaluation of a tenured teacher on a CAP, because she never had the opportunity to re-administer the diagnostic exam to her students, which is the appropriate assessment metric to determine whether she had met her SGOs.

The Respondent's own words set aside her accusation about the May 15, 2015, date. Respondent stated in her Certification *" I was instructed to bring data demonstrating student growth at the annual summary conference,* ***but because the diagnostic exam*** **was not administered by then, and my students were still learning circles, the only somewhat-appropriate artifact I could think to bring was a spreadsheet consisting of my students' scores on exit slips and tests from**

December 2014 and January 2015 relative to geometric shapes." (see. Thomas Certification ¶ 9, and Exh. C) (emphasis supplied) ¶

January 2015 was four months away from April 2015, the date in Respondent's CAP and yet she still had not administered the diagnostic exam. Respondent admits that at the time of the annual summative conference "**her students were still learning circles."** Nevertheless, as a result of the goal-setting conference Respondent's CAP identified two student learning goals for the 2014-2015 school year: (a) understanding and applying theorems about circles; and (b) make geometric constructions and express geometric properties with equations. (see Ortiz Certification ¶ 16 and Exh. E)

Frankly, as of May 14, 2015, Respondent still had not met the goal of understanding and applying theorems about circles, yet she insists the Petitioner rushed to administer the annual summative evaluation without the results of the diagnostic exam that she blatantly refused to administer in April 2015.

Respondent's lack of administering the diagnostic test cannot be held against the petitioner. Even if the May 15, 2015, summative evaluation conference was adjourned, Respondents Certification showed a remarkable lack of adhering to her 2014-2015 CAP. She stated, *"On or about May 14, 2015, I was called into the office to meet with Vice Principal Ortiz for my annual evaluation conference, during which time we discussed my summative evaluation.* ***At this Point I did not have an opportunity to re-administer the diagnostic exam. My students haven't even completed the unit on circles yet, so it would not have been appropriate to re-administer the diagnostic exam even if I had chosen to do so."*** (see Thomas Certification ¶ 8)

When Respondent met with Vic Principal Ortiz she knew that she had not complied with her 2014-2015 CAP. She had the opportunity to request that the evaluation not be held until she had completed the diagnostic exam. She chose not to do so and incredibly blames the Petitioner for not adhering to the permissive date for evaluating a tenured teacher on a CAP. Nothing can be further from the truth. Candidly, Respondent could have admitted she did not administer the diagnostic exam which was in violation of her 2014-2015 CAP and ask for more time. The record shows she did not take advantage of that opportunity.

More importantly, Respondent's reply brief does not address the mysterious manner in which she alleges "April 2015" appears in her CAP. To bolster her unsupported assertions Respondent in her reply brief strongly contends that under *" the laws of our State, it is the duty of the school board employer – not the tenured employee – to ensure the statutory requirement, of annual evaluations are complied with."*

Yes, but teachers tenured or not have a professional obligation to cooperate with those laws and make sure their intent is carried out. Her argument about the May 15, 2015, date for completion of her annual evaluation segues into her contention that the Petitioner violated N.J.A.C. 6-10-2.4(4)(d), and her 2014-2015 summative evaluation was legally defective.

N.J.A.C. 6-10-2.4 is the evaluation procedure for all teaching staff. Section (4)(d), states: *If any scores for the teaching staff member's evaluation rubric are not available at the time of the annual summary conference due to* ***pending assessment results****, the annual summative evaluation rating shall be calculated once all component ratings are available.* (emphasis suppiled)

There was no pending assessment result because Respondent did not administer the diagnostic exam in April 2015. Respondent placing blame on Petitioner because Respondent did not comply with her 2014-2015 collaboratively agreed upon CAP is another example of her refusing to take responsibility for her actions or lack thereof. It defies logic to pass blame on the Petitioner when Respondent did not do her part in having completed the diagnostic exam so it could be addressed in her annual summative evaluation.

There is nothing sufficient or compelling in Respondent's arguments about the CAP and its progeny including the Petitioner's alleged violation of N.J.A.C. 6-10-2.4(4)(d), to dismiss the tenure charges.

Respondent's arguments about the application of N.J.S.A. 18A:6-11, and N.J.S.A 18A:6-17.3 is misapplied. The seminal case in addressing inefficiency charges utilizing two (2) distinct separate sections of Ch. 26 is Arbitrator Simmelkjaer I/M/O Neil Harris, State-Operated School District, City of Newark Agency Docket 244-9/14. Arbitrator Simmelkjaer determined that *:[H]ad the Legislature intended that a teacher charged with inefficiency for two consecutive years of ineffective or partially ineffective ratings on their annual summative ratings be evaluated utilizing two different and asymmetric evaluation procedures – one consistent with section 25 of TEACHNJ and the other consistent with Section 8 – it had the wherewithal to provide appropriate statutory language."*

Section 8 refers to N.J.S.A. 18A:6-16 and Section 25 refers to N.J.S.A 18A:6-17.3. Arbitrator Simmelkjear dismissed the tenure charges because the evaluation process had not been followed.

In the Cheatham award, supra arbitrator Bluth dismissed the tenure charges because the Petitioner (same Petitioner as in the instant matter) filed amended tenure charges of inefficiency under N.J.S.A. 18A:6-16. However, the above award was the second award with the same parties. In the first award I/M/O Tenure Hearing of Sandra Cheatham, State-Operated School District, City of Newark, Agency Docket No, 266-8/14 Arbitrator Bluth rejected the Petitioner's argument that if he *"found that Respondent was not culpable under Section 25, he should treat the charges as if they had been filed under Section 8."* That determination places the Cheatham awards supra, in context with the fact pattern in the matter before me. The standards for an arbitrator to review inefficiency charges is found in N.J.S.A 18A:6-17.3 and not in N.J.S.A. 18A:6-11.

In fact, N.J.S.A. 18A:6-17.3 c. specifically states, *"Notwithstanding the provisions of N.J.S.A. 18A:6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a. of this section, the Commissioner shall examine the charge."* There is nothing in Section 25 that would allow a charge of inefficiency to be heard under N.J.S.A. 18A:6-11.

In fact, N.J.S.A. 18A:6-11 informs the parties, and in particular, a board of education as to what is required in the filing of tenure charges such as written charges, statement of evidence, statement of positon by employee, and certification of charges, and that any hearing will not take place at a public meeting. It is acted upon in compliance with N.J.A.C. 6A 3.5-1 (c).

Nevertheless, it must be acknowledged that the Petitioner is not contending that if they are not successful under N.J.S.A. 18A:6-17.3, I am to review the tenure charges of inefficiency under N.J.S.A. 18A:6-11.

For the foregoing reasons, and having heard the proofs and allegations of the parties, I AWARD the following:

AWARD

The Respondent has not met its burden of proof for the tenure charges of inefficiency filed against Sherlene Thomas to be dismissed.

Therefore, we shall proceed to hearing with the agreed upon dates starting with December 7, 2015.

Dated November 16, 2015

Gerard G. Restaino, Arbitrator

State of Pennsylvania)

County of Wayne) ss:

On this 16th day of November, 2015, before me personally came and appeared Gerard G. Restaino to me known to be the person who executed the foregoing document and he duly acknowledged to me that he executed the same.

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Judith K. Restaino, Notary Public
Lake Twp., Wayne County
My Commission Expires Nov. 10, 2017
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

384-15

AGENCY DKT. NO. 256-9/15

IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY IBIDA,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF PATERSON,	:	
PASSAIC COUNTY.	:	
	:	

The record of this matter, along with the parties' proposed Settlement Agreement and General Release, have been reviewed. The Commissioner finds that the proposed Agreement – a term of which is respondent's resignation from employment in petitioner's district – is consistent with the established standards governing settlement of tenure matters contained within *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846, and as incorporated in *N.J.A.C.* 6A:3-5.6.

To the extent that Paragraph 13 of the Agreement provides for strict confidentiality, the parties are reminded that the Settlement Agreement may be subject to disclosure pursuant to the Open Public Records Act, *N.J.S.A.* 47:1A-1, *et seq.*

Accordingly, the parties' settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11/18/15

Date of Mailing: 11/19/15

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement") is made by and between the STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, with an address at 90 Delaware Avenue, Paterson, New Jersey 07503, and its successors, assigns, officers, employees, agents and representatives (collectively, the "School District"), and ANTHONY IBIDA, residing at 2840 Debra Way, Union, New Jersey 07083 ("Employee") (collectively, the "Parties").

WHEREAS Employee is a tenured teaching staff member employed by the School District as a teacher;

WHEREAS the State District Superintendent of the School District ("Superintendent") certified a tenure charge of *Anthony Ibida, State-operated School District of the City of Paterson, Passaic County* ("Tenure Charge"), and the charge has been assigned Agency Docket No. 256-9/15;

WHEREAS, because of the cost and expense of prosecuting the charge and the uncertainty of its outcome, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

WHEREAS the proposed settlement is in the best interest of the Parties and the public because it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

NOW, THEREFORE, subject to approval by the Commissioner, the Parties hereby agree as follows:

1. Immediately upon execution of this Agreement, Employee will resign from his employment in the School District, effective 82 school days from the Effective Date of this

Agreement as set forth below ("Resignation Date"). Attached as Exhibit A is a copy of Employee's signed letter of resignation.

2. Between the Effective Date and the Resignation Date, Employee will receive the following compensation:

(a) For the first seventy-seven school days after the Effective Date, salary at a prorated rate equivalent to one-half of his current annual salary, minus all applicable withholdings and deductions, payable in accordance with the School District's normal payroll procedures;

(b) For the seventy-eighth through eighty-second school days after the Effective Date, salary at his current annual salary rate, minus all applicable withholdings and deductions, payable in accordance with the School District's normal payroll procedures; and

(c) All employee benefits due to him from the Effective Date to the Resignation Date, at the benefit levels and in accordance with all terms in effect on the Effective Date.

3. In exchange for Employee's resignation, the School District agrees to dismissal of the Tenure Charge, and further agrees not to pursue a tenure charge so long as this Agreement remains in effect and is not ruled invalid or void by any court or administrative agency of competent jurisdiction. However, if this Agreement is ruled invalid or void, the School District retains the right to pursue action against Employee, including but not limited to tenure charges and termination from the School District.

4. This Agreement is based on the understanding that the facts underlying the Tenure Charge do not constitute grounds for disciplinary action or penalty imposed on Employee and do not give rise to any obligation on the part of the School District to notify the State Board of Examiners or Division of Pensions. The School District agrees not to seek suspension or revocation of Employee's teaching certification or license and not to challenge his right to apply

for or receive pension benefits on any grounds related to the Tenure Charge or his resignation pursuant to this Agreement. Notwithstanding the foregoing, Employee understands that this Agreement is not intended to affect the possibility of any proceedings that may be pursued by the State Board of Examiners relative to his teaching certificate.

5. The School District will not contest any application for unemployment compensation that Employee may make relative to his separation from employment with the Paterson Public Schools.

6. As of the Resignation Date, all of Employee's rights of employment with the School District, including but not limited to salary, benefits, tenure and seniority, will permanently end.

7. Employee will not apply for reemployment with the School District at any time. If Employee does apply for reemployment with the School District and is approved for employment, the terms of this Agreement shall control and shall be grounds for immediate termination of Employee's employment. Additionally, Employee shall not enter onto the premises of any school in the School District without express written permission of the principal. If Employee does enter onto the premises of any school in the School District without such permission, all of the School District's obligations under this Agreement shall cease immediately.

8. In exchange for the consideration set forth in paragraph 2 above, the sufficiency of which is hereby acknowledged, Employee hereby waives and releases any and all claims of any nature against the School District, including any claim for attorneys' fees, costs or other monetary relief, and hereby releases and discharges the School District with respect to any and all claims or rights that he has or may have against the School District. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or

character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Employee's employment with the School District or separation from employment with the School District. It specifically includes, without limitation, all claims which Employee may have regarding tenure, seniority, compensation in any form, withholding of increment, discrimination on any basis, and any and all claims of violation of Employee's rights under any federal or state civil rights law; any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wage and Hour Law; disability benefits laws; retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution and the New Jersey Constitution; any other alleged violation of any federal, state or local law, regulation or ordinance; and any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or

public policy, having any bearing whatsoever on his employment by and/or termination of his employment with the School District, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, wages, attorneys' fees, costs, and/or future wage loss.

9. Notwithstanding the terms of paragraph 8 of this Agreement, Employee does not waive any right he may have to workers compensation benefits or pension benefits. Moreover, notwithstanding the terms of paragraph 8, Employee is not and shall not be prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor or the Equal Employment Opportunity Commission. Should either such agency file a charge, action, complaint or lawsuit against the School District based upon any of the claims in Paragraph 8, Employee agrees not to seek or accept any resulting relief whatsoever.

10. To comply with the Older Workers Benefit Protection Act, if applicable, this Agreement advises Employee of the legal requirements of that Act and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Employee acknowledges that he: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Agreement; and (v) has seven (7) days from the date of his execution of this Agreement to revoke it. Employee understands that he may rescind this Agreement within seven (7) calendar days of signing it, and that such rescission must be in writing and delivered to counsel for the School District either by hand or by certified mail within the seven-day period.

11. This Agreement shall not be effective, and the School District shall have no obligation hereunder, until seven (7) calendar days from the date of Employee's execution of this Agreement or the date of the School District's receipt of approval by the Commissioner of Education pursuant to paragraph 22 below, whichever is later ("Effective Date").

12. Employee's separation from employment will be deemed a voluntary resignation in good standing. Upon inquiry from any third party to authorized employees or representatives of the School District, those employees or representatives will provide no information other than to confirm Employee's employment, position, salary and dates of employment, and state that the reason for his separation from employment was his resignation.

13. Except as set forth herein, Employee shall keep the terms of this Agreement strictly confidential. Employee is expressly forbidden from discussing this Agreement with any person, other than his accountant, tax advisor and attorney ("permitted disclosures") and any other individual or entity as necessary to implement the Agreement or to which they are legally obligated to respond ("legally-required disclosures"). In making any permitted disclosure, Employee agrees that he will inform the person to whom he makes the permitted disclosure that the existence and substance of this Agreement, the settlement negotiations giving rise to this Agreement, and the sum of money paid pursuant to this Agreement are to be held strictly confidential to the fullest extent permitted by law. In the event of any breach of this confidentiality provision, all of the School District's obligations under this Agreement shall cease immediately. The School District agrees that it will keep the terms of this Agreement confidential to the extent permitted by law.

14. This Agreement shall not constitute a precedent in any matters involving other employees.

15. The Parties each acknowledge that counsel has advised them regarding this Agreement and that each is signing this Agreement freely and voluntarily, without duress, coercion or pressure from the other party.

16. Each signatory to this Agreement understands, acknowledges and agrees that this Agreement constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

17. This Agreement shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Agreement.

18. This Agreement may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

19. This Agreement and any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties jointly prepared this Agreement.

20. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter hereof, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Agreement.

21. If any provision of this Agreement is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

22. This Agreement is subject to approval by the Commissioner of Education pursuant to N.J.A.C. 6A:3-5.6, and will become effective only upon approval by the Commissioner. Counsel for the Parties shall jointly request the Commissioner's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charge.

Dated: 10/15/15

ANTHONY IBIDA

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON

Dated: 10/30/15

By: DONNIE W. EVANS
State District Superintendent

CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):

I certify that the State District Superintendent has consented to the terms of this Agreement.

Dated: 11/3/15

Brenda C. Liss
Riker Danzig Scherer Hyland & Perretti LLP
Attorneys for State-operated School District
of the City of Paterson

APPROVED:

Dated: _____

DAVID C. HESPE, Commissioner

CERTIFICATION

I, ANTHONY IBIDA, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 10/15/15

Anthony Ibida
ANTHONY IBIDA

SETTLEMENT AGREEMENT AND GENERAL RELEASE:

EXHIBIT A

ANTHONY IBIDA
2840 Debra Way
Union, NJ 07083

October 15, 2015

Dr. Donnie W. Evans
State District Superintendent
State-operated School District of Paterson
90 Delaware Avenue
Paterson, NJ 07503

Dear Superintendent Evans:

I hereby unconditionally resign from my employment with the State-operated School District of Paterson ("School District").

My resignation will be effective 82 school days from the Effective Date of the Settlement Agreement between the School District and me, as defined therein.

Very truly yours,

ANTHONY IBIDA

Cc: Samuel Wenocur, Esq.
John McEntee, PEA
Sasha Wolf, NJEA
Carol Pierce, NJEA

354-15

T.H., on behalf of minor child, K.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the discipline imposed upon K.H. – a student athlete – by the respondent Board based on conduct that occurred away from school grounds. Specifically, K.H. posted two pictures on Instagram that appeared to show K.H. and another student – who was wearing an Allentown High School sweatshirt – drinking alcohol. K.H. was, *inter alia*, suspended for thirty days from the basketball team and barred from participating in athletic events or practices for thirty days; the discipline was not, however, recorded in K.H.'s permanent file. Petitioner also contested a one-day detention that K.H. served on February 19, 2014 for an unrelated social media infraction. The Board filed a motion for summary decision, asserting that K.H. violated school policy when she publicized drinking behavior through a post on Instagram. The Board further asserted that petitioner's claim regarding the one-day detention was filed beyond the 90-day window for the filing of appeals. The petitioner filed a cross-motion for summary decision.

The ALJ found, *inter alia*, that: the facts in this matter are substantially undisputed; pursuant to *N.J.A.C.* 6A:16-7.5, in order for a school district to assert control over student behavior away from school, there must be a clear nexus between the behavior and student health or safety, and the district must then establish that the behavior materially and substantially interferes with the orderly operation of the school; underage drinking is a potential problem and if the within behavior had occurred on school grounds or at a school related function, there would be no question as to the Board's jurisdiction, *N.J.S.A.* 18A:37-2; the facts of the within case – unlike *G.D.M. v. Board of Education of the Ramapo Indian Hills School District,* 426 *N.J. Super* 246 – are not aggravated by further inappropriate behavior that could be considered substantial interference; and K.H.'s one-day detention was issued on February 19, 2014, but the within appeal was not filed until May 27, 2014, which date is beyond the 90-day period for the filing of appeals. The ALJ concluded that petitioner is entitled to have any record of the event eliminated or marked as having been reversed. Accordingly, the Board's motion for summary decision as to the drinking incident was denied; the Board's motion as to the one-day suspension was granted; the petitioner's motion seeking reversal of the Board's decision regarding the drinking incident was granted, and was denied as to the one-day suspension. The petition was dismissed.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions. Accordingly the Initial Decision was adopted as the final decision in this matter.

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

Issued 11/19/15

OAL DKT. NO. EDU 8021-14
AGENCY DKT. NO. 134-5/14

T.H., on behalf of minor child, K.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the Upper Freehold Regional Board of Education (Board). In this case the petitioner is challenging the Board's decision imposing a 30-day suspension from participation in extracurricular activities on K.H. based on conduct that occurred away from school grounds. K.H. posted two pictures on Instagram that appear to show K.H. and another student – who was wearing an Allentown High School sweatshirt – drinking alcohol.[1] Petitioner also contests a one day detention that K.H. received for an unrelated social media infraction. The Administrative Law Judge (ALJ) found that the challenge to the Board's decision regarding the unrelated social media infraction was barred by the 90-day rule in accordance with *N.J.A.C.* 6A:3-1.3. The ALJ also found that the Board overstepped its authority under *N.J.A.C.* 6A:16-7.5[2] when it gave K.H. a 30-day suspension from extracurricular activities for the conduct that occurred off-school grounds.

[1] K.H. neither admitted nor denied that she was drinking alcohol. The student in the picture with K.H. admitted to school officials that the two were drinking alcohol.

[2] *N.J.A.C.* 6A:16-7.5 was re-codified from *N.J.A.C.* 6A:16-7.6 effective March 17, 2014.

The Board takes exception to the ALJ's determination that it overstepped in disciplining K.H. for her inappropriate conduct. The Board argues that the facts in this case are different from the circumstances in *G.D.M and T.A.M., on behalf of minor child, B.M.M. v. Board of Education of the Ramapo Indian Hills Regional High School District*, 427 *N.J. Super.* 246 (App. Div. 2012) because in that case the Ramapo Indian Hill's Board sought to penalize any off campus conduct without the requisite nexus to the school. Here the Board maintains that the nexus between K.H. and the school was supplied through the use of an Allentown High School sweatshirt worn by the student posing with K.H. and the "sophomore sensation" hashtag utilized on Instagram. The Board stresses that the "requirement of appropriate discipline" in the school was implicated by the use of school athletic apparel and the social media hashtags that inexorably link the school to inappropriate and illegal conduct. Therefore, the Board contends that it reacted appropriately and responsibly to K.H.'s conduct, and the 30-day suspension from extracurricular activities should be upheld.

After consideration and review, the Commissioner is in accord with the ALJ's determination that the Board's decision to suspend K.H. from extracurricular activities for 30 days was arbitrary capricious and unreasonable because the off-school conduct did not materially and substantially interfere with the orderly operation of the school required by *N.J.A.C.* 6A:16-7.5(a)2. The Commissioner also agrees with the ALJ's determination – for the reasons stated in the Initial Decision – that K.H.'s challenge to the Board's decision to give her a detention because of the unrelated social media infraction was barred by the 90-day rule.

There is no doubt that under *N.J.A.C.* 6A:16-7.5, a board of education has the authority to "impose a consequence on a student for conduct away from school grounds … that is consistent with the district board of education's code of student conduct." The board of education, however, can only exercise that authority when:

1. "it is reasonably necessary for the student's physical or emotional safety, security and well-being or for reasons relating to the safety, security and well-being of other students, staff or school grounds pursuant to N.J.S.A. 18A:25-2 and 18A:37-2" [*N.J.A.C.* 6A:16-7.5(a)1] and

2. "the conduct that is the subject of the proposed consequence materially and substantially interferes with the requirements of appropriate discipline in the operation of the school." [*N.J.A.C.* 6A:16-7.5(a)2.]

As a threshold matter the Commissioner finds that Board Policy 5600, "Pupil Discipline", complies with the requirements outlined in *N.J.A.C.* 6A:16-7.1 and *N.J.A.C.* 6A:16-7.5 relating to the Board's authority to discipline students for conduct that occurs away from school grounds.[3]

In order to evaluate whether the Board acted in an arbitrary, capricious or unreasonable manner in suspending K.H. from participating in extracurricular activities, it must be determined whether the discipline for K.H.'s off-school conduct was reasonably necessary for K.H.'s safety, security and well-being – or for the safety, security and well-being of other students – and whether the conduct materially and substantially interfered with the orderly operation of the school. Although the student athletes at Allentown High School are required to sign the Athletic Participation/Permission Form and expressly agree to adhere to the student code of conduct, the crux of the analysis here involves what the regulations permit as a consequence[4] for a violation of the code of conduct that occurs away from school grounds. When *N.J.A.C.* 6A:16-7.5(a) was adopted, it clearly created an express distinction between a board of education's authority to impose any

[3] Although participation in extracurricular activities is a privilege, and not a right, it does not negate the fact that a board's decision to revoke a student's ability to participate in extracurricular activities amounts to a form of discipline. Therefore, student conduct policies must comply with the requirements relating to discipline for conduct away from school grounds that is outlined in *N.J.A.C.* 6A:16-7.6. *G.D.M., supra*, 427 *N.J. Super* at 261, 262 ; *M.W., on behalf of minor child, C.W. v. Board of Education of the Borough of Haddonfield, Camden County*, Commissioner Decision No. 386-12, decided September 24, 2012.

[4] "Giving the terms used in *N.J.A.C.* 6A:16-7.6 their 'common meaning,' a consequence is any result that follows from a student's violation of the code of conduct." *G.D.M., supra*, 427 *N.J. Super* at 261.

consequences for conduct that occurs off-school grounds as opposed to conduct that occurs on school grounds or at school functions. *M.W.*, *supra*, Commissioner Decision No. 386-12 at 4-5.

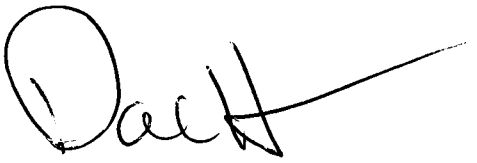
With respect to the first prong of the dual requirements enumerated in *N.J.A.C.* 6A:16-7.5(a), the Commissioner finds that it was reasonable for the Board to determine that imposing discipline on a student for posting pictures on Instagram which potentially glorify underage alcohol consumption by student athletes is necessary for the student's well-being and the well-being of other students. The underlying purpose of the student conduct code is to promote proper behavior, including the deterrence of underage drug and alcohol use. The Board's concern that published evidence of apparent alcohol consumption by a prominent student athlete could influence other students to engage in such behavior is reasonable and consistent with *N.J.A.C.* 6A:16-7.5(a)1.

Although the discipline imposed on K.H. satisfied the first prong of the analysis outlined in *N.J.A.C.* 6A:16-7.5(a)1, the off-school conduct did not materially and substantially interfere with the discipline of the school as required by *N.J.A.C.* 6A:16-7.5(a)2. It is without question that K.H. exercised very poor judgment by posting pictures on Instagram that appear to depict alcohol consumption by minors, but as the ALJ explained in the Initial Decision, the off-school conduct "was not aggravated by further misdeeds or circumstances that might draw the matter across the substantial interference threshold." (Initial Decision at 3) There is no evidence indicating that the Instagram post caused any disruption to the school environment or impacted the orderly administration of the school. In order to meet the material and substantial impact requirement under *N.J.A.C.* 6A:16-7.5(a)2 there must be evidence of more than merely a risk or fear of an impact on the school environment. In *G.D.M.*, *supra*, the Appellate Division emphasized that a board of education may only exercise its authority to discipline a student for off-campus conduct when the conduct *materially and substantially* interferes with the orderly operation of the school. *G.D.M*, supra, 427 *N.J. Super.* at 259. The Commissioner is not persuaded by the Board's argument that – because the student in the picture with K.H. was wearing an Allentown High School sweatshirt and the

"sophomore sensation" hashtags were used – the necessary nexus to the school was established. Simply because there was a connection to the school via the sweatshirt and the presence of two student athletes, the conduct did not rise to the level of materially and substantially interfering with the discipline of the school. Therefore, the Board's decision to impose a 30 day suspension on K.H. for the off-campus conduct was arbitrary, capricious and unreasonable. However, as the ALJ pointed out in the Initial Decision, there is no relief available to the petitioner since the 30 day suspension was already served by K.H. in March 2014, and the Board never put anything involving the suspension into K.H.'s record.

Accordingly, the recommended decision of the ALJ is adopted as the final decision in this matter.

IT IS SO ORDERED.[5]



COMMISSIONER OF EDUCATION

Date of Decision: 11/19/15

Date of Mailing: 11/19/15

[5] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8021-14

AGENCY DKT. NO. 134-5/14

T.H. on behalf of minor child, K.H.,

Petitioner,

v.

BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY.

T.H. on behalf of K.H., petitioner, pro se

Patrick J. Madden, Esq., for respondent (Madden and Madden, attorneys)

Record Closed: June 25, 2015 Decided: July 16, 2015

BEFORE **SOLOMON A. METZGER**, ALJ t/a:

This matter arises out of a decision by the Upper Freehold Regional Board of Education to discipline K.H. for certain conduct away from school. Petitioner sought review before the Commissioner pursuant to N.J.S.A. 18A:6-9 and the matter was transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et. seq. The parties have filed cross-motions for summary decision,

pursuant to N.J.A.C. 1:1-12.5; Brill v. Guardian Life Ins. Co. of Amer., 142 N.J. 520 (1995).

The facts are substantially undisputed. During the 2013-14 school year, K.H. was a sophomore at Allentown High School. She was a student athlete involved in a number of sports. In February 2014, during the girls' basketball season, the school principal Constance Embley received two photos in the mail anonymously depicting K.H. and another Allentown sophomore apparently drinking alcoholic beverages. In one of these pictures the companion is wearing an Allentown High School sweatshirt. Both photos had been posted on Instagram with the tag "Sophomore sensations."

Ms. Embley made inquiry with the two students. K.H.'s parents advised her not to answer questions concerning drinking; the companion acknowledged they were drinking beer. K.H. acknowledged posting the photos on Instagram. As a student athlete K.H. signed various forms indicating that she would conduct herself in a manner befitting her standing as a role model within the school. The student handbook reminds student athletes that they are in the public eye and will be subject to scrutiny. Therefore, they must among other things, remain drug- and alcohol-free.

The consequence imposed by the District was suspension for thirty days from the basketball team, no participation in athletic events or practices for thirty days, including weight room, and no year-end banquets or awards for basketball. As it develops K.H. did receive her varsity letter, certificate and pin for the 2013-14 basketball season. The discipline imposed was not recorded in K.H.'s permanent file so as not to impact college prospects.

Petitioner also contests a one-day detention for a social media infraction. During a basketball game on February 15, 2014, K.H. and an opposing player went for a ball and there was what looked like a kicking incident. Later K.H. re-tweeted a derogatory tweet from someone about the opposing player. This was brought to the District's attention by the opposing player's mother and deemed unsporting. The discipline was

issued on February 19, 2014; the petition before the Commissioner was filed on May 27, 2014. This is the substance of the record.

Although boards of education enjoy wide latitude in the conduct of school affairs, Kopera v. W. Orange Bd. Of Educ., 60 N.J. Super. 288 (App. Div. 1960), a more circumscribed regulatory scheme has developed around student behavior away from school, N.J.A.C. 6A:16-7.5; G.D.M. v. Bd. Of Educ., Ramapo Indian Hills Sch. Dist., 427 N.J. Super. 246 (App. Div. 2012). To exercise control over such conduct the District must first show a nexus to student health or safety and then establish that this materially and substantially interferes with the orderly operation of the school. During the period in question, the Board had a written policy on the subject, since revised, which attempted to track this regulatory scheme. In Ramapo Indian Hills, the court was faced with a facial attack against a school rule purporting to generally regulate off-campus conduct. The thrust of the District's interest was in drinking or drug use that resulted in arrest. Interpreting the Department's regulations the court found the school rule overbroad and without the required nexus.

The tenor of Ramapo Indian Hills, suggests that the Board here has overstepped. Underage drinking is a potential problem and school authorities are wise to be alert to it. Had these events transpired on school grounds or at a school related function there is no question as to the Board's jurisdiction[1], N.J.S.A. 18A: 37-2. From the administration's perspective a prominent student publicized drinking behavior, which has some potential to influence others and sully the school's reputation. These connections are plausible, but insufficient in the context of rules that require a material and substantial impact on school order. The trigger for district involvement in Ramapo Indian Hills was arrest for illicit use of intoxicants or drugs. That is at least as public as two photos on Instagram. The facts here are not aggravated by further misdeeds or circumstances that might draw the matter across the substantial interference threshold. It appears that this display was no more than an impulsive teenage moment.

[1] Petitioner's brief continues to maintain that K.H. neither confirms nor denies drinking. That posture is discouraged in the context of summary decision. Equivocation is an acknowledgement for purposes of the motion, Brill, supra.

Petitioner seeks various forms of relief, including monetary damages, an apology, an investigation, dismissal of responsible officials and an order enjoining Ms. Embley from further contact with K.H. Some of the remedies sought are simply unavailable under the statutory scheme, others are beyond the scope of this inquiry, and more generally any substantive remedy against the District or any specific individual overreaches. The Board perceived that it was acting in the interest of the student body. That it exceeded its mandate does not vindicate the conduct. Petitioner is entitled to have any record of this event eliminated or marked as having been reversed.

The one-day detention question is in this instance controlled by the 90-day rule, N.J.A.C. 6A:3-1.3(i); Kaprow v. Bd. Of Educ. Of Berkeley, 131 N.J. 572 (1993). From this record K.H. received notice of detention on February 19, 2014. The petition was filed with the Commissioner on May 27, 2014. The 90-day filing rule is typically adhered to strictly. Nothing in petitioner's papers address any basis for exception.

Based on the foregoing, the Board's motion for summary decision is **DENIED** as to the drinking incident and **GRANTED** as to the one-day detention. Petitioner's motion seeking reversal of the Board's decision regarding the drinking incident is **GRANTED** and is **DENIED** as to the one-day suspension. This concludes the proceeding and it is dismissed.

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

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

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

July 16, 2015
DATE

SOLOMON A. METZGER, ALJ t/a

Date Received at Agency:

Date Mailed to Parties:

mph

387-15

IN THE MATTER OF THE TENURE HEARING	:	
OF DANIELLE BRODO, STATE-OPERATED	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
NEWARK, ESSEX COUNTY.	:	

SYNOPSIS

Petitioning Board certified tenure charges of unbecoming conduct against respondent – a tenured employee of the State-Operated School District of the City of Newark – and sought to terminate her employment with the district. Neither respondent nor any attorney acting on her behalf filed an answer to the petition following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.4(h), the allegations – which respondent has chosen not to deny – may be deemed admitted and warrant the termination of the respondent from her tenured position. Accordingly, the Commissioner granted summary decision to the petitioner, dismissed the respondent from her tenured position in petitioner's school district, and forwarded a copy of this decision to the State Board of Examiners for review and action as that body deems appropriate.

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

November 19, 2015

AGENCY DKT NO. 314-10/15

IN THE MATTER OF THE TENURE HEARING	:	
OF DANIELLE BRODO, STATE-OPERATED	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
NEWARK, ESSEX COUNTY.	:	

For the Petitioner, Robert M. Tosti, Jr., Esq.
No appearance by or on behalf of Respondent, Danielle Brodo

This matter was opened before the Commissioner of Education on October 15, 2015 through tenure charges of conduct unbecoming certified by Christopher Cerf, State District Superintendant of the State-Operated School District of the City of Newark, together with supporting evidence against respondent Danielle Brodo, a tenured teacher in the petitioner's employ. The petitioner provided respondent with written notice of such certification at her last known address, via Federal Express on October 15, 2015. The petitioner also served a copy of the tenure charges on the respondent's union representative.

On October 16, 2015, the Commissioner directed respondent – via both certified and regular mail – to file an answer to the charges. This communication provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the date such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*" and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted.

The certified tenure charges and statement of supporting evidence filed by the petitioner in this matter indicate that respondent has engaged in a pattern of chronic and excessive

absenteeism since the 2014-15 school year, and also in prior years. Specifically, respondent has been absent from work since the afternoon of November 18, 2014. Although respondent submitted a request for a medical leave on January 15, 2015, such request was denied as it was unsigned and contained insufficient medical documentation. Respondent failed to respond or submit further medical records and – to date – remains absent without leave ("AWOL").

The charges and supporting evidence also indicate that respondent engaged in unbecoming conduct, including failure to prepare her classroom for the academic year, failure to prepare lesson plans, failure to comply with building procedures and requirements, failure to act honestly and professionally with parents, failure to respond to emails, failure to improve attendance, failure to supervise students, and failure to be prepared for class.

Deeming the allegations to be admitted and noting that respondent has failed to respond to the charges certified against her, the Commissioner finds that petitioner's charges of conduct unbecoming a teaching staff member have been proven and warrant the respondent's dismissal from employment.

Accordingly, summary decision is hereby granted to the petitioner, and the respondent is dismissed from her tenured position with the District. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 11/19/15

Date of Mailing: 11/19/15

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

386-15

AGENCY DKT. NO. 250-9/15

IN THE MATTER OF THE TENURE	:	
HEARING OF KAREN MACK,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF PATERSON,	:	
PASSAIC COUNTY.	:	
	:	

The record of this matter, along with the parties' proposed Settlement Agreement and General Release, have been reviewed. The Commissioner finds that the proposed Agreement – a term of which is respondent's resignation from employment in petitioner's district – is consistent with the established standards governing settlement of tenure matters contained within *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846, and as incorporated in *N.J.A.C.* 6A:3-5.6.

To the extent that Paragraph 13 of the Agreement provides for strict confidentiality, the parties are reminded that the Settlement Agreement may be subject to disclosure pursuant to the Open Public Records Act, *N.J.S.A.* 47:1A-1, *et seq.*

Accordingly, the parties' settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11/19/15

Date of Mailing: 11/19/15

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement") is made by and between the STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, with an address at 90 Delaware Avenue, Paterson, New Jersey 07503, and its successors, assigns, officers, employees, agents and representatives (collectively, the "School District"), and KAREN MACK, residing at 480 Valley Road, Montclair, New Jersey 07043 ("Employee") (collectively, the "Parties").

WHEREAS Employee is a tenured teaching staff member employed by the School District as a teacher;

WHEREAS the State District Superintendent of the School District ("Superintendent") certified a tenure charge of inefficiency to the Commissioner of Education of New Jersey, captioned *In the Matter of Karen Mack, State-operated School District of the City of Paterson, Passaic County* ("Tenure Charge"), and the charge has been assigned Agency Docket No. 250-9/15;

WHEREAS, because of the cost and expense of prosecuting the charge and the uncertainty of its outcome, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

WHEREAS the proposed settlement is in the best interest of the Parties and the public because it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

NOW, THEREFORE, subject to approval by the Commissioner, the Parties hereby agree as follows:

1. Immediately upon execution of this Agreement, Employee will resign from her employment in the School District, effective 15 school days from the Effective Date of this Agreement as set forth below ("Resignation Date"). Attached as Exhibit A is a copy of Employee's signed letter of resignation.

2. Between the Effective Date and the Resignation Date, Employee will receive the following compensation:

(a) For the first ten school days after the Effective Date, salary at a prorated rate equivalent to one-half of her current annual salary, minus all applicable withholdings and deductions, payable in accordance with the School District's normal payroll procedures;

(b) For the eleventh through fifteenth school days after the Effective Date, salary at her current annual salary rate, minus all applicable withholdings and deductions, payable in accordance with the School District's normal payroll procedures; and

(c) All employee benefits due to her from the Effective Date to the Resignation Date, at the benefit levels and in accordance with all terms in effect on the Effective Date.

3. In exchange for Employee's resignation, the School District agrees to dismissal of the Tenure Charge, and further agrees not to pursue a tenure charge so long as this Agreement remains in effect and is not ruled invalid or void by any court or administrative agency of competent jurisdiction. However, if this Agreement is ruled invalid or void, the School District retains the right to pursue action against Employee, including but not limited to tenure charges and termination from the School District.

4. This Agreement is based on the understanding that the facts underlying the Tenure Charge do not constitute grounds for disciplinary action or penalty imposed on Employee and do not give rise to any obligation on the part of the School District to notify the State Board of

Examiners or Division of Pensions. The School District agrees not to seek suspension or revocation of Employee's teaching certification or license and not to challenge her right to apply for or receive pension benefits on any grounds related to the Tenure Charge or her resignation pursuant to this Agreement. Notwithstanding the foregoing, Employee understands that this Agreement is not intended to affect the possibility of any proceedings that may be pursued by the State Board of Examiners relative to her teaching certificate.

5. The School District will not contest any application for unemployment compensation that Employee may make relative to her separation from employment with the Paterson Public Schools.

6. As of the Resignation Date, all of Employee's rights of employment with the School District, including but not limited to salary, benefits, tenure and seniority, will permanently end.

7. Employee will not apply for reemployment with the School District at any time. If Employee does apply for reemployment with the School District and is approved for employment, the terms of this Agreement shall control and shall be grounds for immediate termination of Employee's employment. Additionally, Employee shall not enter onto the premises of any school in the School District without express written permission of the principal. If Employee does enter onto the premises of any school in the School District without such permission, all of the School District's obligations under this Agreement shall cease immediately.

8. In exchange for the consideration set forth in paragraph 2 above, the sufficiency of which is hereby acknowledged, Employee hereby waives and releases any and all claims of any nature against the School District, including any claim for attorneys' fees, costs or other monetary relief, and hereby releases and discharges the School District with respect to any and all claims

or rights that she has or may have against the School District. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Employee's employment with the School District or separation from employment with the School District. It specifically includes, without limitation, all claims which Employee may have regarding tenure, seniority, compensation in any form, withholding of increment, discrimination on any basis, and any and all claims of violation of Employee's rights under any federal or state civil rights law; any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wage and Hour Law; disability benefits laws; retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution and the New Jersey Constitution; any other

alleged violation of any federal, state or local law, regulation or ordinance; and any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on her employment by and/or termination of her employment with the School District, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, wages, attorneys' fees, costs, and/or future wage loss.

9. Notwithstanding the terms of paragraph 8 of this Agreement, Employee does not waive any right she may have to workers compensation benefits or pension benefits. Moreover, notwithstanding the terms of paragraph 8, Employee is not and shall not be prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor or the Equal Employment Opportunity Commission. Should either such agency file a charge, action, complaint or lawsuit against the School District based upon any of the claims in Paragraph 8, Employee agrees not to seek or accept any resulting relief whatsoever.

10. To comply with the Older Workers Benefit Protection Act, if applicable, this Agreement advises Employee of the legal requirements of that Act and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Employee acknowledges that she: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives her right to pursue any current claims she may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Agreement; and (v) has seven (7) days from the date of her execution of this Agreement to revoke it. Employee understands that she may rescind this Agreement within seven (7) calendar days of

signing it, and that such rescission must be in writing and delivered to counsel for the School District either by hand or by certified mail within the seven-day period.

11. This Agreement shall not be effective, and the School District shall have no obligation hereunder, until seven (7) calendar days from the date of Employee's execution of this Agreement or the date of the School District's receipt of approval by the Commissioner of Education pursuant to paragraph 22 below, whichever is later ("Effective Date").

12. Employee's separation from employment will be deemed a voluntary resignation in good standing. Upon inquiry from any third party to authorized employees or representatives of the School District, those employees or representatives will provide no information other than to confirm Employee's employment, position, salary and dates of employment, and state that the reason for her separation from employment was her resignation.

13. Except as set forth herein, Employee shall keep the terms of this Agreement strictly confidential. Employee is expressly forbidden from discussing this Agreement with any person, other than her accountant, tax advisor and attorney ("permitted disclosures") and any other individual or entity as necessary to implement the Agreement or to which they are legally obligated to respond ("legally-required disclosures"). In making any permitted disclosure, Employee agrees that she will inform the person to whom she makes the permitted disclosure that the existence and substance of this Agreement, the settlement negotiations giving rise to this Agreement, and the sum of money paid pursuant to this Agreement are to be held strictly confidential to the fullest extent permitted by law. In the event of any breach of this confidentiality provision, all of the School District's obligations under this Agreement shall cease immediately. The School District agrees that it will keep the terms of this Agreement confidential to the extent permitted by law.

14. This Agreement shall not constitute a precedent in any matters involving other employees.

15. The Parties each acknowledge that counsel has advised them regarding this Agreement and that each is signing this Agreement freely and voluntarily, without duress, coercion or pressure from the other party.

16. Each signatory to this Agreement understands, acknowledges and agrees that this Agreement constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

17. This Agreement shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Agreement.

18. This Agreement may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

19. This Agreement and any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties jointly prepared this Agreement.

20. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter hereof, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Agreement.

21. If any provision of this Agreement is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

22. This Agreement is subject to approval by the Commissioner of Education pursuant to N.J.A.C. 6A:3-5.6, and will become effective only upon approval by the Commissioner. Counsel for the Parties shall jointly request the Commissioner's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charge.

Dated: 16 October 2015

KAREN MACK

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON

Dated: 10/30/15

By: DONNIE W. EVANS
State District Superintendent

CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):

I certify that the State District Superintendent has consented to the terms of this Agreement.

Dated: 11/3/15

Brenda C. Liss
Riker Danzig Scherer Hyland & Perretti LLP
Attorneys for State-operated School District
of the City of Paterson

APPROVED:

Dated: _____

DAVID C. HESPE, Commissioner

CERTIFICATION

I, KAREN MACK, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 16 October 2015

Karen Mack
KAREN MACK

SETTLEMENT AGREEMENT AND GENERAL RELEASE:

EXHIBIT A

KAREN MACK
480 Valley Road
Montclair, NJ 07043

October 16, 2015

Dr. Donnie W. Evans
State District Superintendent
State-operated School District of Paterson
90 Delaware Avenue
Paterson, NJ 07503

Dear Superintendent Evans:

I hereby unconditionally resign from my employment with the State-operated School District of Paterson ("School District").

My resignation will be effective 15 school days from the Effective Date of the Settlement Agreement between the School District and me, as defined therein.

Very truly yours,

Karen Mack

KAREN MACK

Cc: Samuel Wenocur, Esq.
John McEntee, PEA
Sasha Wolf, NJEA
Carol Pierce, NJEA

388-15L

388-15

State of New Jersey

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

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

DAVID C. HESPE
Commissioner

November 20, 2015

N[redacted] C[redacted] *pro se*
[redacted]
Elizabeth, New Jersey 07208

Board Secretary
Board of Education of the City of Elizabeth
Mitchell Building
500 North Broad Street
Elizabeth, New Jersey 07207

Re: *N.C., on behalf of minor child, D.C. v. Board of Education of the City of Elizabeth, Union County*, Agency Dkt. No. 245-9/15.

Dear Parties:

Upon review of the Petition of Appeal filed in connection with the matter entitled *N.C., on behalf of minor child, D.C. v. Board of Education of the City of Elizabeth, Union County*, Agency Dkt. No. 245-9/15, and based upon the Board's failure to submit an Answer to the petition, I have determined to grant summary decision in favor of petitioner.

On September 4, 2015, petitioner filed a Petition of Appeal pursuant to *N.J.A.C.* 6A:3-8.1 *et seq.* claiming that D.C. was entitled to attend school in the District in accordance with *N.J.S.A.* 18A:38-1 *et seq.* A copy of the Petition of Appeal was served upon the Board Secretary via facsimile on September 8, 2015, together with an acknowledgment of filing and notice that an Answer to the petition was due within 20 days. *N.J.A.C.* 6A:3-1.5.

Because the Board failed to respond to the initial notice, on September 29, 2015, a second notice was sent to the Board Secretary – via certified and regular mail – clearly indicating that, absent receipt of an Answer to the Petition of Appeal within 10 days, each count in the petition would be deemed admitted and this matter may be decided on a summary decision basis pursuant to *N.J.A.C.* 6A:3-1.5(e). The Board also failed to respond to the second notice. On October 23, 2015, a final notice was sent to the Board Secretary – via certified and regular mail, with a copy to counsel for the Board – again clearly indicating that, absent receipt of an Answer to the Petition of Appeal within 10 days, each count in the petition would be deemed admitted and this matter may be decided on a summary decision basis.

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To date, no Answer has been filed on behalf of the Board. Accordingly, petitioner's claim that *D.C.* is entitled to attend school in the District pursuant to *N.J.S.A.* 18A:38-1 *et seq.* is deemed admitted by the Board. The Board is hereby ordered to continue to admit *D.C.* into its public school system, free of charge, so long as there is no change in circumstances that would alter that entitlement.*

Sincerely,

David C. Hespe
Commissioner

c: Marvin Lehman, Esq.
County Superintendent
State Law Library

DCH/MKD/JKH

VIA REGULAR MAIL

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

389-15

OAL DKT. NO. EDU 09790-13
AGENCY DKT. NO. 143-6/13

MELINDA HEUSCHNEIDER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY AND DR. SHARON AMATO, ACTING SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11/19/15

Date of Mailing: 11/20/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 09790-13
AGENCY DKT. NO. 143-6/13

MELINDA HEUSCHNEIDER,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY, AND DR. SHARON AMATO, ACTING SUPERINTENDENT,
Respondents.

Dennis J. Melofchik, Esq., for petitioner

Dennis McKeever, Esq., for respondent (Sciarrillo Cornell Merlino McKeever & Osborne, attorneys)

Record Closed: October 7, 2015 Decided: October 8, 2015

BEFORE **RICHARD McGILL**, ALJ:

Melinda Heuschneider filed a petition with the Commissioner of Education challenging the non-renewal of her employment contract for the 2013-2014 school year by the Board of Education of the Borough of Fort Lee. The matter was transmitted to

the Office of Administrative Law on July 12, 2013, for determination as a contested case.

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

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

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

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

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

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

Oct. 8, 2015
DATE

RICHARD McGILL, ALJ

Date Received at Agency:

Date Mailed to Parties: OCT 15 2015
ljb

10-15-15
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SCIARRILLO, CORNELL, MERLINO, MCKEEVER & OSBORNE, LLC.
138 St. Paul St.
Westfield, New Jersey 07091
(908) 481-5000
Attorneys for the Fort Lee Board of Education

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MELINDA HEUSCHNEIDER, Plaintiff, v. FORT LEE BOARD OF EDUCATION, Defendant.	Docket No. EDU-9790-2013N Agency Docket No.: 143-6/13 STIPULATION OF SETTLEMENT

The Fort Lee Board of Education ("Board") and Melinda Heuschneider hereby enter into the following Stipulation of Settlement:

1. Ms. Heuschneider was an employee of the Fort Lee Board of Education;

2. Ms. Heuschneider was non-renewed for the 2012-2013 academic year;

3. Following her non-renewal, an action was commenced by Ms. Heuschneider;

4. After good faith negotiations between the Board and Ms. Heuschneider, a settlement has been reached and the matter is resolved;

5. The Board agrees to provide Ms. Heuschneider with a Letter of Recommendation and in consideration therefore, Ms. Heuschneider agrees to the following:

6. Ms. Heuschneider hereby releases, waives, and discharges the Board, and its present and former board members, officers, employees, and representatives, and their estates and/or heirs thereof from any and all claims, which she, her estate and/or heirs may have against any of them;

7. This releases and waives all claims, known and unknown, resulting from anything which has happened up to now, including claims for attorney's fees arising up to the date of the execution of this release;

8. Without limiting the scope of the foregoing provision in any way, Ms. Heuschneider specifically releases all claims, which were or could have been asserted by her;

9. Ms. Heuschneider also releases and waives all claims relating to or arising out of any aspect of her employment to date with the Board, including but not limited to, all claims under Title VII of The Civil Rights Act; The Civil Rights Act of 1991 and the laws amended thereby; Sections 1981 through 1988 of Title 42 of the United States Code; the Employee Resignation Income Security Act of 1974; the Immigration Reform Control Act; the Fair Labor Standards Act; the Occupational Safety and Health Act; the Age Discrimination in Employment Act of 1967; the Older Workers Benefit Protection Act of 1990; the Americans with Disabilities Act; the Family and Medical Leave Act of 1993; the New Jersey Family Leave Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Wage and Hour Act, and any related federal, state or local law claims, and any claims of discrimination based on race, age, sex, religion, color, creed, handicap or disability, citizenship, national origin, and any other factor prohibited by any federal, state or local law, rule, regulation or guideline; any claim for wrongful discharge; any contract of employment, express or implied; any provision of the Constitution of the United States or the State of New Jersey; and any other law, common or statutory, of the United States, the State of New Jersey or any other state; any claims for the negligent and/or intentional infliction of emotional distress or specific intent to harm; any claims for attorneys' fees, costs and/or expenses; any claims for unpaid or withheld wages, severance pay, benefits, bonuses, deferred compensation, and/or other compensation of any kind; and/or any other

federal, state or local human rights, civil rights, wage and hour, wage payment, pension or labor laws, rules and/or regulations, and all claims growing out of any legal restrictions on the Board's right to hire and/or terminate its employees, including all claims that were asserted and/or that could have been asserted by Ms. Heuschneider.

10. Specifically excluded from this general release is Ms. Heuschneider's right upon cessation of employment by the board to obtain continued medical coverage at her own expense under the Consolidated Omnibus Reconciliation Act of 1986 (COBRA); any rights she may have arising under the Teachers' Pension and Annuity Fund (TPAF) and related statutes and regulations; any rights she may have for indemnification by the Board pursuant to *N.J.S.A.* 18A:16-6 and -6.1; and any rights she may have under the New Jersey Workers' Compensation Law, *N.J.S.A.* 34:15-1, *et seq.*

11. Ms. Heuschneider also promises not to sue and waives all claims against the Board covered by this Stipulation of Settlement. If one party breaches this promise by suing the other for any such claims, the breaching party will pay all costs and expenses the other party incurs defending against the suit, including reasonable attorney's fees and costs. Notwithstanding the foregoing, the Parties reserve their right to enforce the terms of and this Stipulation of Settlement.

12. This Agreement shall not constitute and/or establish any past practice or precedent for any proceeding, and may neither be cited nor relied upon in the event of any future dispute between the District and its Employees.

13. The Parties understand and agree that this Agreement is the compromise of disputed claims and that the consideration set forth herein is not to be construed as an admission of any allegation and/or of liability on the part of any Party hereto.

14. This Agreement contains the entire agreement between the District and Ms. Heuschneider with respect to the subject matter and supersedes all prior agreements or understandings dealing with the same subject matter. There is no agreement on the part of the District to do anything other than as is expressly stated in this Agreement. This Agreement shall in all respects be interpreted, enforced and governed by the Laws of the State of New Jersey.

15. Ms. Heuschneider acknowledges that she was advised to consult with an attorney regarding this Stipulation of Settlement; and that she has read this Stipulation of Settlement and fully understands it and agrees to be bound by it. Ms. Heuschneider also acknowledges that she has been given a reasonable period of time within which to consider this settlement and the terms of this Stipulation of Settlement prior to executing it.

DATED: September 25, 2015

Dennis McKeever, Esq.
Attorney for the Fort Lee Board of Education

Dennis J. Melofchik, Esq.
Attorney for Melinda Heuschneider

STATE OF NEW JERSEY - DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of Tenure Hearing of John Costello:

SCHOOL DISTRICT OF THE CITY OF NORTHFIELD

Case No. 150-7/15

and

OPINION
and AWARD

JOHN COSTELLO

Before:
Edmund Gerber, Arbitrator

Appearances:
For the School District of the City of Northfield
John G. Geppert, Jr., Esq.
Syrion A. Jack, Esq., on the Brief
Schwartz, Simon, Edelstein & Celso

For the Respondent:
Michael B. Berman, Esq.

The Northfield Board of Education filed tenure charges against Respondent John Costello on July 1, 2015. On July 20, 2015, the State of New Jersey Department of Education deemed the tenure charges sufficient, if true, to warrant dismissal or reduction in salary and the charges were referred to me, Edmund Gerber, as arbitrator. Hearings were conducted by telephone on August 17, 2015 in the offices of the Northfield Board of Education in Northfield, New Jersey on September 11, 18, 28 and October 5, 2015 and by telephone on October 8, 2015. Both parties examined and cross-examined witnesses and introduced evidence. Both parties submitted briefs which were received by November 4, 2015.

CHARGES

The charges filed by the Board of Education consisted of the following:

Charge 1

The charges allege unbecoming conduct and/or other just cause for dismissal including but not necessarily limited to insubordination and incompetence related to failure to discharge responsibilities in caring for students who have suffered injury or illness.

Count 1

Specifically, Count 1 alleges that Costello violated the School's standing order concerning the protocol for administering to students suffering seizures on or about November 5, 2014.

Count 2

Count two alleges that the Respondent violated standing orders on November 10, 2014 when he was summoned to attend to a third grade student who he was informed had passed out by failing to promptly respond to a student and taking less than thirty seconds to assess the student's health status and failed to evaluate the child or ask her questions before escorting her to the nurse's office.

Count 3

On or about January 16, 2015, Respondent failed to follow standing orders when he called the School's Principals to the nurse's office where they found a third grade student crying by the Respondent's desk. The student stated she did not feel well and was going to throw up. The Respondent failed to care for the student and was visibly upset, stating that he was upset because the student was sent to his office by the teacher without a nurse's pass. The Respondent continued to state he was upset with how he was being treated. The Principals directed the Respondent to call the student's parent and sent the child back to her classroom.

Charge 2

Charge 2, Conduct unbecoming and/or other just cause for dismissal, including not necessarily limited to insubordination and incompetence related to failure to perform duties. The foregoing counts facts alleged are incorporated by reference into this charge.

Count 1

Board Policy No. 5141, *Health,* requires that the nurse assist with physical examinations; conduct biannual scoliosis screenings, and conduct audiometric screening. On or about May 7, 2015, Mr. Costello failed to update the referral forms needed to be sent home regarding students who failed their annual health screening performed in the nurse's office.

Count 2

Pursuant to N.J.A.C. 6A:16-2.2(H)(1)(ii)(1), prior to participation in a school sponsored athletic or intramural athletic team or squad for students enrolled in any grades from 6 to 12, the report of health findings or medical examination for participation shall be documented on forms approved by the Commissioner of Education. Respondent was required to update the newly approved sport physical forms. Despite the foregoing, during the period prior to May 7, 2015, Respondent failed to update the newly approved sport physical forms.

Count 3

Pursuant to Board policy, all medications prescribed by a physician for particular students as well as all over the counter medications shall be securely stored and kept in their original labeled container. On or about May 7, 2015, the Respondent's personal prescription medication was discovered in an unlocked drawer within the health office together with a number of unlabeled prescription medicines.

Count 4

Board Policy 5141.21 also requires that "all medications brought to school by the parent or guardian shall be picked up at the end of the school year or at the end of the period of medication." However, on or about May 7, 2015, expired, unmarked medications were discovered in the closet of the nurse's office and in the active medication cabinets.

Count 5

Pursuant to N.J.A.C. 6A:16-2.3(b)(3), the responsibilities of the certified school nurse shall include the maintenance of student health records as well as, based upon a parent's failure to provide evidence of a child's immunizations, recommendations to the school principal students who shall not be admitted or retained in the school building. Further, the nurse shall annually review student immunization records that any exemption from immunization continues to be applicable to any student. On or about May 7, 2015, student vaccination records maintained by the Respondent were discovered in the health office in an unmarked folder.

Count 6

The Respondent also failed to enter vaccination records into the electronic computer system.

Count 7

Pursuant to Board of Education Policy No. 5141.21, *Administering Medication*, Mr. Costello is required to maintain a copy of physicians' standing orders in the nurse's office and record the name of the student to whom medications may be administered, the prescribing physician, the dosage and timing of medication and a record of each instance of administration. On or about May 8, 2015, Respondent failed to maintain the physicians' standing orders for medication administration and emergency medication administration.

Count 8

Pursuant to Board Policy, the Respondent was charged with the responsibility of maintaining the District's Automated External Defibrillators (AED), on or about May 7, 2015, Respondent had failed to connect an AED box to the alarm, failed to update the pads and batteries and failed to maintain the log in both the AED box and in a binder in the health office.

Count 9

Pursuant to N.J.A.C. 6A:16-2.3(b) (3) (iii), it is the responsibility of the nurse to maintain student health records. Access to and disclosure of information in the student health records shall meet the requirements of the Family Education Rights and Privacy Act (FERPA). On or about May 8, 2015, bills for an AED and a letter dated back to 2004 regarding a student's health issue were kept in a box used to store feminine products which is located by the reception desk in the nurse's office.

Count 10

Pursuant to N.J.S.A. 6A:32-7.4(b), school districts may store all documents either electronically or in paper format. Prior to May 8, 2015, the Respondent failed to complete the electronic version of each student's health history and appraisal form and failed to merge the information with the student's current electronic vaccination records. The lack of continuity between the paper and electronic form of each student's health history cause the District to be incompliant when running a Vaccination Compliance Report.

Count 11

Pursuant to N.J.A.C. 6A:16-2.1(a), each school district shall ensure immunization records shall be reviewed and updated annually. Moreover, pursuant to Board Regulation 5141.3, *Health Examinations and Immunization Procedures*, every school shall maintain

in its health office a State of New Jersey immunization record for every student. The record shall include the date of each immunization and shall be separated from the child's other medical records for purposes of immunization record audit. The nurse is responsible for annually reviewing student immunization records. On May 8, 2015, Respondent failed to maintain up to date student vaccination records as it was discovered that the student vaccination records and student vaccination certifications were not entered into the electronic form of a student's health and history appraisal.

Count 12

Despite the fact that Board Policy 5141.3 requires every school to maintain official State of New Jersey immunization records for every student and that this record shall be separated from the child's other medical records for the purpose of immunization record audits, on or about November 24, 2014, Respondent's actions were deficient on approximately 37 occasions due to the Respondent's failure to collect and record sixth grade immunizations as required by the Atlantic County Department of Human Services following an immunization audit of the Northfield Community School.

Count 13

Board Policy 5141, *Health*, provides that the school nurse shall have the primary responsibility for the administration of glucagon to a student with diabetes who is experiencing severe hypoglycemia. Despite the foregoing, on or about May 8, 2015, Respondent failed to maintain a glucometer in accordance with the aforementioned policy and regulation in the nurse's office in order to evaluate for hypoglycemia of students or staff.

Count 14

Board Policy 1541.21, *Administering Medication*, provides that the Board shall permit the school nurse or school physician to administer epinephrine via epi-pen or other prefilled auto-injector mechanism in emergency situations. On or about May 8, 2015, it was discovered that the Respondent allowed the epi-pen and epi-pen juniors located in the nurse's office to expire. Accordingly, no emergency epi-pens would have been available in the event of an anaphylaxis reaction of a student or staff member.

Count 15

Pursuant to N.J.S.A. 18A:40-12.7, each public school in the State shall have and maintain for the use of pupils at least one nebulizer in the office of the school nurse or other accessible location. Moreover, pursuant to N.J.S.A. 6A:16-2.1(a)(5)(i), the treatment of asthma in the school setting shall include but shall not be limited to the requirement that each school nurse shall be authorized to administer asthma medication

through the use of a nebulizer. Despite the foregoing, on or about May 8, 2015, Respondent failed to maintain nebulizer tubing, stock albuterol, and/or masks or wands in the nurse's office.

Count 16

Pursuant to the District's Nursing Services Plan for the 2014-2015 school year, 12 students were identified as "Level II: Medically Fragile"; that is, students with complicated healthcare needs that each day face a possibility of a life-threatening emergency requiring the skill and judgment of a professional nurse. Examples may include but are not limited to severe seizure disorder requiring medication. Yet, on or about May 8, 2015, Respondent had no initialized healthcare plan available for a student who experienced a seizure in school and no seizure log where pertinent information regarding all seizure students could be readily identified and treated in the event of an emergency.

Count 17

On or about May 6, 2015, the Respondent failed to update a student's electronic medical record with a neurologist note detailing the treatment protocol of a student with a history of seizures when the student presents with a headache, despite the fact that the documents had been sent into the nurse's office on January 2015, stamped and marked received on January 9, 2015 and stored within the student's paper file.

Count 18

Although pursuant to N.J.A.C. 6A:16-2.3(b)(3)(i), the nurse is required to carry out written orders of the medical home and standing orders of the school physician, on or about May 8, 2015, the Respondent maintained written protocols in the nurse's office. No standing orders were available, nor were there any signed copies in the nurse's office. The binder marked standing orders located within the nurse's office only included protocols for care.

Count 19

Pursuant to N.J.A.C. 6A:16-2.3(b)(3), the responsibility of the certified school nurse shall include assisting in the development of and implementing health care procedures for students in the event of an emergency and "writing and updating at least annually the individualized healthcare plans and individualized emergency plans for students' medical needs and instructing staff as appropriate." Yet, on or about May 8, 2015, Respondent failed to maintain any plans regarding health issues in the nurse's office.

Count 20

Pursuant to N.J.A.C. 6A:16-2.3(b)(3)(xii), the nurse shall update in writing at least annually individual healthcare plans and individualized emergency healthcare plans for students' medical needs and instructing staff as appropriate. Nevertheless, on or about May 8, 2015, Respondent failed to maintain any staff instruction file or lesson in the nurse's office.

Count 21

Board Policy 5141, *Health*, provides for the implementation of procedures for cardiopulmonary resuscitation and AED use, specifically stating that the Chief School Administrator shall oversee the development and implementation of a District emergency action plan that establishes guidelines for the use of the AED. The emergency plan shall include a list of no less than five school employees, team coaches or licensed athletic trainers who hold current certifications recognized by the Department of Health in Pulmonary Resuscitation and the use of a defibrillator. The list shall be updated as necessary at least once in each semester of the school year. Further, detailed procedures on responding to a sudden cardiac event including the identification of the persons in the school who will be responsible for: responding to the person experiencing the sudden cardiac event, calling 911, starting cardiopulmonary resuscitation, retrieving and using the defibrillator and assisting emergency responders in getting to the individual experiencing the sudden cardiac event. However, on or about May 8, 2015, Respondent has failed to maintain an AED log in the nurse's office, document monthly checks of the machine and make the emergency action plan readily available in a clearly marked binder within the nurse's office.

Count 22

Pursuant to N.J.A.C. 6A:16-2.3(b)(3)(iii), it is the responsibility of the school nurse to maintain student health records in accordance with N.J.S.A. 18A:40-4. N.J.S.C. 6A:16-2.4(c) provides that access to and disclosure of information in the student health record shall meet the requirements of FERPA and N.J.A.C. 6A:32-7. Despite these requirements, on or about May 8, 2015, Respondent stored confidential student and staff health information in an unlocked closet located within the nurse's office. The foregoing acts and omissions by the Respondent as set forth in the above counts, individually and cumulatively, constitute unbecoming conduct and/or just cause warranting dismissal, including insubordination and incompetence.

Charge 3 – Incapacity

The foregoing charges and specific counts are incorporated by reference as if fully set forth herein. During a conference held on or about November 19, 2014, Respondent indicated to interim superintendent Garguilo in the presence of union representative, Mr. Levy, that he had difficulty recalling the incidents and commented that he had trouble remembering a lot of things this year. On or about January 16, 2015, Mr. Costello was observed by Principal Robbins and Principal Vaccaro with trembling hands and was experiencing body vibrations. Mr. Costello made several loud rambling statements regarding his dissatisfaction with his current position, including that he was "tired of the abuse from staff and couldn't take it any more" which resulted in both Principals advising respondent to go home. The Respondent was directed to admit to a psychological examination. Clinical Psychologist Dr. Chester C. Sigafoos, Ph.D., assessed respondent's psychological functioning and his fitness for duty. Dr. Sigafoos concluded that given Respondent's psychopathological condition, in the role of a school nurse, there are no meaningful school accommodations that can be made and Respondent is not fit for a return to duty as a nurse. As a result, Respondent has been out of work since on or about February 20, 2015. Respondent's inability to perform his job duties with or without reasonable accommodations constitutes incapacity and/or other just cause warranting dismissal based upon unfitness for duty. To date, Mr. Costello has not returned to his positon and has been determined not to be fit for duty. His inability to return to his position has had and continues to have a negative impact on the school district.

Charge 4

Unbecoming conduct warranting dismissal related to a pattern of numerous and ongoing inappropriate acts and omissions. All of the foregoing background information, charges counts, and the facts set forth are therein incorporated by reference as if fully set forth herein. The Commissioner of Education and the courts recognize that the totality of a pattern of conduct may constitute unbecoming conduct, even when the individual acts comprising it may not. See e.g. Cowan v. Bernardsville Board of Ed., Tenure Hearing of Gray Young and Tenure Hearing of Donald Dudley. The course of misconduct set forth in the within charges and counts jointly and severally based upon numerous ongoing infractions over an extended period of time constitutes a pattern of inappropriate conduct which rises to the level of unbecoming conduct. This pattern in the course of unbecoming conduct during the extended period of time manifestly demonstrates the respondent's unprofessional attitude, recalcitrance and general unfitness to continue to serve as a public school nurse warranting his immediate dismissal.

BACKGROUND

John Costello has been a Certified School Nurse with the District since September 2001. The building in which Costello works contains two separate schools, a primary and elementary school and a middle school. Each school has its own principal. Prior to the 2014-2015 school year Costello was one of two full time school nurses assigned to the building and enjoyed a satisfactory work record

However, at the conclusion of the 2013-2014 school year, fellow nurse Virginia Wolf retired and the Board replaced the full time school nurse positon with a part-time position and hired a part-time nurse.

THE BOARD'S WITNESSES

On November 10, 2014, at approximately 12:10 p.m. students were moving to different classrooms when C., a student in a third grade class, became ill. The incident was recorded by the security cameras, and that recording was introduced into evidence Exhibit P-48. According to teacher Sadye Heenan, Student C was pale and holding her stomach. C started to stumble and Henan grabbed her and another teacher, Ms. Morales came to help. Heenan testified that Student C was not responding to any questions and as can be seen in the recording, she became limp. Heenan sat on the ground and lowered C to her lap. A third teacher, Mrs. Levy can be seen with Heenan and C. When C. collapses Heenan asked Levy to get the school nurse. Levy can be seen leaving C and running down the hall. Another section of the recoding shows Levy arriving at the nurse's office on the run and then leaving the nurses office with Costello. Levy moved swiftly back to Student C. However, Costello can be seen waiting in the hallway for a class to pass and then walking in a deliberate manner well behind Levy, all the while with a letter sized paper in his mouth. During this time Student C. remained slumped in Heenan's lap. As soon as Costello arrived at the scene he immediately reached down, held C. by the wrist with one hand and held her under the arm with the other and lifted her to her feet and, with Heenan holding C'.s other arm, the two walked C. back to his office. It is apparent that Costello never spoke a word to anyone since he never removed the paper from his mouth. Heenan testified that Costello was actually humming with the paper in his mouth while walking C. to the nurse's office.

When they arrived at the nurses office Costello told Heenan to put Student C into a chair. He stated that he was going to call C.'s home so that her mom can pick her up. Henan left and got Student C's things. Heenan testified that this was not a little girl that was looking for attention. She thought that this was an urgent matter for C. She had passed out and needed a wheel chair; it was an emergency and should as such. Heenan was so upset about how Costello behaved that she cried afterward.

Lauren Morales' testimony was consistent with Heenan's. She testified that C. was unresponsive to any questions that were asked of her and thought she was unconscious. Morales was upset by the way Costello treated the matter. She was concerned about C. but Costello just walked up with a paper in his mouth and without a word picked C. up to her feet and walked her away. Morales did not expect Costello to run necessarily but to respond quickly. Rather, he just walked up and seemed unconcerned

Laura Levy's testimony was also consistent. She testified that Student C was beginning to gag as if she were going to vomit and Levy said that she would get Costello. She ran to the nurse's office and told Costello to come quickly. Costello called to another adult in the office and said he'd be right back. He followed Levy out of the office asking where C. was. When Levy and Costello were at the double doors to the atrium, a class was coming through in the opposite direction. Levy said excuse me and made her way through the passing students. Costello waited for the students to pass before following Levy. Costello made no attempt to catch up to Levy. When Levy returned to Mrs. Henan and Student C, she could see the student appeared incoherent. The student did not appear to be conscious and her hands were making unnatural jerking movements. Levy was appalled at Costello's behavior. He made no attempt to move quickly and said nothing at all to C. or ask the teacher's attending her what happened.

The School's standing orders for fainting [Exhibit P-3, NF118] directs that if a student faints have her lie flat for at least fifteen minutes, keep her warm and take her temperature.

On November 5, 2014, at 2:55 p.m., Costello was summoned to a class to attend to a student was having a seizure.

Teacher, Fran Cusick was informed by student L's aide that L was having a seizure. Cusick could see that the student was having a seizure and called the nurse's office but only received a message service. Upon hanging up the phone another teacher, Ms. Martin, called about an unrelated matter. Cusick asked Martin to go to the nurse's office and have the nurse come to her room. Within minutes Costello arrived and said to Cusick "he had to go to work". Costello then walked over to Student L who alert and was able to get up from his desk on his own. Costello and the student's aide, Ms. Gitto escorted Student L from the room. Several days later, Costello delivered a flyer about seizures to Cusick but did had no discussion with Cusick about seizures in general or student L in particular. The flyer described how to treat different types of seizures. For a mild or absence seizure (formerly known as a *petit mal* seizure) apparently suffered by Student L, no particular treatment is necessary. Mrs. Cusick tried to call Costello to discuss the proper procedures for handling Student L if he has another such seizure but Costello was out of the building. Cusick called again but was unable to reach him.

Costello never discussed the proper procedure for handling such absence seizures with Cusick.

November 19, 2014 meeting

Acting Superintendent Garguilo testified that he had a meeting with Costello on November 19 concerning the events that occurred on November 10. At Garguilo's request Mr. Levy, an Association Representative, was present at the meeting. Garguilo asked Costello about a third grade girl who passed out in the hallway. According to Garguilo, Costello responded "I don't know what you're talking about. Someone passed out in the hallway? And this was on Tuesday? I was out two days last week and I was here on Tuesday? I don't know if I'm coming or going to be honest with you. Was it at a particular time?" Garguilo responded, "It was coming out of Ms. Burnet's gym class. You don't recall any of this?" Costello stated "I got called to fourth grade for a student who was having a seizure. I don't know even if I knew the information right now. I would have to get my notes. Was a JIF report generated by a teacher? I will be honest with you, I don't remember a lot of things this year." The Superintendent said it was Monday, approximately 12:00 p.m. According to the teacher she was wobbly and then went down. According to Garguilo, Costello responded, "it's starting to make a little more sense but I would still have to see my notes." The Superintendent then gave the name of the student then Costello asked, "can I ask what you heard happened?" Garguilo responded a child passed out. You came down, picked up the child and brought her to the office. Check your notes and get back to us. Write a document report."

Immunization Records

Garguilo testified that on November 24, 2014, the Atlantic County Department of Human Services conducted an immunization audit to ensure that the students at the middle school were properly vaccinated or received exemptions. The immunization records were kept by the school nurse. The Atlantic County investigators found that 37 students did not have proof of proper immunizations. According to Garguilo, the 37 deficiencies were all in the sixth grade and the deficiencies were due to the Respondent's failure to collect or record said sixth grade immunizations.

Garguilo also noted that when the County first notified Costello of its intention to County to review the Board's immunization records, the Respondent scheduled them for a day that the school was to be closed for the Jewish holiday, Rosh Hashanah, so when the County officials came to the school they found it was closed. According to Garguilo, the district schools have traditionally been closed for the holiday.

January 16, 2015 meeting

On January 16, 2015, Maureen Vaccaro, the Principal of the primary and elementary school was told by a staff member at approximately 8:30 a.m. that Costello needed her immediately. She arrived at the nurse's office at the same time as the Principal of the middle school, Glenn Robbins. According to Vaccaro, when the two Principals entered the nurse's office, a third grade girl was crying while seated by Costello's desk and Costello was sitting at his desk. Costello immediately got up and went to the back of the office and sat down in another chair. He started to shake. His hands were trembling and his entire body seemed to be vibrating. Vaccaro said, "John, just sit, take a breath, relax, breathe." Costello responded loudly, "I am tired of this. I can't take this anymore. I have asked for help from the administration and I don't get it. When I call you and ask for help and you never get back to me. You never answer me." He yelled and repeated at Robbins that Robbins never gets back to him. Vaccaro asked where the student came from and Costello stated that "she was sent to me by Mrs. Heenan. This is what I mean. She was sent because the teacher said she might be getting sick. That she didn't feel well. That she said she was going to throw up and this is what I mean. She sent her to me without a nurse's pass. What am I supposed to do about that? I get no respect from the teachers, and I'm tired of how they speak to me."

Glen Robbins' testimony was similar. He also witnessed Costello's entire body begin to shake and he stated that "he was sick and tired of being disrespected by faculty, as one teacher proceeded to send a student to him, the student was crying at the time, because she didn't feel well." According to Robbins, Costello rambled on making several statements in regards to staff and not getting support from the administration. Also that he was "tired of the abuse from staff and couldn't take it anymore." Both Vaccaro and Robbins commented that these statements were made in the presence of the young student sitting in the office.

Vaccaro said that Costello needed to go home and was asked if he would be able to drive or would he need a ride. The Principals then arranged for a substitute. Costello called up the student's home, then took the student back to class and Costello was still visibly upset but said he would leave on his own once he was settled. Costello left the building at approximately 9:50 a.m. Vaccaro called Costello on Saturday, the 17th, to see if he felt any better. Costello said he was feeling better. He had visited his doctor on Friday and that he was prescribed medicine to help calm him and that on Friday he had been coming off of steroids. He said that he felt much better.

On February 19, 2015, Costello was placed on administrative leave by Garguilo and has not returned to work.

Preliminary Discipline

On February 24, 2015, Garguilo notified Costello that upon his recommendation the Northfield Board of Education passed a resolution pursuant to N.J.S.A. 18A:29-14 withholding his increment for the 2015-2016 school year. The increment was being withheld specifically because of his response to the two medical emergencies of November 10 and November 11 because of his failure to assess either of the students' medical condition before "swiftly and carelessly moving the students to your office. Moreover, on November 24, 2014 the District was cited by the Department of Human Services for its failure to collect and record sixth grade immunizations."

Also on February 24, 2015, the Respondent was directed to submit to physical and mental examinations. The stated reasons for the direction of such examinations were because of: a) the manner in which he responded to ill students, particularly so on November 10, 2014' b) the manner in which he provided Cusick a leaflet on first aid for seizures without ever discussing the nature of this folder or the appropriate way for her to treat a student having a seizure, c) because of his memory loss at the conference with Garguilo on November 19, 2014, and d) because of the occasion on January 15, 2015 wherein Costello beckoned principals Vaccaro and Robbins to his office and acted inappropriately before a student in his office. He was shaking and visibly upset because the student was sent to the nurse's office without a note.

As directed by the District, the Respondent underwent an evaluation by Chester A. Sigafoos. PhD. Sigafoos conducted a preliminary interview with Costello and initially believed that Costello did not have any serious psychological problems. However, he then administered a battery of tests to Costello, including Paulhus Deception Scales, Bender-Gestalt Perceptual Motor Examination, Rorschach Ink Blot Test, State-Trait Anger Expression Inventory, Million Clinical Multiaxial Inventory and Minnesota Multiphasic Personality Inventory. After interpreting the results of the test and examining those results in light of Costello's work record, Sigafoos issued a 46 page report which concluded that Costello had formed a maladaptive way to manage complex situations and found in part:

> In summary this is a very complex and distraught man. He is able to accurately perceive his world and his functioning in it. This presents as a double edge sword because just as much as he sees positive aspects he will also accurately see negative aspects. As the present time he is seeing negative aspects in himself which would account for why he tried to fake good in his presentation during the evaluation. He lacks a consistent and well defined coping style and will alternate ineffectively between expressive and ideational ways of dealing with his situations. He is likely to conduct himself in an unpredictable way. Recognizing that he does not have

adequate coping styles to deal with his current levels of stress only heightens his anxiety and depression. He may have been effective in managing his stress in the past but current testing shows that he cannot do that now.

Sigafoos concluded that, given Respondent's psychopathological condition and the role of a school nurse, there are no meaningful workplace accommodations that can be made and Respondent is not fit for return to duty as a nurse. "[t]he role of the school nurse requires clarity of thought, good decision making, rational thought processes, being responsive, good moral judgement and freedom from clinical or characterological pathologies that will interfere with performance and execution of his duties".

Sigafoos testified that that providing an accommodation of another school nurse to address a workload problem, doesn't address the central issue that being able to perform one's duties first and foremost requires him to be an independent health practitioner free of mental disease, defect and/or limitations

Sigafoos' made the following diagnosis: Generalized anxiety disorder, major depression, obsessive compulsive personality disorder, avoidant personality traits and schizoid personality traits. His recommendations were that the prognosis for is poor. He is not fit for duty.

Denise Petro was hired as a substitute nurse on April 28, 2015. She is a registered nurse and has a substitute certification but is not a licensed school nurse. She testified as to how she found the nurse's office in disarray. On May 7, 2015, she provided Garguilo with an itemized list of those areas where she believed the nurse's office was deficient. [Exhibit P-10].

As per your request, I would like to document the following finding from the health office:

1. Referral forms needed to send home for students who failed their annual health screening performed in the health office were not located. The IT department was able to find a decade old form that I updated.
2. All of the Sport physical forms that were available in the health office were not the new approved forms.
3. Prescription medication was found in an unlocked desk drawer. The medication was both personal medication and unlabeled prescriptions. (noted early via e-mail to you)
4. Outdated medication were located in a bag in the closet and also in the active medication cabinets. Within the bag were unlabeled and unmarked medication that was identified as Excedrin. (Children should not take Excedrin due to the Aspirin component and caffeine.)

5. Some screening were completed and documented in the computer and not on the student's A-85 and vice versa.
6. Student with doctor's treatment protocol from their neurologist was not entered in the computer. After searching for the students file, the letter was located and mark rec 1/29/2015. See attached. (date 5/5/2015)
7. Vaccine records found in an unmarked folder. Crossed reference and they were not completely entered into the computer.
8. Unable to find signed physician order standing orders for school medication administration. Emergency medication standing orders not located. Examples: epi-pens, albuterol, oxygen.
9. No documentation of AED's monthly checks. AED boxes not connected to alarm, outdated pads and batteries. Log should be maintained both in the AED box and a binder in the health office. May 8, 2015.
10. While cleaning out the feminine product box by the students I found the bills for the AED and a letter form the school nurse regarding a student and a health issue dated 2004
11. Electronic A-45 for each student has not been filled out or merged with the current electronic vaccination records. When running a vaccination compliance report all students are incompliant due to this lack of continuity.
    N.J.S.A. 6A:16-2.1
12. (a)1. As stated earlier, the vaccination records on the paper A-45 and vaccination certificates from the student's and the electronic medical record do not reflect the same information. NJSA 18A:40-4 and NJAC 6A:16-2.4
13. (a) 4. There is no glucometer in the health office to evaluate for hypoglycemia of students or staff.
14. (a) 4. The stock epi-pen and epi-pen Jr are expired and therefore no emergency epi-pens are available in the event of an anaphylaxis reaction to a student or staff member.
15. (a) 5. There is no stock albuterol, nebulizer tubing and or masks or wands in school.
16. (a) 10. There was no initialized healthcare plan available for a student who experienced seizure in school. Furthermore, there was no Seizure log available where all pertinent information regarding all seizure students could be readily identified and treated in the event of an emergency.
17. 6A:16-2.2(h) 1. ii Information received via written correspondence from parent and physician in regard to a student's care upon arrival in the Health Office with complaints of a headache were not available in the

electronic medical record. Upon searching through the paper file the note was discovered marked, dated and signed received.

18. 6A:16-2.3(A)vi. Only written protocols were available not "standing orders" and there was no sign copy in the Health Office.
19. 3. V As stated earlier, the vaccination records on the paper A-45 and vaccination certificates from the student's and the electronic medical record do not reflect the same information.
20. 3. X no lesson plans regarding health issue found in Health Office
21. 3 X ii No staff instruction file or lesson were found in Health Office Janet's Law
22. No AED log in Health Office. NO monthly check of machine documented.
23. Emergency Action Plan not readily available in a clearly marked binder.
24. According to the Emergency Action Plan page, 20 monthly checklist not maintained to available

In general, the Health Office was in complete disarray. There is no order to the files, student's documentation and records can be found in various places. The binder marked standing orders supply only protocols for care and not standing orders from the school physician. Emergency information is not readily available to a substitute or other healthcare professional in the time of an emergency, for example seizure, anaphylaxis, or diabetic crisis.

Also attached is a list of expired mediation and medication from students who no longer attend the Northfield Community School either due to transfer or graduation.

I will report any other issues I feel need to be brought to your attention.

Petro testified as to her findings in Exhibit P-10. Most of the AEDs batteries were expired, batteries and pads that were in stock were also expired. A log for the AEDs was taped on a cabinet door but the entries were not up to date. She "panicked" because she could not rely on the units being functional. Petro found that the records for seizure patients were in files in the office but were not in the electronic files. She expected to find logs in the office in terms of how to use the office nebulizer but never found any such information. There were binders of information that were unmarked. Some were found in a desk drawer. A letter form the school nurse regarding a student and a health issue dated 2004 was found in a feminine product box. The nursing servicing plan for the current year was in the back of the cabinet.

In all, there were over 200 expired medicines of one type or another, including over fifty epi-pens, some of which had expiration dates as old as 2008. Such medications

should have been disposed of through contacting parents to take them or through the use of a service which would pick up such expired medications and destroy them.

There were papers that were left in various places in the office, some of which were student medical records and some were in unlocked cabinets in the waiting room. Student records in general were in unlocked closets. Nursing passes were unsecured on the desk. Similarly, child study team information was left unsecured in piles of papers. The sport physical exam forms that were in the office were an older type that were not to be used and she could not find the proper forms. Petro noticed that there was no glucometer even though nurses were expected to treat students and faculty that might be hypoglycemic. Similarly the nebulizer lacked wands and other essential parts

On the basis of reviewing the documents and records in the office Petro also found among other deficiencies that. the referral forms for students who failed their annual health screening had not been updated, vaccination records were in an unmarked folder, the school physician's standing orders for medical administration and emergency medication administration were not up to date, there was no log identifying all seizure students and their proper treatments, etc.

Carol Murphy became a Nurse's Aide in the district in March of 2015. She testified that the nurse's office was disorganized- just stacks of papers. They were not in any particular order. There were old outdated materials. Student files with medical information were in unlocked drawers. It appeared that nothing was ever recycled or thrown out. Whatever that came into the office was still there. Murphy testified that a support staff employee came into the nurse's office with symptoms that may have been attributable to low blood sugar but a glucometer was not available and she was forced to call 911 for an ambulance.

Murphy acknowledged the nurse's office was always locked whenever it was unoccupied.

Kim Geria worked as a part-time nurse from October or November 2014 to the end of the school year. She testified that the nurse's office was disorganized; records and medications were not secured. Forms with student's names and medication were not secured. She believed this was a HIPPA violation. She testified that in May of 2015 Geria had to order AED pads and batteries because they had expired.

RESPONDENT'S DEFENSE

John Costello testified on his own behalf. He was first employed as a registered nurse in the District in 2001. Up until the 2014-2015 school year, he had received satisfactory evaluations. Other than two letters of reprimand in 2007, he has consistently receiver satisfactory evaluations and commendations. Costello acknowledged that he

does not use the school computer system. Although the school uses electronic files, he does not believe he was obligated to keep electronic records since paper or hard copies are more secure as they can be kept under lock and key whereas electronic records can be inappropriately accessed in the school's computer system.

Prior to the 2014-2015 school year, Virginia Wolf was the full-time nurse for the middle school and he served he was full-time nurse for the primary and elementary grades. When Wolf retired in the spring of 2014, the District replaced her with a part-time nurse. According to Costello, the part-time nurse was not interested in doing her job but was busy looking for another full-time position. He felt overwhelmed by the increase in his workload. Accordingly, when he was called in to the meeting on November 19, 2014, and stated he does not know whether he is coming or going, he was referring to being administratively overworked and was not referring to dealing with patients.

Costello had no prior notice of the reason for the November 19, 2014 meeting with Garguilo. The meeting was set up by a secretary. Similarly, Mr. Levy was asked to attend the meeting as a union representative was called to attend the meeting but was not given any indication of the substance of the meeting.

Costello did not view the November 9, 2014 incident with student C, as a significant event. Specifically, in regards to his not rushing to the aid of C when first notified, he noted that it was noontime and classes were passing in the hallway. When he entered the hallway, he waited for a special needs class to pass by before he proceeded, since he did not to disrupt such a class. As he approached C. he assumed that from her posture she was vomiting. He testified that people who vomit get dystonia, get wobbly. [1]He realizes now that putting a piece of paper in his mouth proved to be very disturbing to other people but he did so to keep his hands free. When he approached Student C, it appeared from her posture that she was leaning over a garbage can vomiting. Costello does not believe you bring a wheelchair to an ill child as opposed to an injured one. Putting an ill child in a wheelchair would not be a good thing to do whereas an injured child should lie down. He claimed that he could evaluate the child's condition by observing her posture.

When the County school board called to say they were going to do an immunization audit, they were the ones who picked the date which turned out to be a Jewish holiday. Costello was not aware that schools would be closed on that date. Further, according to Costello, of the 36 students for which the County claimed there was no immunization record, Costello claimed it was the fault of the old forms and that, in fact, 30 of these students did have proper immunization but the old forms did not reflect this. The district

[1] It is noted however the recording from the security camera shows C. in a recumbent position in Heenan's lap. She does not appear leaned forward.

had 30 days to correct this deficiency and he did so. The District did not suffer a penalty because it failed the initial audit.

Costello claimed he treated the child in Ms. Cusick's class who had a seizure properly. The child had a mild or absence seizure, where the child blanks out for perhaps ten seconds. There is no treatment necessary for such a seizure. The school policy for treating seizures does not mention such absence seizures; it is clearly designed for grand mal seizures where it directs people not to restrain or insert object into the mouth, turn head to the side, loosen clothing gently, etc. He did not pass off the child with absent seizures on November 11, 2014. He waited for the mother who picked him up and she left the building with her child.

Costello claimed that he appeared anxious at his meetings with the two principals on January 16, 2015 because he was under stress. His mother was ill and he blamed his appearance on the medications he was taking; Prednisone and Gabapentin, which is used for neurologic pain in the feet. He commented without a question being asked that he was being urged to settle the tenure charge but he did not want to settle; he loved to take care of children and wanted his job back. Under cross-examination he was asked about a gap in his curriculum vitae. He had worked between 1993 through July 1996 at Camden County Vocational School and he apparently next worked from January 1997 through August of 2000, in the School District of Philadelphia. When asked what he was doing between July 1996 and January 1997, his response was "I don't know."

He also testified that the prior full time nurse, Mrs. Wolf, was "amazing" but the part-time nurse's inattentiveness to her job was extremely stressful for Costello. He also testified that parents are notified to pick up medications and epi-pens at the end of the school year. Those that were not picked up could be used for training. Costello also maintained that there was no policy enacted concerning disposition of expired drugs so Costello put the expired drugs in the locked closet. He also claimed that the AED pads were not expired when he stopped working and it was the part-time nurse's duty to check the pads every week.

Virginia Wolf also testified on behalf of Respondent. She worked from 1988 to 2013 as a nurse in the District. She testified that both she and Costello maintained the AEDs. They were never told to create a log but she made her own chart in the storeroom about the AED pads. She testified that if the parents that who were called did not pick up the medications, a medical waste person would come every year in October to pick up expired medications but the nurse's office would keep some epi-pens for training. She also claimed that diabetics have their own glucometers and they did not stockpile medications. When asked about proper policy to treat children who have absence seizures, Wolf would abide by the parent's request rather than by any protocol and she would normally walk the student to the office and call the parent.

The Respondent also had fitness for duty evaluations done by an independent psychiatrist, Dr. Charles Meusburger. Meusburger conducted an assessment based upon his interview of Costello. At the time, Dr. Sigafoos' had not yet issued his report. It was Meusburger's opinion that "the patient at this time does not demonstrate any axis1 psychiatric diagnosis and is not required to have any subsequent ongoing treatment prior to returning to work." There was an addendum to the report that the documents relating to Costello's work record were reviewed subsequent to his evaluation and that "as a result of the review of the documents, it is understandable that the school board, as well as the Superintendent would have concerns regarding performance, reliability and standards of care. However, the purpose of this evaluation is to ascertain to a reasonable degree of validity and with the information available at the time, whether or not there are psychiatric reasons why these concerns were present." Meusburger concluded that it is his professional psychiatric opinion that within a reasonable degree of certainty that the issues raised about Costello's performance were not due to psychiatric causes.

Costello was also evaluated by Robert L. Tanenbaum, Ph.D. Dr. Tanenbaum reviewed some of Costello's work record as well as the report of Dr. Sigafoos. Dr. Tanenbaum testified that he had Costello take some of the same tests that were administered by Sigafoos and the tests did reveal a certain level of depression and anxiety. However, Tanenbaum concluded that Costello does not demonstrate evidence of a psychological disorder or dysfunction to a degree that would substantially interfere with his ability to perform his job duties. Tanenbaum also stated in his report:

> It is not clear on the basis psychological evaluation findings whether Mr. Costello's personality characteristics and style actually prevent him from doing his job according to requirements. There appears to be a high level of situational stress at work which have contributed to his feeling upset and depressed about his employment future with the school. He may be responsive at this time to psychological counseling that is structured and supportive, permitting him to resume his employment with the Northfield Board of Education. However, until a factual determination can be made as to whether Mr. Costello has substantially and repeatedly failed to perform in his role as a school nurse, a determination that he is psychologically unfit, and permanently so, would appropriately be deferred until the facts are made clear.

In his testimony, Dr. Tanenbaum said that it is a very high bar to find that someone is incapable of working because of their psychological condition and he believed Costello's psychological state should no bar him from employment as a school nurse. Costello had testified that Sigafoos had Costello complete some of the tests, including the MMPI at home. Tannenbaum expressed concern that it is not appropriate to give the

MMPI unsupervised since the test's subject would have the opportunity to cheat, to go online and to research how to answer the questions.

It came to light in Dr. Tanenbaum's testimony that he was unaware of Costello's conduct and condition at his meeting with Principals Vaccaro and Robbins on January 16 where his hands were shaking and whole body "vibrating". Tanenbaum stated that he did not know what would have caused Costello to act this way. When asked if such a response could be evidence of a panic disorder, Dr. Tanenbaum showed a reluctance to answer the question but finally stated it was not evidence of a panic disorder.

ARGUMENT

The Board argues:

The Board acknowledges that it bears the burden of establishing the truth of the charges by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to be preponderant if "it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Company, 124 N.J. L. 420, 423 (Sup. Ct. 1940). The Respondent exhibited haphazard judgment, apathy and unstable behavior concerning his rendition of care to students. New Jersey tenure law establishes that repeated defiance and violations of directives and policies may warrant dismissal for insubordination. Pre-TEACHNJ cases have defined insubordination similarly. See e.g., Tenure hearing of Miguel Valladares, 2012 N.J. AGEN. LEXIS 316 60-61 (ALJ 2012) aff'd Cmm'r (August 3, 2012). Insubordination defined as the willful and intentional disregard of the lawful and reasonable directives of an employee's duly authorized supervisor. Board of Ed. Twp of Teaneck v. Wilburn, 91 N.J.A.R. 2d. (Edu 48), N.J. AGEN LEXIS 2432 Aff'd Cmm'r (October 15, 1991) Teacher's disregard for a supervisor's request to provide lesson plans was an act of insubordination warranting dismissal.

Respondent's conduct also warrants a finding of "unbecoming conduct". Unbecoming conduct is a broadly defined elastic term encompassing conduct which has a tendency to destroy public respect for public employees and confidence in the public service. Karins v. Atlantic City, 152 N.J. 532, 554 (1998). In Laba v. Newark Board of Ed., 23 N.J. 364, 384 (1975), the New Jersey Supreme Court established that the touchstone of unbecoming conduct is the employee's fitness to discharge the duties and functions of his or her office or position. Contrary to respondent's assertion that a finding of unbecoming conduct requires action equivalent to a criminal act, a finding of unbecoming conduct does not require a violation of any specific rule or regulation, but rather be based primarily on implicit standard of good behavior. Respondent's position entrusted with the care and custody of children, carries a "heavy duty requirement of self-restrain and controlled behavior rarely requisite to other types of employment." I/M/O

Tenure Hearing of Jacque L. Sammons, 1972 SLD 302. A school nurse's failure to render proper care has been found to be sufficient to sustain a determination of unbecoming conduct and the termination of employment and/or revocation of the nurse's school nurse certificate. See I/M/O Certificates of Juliette Kersaint, 2007 N.J. AGEN LEXIS 63 OAL (2007) Aff'd State Board of Examiners (June 7, 2007). In Kersaint, the Respondent school nurse failed in several instances to render appropriate care to ill or injured students. The ALJ concluded that one instance where the respondent failed to respond to a child's asthma attach alone was serious enough to constitute unbecoming conduct. In I/M/O Tenure Charges Against Kathleen Alexander, Dkt. No. 74-3/13, (June 27, 2013), the arbitrator sustained the dismissal of a school nurse for unbecoming conduct stemming from the nurse's failure to provide proper care to an injured student. The student reported to the nurse's office with an injured foot. The nurse never left her seat but told the student to sit on the bench and after observing the student's foot was swollen, the nurse told the student to retrieve an ice pack from the refrigerator. The nurse then permitted the student to leave the office without the ice pack or any other treatment. At no time did the nurse ever leave her desk. The arbitrator found that this conduct unbecoming of a school nurse and found that dismissal was warranted in light of other instances involving the nurse and other the nurses' refusal to act. See also I/M/O tenure hearing of Mary Snyder, Agency Dkt No. 190-6/88, State Board of Ed (August 2, 1989).

The actions of Respondent met or exceed the tenured employees discussed above warranting his dismissal from employment. The respondent repeatedly failed to comply with legitimate and reasonable administrative directives to provide appropriate care as a school nurse. As a result, the quality of care provided to the children of Northfield Community School has been unnecessarily compromised. As set forth in the Board's job description for school nurse, the Respondent is obligated to carry out written orders of the medical home and sanding orders of the school physician. Respondent failed to comply with the appropriate procedures for seizures. On November 5, Respondent was called to assist Student L who, according to Ms. Cusick, experienced a seizure. Upon arriving the respondent merely stated that "he had to go to work" and escorted Student L to the nurse's office. Similarly, the respondent failed to comply with appropriate procedures including school standing orders for fainting. The policy set forth a protocol which includes have the student lie flat for at least 15 minutes. Miriam Webster's medical dictionary defines faint as "weak, dizzy and likely to faint." Respondent failed to follow this protocol on November 10, 2014 when he was called to assist Student C who was vomiting, potentially passing out and could not stand. Respondent showed no urgency in his response, wasting valuable time and upon arriving, performed no assessment, grabbed C by the arm and told her to stand up, in direct contravention to the standing order. Respondent's treatment of C left at least three teachers in tears. Vaccaro testimony, Henan Testimony Levy Testimony. Respondent also failed to comply with Northfield Standing orders for nausea/vomiting. The policy sets forth a specific protocol to be

followed. The protocol requires 1) check temperature; 2) allow student to rest; 3) contact parent/guardian. If temperature is above 99.6, or student is witnessed vomiting, call parent/guardian to take home. Respondent failed to follow this protocol both on November 10, 2014 and again on January 16, 2015 when a student was found in the respondent's office crying and stated she did not feel well and was going to throw up. Respondent failed to care for the student and instead became visibly upset, started shaking and trembling and said that he was upset that the teacher sent an ill student to him without a nurse's pass. Vaccaro testimony, Garguilo testimony.

Dr. Sigafoos determined that the Respondent suffered a panic attack during this incident. A conclusion which was not refuted by Respondent. Both Principals stated that the Respondent was not in a condition to care for children or speak with parents.

Charge 2

The Respondent is guilty of insubordination and unbecoming conduct for failure to perform the duties of a school nurse. Title 6A of the New Jersey Administrative code provides that the role of the certified school nurse shall include, but not be limited to, carrying out written orders of the medical home standing orders of the school physician, maintaining student health records, recommending to the school principal students who shall not be permitted to or retained in the school building based upon a parent's failure to provide evidence of the child's immunization, annually reviewing student immunization records, directing and supervising the emergency administration of epinephrine and glucogen, administering asthma medication through the use of a nebulizer, reviewing and summarizing available health and medical information and writing and updating at least annually the individualized health care plans and the individualized emergency health care plans for students' medical needs, implementing procedures for students in the event of an emergency, and providing other nursing services.

Respondent's repeated failure to carry out his legal responsibilities as a school nurse is serious enough to require his dismissal. In Kersaint supra, the Petitioner-Board similarly argued that the school nurse failed to properly fulfill her duties as a school nurse on several occasions. The ALJ found that the nurse left used needles in a common supply cabinet, failed to have a medical waste container, did not document where necessary equipment was stored, failed to make sure students were properly immunized and failed to keep proper immunization records. The ALJ concluded that although the actions of the Respondent were not intentional, the omission could have had very serious consequences. The ALJ ordered that the Respondent's school nurse certificate be revoked. In I/M/O the Certificates of Barbara Lentine, Dkt. No. 1011-136, State Board of Examiners (November 30, 2012), the State Board of Examiner sustained the ALJ, finding that the nurse failed to complete daily logs of student visits. The nurse only completed the log at the end of the school year which led to discrepancies in the records. The Board

noted that while such conduct may not have impacted students, such deviation from proper record keeping was dangerous and could not be disregarded. In Tenure Hearing of Jill Kubicki, supra, a teacher had been cited for her repeated failure to adhere to school policies such as: failure to check emails; failure to complete progress reports; failure to revise her substitute plans; failure to meet with parents; failure to take advantage of technology existence; and failure to produce testing protocols. The ALJ determined that the teacher should be dismissed from her position. The Respondent's actions here and inaction during the 2014-2015 school year were constant and far more systematic than those mentioned above and could have very serious consequences for the students in his care. After Respondent was placed on leave, Denise Petro discovered an abdication of duty by Respondent far more pervasive than the school nurses in Lentine and Kersaint, warranting termination. Specifically, Respondent in contravention of his job description, board policies and state statutes and regulations, failed to update annual health screening forms contrary to Board Policy 5141 which provides that certified school nurses shall among other things, assist with physical examinations, conduct biannual scoliosis screenings, conduct an audiometric screening. Garguilo testimony, Petro testimony (P-10), failed to update sport physical forms required by N.J.A.C. 6A:16-2.2(h)(1)(ii)(1), maintain student vaccination records required by N.J.A.C. 6A:16-2.3(b)(3), failed to enter vaccination records into the computer system contrary to NJAC 16-2.1A and NJAC 6A:16-2.3(b)(3)(v) (P-10), failed to properly maintain the Board physician's standing orders, improperly maintains student records in a box for feminine hygiene products in an unlocked closed contrary to NJAC 6A:16-2.3(b)(3)(iii); NJAC 6A:16-2.4(c) and NJAC 6A:32-7.4 requiring records to be secured and limited to authorized persons. Acted in a deficient manner in 37 occasion due to failure to collect and record sixth grade immunizations as noted in the Atlantic County Department of Human Services; See NJAC 8:5-4.7 (every school ... shall maintain an official State of New Jersey school immunization records for every pupil.) and Board Policy 5141.3 (P-13); failed to maintain individualized health care plans for students and staff in violation of NJAC 6A:16-2.3(b)(3) and the Board's nursing services plan for the 2014-2015 school year; failed to merge paper records into electronic records a direct threat to the health and safety to the students. Respondent also failed to properly store medications by leaving his personal prescriptions in an unlocked drawer with unlabeled prescription bottles contrary to Board Policy 5141 which states in relevant part "all medications shall be securely stored and kept in the originally labeled container." Leaving unlocked and expired medication in medication cabinets contrary to board policy 5141.21 which requires "all medications shall be brought to school by the parent or guardian for such student and shall be picked up at the end of the school year or at the end of the period of medication, whichever is earlier. Respondent further failed to properly maintain equipment necessary to treat asthmatics, diabetic and other students and faculty of urgent need of medical care. Respondent failed to maintain the school's AEDs in working order and failed to maintain an AED log in

violation of policy 5141. Respondent failed to maintain a glucometer, contrary to board policy NO. 5141. Respondent allowed the epi-pen and epi-pen juniors in the nurses' office to expire. Respondent failed to maintain nebulizer tubing, stock albuterol, masks or wands contrary to NJSA 18A:40-12.7 requiring each school to have and maintain for the use of pupils at least one nebulizer in the office of the school nurse. Respondent's failure to maintain equipment was not without consequence. Mrs. Murphy testified that because the school's glucometer was not properly maintained, she was forced to call 911 for a janitor with low blood sugar. Mrs. Geria testified that she was forced to order AED pads for children and adults because existing pads had expired during respondent's tenure. Respondent's abdication of duty placed the health and safety of the children and adults of the school in very real danger. Dismissal is the appropriate penalty for teachers who compromise the safety of students. See In IMO Paula Weckesse, 2013 N.J. AGEN LEXIS 155 (OAL 2013) Aff'd Comm'r (September 16, 2013) where a teacher failed to follow school procedure in addressing students who had fallen asleep in class. The teacher forced a student that fell asleep in class to stand up in order to stay awake. School addresses procedure requires that students who fall asleep in class and requires parents to be notified to see if there is a health concern and have students tested for drugs. The ALJ concluded that from a safety point of view, the teacher's conduct created a health hazard and ordered the teacher's tenure be terminated. See also IMO tenure hearing of Barbara Thomas, 2002 N.J. AGEN LEXIS 575 (OAL 2002) and IMO Tenure Hearing of Curtis Robinson, 2008 N.J. AGEN LEXIS 752 (OAL 2008).

Accordingly, the board has proven that Costello engaged in numerous acts of insubordination and unbecoming conduct. Therefore his dismissal from his positon is warranted.

Count 3

Respondent has demonstrated his incapacity to perform the duties of a school nurse. In addition to the unbecoming insubordinate conduct set forth above, respondent is not fit to serve as a school nurse and must be dismissed for incapacity. The Board has a right to require an employee to submit to a mental health evaluation whenever in the judgment of the Board, an employee shows evidence of deviation from normal physical or mental health. N.J.S.A. 18A:16-2. The use of a clinical psychologist to determine a teaching staff member's mental capacity to work has been repeatedly sanctioned. See e.g. Jones v. Board of Trustees of Teachers' Pension Annuity Fund, 2015 N.J. AGEN LEXIS 214 (OAL 2015). See also I/M/O/ the Tenure Hearing of Henry Allegretti, School District of the City of Trenton, Mercer County, 2000 N.J. AGEN LEXIS 1679 Comm'r (March 22, 2000). Similarly, IMO Licenses of Roseann Ravo, Dkt No. 311-06/95-112 State Board of Examiners (November 20, 1997). Accordingly, Petitioner's use of a psychologist in the instant manner is appropriate and with prior precedent. Removal of teaching staff members who are not fit for duty is appropriate. For example, I/M/O the

Tenure Hearing of Paul Varano, Board of Education Irvington, Essex County, 2002 N.J. AGEN LEXIS 360 (OAL 2002) Aff'd Comm'r (July 1, 2002) an industrial arts instructor was removed for incapacity as a result of bizarre behaviors demonstrated. Respondent isolated himself from students during class and playground duty and accused the school administration of trying to set him up. The Respondent was evaluated by a mental health professional who concluded that the Respondent's behavior was "highly abnormal and fit the criteria of a schizotypal (sic) personality trait." The doctor opined that the Respondent was not fit for his duties of a teacher and the ALA agreed sustaining the charge of incapacity. The record here similarly demonstrates that the Respondent is incapable of performing the duties of school nurse. Sigafoos concluded that the Respondent was unable to function in his job as a school nurse. Most tellingly, Respondent's own doctors, Dr. Tanenbaum and Dr. Meusburger expressed their own concerns about Respondent's conduct. Dr. Meusburger's report stated that given the Respondent's conduct, "it is understandable that the school board as well as the Superintendent would have concerns regarding performance, reliability, and standards of care." Dr. Tanenbaum stated that Respondent may, however, demonstrate behavioral characteristics which limit his effectiveness and rub his co-workers and superiors the wrong way. Given the testimony and report produced by Dr. Sigafoos and statements made by Respondent's own doctors, the Board has proven by a preponderance of the evidence that the Respondent is incapable of performing his job as a school nurse and must be dismissed.

Count 4

Respondent has exhibited a pattern of conduct establishing other just cause and warranting dismissal based upon the well-established body of school law, principles and precedent. Prior to the enactment of TEACHNJ, the courts and commissioner of New Jersey have developed a clear precedent that permits this tribunal to dismiss Respondent not only for each of the separate charges alleged, but also for the charges viewed in their totality when they demonstrate a pattern of misconduct over a period of time. The sworn tenure charges alleged that the acts and omissions of Respondent, jointly and severally manifest a serious of ongoing infractions over an extended period time constituting a pattern of conduct unbecoming a teaching staff member. Said pattern of conduct likewise warrants dismissal. See Tenure Hearing of N. William Cowan, 224 N.J. Super 737, 750-51 App Div. (1998) (a residuum of evidence is not needed to prove each act so long as the combined force of relevant here say and relevant competent evidence sustains ultimate findings of unbecoming conduct). Factors to be considered in assessing a penalty include the nature and gravity of the offense under all of the circumstances involved, any mitigating or aggravating factors, impact of the penalty on the teacher's career and any harm or injurious effect which a teacher's conduct may have had on the maintenance of discipline and the improper administration of the school system. Usually as series of events demonstrating a pattern of behavior is an indication of unbecoming

conduct. Tenure Hearing of Molokwu, OAL Dkt. No. Edu9650-04 (2004). See also Cowan Supra at 751 (employee may be dismissed where a pattern of conduct persists over a pattern of time even though each individual charge standing alone would not typically warrant dismissal). See Tenure Hearing of Greg Young, 1010 N.J. AGEN LEXIS 511 (September 3, 2010). In the Matter of Tenure Hearing of Michele Gibbs, Dkt. No. 45-313 (May 20, 2013). Regardless of how well intentioned a teacher might be, the issue to be decided in tenure cases and specifically cases in which a pattern of conduct exists that amount to just cause warranting termination is "whether the Respondent has a temperament and judgment necessary for a teaching staff member and, if so, should she be returned to the classroom." Just as in Gibbs, the testimony of the Board's witnesses is credible and cumulatively shows a pervasive pattern of behavior by a nurse that he either could not or would not perform his conduct to meet the legitimate and reasonable expectations of the administration. Respondent is unfit to remain a tenured school nurse based upon well-established arbitration case law, principles and precedents. It has been held that an employer should satisfy certain conditions in order to prove just cause in disciplining employees, including the employee was forewarned the consequences of his actions, the employer's rules are reasonably related to business efficiency and the performance of the employer might expect from an employee an effort was made before discipline to determine whether the employee was guilty as charges. The investigation was conducted fairly and objectively, substantial evidence of the employee's guilt was obtained, the rule was applied fairly and without discrimination, and the degree of discipline was reasonably related to the seriousness of the employee's offense and the employee's past record. See Oahu Transit Service and OBT Local 996, 2006 N.A.C. 138 (2006). In addition, it must be stressed that the inherent duties of a public employee include compliance with all reasonable rules and regulations and duties arising from a fiduciary relationship to the republic and from such duties that may arise from the nature of the position held. Hartman v. Ridgewood, 258 N.J. Super 32 App. Div. (1992). Unless a penalty is unreasonable, arbitrary or offensively excessive under all of the circumstances, it should be permitted to stand. Ducher v. Department of Civil Service, 7 N.J. Super 156 App. Div. (1950). Summary discharge in lieu of corrective discipline is appropriate for very serious offenses. Elkouri and Elkouri, How Arbitration Works, page 964 (6th Ed. 2003). Here, just cause conditions have been satisfied in the application of the foregoing precedents must result in a determination that Respondent be dismissed from his position.

The Respondent argues:

When Costello was called to the classroom of Mrs. Cusick on November 5, 2014 because student L was having a seizure, the seizure had ended by the time Costello arrived. L was able to arise from his desk on his own and Costello walked L out of the room to the nurse's office. According to Exhibit W, the Mayo Clinic defines an absence

seizure as a brief sudden loss of consciousness. Exhibits X, Y and Z from the Epilepsy foundation explain that absent seizures cause short periods of blanking out or staring into space and when an absence seizure ends, the person usually continues doing whatever they were doing before the seizure. They are almost always wide awake and able to think clearly. No first aid is needed because of the seizure. Costello testified that when he entered the classroom and approached Student L, he told him that they would have to go to the nurse's office. Student L responded that he did not feel that was necessary but Costello responded that he knew the drill. Student L arose and walked to the nurse's office with the teacher aide and Costello. Costello acted consistent with the recommendations of the Epilepsy Foundation that once the seizure has ended, in approximately ten seconds, there is no further treatment required.

The Respondent points out that in the incident that occurred on November 10, 2014 involving Student C, Costello explained that he did not keep pace with Mrs. Levy in responding to the sick child because there was a class of quite young special needs children walking by and he did not wish to disturb or disrupt them. Costello claimed that he put the paper in his mouth in order to free his hands up. At no point does the video show Student C lying down or fainting. Costello was able to analyze the situation, realizing that Student C had not fainted and therefore, the school protocol for dealing with fainted children did not apply. Costello's reaction in a meeting with Vaccaro and Robbins, Costello claims he was being eased off Prednisone and had a very negative reaction or response to coming off that medication. According to Costello, he did not want to leave the building until a substitute nurse was in the building.

Costello challenges the report of Dr. Sigafoos, noting that he had never tested a nurse before. Regardless, Sigafoos felt confident to testify as to the fitness of Costello. He underlined that Costello was suffering several deficiencies in his personality which would preclude him from being an acceptable school nurse. However, he also concluded that Costello was suffering from "burnout." Costello claims that burnout often can be relieved by a couple of days off and return to work shortly thereafter. Respondent argues that a review of Sigafoos' curriculum vitae demonstrates that the majority of his work is for the former Division of Youth and Family Services and for fitness for duty for police officers and correction officers. Work of that nature, particularly in the field of criminal justice does not fit one to be able to do an evaluation of a school nurse.

Costello is also critical of Dr. Sigafoos for sending Costello home to complete the MMPI test. The manual for administering the test, Exhibit Q, states that it is desirable that the test be taken within line of site. Respondent argues that the MMPI materials should not have been taken home with the test taker, nor should the test be taken anywhere else where supervision is not possible. It is argued that the fact that Costello was allowed to take the test home and complete it there, brings into question his knowledge of proper test taking and scoring. Dr. Sigafoos' abject failure to monitor the

MMPI environment is a clear indication that his mind had been made up as to the outcome of the examination prior to the examination ever being given. He was hired by the District knowing full well what the recommendation would be.

By contrast, the examination of Dr. Charles Meusburger, Exhibit B, concludes that Costello did not demonstrate any "axis 1 psychiatric diagnosis and is not required to have any subsequent ongoing treatment prior to returning to work." This clearly refutes and repudiates the finding of Dr. Sigafoos. Further, Dr. Tanenbaum, who has examined school nurses in the past, found that Costello did not demonstrate evidence of psychological disorder or dysfunction to a degree that would substantiate or interfere with his ability to perform his current duties with the Northfield Board of Education. Although Dr. Tanenbaum found that there is situational stress, Costello is fit for duty and can and should return to his position as school nurse.

It is further argued that N.J.S.A. 18A:16.2 physical examinations; drug testing; requirements sates "the Board may require individual psychiatric or physical examinations of any employee wherever in the judgment of the Board an employee shows evidence of deviation from normal physical or mental health." It is argued that the legislature did not write psychological or mental health but specifically psychiatric. It is argued that psychiatric means the services or examination by a trained licensed professional psychiatrist and does not allow for the interpretation for the word psychiatrist to mean psychologist. In the absence of any contrary interpretations, rather than the obvious literal or true meaning of the term psychiatrist, it is respectfully requested that the report of Dr. Sigafoos be determined as improper and not be considered by the arbitrator. Whether the report is considered or not, the reports of Dr. Tanenbaum and Dr. Meusburger should carry the day on the issue of mental competence and Charge 3 of the tenure hearing complaint should be dismissed outright.

Respondent notes that although the Board was cited for Costello's failure to collect and record the sixth grade immunizations, the deficiency must be seen in light of the total student population of the building which was 921 students and essentially, out of the 13 deficiencies that represents only a deficiency rate of 4% and that all deficiencies were resolved and all records were appropriately updated and the Board did not suffer any sanctions or censures. Its records were complete as of the New Year.

The respondent also challenges the testimony of Denise Petro. Although admittedly a registered nurse, she became so in December of 2014, she is not a certified school nurse. She testified as to expired medications, absent student and staff records and messy conditions. Although Petro testified there were any number of expired medications in the closets, she acknowledged that the nurse's office is locked when there is no one in the office and that medication cabinets were independently secured as well. Kimberly Garia, the substitute nurse who is currently employed by the School District

testified that, even as of this date, there are still expired medications in the office and that, although she and others have attempted to have parents come by and pick up medications, some of them are still there.

There is testimony that the expired epi-pens are useful for training purposes. Moreover, Costello testified that he had made arrangements for leftover medications and materials to be picked up in October 2014 but on that date, the medical waste service came but he was in a training course and there was confusion in the office as to what to do. Therefore, the expired medications and epi-pens were never picked up. Although the testimony was that student health records were not kept current, nevertheless it was unrefuted by both Petro and Costello that the hard copies of these records, known as the A-45, were current. What was not current was the electronic data collection system. It is maintained that it is an optional system that does not replace the A-45 cards, it supplements it. Costello testified that the electronic records are not secure inasmuch as others have access to electronic records throughout the building. It is claimed that the lack of security is a violation of the Health Insurance Portability and Accountability Act (HIPAA) and Federal Education Rights and Privacy Act (FERPA).

Lastly, there is testimony that the room is messy and records exposed. However, Costello was out of the building by late February and Petro did not begin work until April 29, 2014. So, for two months there were numerous people had access to the office and had the ability to open cabinets and put records that otherwise had been secured in non-secured areas. Similarly, the testimony concerning the AEDs. School policy states that the Program Coordinator is to maintain the AEDs are the school nurse and/or certified athletic trainer and equipment maintenance needs to be done on a monthly basis with a monthly checking for batteries and pads for damage and expiration dates. Costello testified that the part-time school nurse, Mrs. Bagstrom, developed and maintained the AED log starting with the 2014-2015 school year. It was Costello's belief and understanding that the log was current as of his last day in the building. The last time Costello was present, the AED log was on Bagstrom's desk in a binder. Board Exhibit 12 shows that the batteries at Location A, the health office, were changed in May of 2013 and were set to expire in May of 2015 as were the pads. The upstairs pads were to expire May of 2015. The batteries upstairs seems to be less clear. Petro testified she purchased new AED equipment and machinery. The Board's Exhibit 12 does give evidence as of May 2015, the pads and batteries would have expired and that Petro simply purchased scheduled items that were due to expired in May of 2015. This would tend to show that the Petro exaggerated the facts.

It is argued that since there no crime charged against Costello the conduct unbecoming charge must be dismissed because there is nothing placed before the arbitrator that shows malevolent conduct.

The collective negotiations agreement between the Northfield Board of Education and the Northfield Education Association provides at Article 5 that no employee shall be discharged, disciplined, reduced in rank or compensation without just cause. The contract also provides that except in cases of emergency, whenever an employee is required to appear before the superintendent, board or committee thereof, concerning any matter which could adversely affect the continuation of that employment of his/her office, position or employment or salary or increment pertaining thereto, then he/she shall be given prior written notice for the reason of such meeting or interview and shall be entitled to a representative of the association to advise him/her in representing him/her during such meeting or interview. That process of fair hearing was clearly violated when the Superintendent called Mr. Costello into his office on November 19, 2014. Although the Association representative was also called into that meeting, neither the Association representative nor Costello received any advanced notice of the meeting nor did either of them know the purpose of that meeting. Costello testified that he was under the impression that the meeting with the Superintendent was to discuss the division of labor between the part-time nurse and himself. This was a clear violation of the collective negotiations agreement. It is noted that Costello has had positive evaluations since he first began to work in the District until the 2014-2015 school year.

DISCUSSION

It is not surprising that when the District eliminated one of the two fulltime school nurse positions and replaced it with a part-time nurse Costello was confronted with increased duties and the stress level of his position increased. Unfortunately, Costello could not handle that stress. He could not properly function at a level necessary to perform his duties as a school nurse in a satisfactory manner.

As to the specific acts the Respondent was charged with:

Although the school has a protocol for the proper handling of seizures, the procedures only addresses *grand mal* seizures and do not address absence seizures such as the one experienced by student L. It is apparent that Costello acted in a medically appropriate manner on November 5, 2014 with Student L. However, part of a school nurse's duties is to interact professionally with teaching staff and educate them as how to handle the health problems of the children in their classes. However, Costello's simply gave Cusick a leaflet on seizures without any explanation. Costello's conduct was consistent with the analysis of Dr. Sigafoos that in that he inappropriately avoided interaction with Cusick.

I do not credit Costello's testimony about his response when called to attend Student C, who became sick in the hallway on November 10, 2014. The video recording shows that Costello could not have said one word during the entire incident; he placed a

letter sized paper in his mouth just as he first left the nurse's office with Levy and never removed it during the entire episode. He could not have asked anyone, including C the ill student, about what happened or how C felt. Rather, he immediately assisted her to her feet and walked her back to his office. Moreover, Costello's testimony that he could ascertain how C felt because of her posture does not hold. C was not as he testified leaned forward as if to vomit. Rather she was recumbent in the lap of her teacher who in turn was sitting on the floor. Costello's made no attempt to ask C how she felt or ask any of the three teachers present what happened. Costello's conduct left the teachers quite upset and his conduct was totally inappropriate and consistent with Sigafoos's evaluation.

When Respondent was called into Garguilo's office on November 19, 2014, he could not recall the incident with C, nine days earlier. It is understandable that Costello did not immediately recall the incident since Garguilo said a girl fainted, whereas C was conscious when Costello saw her. But upon further explanation Costello still could not recall the event and said that he "doesn't know whether he is coming or going" and "doesn't recall a lot of things this year." Costello's response was a legitimate cause of concern for Garguilo. I am not impressed by Costello's contention that his remarks was specifically referring to his extra workload since he was specifically being asked about the treatment of C. While it is not unreasonable for Costello to feel the pressure of the extra work involved, his failure to even recall an incident nine days before, where a teacher came running to him for assistance and two other teachers were waiting for him to respond, is cause for concern. As a school nurse he must be able to function effectively even though he was dealing with the situational stress of an increased work load.

The Respondent argues that by the terms of the collective negotiations agreement between the Northfield Education Association and the district he was entitled to advanced written notice of the reasons for the meeting but neither Costello nor his Association representative were given such notice. However, there is no indication that a grievance about the lack of notice was ever filed or that the Education Association representative sought to adjourn the meeting in order to give Costello a chance to prepare. Also, the Board has not sought to introduce evidence about the November 10 incident which was gathered at the investigatory interview *per se*. Rather, at issue is Costello's mental state at the meeting, his inability to recall an event nine days earlier and his emotional response in particular. I will consider such evidence.

The third incident was on January 16, 2015, when Costello called the two building Principals, Vaccaro and Robbins into the nurse's office. A young female student was crying in the office and, in front of the student, Costello complained about the girl's teacher sending her to the nurse's office without a note. His complaining of the teacher in the presence of the student showed a serious lack of judgment. It was at this point that Costello's hands began to shake and his body began to vibrate. It was apparent that Costello could not properly function and was sent home. Costello blamed his emotional

state on the medications he was taking but he introduced no independent medical evidence to corroborate his claim.

After Costello was sent home, it was discovered that the nurse's office was in disarray. The amount of expired medications must have taken years to accumulate. According to Wolf, a company that disposed of drugs came every October to pick up expired medications but according to Costello there was a mix-up in October 2014 and no drugs were picked up. But as Petro testified there were scores of expired drugs of all kinds in the office with expiration dates dating back as far as 2008. Although these drugs must have remained in the office for years Costello bears some responsibility for never disposing of them since he shared this office with Wolf for many years.

Papers and records in the nurse's office were not kept in any coherent order and student medical records were not secured. Although Respondent points out he stopped work in January and Petro, who documented the state of the nurse's office, did not start work until late April, both Murphy and Geria testified that the nurse's office was a mess when they were first hired. Although it is possible that some if the disorder, .e.g., the blank student passes on the nurse's desk, were not the fault of Costello, I am satisfied that Costello bears a good deal of responsibility for the disarray in the Nurses office.

The pads and batteries for the ADP machines were expired in May of 2015. Although Costello testified that the machines were in working order when he left in January, Gerta testified that the replacement pads in stock were already expired. While Costello cannot be held accountable for pads or batteries which expired in May of 2015 he is accountable for having replacement parts in stock and up to date. Similarly, the office failed to have a glucometer or the ancillary parts for the nebulizer in stock.

The respondent has not provided a good reason as to why books concerning proper medical procedures were not out in plain sight.

Costello readily admitted that he never inputted medical information into the schools computer system, arguing that the pertinent regulations did not require that records be kept on computer. Nevertheless it was school policy to input student medical information into the system. The respondent's failure to follow this school policy would almost certainly lead to confusion and delay, for the complete health records for any given student were kept in two places, some of the records in hard copies in the nurse's office and the balance in the computer system.

There was a significant breakdown in Costello's health record keeping as witnessed by County's immunization audit where 35 students, apparently the entire sixth grade, did not have proper records for immunization.

In general, Costello failed to keep up with his ministerial duties in maintaining the nurse's office and again this failure is consistent with Dr. Sigafoos' evaluation of Costello.

The Respondent had two psychiatric/psychological evaluations on his own. One by Dr. Meusburger, a Psychiatrist, who did not testify but his report was admitted into evidence. Meusburger concluded that Costello's performance was not due to any psychiatric causes. However, the report also noted that Meusburger did not have an opportunity to review Board documents about Costello's conduct before he reached his conclusion and he acknowledged that it is understandable that the school board had concerns about Costello's conduct.

Dr. Tanenbaum, a psychologist who did testify also issued a report. In his report Tanenbaum noted that testing revealed that Costello did suffer from some measure of depression and anxiety although not to the degree indicated in Sigafoos' report. The report concluded, "[I]t is not clear on the basis of psychological findings whether Mr. Costello's personality characteristics and style actually prevent him from doing his job according to requirements." He noted that there was a high degree of situational stress at work and recommended counseling. Tannenbaum testified that he did not find that Costello was psychologically unfit for there is a high bar for such a finding. Tannenbaum was not aware of the incident of January 15, 2015 when Costello shook to the point he was vibrating and was sent home. When asked if this were an anxiety attack, Tanenbaum said he didn't know what it was. It is not clear that, if Tanenbaum had been able to identify this as an anxiety attack, he would have reached a different opinion about Costello's fitness.

The Respondent has not supplied any case law in support of its argument that N.J.S.A. 18A:16.2 requires examinations for incapacity to be performed by a psychiatrist. The District has cited several cases where a psychologist's evaluation was relied upon for such a finding. e.g. Jones v. Board of Trustees of Teachers' Pension Annuity Fund, *(Supra)* I/M/O/ the Tenure Hearing of Henry Allegretto, School District of the City of Trenton, Mercer County *(Supra)* and IMO Licenses of Roseann Rave *(Supra.)* Accordingly, I conclude that I may rely upon SIgafoos' report.

The Respondent has also challenged the reliability of Sigafoos' testing practice since he had Costello take the MMPI test at home. According to Tanenbaum this is bad practice since the test should be taken under supervision to avoid cheating. When taking the test at home the subject could search the internet to find out how to take the test to avoid any negative findings. While I have no doubt that the test should be taken under supervision, here the test results negatively reflect on Costello so I see no reason to conclude that Costello cheated on the test or otherwise conclude that the test should not be relied upon.

Costello was not a reliable witness. When questioned why he left a position with one school district in July of 1996 after being employed there for three years, he replied, to take a position in another district. It was pointed out that there was a six month gap in his resume between the two positions, the new one began in January 1997. When asked what happened and what he did for six months Costello replied that he did not remember. Costello took no responsibility for his mistakes but was self-righteous[2] and tried to explain away every charge against him. Under these circumstances I cannot fully credit Costello's claim that his conduct on January 16, 2015 was due to a bad reaction to his medication, It is noted that he also acted inappropriately several times in November of 2014.

Given Costello's long record of satisfactory service with the district, his removal cannot be taken lightly. However, it is apparent that Costello was unable to competently perform his duties during the fall and winter of 2014-2015. He showed no self-awareness of his anxiety level and of how he was perceived by others. His own psychological expert, Dr. Tanenbaum recommended that Costello undergo counseling to help him cope with his stress, but there is no evidence that he ever did so. Unfortunately, there is no reason to think that if Costello were returned to the same work situation somehow he would behave any differently.

Accordingly, in light of the entire record, including but not limited to the evaluation and recommendation of Chester E. Sigafoos, PhD. I find the Board of Education has met its burden of proof and will sustain the tenure charges against John J. Costello due to Incapacity.

AWARD

The Northfield Board of Education has met its burden of establishing the incapacity of John J. Costello. The tenure charges are sustained

Edmund Gerber, Arbitrator
November 21, 2015

[2] Witness Costello's *sua sponte* and inappropriate remark that although he was urged to settle this tenure charge he refuses to settle.

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393-15

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
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November 30, 2015

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Re: *Hadassah Muhammad v. Cami Anderson, Superintendent, State-Operated School District of the City of Newark, Essex County; Christopher Cerf, in his capacity as former Commissioner of Education; Michael Maillaro, Newark Teachers Union, Agency Dkt. No. 83-4/15*

Dear Parties:

Upon review of all submissions filed in the above-referenced matter, I have determined – for the reasons set forth below – to grant respondents' Motions to Dismiss the Petition[1] for lack of jurisdiction pursuant to *N.J.A.C.* 6A:3-1.10.

This matter was initiated via a Petition for Declaratory Ruling, filed on April 20, 2015. Therein, petitioner indicated she was employed by respondent, State-Operated School District of the City of Newark ("District"), from September 2000 until March 2012 – at which time she retired due to a permanent disability. Petitioner alleged that she should have received retroactive compensation for the period worked between June 30, 2010 – when the contract between the District and respondent Newark Teachers Union ("Union") expired – and her retirement date. As a result, petitioner seeks $150,000.000.

In lieu of an Answer, respondent Christopher Cerf, in his official capacity as former Commissioner of Education, ("Cerf") filed a Motion to Dismiss the Petition.[2] Therein,

[1] As discussed herein, respondents Christopher Cerf and the State-Operated School District of the City of Newark each moved to dismiss the Petition.

[2] Both the Union and the District filed answers indicating that the matter referenced in Ms. Muhammad's petition was in arbitration, and asserting that the Commissioner lacked jurisdiction. The Union further indicated that it was

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Cerf argued that petitioner's request for a declaratory ruling should not be entertained since she was not seeking an interpretation of a statute or rule within the jurisdiction of the Commissioner. In the alterative, Cerf posited that – even if it is construed as an appeal rather than a request for declaratory ruling – the Petition should be dismissed for lack of jurisdiction as it does not set forth a controversy or dispute arising under the school laws. *N.J.S.A.* 18A:6-9.

More specifically, Cerf contends: 1) a dispute as to whether petitioner is entitled to payment under the terms of an employment contract does not invoke the Commissioner's jurisdiction; 2) a dispute as to whether the terms of the collective bargaining agreement ("CBA") negotiated between the Union and the District constitute an unfair labor practice is within the jurisdiction of the Public Employment Relations Commission ("PERC"), not the Commissioner; and 3) any claims that the District violated federal law – such as Section 504 of the Rehabilitation Act and/or Title II of the Americans with Disabilities Act – do not confer original jurisdiction upon the Commissioner.

The District later filed its own Motion to Dismiss the Petition – along with a letter brief seeking to join in Cerf's motion – substantially for the reasons asserted by the Deputy Attorney General. Subsequently, petitioner filed opposition and urged the Commissioner not to dismiss her Petition; however, she failed to address any of the jurisdictional issues raised by respondents.

First, because the Petition seeks "consequential relief" beyond a declaration as to the meaning of a statute or rule, I decline to entertain it as a request for declaratory ruling. *N.J.A.C.* 6A:3-2.1(a)(1). Second, even if the Petition is viewed instead as a Petition of Appeal, I am persuaded by the arguments advanced by respondents that the Petition must be dismissed for lack of jurisdiction.

N.J.S.A. 18A:6-9 grants the Commissioner jurisdiction to hear and decide controversies and disputes arising under school laws. *Balsley v. N. Hunterdon Reg'l Sch. Dist. Bd. of Educ.*, 117 *N.J.* 434, 438 (1990); *Hinfey v. Matawan Reg'l Bd. of Educ.*, 77 *N.J.* 514, 525 (1978). Conversely, "Where the controversy does not arise under the school laws, it is outside the Commissioner's jurisdiction even though it may pertain to school personnel." *E. Brunswick Bd. of Educ. v. Twp. Council*, 48 *N.J.* 94, 102 (1966).

Generally, the Commissioner lacks jurisdiction over disputes that are purely contractual in nature. *See Picogna v. Bd. of Educ.*, 249 *N.J. Super.* 332, 335 (App. Div. 1991) (no jurisdiction over contract claim of non-tenured school employee because no interpretation of school laws required); *S. Orange-Maplewood Educ. Ass'n v. Bd. of Educ.*, 146 *N.J. Super.* 457, 462-463 (App. Div. 1977) (no jurisdiction where dispute involved interpretation of sabbatical leave provisions of agreement and no statutory interpretation was required).

Petitioner's claims regarding the CBA and its enforcement necessitate interpretation of contractual language – rather than school law – and nothing within the petition indicates that agency expertise is required to resolve the dispute. Similarly, to the extent

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in accord with Ms. Muhammad's position that she was entitled to retro-pay under the October 2012 Memorandum of Agreement.

petitioner alleges unfair labor practices pursuant to *N.J.S.A.* 34:13A-5.4, or federal law claims pursuant to Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act, the Commissioner lacks jurisdiction to decide such claims as they do not arise under the school laws of this state.

Upon careful review of the petition, I find and conclude that petitioner has made no allegation of a violation of school law or regulation which would bring this matter within my jurisdictional authority. Accordingly, the instant Petition of Appeal is hereby dismissed.[3]

Sincerely,

David C. Hespe
Commissioner of Education

c: Essex County Superintendent

[3]Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1) and applicable court rules, Commissioner decisions may be appealed to the Superior Court, Appellate Division.

394-15

OAL DKT. NO. EDU 17758-15
AGENCY DKT. NO. 343-11/15

Y.T., on behalf of minor child, L.R.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the recommended Order – that petitioner has demonstrated entitlement to emergent relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL granting petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/01/15
Date of Mailing: 12/01/15

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 17758-15
AGENCY DKT. NO. 343-11/15

Y.T., on behalf of minor child, L.R.,
Petitioner,
v.
BOARD OF EDUCATION OF
THE TOWNSHIP OF WILLINGBORO,
BURLINGTON COUNTY,
Respondent.

Sean Benoit, Esq., for petitioner (Disability Rights New Jersey, attorneys)

Kim C. Belin, Esq., for respondent (Cooper Levenson, attorneys)

Record Closed: November 16, 2015 Decided: November 19, 2015

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

Y.T. (petitioner) filed a petition for due process on behalf of her daughter, L.R., a minor, seeking an order directing the Willingboro Board of Education (respondent) to provide L.R. with home instruction in accordance with a request filed with the Board. In the

current proceeding, petitioner seeks an order on emergent relief granting the sought after relief immediately pending the due process proceeding.

PROCEDURAL HISTORY

On November 4, 2015, petitioner's petition of appeal was filed with the Office of Controversies and Disputes of the New Jersey Department of Education, along with a request for emergent relief. On November 5, 2015, the emergent matter was filed along with the due process request with the Office of Administrative Law (OAL). The emergent relief request was scheduled for oral argument, which was held on November 12, 2015. The record was held open for one day to permit respondent to file an additional certification. Although the certification was clearly transmitted by facsimile and stamped received by the OAL on November 13, 2015, it was not received by the undersigned until November 16, 2015 at which time it was deemed timely and the record was closed on emergent relief.

FACTUAL DISCUSSION

Many of the facts do not appear to be disputed. L.R. is a ten year old special education student residing in the Willingboro Township School District. Petition of Appeal, November 4, 2015, ¶1. L.R. has been diagnosed with ADHD and Oppositional Defiant Disorder. Id. at ¶3. L.R. is classified as eligible for special education services under the category of emotionally disturbed. Id. In the 2014-2015 school year, L.R. was placed in the Twin Hills Elementary School's Self-Contained/Behavioral Disabilities (BD) classroom. Through a serious of events, which are a part of and the subject of a matter currently pending in the Office of Special Education and are not currently before the Commissioner, or pertinent to this appeal, L.R. has not been in school since May of 2015.

On October 6, 2015, L.R. was seen by her pediatrician Dr. Kargman, who issued a letter to the school district stating that L.R. "has been having emotional and behavioral problems of anxiety, mood disorder, ODD and ADHD." Dr. Kargman went on to recommend that L.R. "be placed on home study for 90 days." Petition of Appeal, November 4, 2015, ¶21, Exhibit B.

On October 13, 2015, DRNJ filed the aforementioned request for due process with the New Jersey Office of Special Education that is not a part of this appeal. Id. at ¶22. On the same day, Dr. Kargman's note was submitted to the District, along with a written request for home instruction due to medical necessity. Id. at ¶23. On October 22, 2015, eight school days after petitioner's request was filed, the School District's attorney responded by stating that the request was sent to the District's physician for verification of the need for home instruction and that the District's physician, Dr. Bonnett, would need to talk to Dr. Kargman. Petition of Appeal, November 4, 2015, ¶¶ 24-27, Exhibit I. On October 23, 2015, the School District's attorney was notified that more than five days had passed since the request. Id. On October 23, 2015, the School District's attorney responded stating that the regulation governing home instruction for a medical necessity does not impose a five-day limit on the School District's physician and that the District was not in violation of the regulation. Id.

On October 27, 2015, the School District's attorney was notified that Dr. Kargman had been authorized by L.R.'s parent to talk with Dr. Bonnett. Id. As of November 3, 2015, fifteen school days had passed since Dr. Kargman's note was submitted to the School District. Id. at 28. Petitioner submitted the application for emergent relief on November 4, 2015. On November 10, 2015, the School District denied the application for homebound instruction. The reason offered for the denial was "We called Dr. Kargman's office twice in two weeks for more information to support the request with no response." Respondent's brief, November 11, 2015, Exhibit 1.

At oral argument, petitioner presented a certification by Y.T. stating that on November 11, 2015, she had been told by Dr. Kargman's office that Dr. Bonnet had not contacted that office, but that the District's Director of Special Services, Abdel Gutierrez, had. Over the objection of petitioner, the record was held open to permit respondent to submit a certification by Mr. Gutierrez in response to petitioner's certification, which the District had not been furnished with prior to oral argument. That document was submitted in a timely manner and received by the undersigned on November 16, 2015. In that document, Gutierrez certified that in an effort to expedite matters, he contacted Dr. Bonnett and obtained his permission to contact Dr. Kargman to obtain the additional information Dr. Bonnett needed. Gutierrez did

contact Dr. Kargman's office and received no response. Once Gutierrez received the petition and request for emergent relief, he told Dr. Bonnett that a response was needed immediately.

LEGAL DISCUSSION

The standards which must be met by the moving party in an application for emergent relief are embodied in N.J.A.C. 1:1-12.6 and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). Emergency relief may only be granted if the judge determines that:

1. The petitioner will suffer irreparable harm if the relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The petitioner must satisfy all four prongs of the Crowe test.

N.J.A.C. 6A: 16-10.1 provides that:

> a) The district board of education shall provide instructional services to an enrolled student, whether a general education student in kindergarten through grade 12 or special education student age three to 21, when the student is confined to the home or another out-of-school setting due to a temporary or chronic health condition or a need for treatment that precludes participation in their usual education setting, whether general education or special education.
>
> 1. To request home instruction due to a temporary or chronic health condition, the parent shall submit to the school district a request that includes a written determination from the student's physician documenting the projected need for confinement at the student's residence or other treatment setting for more than 10

consecutive school days or 20 cumulative school days during the school year.

i. The school district shall forward the written determination to the school physician, who shall verify the need for home instruction. The school physician may contact the student's physician to secure additional information concerning the student's diagnosis or need for treatment, and shall either verify the need for home instruction or shall provide to the district board of education reasons for denial.

2. The school district shall notify the parent concerning the school physician's verification or reasons for denial within five school days after receipt of the written determination by the student's physician.

3. The school district shall provide instructional services within five school days after receipt of the school physician's verification or, if verification is made prior to the student's confinement, during the first week of the student's confinement to the home or out-of-school setting.

With regard to the first required prong in resolving an emergent relief request, "irreparable harm" is defined as the type of harm "that cannot be redressed adequately by monetary damages." Crowe, supra, 90 N.J. at 132-33. In addition, the irreparable harm standard contemplates that the harm be both substantial and immediate. Subcarrier Communications v. Day, 229 N.J. Super. 634, 638 (App. Div. 1977). However, pecuniary damages may sometimes be inadequate because of the nature of the injury or the right affected. Crowe, supra, 90 N.J. at 133. For example, in Crowe the Court determined neither an unwarranted eviction nor reduction to poverty could be compensated adequately by monetary damages awarded after a distant hearing. Ibid. The threshold standard for irreparable harm in the area of education is showing that once something is lost, it cannot be regained. M.L. o/b/o S.L. v. BOE of the Township of Ewing, EDU 4949-09, Emergent Relief (June 15, 2009). Since money damages are not available in education cases, and compensatory education is the only relief available, the analysis to be used is that if compensatory education, provided at a later date, cannot remedy the situation, then the harm is irreparable. Howell Township Board of Education v. A.I. and J.I. o/b/o S.I., EDU 5433-12, Emergent Relief (May 2, 2012).

In the present matter, if emergent relief is denied, petitioner is faced with an unenviable choice. She will either send L.R. to school despite a written letter from L.R.'s physician that says she should not be in school, or she will keep L.R. at home, where L.R. will not receive educational services and may face truancy proceedings. That a child who is suffering from a physical or mental illness and is deemed medically best kept out of school may potentially and irreparably suffer harm if compelled to attend school (let alone potentially visit harm upon others in the school setting) is self-evident and requires no further analysis. If that same child remains out of school and is not receiving educational services, the question is raised as to whether the lost educational services could be regained.

In L.K. & A.K. ex rel. L.K. v. No. Burlington Cnty. Reg'l Bd. of Educ., EDU 6071-12, Final Decision (March 21, 2014), which, as in the present matter, involved a dispute arising under the school laws, the Commissioner of Education denied, for lack of jurisdiction, petitioners' claim for compensatory education for the school district's failure to provide their classified child an education during his suspension from school. In that case, the school district had intended to impose a five-day suspension, but instead kept the child from school for more than ten days. Although the child thus received a de facto long-term suspension, the Commissioner found that the school district had denied him due process and other rights that come with a long-term suspension, such as the right to a hearing and the right to home instruction after five days. However, while the denial of these rights entitled the child to an expungement of the suspension from his record and reinstatement to school, he was not entitled to an order for compensatory education from the Commissioner.

As the Commissioner stated in his decision,

> [s]etting aside the fact that [the child] appears to have been without educational instruction for no more than ten school days, the remedy of compensatory education has been judicially fashioned to compensate special education students for violations of the [IDEA] . . . As the Commissioner of Education does not have jurisdiction to adjudicate challenges to the IDEA, he may not award remedies designed to compensate students for IDEA violations.

Like in L.K., in the present matter petitioner alleges a violation of a law within the Commissioner's jurisdiction, and even if it is determined that L.R. was unlawfully denied home instruction under N.J.A.C. 6A:16-10.1, the Commissioner does not have jurisdiction to grant compensatory education as relief. Accordingly, I **CONCLUDE** that petitioner will suffer irreparable harm if emergent relief is not granted.

To obtain emergent relief, a petitioner must also demonstrate a likelihood that they will prevail on the merits of the underlying claim. In the present matter, petitioner seeks an order that respondent violated the provisions of N.J.A.C. 6A: 16-10.1. It is not disputed and the District acknowledges that it did not, within five school days, notify petitioner "concerning the school physician's verification or reasons for denial within five school days after receipt of the written determination by the student's physician[,]" as explicitly and plainly required by N.J.A.C. 6A: 16-10.1(a)2. Accordingly, I **CONCLUDE** that petitioner has demonstrated a likelihood of success in showing a violation occurred at plenary hearing.

Each party argues that they will suffer greater harm if they do not prevail on the question of emergent relief. Considering the foregoing, it is apparent that if emergent relief is denied, L.R. will suffer irreparable harm in either not receiving educational services or in attending school against the advice of her physician. The same cannot be said for respondent, who if successful at plenary hearing, would have provided home instruction services to a student that did not require them. Accordingly, I **CONCLUDE** that the balance of equities argument favors petitioner.

Finally, in order to grant a motion for emergent relief in advance of a plenary hearing, a judge must be satisfied that "[t]he legal right underlying petitioner's claim is settled." N.J.A.C. 6A:3-1.6(b)(2). In other words, a judge "must not grant an injunction in cases when the principal of law on which it depends is disputed, and has not been settled in this state." Stevens v. Paterson & N. R. Co., 20 N.J. Eq. 126, 132 (Ch. 1869).

In the present matter, respondent argues that the legal right to home instruction upon a school district's failure to comply with the five-day requirement under N.J.A.C.

6A:16-10.1(a)(2) is not explicitly provided by regulation and, because the issue has not been addressed by any court in this State or the Commissioner of Education, the legal right underlying petitioner's claim is unsettled.

N.J.A.C. 6A:16-10.1(a)2 requires that a district notify the parent of the district's physician's verification of or reasons for denying the need for home instruction within five school days. The parties do not dispute that this did not happen. The regulation does not require that the school's physician contact the student's physician, but permits the school's physician to do so if he or she requires additional information. The school's physician may verify or deny without such consultation, and the regulation does not provide for an enlargement of the required timeframe when such inquiry is elected to be made.

In the present matter, the record is clear and there is no dispute that the Board did not notify petitioner of the need to refer the matter to its physician, a referral that is required by the regulation, until the eighth school day after the request, three school days longer than permitted. Mr. Gutierrez's certification makes it clear that in fact the district's physician never contacted or even attempted to contact, L.R.'s physician, and only issued a denial twenty-eight calendar days after the request when faced with an emergent relief application, citing the need for additional information that Dr. Bonnet had never even requested of Dr. Kargman, having delegated the request for information to non-medical personnel.

N.J.S.A. 18A:40-1 requires every school district to appoint a licensed physician as medical inspector. N.J.A.C. 6A:16-2.3(a)(4) provides that

> the school physician shall provide, at a minimum, the following services: . . .
>
> xi. Review, approval, or denial with reasons of a medical home determination of a student's anticipated confinement and resulting need for home instruction.
>
> [Emphasis added]

Clearly, in this matter, the minimum service expected of a school physician has not been provided.

It is true that the automatic provision of home instruction upon a school district's failure to comply with the five-day requirement under N.J.A.C. 6A:16-10.1(a)(2) is not explicitly provided for in the regulation. However, it would appear that to require a potentially sick student to return to class pending a plenary hearing in such an instance would produce an absurd result contrary to the intent of and to the public policy concerns informing the regulation, which clearly seeks to prevent a break in services longer than ten days. It requires little to no imagination to conceive of examples which illustrate this point. Suffice it to say that requiring a child suffering from physical or mental illness to attend school when they are not medically cleared to do so could lead to many potential harms visited upon that student or others around them in the school setting.

Respondent stated its belief at oral argument that petitioner is merely "forum shopping" for relief to maintain her desired status quo pending the concurrent special education due process petition. Such belief, no matter how strongly held or factually based, does not absolve the District of its obligation to review and either verify or deny with reason a request for home instruction under N.J.A.C. 6A:16-10.1. To fail to respond is to perform a disservice and abdicate responsibility not only to the petitioning student, but to the greater school community as well. Accordingly, I **CONCLUDE** that petitioner has demonstrated a legal right to the relief sought.

Based on the foregoing, I **CONCLUDE** that petitioner has demonstrated sufficiently that emergent relief is appropriate in this matter. Petitioner's request is **GRANTED.**

ORDER

Having **CONCLUDED** that petitioner is entitled to the requested emergent relief and that the petitioner's request for emergency relief is **GRANTED**, it is **ORDERED** that respondent provide L.R. with home instruction during the pendency of the underlying due process matter, for a period not to exceed ninety days (the period requested) from the date Dr. Kargman issued the original letter (October 6, 2015). This timeframe would run until approximately January 4, 2016.

The parties are reminded of the provisions of N.J.A.C. 6A:16-10(c)4 which states:

> For a student with disabilities, the home instruction shall be consistent the student's individualized education plan (IEP) to the extent appropriate and shall meet the Core Curriculum Content Standards. When the provision of home instruction will exceed 30 consecutive school days in a school year, the IEP team shall convene a meeting to review and, if appropriate, revise the student's IEP.

The matter will now be scheduled for plenary hearing on the underlying due process petition.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

November 19, 2015
DATE

ELIA A. PELIOS, ALJ

EAP/nd

395-15

AGENCY DKT. NO. 165-7/15

N.D. AND A.D., ON BEHALF OF MINOR CHILD, K.D.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOLS, OCEAN COUNTY,	:	
RESPONDENT.	:	

Prior to its transmittal to the Office of Administrative Law for a contested case hearing, the parties notified the Commissioner that this matter had been resolved. The record, the parties' fully executed Settlement Agreement ("Agreement"), and the Board Resolution approving the Agreement have been reviewed pursuant to *N.J.A.C.* 6A:3-1.13(b)2.

Upon such review, the Commissioner hereby approves the proposed settlement terms and dismisses the petition of appeal, subject to the parties' compliance with the Agreement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/01/15

Date of Mailing: 12/01/15

396-15

In the Matter of the **TENURE** Hearing	)	
of	)	**OPINION and AWARD**
PATSY CUNTRERA "Respondent"	)	
and	)	AGENCY DOCKET NO. 223-8/15
PASSAIC COUNTY VOCATIONAL SCHOOL DISTRICT "Petitioner"	)	

In accordance with the Teacher Effectiveness and Accountability for Children of New Jersey Act, ("TEACHNJ Act" or "Act") P.L. 2012, Chapter 26 signed into law by Governor Chris Christie on August 6, 2012 the undersigned was appointed as Arbitrator of the dispute described herein.

The hearings were held on October 14 and 21, 2015 at the Passaic County Technical Institute, Wayne, New Jersey. Both parties were afforded full opportunity to present all the necessary proofs and evidence. A verbatim transcript was made and all witnesses were sequestered and sworn. Briefs were received as agreed. (See Exhibit A)

BEFORE: Mattye M. Gandel, Arbitrator

APPEARING FOR PETITIONER:

Albert C. Buglione, Esq.
Buglione Hutton & De Yoe, LLC

APPEARING FOR RESPONDENT:

Ronald Ricci, Esq.
Ricci Fava & Bagley, LLC

Under TEACHNJ, if a tenured member is rated ineffective or partially effective in two consecutive summative annual evaluations, he or she will be charged with inefficiency and using the Stronge Evaluation Model, recommended by the NJ Department of Education and which is fair and equitable, Respondent has failed to meet the minimum standards that are required for a teacher to maintain his tenure, requiring these charges for tenure revocation to be sustained.

While Respondent chided the District for observing him the day he returned from absences in April and two days in a row in May, there are no provisions in the Statute indicating when or under what conditions observations are to be conducted. It is the District's position that when a teacher returns to work from an illness, he is expected to be prepared to work for a day of service and that he did not object to being evaluated and did not request an adjournment because he was not prepared.

As for Respondent's absences, he accumulated sixty (60) sick-days during the 2014-2015 school year; that due to his excessive absence, respondent disregarded and abandoned his professional responsibility to provide for the "efficient operation" of the District and disrupted the educational program at the expense of the students.

Further, Title I of the American's with Disabilities Act of 1990 requires an employer to provide reasonable accommodation to qualified individuals with disabilities; that Respondent and his doctors did not provide the requested and required information to assess the requested accommodation in a timely manner and that a reasonable accommodation was provided respondent after he provided the proper medical documentation.

Finally, credibility is at issue since Respondent has everything to gain or lose in this matter. The District asserts that its witnesses testified directly and without hesitation; that their testimony was consistent with the evidence submitted but that Respondent's testimony was not credible; that he contradicted himself and that Respondent's excuses for all of his non-compliance were unacceptable.

Therefore, the District asks this Arbitrator to determine that it has met its burden and to sustain the Charges.

RESPONDENT'S POSITION:

Respondent's position is that the evaluation process did not adhere substantially to the required evaluation process and the Corrective Action Plan (CAP) required by TEACHNJ and that these failures materially affected the outcome of Respondent's summative evaluation. Respondent points to the fact that some evaluations had no pre-conference; that pre-conferences must be done in person; that Respondent's supervisor, Salvatore Gambino, who was required by Statute to be present at all post-observation conferences only attended the post-observation conference for his own observation and that Gambino never reviewed the observations held during the school year until the Summative Evaluation in the spring of 2015, which meant that Gambino did nothing to help respondent correct his performance during the school year. Further, it is Respondent's position that a mid-year evaluation was required to be done by the SIP by February 15, 2015 but was never performed.

Respondent's position is that the District acted in an arbitrary and capricious manner when it conducted its second observation during the first period of the first day

that Respondent returned from an extended absence and when it conducted its third and fourth observations on back-to-back days. Doing two observations on consecutive days ignores the purpose behind TEACHNJ and the CAP and does not benefit the teacher on CAP especially because the law requires the fourth observation to give the teacher every opportunity to earn an effective rating.

Additionally, Respondent requested his accommodation in good faith in February 2015 based on his health condition but Respondent claims that the District, rather than give him the accommodations, suspended him in retaliation for his request. Respondent asserts that the suspension was unwarranted as the District had no information that indicated that he was unfit for duty but was reinstated after a month despite the fact that the District never received any further medical documentation regarding Respondent's condition, which indicated that there was no reason to have suspended him in the first place. The District's actions aggravated Respondent's hypertension and severely impaired his ability to improve to meet his goal and constitutes arbitrary and capricious behavior.

Respondent contends that regulations require that SGOs be developed by the teacher in consultation with the supervisor; that SGOs are not meant to be directed by central administration with little if any input from the teacher and are not to be across the board goals but rather geared to a specific teacher but that the SGO's for Respondent were done and directed by Gambino without any consultation with Respondent.

Finally, it is Respondent's position that the District did not provide any evidence supporting a tenure charge of excessive absenteeism; that the focus of absenteeism is not merely the number of days of absence but a consideration of the nature of the absence;

that some form of warning must be given to the employee that superiors are dissatisfied with the pattern of absences and that if the District was so concerned about his absence, it would not have suspended him for no reason after he returned from his extended absence.

Respondent asserts that the District utilized TEACHNJ to try to fire a teacher rather than to provide feedback to an educator; that the District must be strictly held accountable to follow all the procedures required to give a teacher the opportunity to become an effective teacher and that the District failed to follow the mandated procedures put in place to assist teachers.

Therefore, as the District has not followed the requirements of TEACHNJ and has clearly violated numerous requisite mandated procedures, the tenure charges must be dismissed and the Respondent must be reinstated to his former position as a teacher with back pay and remain on the CAP and receive its benefits for the remainder of the 2015-2016 school year.

OPINION:

Under the Teacher Effectiveness and Accountability for Children of New Jersey Act (TEACHNJ/ACT), for inefficiency charges, the arbitrator's role is limited and may only consider whether or not:

(1) the employee's evaluation failed to adhere substantially to the evaluation process, including but not limited to providing a corrective action plan;
(2) there is a mistake of fact in the evaluation;
(3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or

(4) the district's actions were arbitrary and capricious.

Further, an arbitrator must determine if one or more of these considerations is proven, did that fact materially affected the outcome of the evaluation and, finally, the quality of an employee's classroom performance is not subject to an arbitrator's review.

Two charges were brought against Respondent.

Charge One - Inefficiency

The Board has the obligation to prove by a preponderance of the evidence that the statutory criteria for the tenure charges have been met and, in support of its position, the Board submitted all the evaluations and testimony to substantiate that Respondent did not meet the required standards of an effective teacher. Based on observations, he received a rating of 'Partially Effective" for the 2013-2014 school year and, after developing the required CAP, which according to Dr. Michael Parent, Principal "is meant to assist the teacher in helping our students achieve more, learn better and for them to be much more effective educators" and was designed to assist Respondent in deficient areas identified in the evaluation, he received a rating of "Ineffective" for the 2014-2015 school year.

As stated above, this Arbitrator is not empowered to evaluate the quality of the evaluations and, therefore, they remain in the record as fact. However, Respondent asserted that procedurally TEACHNJ was not followed in numerous ways; that the District failed to adhere substantially to the evaluation process and that the District's actions were arbitrary and capricious. Respondent cited several aspects of TEACHNJ to support its position.

TEACHNJ, in conjunction with the New Jersey Administrative Codes and Statutes, places numerous requirements on the District when evaluating a teacher, which must be followed in order for the tenure charges to be sustained. There are requirements for pre-observation conferences, for post-observation conferences, for the number of conferences per school year and for the responsibilities of the designated supervisor and the School Improvement Panel (SIP).

The parties agreed that as a teacher on a CAP, Respondent must receive four evaluations per school year and, in fact, Respondent was evaluated on October 14, 2014 by Lydia Yikon'a; on April 27, 2015 by Salvatore Gambino, Respondent's supervisor, and Joe Sabbath;[1] on May 26, 2015 by Dr. Michael Parent, Principal, and on May 27, 2015 by Director of Special Education, Candice Chaleff. Additionally, Title 6A of the Code §6A:10-4.4 (c) states that

> . . . For all teachers, at least one of the required observations shall be announced and preceded by a pre-conference.

It was undisputed that Yakon'a's conference was announced but was not preceded by a pre-conference and, in fact, Parent testified that the pre-observation is "an opportunity to give us an indication of what they would like us to look at and focus on during the observation." Respondent disagreed with the District's position and rather asserted that the pre-observation is for the observer to advise the teacher what things the observer would be looking for. Certainly, whether the pre-observation conference is as stated by the District or as asserted by Respondent, it was undisputed that no pre-observation conference was conducted by Yakon'a. Further, §6A:10-4.4 states that

> A pre-conference, when required, shall occur at least one but not more than seven teaching staff member working days prior to he observation.

However, in this matter it was undisputed that Yakon'a did not have a pre-observation conference with Respondent as required by law.

Further, as for post-observation conferences, §6A:10-2.5.4 (f) states that

> The teaching staff member's designated supervisor and the teaching staff member on a corrective action plan shall discuss the teaching staff member's progress toward the goals outlined in the corrective action plan during each required post-observation conference, . . .

Parent acknowledged that as Respondent was on a CAP, post-observation conferences were required after all four of observations on him. However, the record established that Gambino, as Respondent's supervisor, was not at the post-observation conference with Yakon'a[2] and that, according to Parent, Gambino was not at the third post-observation with Parent. As for the fourth observation Chaleff testified that she wrote her comments in a memo to Respondent. Therefore, as there was no post-observation conference after Chaleff's observation, which she testified she did not know was required, Gambino, by definition, was not at that conference.

Further, regarding the purpose of post-observation conferences §6A:10-4.4 (2) stated that

> The post observation conference shall be for the purpose of reviewing the data collected at the observation . . . and offering areas to improve effectiveness.

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[1] TEACHNJ requires at least one co-observation per year.

[2] In fact, Gambino admitted that he never even read Yakon'a's evaluation until he compiled the summative report in the spring of 2015. Certainly, Gambino was unable to give Respondent guidance during the year as he had not read the evaluation until the end of the year.

In the opinion of this Arbitrator, the Code is very clear. Not only are there to be four evaluations per school year for a teacher on a CAP so that the teacher can improve but also, as testified to by Chaleff,

> the goal behind the evaluation process is to work in the best interest of the community to assure the parents and the community that their students are receiving an appropriate education by effective teachers.

As for the CAP she stated that

> The goal is to first alert them that their teaching is not meeting the effective standard, to provide them . . . a means to which the teacher can improve themselves and provide the guidance to help the teacher learn or improve their ability in those areas that the CAP was developed for.

Additionally, the requirement under §6A:10-2.5.4(f) is that the designated supervisor and the teacher "shall discuss" the teacher's progress during each required post-observation conference. This was clearly not followed.

While Parent asserted that post-observation conferences can be in writing and do not have to be face-to-face, this Arbitrator cannot agree. The word "discuss" has a very specific meaning and when legislators write law and codes, each word must be given meaning. To discuss is not to write an evaluation and send it to the teacher as was done by Chaleff. She testified that while she did not conduct a post-observation conference, she submitted her comments regarding her observation on D-1, the Formal Classroom Observation Form, which Respondent reviewed. She further stated that if she had had an actual face-to-face conference she would not have had any recommendations that were not included in D-1. However, that is not the point. The Code says "discuss."

While the Board asserted that according to the Stronge Evaluation model "Acknowledgment of any document is equivalent to a digital signature indicating receipt review, and acceptance of the observation," this Arbitrator must make a decision based on the TEACHNJ Statute, not on an evaluation model, despite being approved by the Board and endorsed by the Department of Education. Acknowledgement that the teacher has read and commented on an observation does not negate the necessity, under TEACHNJ for the observer, the supervisor and the teacher to "discuss" the observation.

Further, though Respondent could have requested a meeting to discuss an observation, the responsibility is on the District to follow the procedures set forth in TEACHNJ, not on the teacher to request a discussion. If a board of education wants to help a teacher improve, to discuss must mean to sit down and have a discussion as to areas in which the teacher can improve and to discuss the negative and positive aspects of an observation.

Whereas TEACHNJ was implemented so that teachers can improve instruction through the adoption of evaluations that provide specific feedback to educators, the idea of the acceptability of written communication as a form of a post-observation does not fit within the goals of the statue. Further, Parent agreed that the idea of a CAP is for a teacher, with the help of the school district, to improve. Therefore, in the opinion of this Arbitrator, post-observations, in accordance with the language of TEACHNJ and the Code, must be, by their very nature and objective, in person.

Gambino acknowledged that in the fall of 2014 (September, October and November) Respondent was doing better under the CAP; that he was doing things he was supposed to be doing and on his way but that he was still not proficient. Of course, the record reflected and, will be discussed below, that Respondent took a leave of absence beginning on December 8, 2014 due to an approved extended medical absence. However, from Gambino's testimony and the fact that Respondent had a good evaluation in October 2014 from Yakon'a, one would expect that he would have had a good year but for his illness and his suspension discussed below.

The District's witnesses repeatedly stated that Respondent did not request an adjournment of his evaluations and did not ask to cancel or redo an evaluation. However, this is not the responsibility of a teacher. It is the District that is the driving force behind the observations and it was well aware that Respondent was having medical issues and of his requests for accommodations.

Another issue affecting Respondent's performance in the spring of 2015 when he returned to work on February 17, 2015 was that he was not put back into his regular math class but was assigned to in-class support classes as a certified math teacher to teach math. The Board's position was that it did not want to disrupt the flow of the teaching while Respondent was absent and wanted to retain the teacher who was covering for him. If this had been the only action toward Respondent, this Arbitrator would have understood the Board's position. However, the cumulative effect of the Board's actions toward Respondent affected the outcomes of the evaluations.

Shortly thereafter Respondent was suspended from February 25 and was reinstated on March 25, 2014, which will be discussed below. However, the relevant part of these dates is that Respondent was absent again for a few days at the end of March and the beginning of April, then was out again from April 13 to April 24, 2015 and the very first day he was back to work, on April 27, 2015, the second evaluation was conducted.

Parent acknowledged that in order to improve one's teaching skills, one has to teach. However, the record established that the last time Respondent taught his regular math class was on December 5 and that he taught his regular class a few days in March and April before he was observed on April 27, 2015, the first day he was back. Clearly, Respondent did not have sufficient time to acclimate himself back to the classroom after such a tumultuous year. While Parent did not believe this was unreasonable, this Arbitrator cannot agree.

The Board cited a previous decision of this Arbitrator (#235-13) in support of its position that given Respondent's many years as a teacher he should have been ready the day he returned to the classroom to teach at his best. As a general principle, this Arbitrator agrees. However, the fact pattern in the instant matter can be differentiated from the previous Award. This Respondent clearly had medical problems and was continually frustrated at the way the District handled his issues especially his suspension and his back-to-back evaluations and its not granting him any of his requested accommodations until the last month of the school year. Further, whereas this Respondent was absent due to approved medical leaves for long stretches of time,

the teacher in the previous decision taught everyday. It was not a situation where he was absent and returned to the classroom and was unfamiliar with the students and where they were in the curriculum. Rather his issues were that he was unable to control the class; that he treated the students in an unprofessional manner; that he received many complaints from students and parents and that received coaching over several years as to his behavior in the class including swearing and using inappropriate language.

Returning to Respondent's fact pattern, he was absent again for several weeks in mid-May and returned on May 25 to once again be evaluated on the first day of his return. However, the District needed one more evaluation before the end of the school year, so what did it do? It evaluated Respondent on May 26, one day after the third evaluation.

This Arbitrator understands that there are requirements under TEACHNJ to observe a teacher on a CAP four times. However, it was undisputed that evaluations are supposed to help the teacher with his strengths and weaknesses and to give him guidance so he can improve. Therefore, there has to be a reasonable time period between evaluations to show improvement. Additionally, the Code requires a post-observation after each conference, which certainly did not happen after the third and before the fourth evaluations.

Respondent also contended that the language regarding the School Improvement Panel, Section C was not followed. According to §6A:10-2.5 (j)

> The School Improvement Panel shall ensure teachers with a corrective action plan receive a mid-year evaluation . . . The mid-year evaluation shall include,

> at a minimum, a conference to discuss progress toward the teacher's goals outlined in the corrective action plan. . .

Further, §6A:10-3.1 states that

> The School Improvement Panel shall include the principal, a vice principal, and a teacher . . .[3]

Additionally, 18A:6-120, Section C states that

> the panel shall conduct a mid-year evaluation of any employee in the position of teacher who is evaluated as ineffective or partially ineffective in his most recent evaluation.

Chaleff acknowledged that as a member of the SIP, she did not recall any mid-year evaluation done for Respondent despite the fact that the N.J.A.C. 6A:10-2.5(j) states that the SIP "shall ensure" teachers with a CAP receive a mid-year evaluation.[4] In contrast, Parent testified that Gambino did the mid-year evaluation "at the same time that . . . that I had done my observation," in other words on May 28, 2015, which was Exhibit 1.4 of Joint Exhibit J-2.[5] However, he acknowledged that the purpose of a mid-year evaluation is "to gauge the progress or lack thereof in a corrective action." With this purpose in mind, it must be concluded that no mid-year evaluation was done in this matter. Clearly, Respondent had no opportunity to gauge his progress. Parent's response was that if Respondent had been in school, the mid-year review could have been done in the middle of the year.

In the opinion of this Arbitrator, the actions of the District certainly did not support an approach whereby it was trying to help Respondent to succeed and to meet

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[3] The parties agreed that as it relates to evaluations, teachers are not included in the SIP.

[4] The language of N.J.S.A. 18A:6-120 is very clear that the Panel shall conduct a mid-year evaluation.

the goals of the CAP. The District acknowledged that Respondent did not fake his illness and it was aware of the reasons for his absences. This Arbitrator can agree that evaluations cannot be done when the teacher is not in attendance but the timing of the evaluations, the second the day he returned from an extended absence and suspension and the third the day he returned from another absence followed by the fourth on the very next day did not appear to represent a District that was trying to work with its staff member, a member who was a longtime employee with no disciplinary record and no history of medical leaves of absence.

A decision rendered by Arbitrator Daniel Brent[6] can be applied directly to this matter. He stated

> Respondent's performance for the year was fatally tainted by an arbitrary and capricious action that materially impaired Respondent's right to be judged and rated on the basis of valid observations and evaluations as required under the TeachNJ statute.
>
> The District has credibly described deficiencies in Respondent's performance observed during that evaluation visit, but the arbitrary and capricious timing and circumstances of this evaluation session was unjustified by sound educational policy, prohibited by applicable statute and undermined the validity of the District's summative evaluation of Respondent Jodi Thompson for the 2013-2014 school year, resulting in the tenure charge of inefficiency.

Similarly, though the evaluations described significant deficiencies in Respondent's work performance in this matter, the surrounding circumstances and the District's response to those circumstances were arbitrary and capricious and unjustified given that Respondent cooperated with administration and was forthright in explaining his illness

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[5] Parent also testified that Gambino did the mid-year evaluation in the "same time period" as he did the second observation (meaning April 27, 2015) and submitted it on May 28, 2015 (According to J-2, Exhibit 1.4 was submitted, May 29, 2015.)

from the very beginning and supported by medical documentation. Further, as stated by Arbitrator Brent, this Respondent must significantly improve his teaching skills, take the guidance and direction offered in the evaluations over the past two years and avail himself of all assistance so that he can return to being an effective teacher. If not, tenure charges may lie in his future. Further, the District must find a way to work with Respondent as set forth in the CAP so that he can improve his teaching methods.

Charge Two - Other Just Cause (Exploitation of Apportioned Sick-Time)

Absenteeism is a very serious matter and affects the educational opportunities students are entitled to expect and affects the productivity of the teacher. In addition, boards of education have a right to expect that its teachers are in class daily and ready to teach every day. Further, as in any form of discipline, the employer must advise the employee that attendance is the employee's responsibility and is a key component to being a productive employee; that excessive absenteeism will not be tolerated and that a series of counseling sessions and progressive warnings will be issued to the employee.

In the instant matter, Respondent, a math teacher, was awarded tenure during the 2008 school year. Assistant Superintendent John Maiello confirmed that prior to December 2014 Respondent never took any extended leave of absence and that he was unaware of any discipline for Respondent before the 2014-2015 school year. However, the record established that during the 2014-2015 school year Respondent was absent

[6] In the matter of Tenure Charges against Jodi Thompson and The State-Operated School District of the City of Newark, Docket No. 240-8/14 and 16-1/15.

on an approved sick leave for sixty (60) days; that the first day that Respondent was absent was December 8, 2014; that he was absent for the months of December of 2014, January 2015, part of February and returned to work on February 17, 2015.[7]

It was undisputed that Respondent kept the District informed of his medical condition including a memo and Excuse Slip, District Exhibit D-2, which indicated that Respondent would return to work on February 17, 2015. Additionally, the Board received a letter from Respondent's doctor, Respondent Exhibit R-2,[8] dated February 12, 2015, which indicated that Respondent was under his care, and cited "significant chronic health conditions that impair activities of daily living for Mr. Cuntrera." The doctor listed ten (10) Significant Health Impairments and identified twelve (12) accommodation ideas that Respondent and the doctor discussed and advised the District that "If these accommodations cannot be provided, please let Mr. Cuntrera know so that we can discuss alternatives." He further suggested that he could be called at any time for further discussions. Maiello acknowledged that he received this memo from Respondent; that he did not call the doctor for further discussions regarding Respondent's medical condition and that though he was concerned about Respondent's fitness for duty, there was nothing in the doctor's note that said Respondent was not fit for duty.

As stated above, Respondent returned to work on February 17, 2015,[9] worked the 17th through the 24th and attended two meetings on February 24th. According to

[7] Respondent's unrefuted testimony was that he received a bug bite while on vacation in Florida in July 2014; that he had severe side effects from that bite and blood pressure problems combined with anxiety. There was no evidence in the record that disputed Respondent's assertions as to his medical condition.

[8] Respondent's Exhibit R-2 and R-7 are the same document.

Respondent, the first meeting was with William Betar, head of human resources, and John Manning, Association Representative (neither of whom testified), at which time Betar told Respondent that the accommodations requested in R-2 could not be given as it would affect the quality of the education of the students. Later that same day Respondent attended a meeting with Superintendent, Diane Lobasco, who also did not testify. Respondent's unrefuted testimony was that Lobasco stated that the doctor did not have the authority to write this letter; that she was concerned about Respondent's safety and that of the students and that he was suspended. However, Maiello testified that when Respondent was suspended the concern was based on the February 12, 2015 memo but he acknowledged that there was no concern for the safety of the students and that there were no complains that Respondent was acting irrational or in a dangerous manner.

Lobosco wrote to the doctor on February 26, 2015, R-9, requesting additional information regarding accommodations and on March 10, 2015, in response to a request by the District, Respondent wrote a memo to Lobosco, R-12, which advised her that Respondent had given authorization to the doctor to release any and all medical records. However, Respondent acknowledged that no notes were sent to the District from the doctor between February 12th and March 19, 2015.

On March 19, 2015, Maiello wrote a memo to Respondent regarding his accommodation requests, R-4. In that letter, of the twelve (12) accommodations requested, the first was granted. Though the District asserted that this was only a

[9] Conditions under which he returned to work were discussed above.

suggestion, the memo was very clear regarding the first requested accommodation, which stated:[10]

> **Extra time will be provided to complete work.**[11]
> An additional period will be allowed. Mr. Cuntrera will no longer be assigned a duty period. All other extra time needed is to be after the contractual end of the day.

For the following requested accommodations, Maiello asked for more information: bullet points 3 through 6, 8 and 9. For bullet points 2, 7 and 10 through 12 Maiello gave suggestions and stated Board policy. In the opinion of this Arbitrator, the first bullet point was accommodated but the record clearly reflected that the accommodation did not take effect until June 2, 2015. In a memo with that date from Maiello to Respondent, R-10, Maiello stated that

> As a result of interactive process conduced with you and review of Dr. Braverman's letter dated April 1, 2015, and the additional medical information you have supplied, please find the PCTI's position with regard to your requests for reasonable accommodations.
>
> . . .
>
> **Extra time will be provided to complete work.**
>
> Request granted. Mr. Cuntrera is no longer being assigned a duty period, this will allow him an additional 42 minutes to complete his work. All other extra time needed is to be after the contractual day.

Though the District claimed that this was the memo that approved Respondent's request to be relieved of his duty period, this Arbitrator cannot agree. The only difference between the response regarding duty period on R-4 and the response on June 2, 2015, R-10, was that it said request granted. However, the March 19, 2015

[10] Maeillo testified that he told Gambino around March 25, 2015 that Respondent was no longer to be assigned a duty period.

memo was also in the affirmative when it stated that "Mr. Cuntrera will no longer be assigned a duty period." However, it was undisputed that Gambino continued to assign Respondent a duty period from March 19 until June 2, 2015 in contravention of Maiello's directive.

This Arbitrator agrees with the District that it is only required to grant reasonable accommodations and is not required to lower its standards. However, while the District asserted that the doctor did not respond in a timely manner, this Arbitrator cannot agree. In response to Lobosco's letter dated February 26, 2015, the record established that the Board received a letter from Dr. Braverman dated April 1, 2015 with his assessments but Maeillo did not grant or deny requests until June 2, 2015, R-10.

The record established that Lobosco and Maeillo were very concerned about Respondent's fitness for duty and, therefore, he was suspended beginning on February 25, 2015. As per R-3, dated February 24, 2015, Lobosco wrote to Respondent to advise him that he was suspended, "subject to the validation of your medical documentation, as well as fitness for duty." However, with no reason given and with no additional medical documentation received by the Board at that time, Respondent's suspension was rescinded and he returned to work on March 25, 2015.[12] A careful review of the testimony and documentation convinced this Arbitrator that there was no reasonable

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[11] Bold and underlined sentence was the accommodation requested by the doctor in R-2 dated February 12, 2015. The next sentences are the response from the assistant superintendent.

[12] Maeillo testified that he told Gambino on March 25, 2015 that Respondent will no longer be assigned a duty period. However, the record established that Respondent continued to be assigned a duty period by Gambino. Despite the fact that the duty period accommodation was granted, Respondent was told by Gambino that he had duty period responsibility. Respondent emailed Gambino on May 6, 2015, R-5, reminding him that he no longer had a duty period and asked Gambino to confirm. It was not until the June 2, 2015 memo, R-10, was issued, that Respondent was not assigned a duty period.

reason to have suspended Respondent on February 25, 2015. The doctor did not state in his memos that Respondent was not fit for duty and though the District continued to claim that it was concerned about Respondent's fitness and the safety of the students, the District did not send Respondent for a second evaluation and did not receive any further information from Respondent's doctor as was stated in the February 24th letter. However, with no explanation, the Board reinstated Respondent on March 25, 2015.

This Arbitrator can understand that the District may have wanted additional medical information but having not received that documentation, if it really believed that Respondent was a danger to himself and to the students or unfit for duty, why did it reinstate him on March 25, 2015? This curious set of facts led this Arbitrator to question the District's actions.

Respondent was absent most days in April and May and taught from May 26 through the end of the school year when Respondent was rated "ineffective" and the Board filed the tenure charges in accordance with TEACHNJ.

Board Policy #3212 (Attendance) stated in pertinent part that

> a teaching staff member who fails to give prompt notice of an absence, misuses sick leave, fails to verify an absence in accordance with Board policy, falsifies the reason for an absence, is absent without authorization, is repeatedly tardy, or accumulates an excessive number of absences may be subject to appropriate consequences, which may include the withholding of a salary increment, dismissal, and/or certification of tenure charges.

There was no evidence in the record of the hearing that Respondent did not promptly notify the District of his absences, that he misused sick leave, that he failed to verify an absence, that he falsified the reason for any absence, that he was absent

without authorization or that he was repeatedly tardy.[13] However, it was the Board's position that Respondent was excessively absent when he was absent sixty (60) sick days in the 2014-15 school year. As testified to by Maiello, the 2014-2015 school year was the first time since Respondent was hired in 2005 that he had "excessive leaves of absence."

The District cited the decision by Arbitrator Robert Gifford in a prior tenure matter, Docket No. 260-9/14,[14] in support of its position that the excessive absence charge should be sustained. However, in the opinion of this Arbitrator, the instant charge can be differentiated from the prior tenure decision in significant ways and does not support the Board's position.

- Steitz had a record of 560.55 days of excessive absenteeism over seven (7) school years.
- Steitz was progressively disciplined and warned about his poor attendance multiple times.

While this Arbitrator agrees that teachers must come to school regularly so that students will have the benefit of consistent instruction, this Respondent was absent sixty (60) days in one school year and never used leaves of absence in the past. Further, Respondent was never warned that his absenteeism would lead to disciplinary charges and, in fact, he was never disciplined for absenteeism, progressively or not, from the 2005 school year through the 2013-2014 school year.

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[13] On the contrary, the record established that Respondent kept the District informed about all of his absences and followed the Attendance Policy completely.

[14] In the Matter of the Tenure Hearing of Carson Steitz, School District of the City of Elizabeth, Union County. Decided by Arbitrator Robert C. Gifford, Esq.

Arbitrator Gifford cited the well established "Substantive Standards of Proof" to conclude that Steitz was excessively absent sufficient to warrant dismissing him from his tenured teaching position. Two of the three items cited are applicable in this matter.

> In order to terminate a tenured employee for chronic absenteeism, the Board must demonstrate that there was consideration of:
>
> (1) the particular circumstances of the absences and not merely the number of absences.
>
> . . .
>
> (3) That there be some warning, given to the employee that his or (sic) supervisors were dissatisfied with the pattern of absences.[15]

However, in this matter, the District did not demonstrate that it took into consideration the particular circumstances of Respondent's absences. He notified the District when he would be out. He had doctor certification of his condition. His doctor explained that he had significant health impairments, and that he needed accommodations, which, except for one were not given, and even that one was given the last month of the school year, and the doctor offered to discuss the accommodations with the Board but that never happened.

There was no testimony to convince this Arbitrator that the Board considered the circumstances of his absences. Rather, it merely looked at the number. Further, the record of the hearing was devoid of any notice to Respondent that his continued absences could lead to tenure charges and he was not progressively disciplined for this matter. Finally, despite the fact that the Board was so concerned for the progress of the students and that there be a consistent teacher's presence in the classroom, it suspended him for nineteen (19) days when he could have been in the classroom thus

increasing his anxiety and exacerbating the medical condition cited by his doctor. There was no proof in the record of the hearing that Respondent "exploited" his apportioned sick time.

For all of the above reasons, this Arbitrator must decide that the Board did not sustain its burden of proving the Tenure Charges.

The District asserted in its brief that Respondent was not a credible witness and that this Arbitrator should credit the testimony of its witnesses. While the District's position is that an employee has a reason to not tell the truth whereas the employer's witnesses should be given greater weight, this Arbitrator cannot agree with that general statement. Each situation is unique and whereas sometimes the Board's premise is accurate, other times it is not. In the instant matter, each witness was evaluated based on his or her own testimony and compared to the testimony of others and, in fact, this Arbitrator concluded that most witnesses were credible. Not only did this Arbitrator conclude that the Grievant was forthright in his testimony, but also that the Board's actions and its implementation, or lack thereof, of TEACHNJ and the Code were important factors in determining that it did not meet its burden.

Finally, the District issued two Formal Reprimands to Respondent on May 4, 2015 for changing historical grades and for fabrication of Student Growth Objectives (SGO), which appeared to this Arbitrator to be related to the same issue. However, Performance Standard 7, Student Academic Progress, or the SGO measure, is part of the evaluation system and, according to N.J.S.A. 18A:6-17.2, Considerations for

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[15] I/M/O Tenure Hearing of Velez, School District of Hudson County Schools of Technology.

Arbitrator in Rendering Decision, the evaluator's determination is not subject to an arbitrator's review. Therefore, these two reprimands will not be addressed.[16] Regarding the third reprimand for using another teacher's information, Respondent specifically noted in the Documentation Log that the material was created by another teacher. Contrary to the District's assertion, Respondent did not try to pass the material off as his own. In the opinion of this Arbitrator, this reprimand was insufficient to support tenure charges.

In conclusion, this Arbitrator has reviewed and carefully weighed all the evidence and arguments presented at the hearing and through briefs by both parties even though many facets were not referred to in the Opinion. Considering all the facts, this Arbitrator must decide that the District did not carry its burden of proof by a preponderance of the evidence; that the manner in which the District conducted the evaluations materially affected the outcome of the evaluations and that the Tenure Charges are to be dismissed.

In consonance with proof and upon the foregoing, the undersigned Arbitrator hereby finds, decides, determines and renders the following:

[16] In fact, at the hearing, Respondent's attorney objected to a discussion of Respondent's conduct in part because it is "part of the evaluation that I can't object to anyway. So I don't think this is relevant."

A W A R D

(1) The Tenure Charges are dismissed.

(2) Respondent shall be reinstated immediately to his former position as a math teacher with back pay and continue to receive the benefits of the CAP for the remaining of the 2015-2016 school year.

Dated: November 27, 2015

Mattye M. Gandel

State of New Jersey)
:SS
County of [redacted] Morris)

On the 27th day of November before me personally came and appeared Mattye M. Gandel, to me known and known to me to be the person described herein who executed the foregoing instrument and she acknowledged to me that she executed the same.

Notary Public

MUSARRAT MOGHAL
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Jan. 20, 2017

EXHIBIT A

The Board of Education requested to submit reply briefs in this matter first asserting that we had agreed to reply briefs but that if there had been no agreement, it asserted that reply briefs were appropriate so that both parties could present their entire positions. Respondent did not agree to the filing of reply briefs and after several emails from both parties and after due consideration, the Arbitrator issued this ruling via email on November 20, 2015.

Gentlemen;

I have checked my notes and the transcript and there is no mention of reply briefs. The following is from the transcript when we discussed filing of briefs at page 221:

Arbitrator: As you know, we have a very short window of opportunity for briefing schedules because we have 45 days from last Wednesday for my decision to be in, which turns out to be Thanksgiving or the next day, Friday. I'm wondering - unfortunately, I'm going to be away the 12th through the 19th. I'm wondering if you can have it to me by the 6th of November, which gives you like ten days.

Mr. Buglione: Yes

Therefore, it is clear that we never discussed the filing of reply briefs. I know that reply briefs have been submitted sometimes in arbitrations but is the exception and is usually when the parties have agreed in advance to submit such.

Additionally, I have carefully considered Mr. Buglione's reasoning for submitting a reply brief. However, while I believe that it is important for each party to have a full opportunity to present its arguments, reply briefs will not be considered in this matter for the following reasons. The parties never agreed to reply briefs, TEACHNJ requires a very short time schedule so that these matters are resolved quickly and because of Petitioner's main reason for wanting to submit a reply brief. While I agree that Petitioner has the right to question Respondent's credibility and to try to impeach his testimony, Petitioner had the opportunity when it submitted its first brief. As Petitioner said in the November 18 emails at 10:14 a.m. and again at 3:32 p.m.,

"It is abundantly clear that the respondent made misstatements <u>at the hearing</u> and we are allowed to point them out through the briefing process." (emphasis added)

At 3:32 p.m.: .. . the respondent was not candid <u>when he testified</u> before Your honor, and the petitioner should be able to point out the inconsistencies in his testimony, and to demonstrate that he provided false testimony." (emphasis added)

I certainly agree that Petitioner has the right to point out these inconsistencies and to try to impeach Respondent. However, whatever Respondent said was testified to at the hearing on October 21, 2015 and Petitioner had every opportunity to argue those points in its first brief. The hearing cannot be reopened to add new documents. Finally, as far as the reading of TEACHNJ, each party submitted several exhibits with its brief and its positions on the law and I will consider both parties' arguments and exhibits in forming my decision.

Respectfully submitted,
Mattye M. Gandel, Arbitrator

SEC DKT. NO. C13-14
OAL DKT. NO. EDE 09925-14
AGENCY DKT. NO. 344-10/15

KATHLEEN KOLUPANOWICH,	:	
COMPLAINANT,	:	
V.	:	COMMISSIONER OF EDUCATION
ANTHONY PREZIOSO, BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, MIDDLESEX COUNTY	:	DECISION
RESPONDENT.	:	

The Decision on Settlement and Penalty issued by the School Ethics Commission ("Commission"), along with the parties' Settlement Agreement ("Agreement"), have been reviewed. The Agreement contains an acknowledgment by respondent that: 1) he engaged in the conduct alleged in Paragraph 9 of the Complaint; 2) said conduct violated the School Ethics Act; and 3) he shall receive a reprimand from the Commission. On October 28, 2015, the Commission issued its final decision approving the parties' proposed Agreement, recommending the penalty of reprimand for respondent's violation of *N.J.S.A.* 18A:12-24.1(f) and (i), and dismissing the matter subject to compliance with the terms of the settlement.

Pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the Commission's determination as to violation of the School Ethics Act is not reviewable by the Commissioner herein. Rather, the Commissioner's jurisdiction is limited to review of the Commission's recommended sanction upon its determination that a violation has occurred. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon such review, the Commissioner agrees – for the reasons expressed in the Commission's final decision – that a reprimand is the appropriate penalty in this matter.

Accordingly, respondent Anthony Prezioso is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11/20/15

Date of Mailing: 11/20/15

401-15

JANENE RODRIGUEZ,	:	
PETITIONER,	:	
v.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – formerly assigned as the principal at New Brunswick High School – appealed her August 2015 reassignment to the position of principal at the McKinley Community elementary school, contending that she had been demoted and her salary potentially reduced, in violation of her tenure rights. The respondent Board filed a motion for summary decision.

The ALJ found, *inter alia,* that: there are no material facts at issue herein, and the matter is ripe for summary decision; although elementary school principals earn less than high school principals under collectively negotiated agreements, the petitioner in the instant case continues to earn the same salary that she did as high school principal; petitioner's benefits also remain the same; petitioner holds the tenured position of "Principal", and there are no separate titles for "High School Principal" and "Elementary School Principal"; petitioner's contentions that her tenure is only in the position of high school principal and that her transfer is a demotion are without merit; the controlling case in this matter, *Williams v. Board of Education of Plainfield,* 176 *N.J. Super.*, 154 (*App. Div.* 1980), certif. denied, 87 *N.J.* 306 (1981), holds that as long as the salary is not reduced, a transfer from the assignment of high school principal to that of elementary school principal is not a demotion as the new assignment is within the same tenured position, and such a transfer is proper and may occur without the petitioner's consent. The ALJ concluded that the respondent's transfer of petitioner was proper, and accordingly granted the Board's motion for summary decision. The petition was dismissed.

Upon review, the Commissioner concurred with the ALJ – for the reasons set forth in the Initial Decision – that the Board acted within its authority when it transferred petitioner from the assignment of high school principal to that of elementary school principal. Accordingly, summary decision was granted to the respondent, and the petition was dismissed.

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

December 9, 2015

OAL DKT. NO. EDU 11645-15
AGENCY DKT. NO. 212-8/15

JANENE RODRIGUEZ,	:	
PETITIONER,	:	
v.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that the Board acted within its authority when it transferred petitioner from the assignment of high school principal to elementary school principal. The Commissioner is also in accord with the ALJ that such transfer was not a demotion, as petitioner remained in the position of principal – only a change of assignment, not a change of position – and her salary was not reduced.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.[*]

COMMISSIONER OF EDUCATION

Date of Decision: 12/09/15

Date of Mailing: 12/10/15

[*] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11645-15
AGENCY DKT. NO. 212-8/15

JANENE RODRIGUEZ,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,
Respondent.

Luretha M. Stribling, Esq., for petitioner

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

Record Closed: October 16, 2015 Decided: November 5, 2015

BEFORE **JESSE H. STRAUSS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On August 6, 2015, Janene Rodriguez (petitioner) filed a Petition with the Commissioner of Education contending that her transfer from the position of Principal of New Brunswick High School to the position of Principal of McKinley Community School, a kindergarten through eighth-grade school by the New Brunswick Board of Education (District or Board) was a demotion with the potential of a $10,000 reduction in pay in violation of the Tenure Statute and TEACH NJ.

On August 6, 2015, the Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the petition and an application for Emergent Relief to the Office of Administrative Law (OAL), pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, for determination as a contested case. Counsel for petitioner requested an adjournment of the August 17, 2015, hearing date because she was scheduled to begin a trial in Superior Court on that date. I heard the Emergent Relief application on September 24, 2015, and denied it on that date. I also ordered the Board to file a Motion for Summary Decision by October 9, 2015, and petitioner to file a Cross-Motion for Summary Decision or a Motion in Opposition to the District's Motion by October 16. Following receipt of the Board's Motion, I received petitioner's Opposition on November 4, 2015, at which time the record closed.

DISCUSSION

Based on the Petition, petitioner's certification in support of her application for Emergent Relief, the District's papers in opposition to the application, and the District's Motion for Summary Decision, I make the following **FINDINGS of FACT**:

The Board hired petitioner into the position of Vice Principal at New Brunswick High School in 2010, where she remained for two years. She was promoted to Principal at the High School in 2012 and became tenured as a Principal. She had received satisfactory observations and evaluations had been designated as "effective." After Aubrey Johnson replaced retiring Superintendent of Schools Richard Kaplan on July 1, 2015, Johnson transferred petitioner to the McKinley Community elementary school effective August 1, 2015, without her consent. Petitioner contends that she is tenured and trained as a high school Principal and has no tenure or experience to work in the position of elementary school Principal. She viewed the transfer as a demotion.

Contrary to petitioner's fear of a reduction in salary because elementary school principals earn less than high school principals under collectively negotiated agreements, the Board has not reduced her salary. Salary and benefits remain the same. Johnson transferred four principals within the District as lateral moves which the

Board determined to be in the best interest of the District's students. Petitioner holds the tenured position of "Principal," and there is no separate title of "High School Principal."

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Summary decision is the administrative counterpart to summary judgment in the judicial arena. N.J.A.C. 1:1-12.5 provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This language is substantially similar to the guidelines for summary judgment under R. 4:46-2(c), which provides in part that the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

In order to defeat a summary decision motion, the adverse party must respond by affidavits setting forth "specific facts showing that there is a genuine issue which can only be determined in an evidentiary hearing." Use of the summary procedure is aimed at "the swift uncovering of the merits and either their effective disposition or their advancement toward prompt resolution by trial." Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954).

The New Jersey Supreme Court has encouraged trial-level courts "not to refrain from granting summary judgment when the proper circumstances present themselves." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 541 (1995). While cautioning that a judge should not weigh the truth of the evidence or resolve factual disputes at this early stage of the proceedings, the Court clarified that "when the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Id. at 540 (citations omitted).

I **CONCLUDE** that this matter is ripe for summary disposition. There are no material disputed facts which require a plenary hearing, and I further **CONCLUDE** that the Board is entitled to summary decision as a matter of law.

Petitioner argues that an employee who has tenure and has received an effective evaluation cannot be transferred to a different position or demoted unless there is cause. The Board contends that it has the authority to transfer a principal from one principal's assignment to another principal's assignment so long as there is no reduction in salary. No disciplinary grounds or pre-transfer due process is required. It does not matter whether petitioner was a good or bad administrator or whether she did anything wrong. A Board may base the transfer solely upon its determination that an individual school may benefit by such transfer.

The seminal case bearing on the issues here is Williams v. Board of Education of Plainfield, 176 N.J. Super. 154 (App. Div. 1980), certif. denied, 87 N.J. 306 (1981). A tenured high school principal challenged her transfer to a position as an elementary school principal without a reduction of salary. The Court affirmed the decision of the State Board of Education that

> . . . petitioner's transfer to the elementary school principalship was a proper transfer to a position of equivalent rank and could occur without appellant's consent. As long as the salary is not reduced, a transfer from the position of high school principal to that of elementary school principal is not a demotion; the certification required is the same, tenure can be acquired in both positions and the duties to be performed are of no less importance from an educational standpoint.
>
> [Id. at 158.]

The services of a Principal, which requires the holding of an appropriate certification issued by the board of examiners, shall be under tenure during good behavior and efficiency, and he/she shall not be dismissed or reduced in compensation except for certain enumerated reasons. N.J.S.A. 18A:28-5. Tenure is acquired after employment in a given position for the period of time specified in the statute. Ibid. Petitioner erroneously tries to make a distinction between the certificate of a high school

principal and the certificate of an elementary school principal. There is but a single certificate for the position of "Principal." N.J.A.C. 6A:9B-11.5.

It is undisputed that petitioner is tenured in the title of Principal and remains so after her transfer to McKinley. Her reliance on N.J.S.A. 18A:28-6 for the proposition that she was transferred to a different position without her consent is misplaced. She was simply transferred to a different location for which consent is not statutorily required rather than to a different position. Neither her tenure nor her certified position changed. She is wrong to characterize her tenure as just in the position of high school principal or that her transfer is a demotion. Her tenure is in the position of Principal.

Additionally, although petitioner expressed a concern that her salary would be reduced because the collective negotiations agreement for administrators provides for a $10,000 differential in the salaries of high school and elementary school principals, representatives of the Board have certified that there was no reduction in salary as a result of petitioner's transfer.

Based on Williams, the law is settled. Petitioner's reliance on Sanchez v. Board of Education of the City of Camden, EDU 23-03, State Board of Education (June 4, 2003), http://nj.law.rutgers.edu/collection/oal/, is misplaced. The State Board of Education in that case noted that the petitioner was entitled under the tenure laws to be placed in an assignment within her tenured position of "Principal," but that the Camden Board had improperly transferred her to the position of "Vice Principal," which is a separately tenurable position. Also, without a reduction of pay associated with the recent transfer of school locations, concern regarding future salary increases or adjustments does not change the calculus. The Court in Williams was very clear that, under applicable statutes, "there is no suggestion much less an express statement, that future salary increases or adjustments are to be considered in determining the validity of a transfer which is otherwise proper. N.J.S.A. 18A:28-5 merely prohibits 'reduc[tion] in compensation' except for the reasons stated and in the manner prescribed therein." Williams, supra, 176 N.J. Super. at 162. I am unconvinced that any aspect of TEACHNJ (N.J.S.A. 18A:6-118 et seq.) has altered N.J.S.A. 18A:28-5 or the case law thereunder with regard to the issues in this matter.

ORDER

It is hereby **ORDERED** that the petition be **DISMISSED.**

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

November 5, 2015
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency:

Date Mailed to Parties: NOV - 9 2015

Laura Dudics
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

400-15

400-15LM

State of New Jersey

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

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Commissioner

December 7, 2015

Noel C. Crowley, Esq.
Crowley & Crowley
20 Park Place
Morristown, New Jersey 07960

Derlys Maria Gutierrez, Esq.
Adams Gutierrez & Lattiboudere, LLC
The Legal Center
1037 Raymond Blvd., Suite 900
Newark, New Jersey 07102

Re: *Ali Feti v. Board of Education of the Borough of Netcong, Morris County, et al.,\ OAL Dkt. No. EDU 14826-13, Agency Dkt. No. 231-9/13.*

Dear Counsel:

I have reviewed the submissions filed in connection with petitioner Ali Feti's motion for leave to file exceptions out of time in the above-captioned matter, along with Mr. Feti's proposed exceptions. Within five days after receipt of this letter, the respondents may file reply exceptions.

Accordingly, the petitioner's motion to file exceptions out of time is hereby granted.

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library

DCH/MKD/JKH

VIA FACSIMILIE AND REGULAR DELIVERY

402-15

OAL DKT. NO. EDU 12148-13
AGENCY DKT. NO. 163-7/13

LAKEWOOD EDUCATION ASSOCIATION ON BEHALF OF ITS MEMBERSHIP,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/09/15

Date of Mailing: 12/10/15

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12148-13

AGENCY DKT. NO. 163-7/13

LAKEWOOD EDUCATION ASSOCIATION ON BEHALF OF ITS MEMBERSHIP,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,

Respondent.

Aileen M. O'Driscoll, Esq., for petitioners (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Katherine A. Gilfillan, Esq., for respondent (Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: October 26, 2015 Decided: November 12, 2015

BEFORE **LISA JAMES-BEAVERS,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on August 27, 2013, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The parties agreed to a settlement of all issues in dispute. The fully executed Settlement Agreement and Board Resolution were received on October 26, 2015, upon which date the record in this matter closed.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures, and as confirmed by the representations of both counsel.

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

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

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

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

November 12, 2015
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 11/13/15

Date Mailed to Parties: 11/13/15

/lam

SETTLEMENT AGREEMENT AND RELEASE

2015 SEP 25 P 2:19

This Agreement and Release ("the Agreement") is entered into and effective this day of September, 2015 ("the Effective Date"), by and between the Lakewood Board of Education ("Board") and the Lakewood Education Association ("Association").

WHEREAS, the Board is a body public and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1; and

WHEREAS, the Association is recognized as the majority representative and the exclusive and sole representative for collective negotiations concerning terms and conditions of employment for all full- or part-time certificated staff clerical personnel and paraprofessionals employed by the Board; and

WHEREAS, on or about July 22, 2015, the Association filed a Petition with the Commissioner of Education which has been docketed under OAL Dkt. No.: EDU 12148-13 and which, among other things, alleged that the Board failed to make the timely transfers of funds pursuant to N.J.S.A. 18A:66-127; and

WHEREAS, the Board has denied the allegations of the Petition and has denied any wrongdoing on its part; and

WHEREAS, the parties have negotiated in good faith and have reached an amicable settlement of all of the claims raised in the Petition and desire to resolve and settle all issues therein on behalf of all members represented by the Association; and

WHEREAS, the parties believe it to be in their best interest to set forth their agreement, and respective obligations and duties in writing;

NOW, THEREFORE, in consideration of the mutual covenants and conditions set forth in this Agreement, the Parties agree as follows:

1. **Payment.** The Board shall pay into the trust fund of the Association's counsel the amount of $2,500.00 in settlement of all claims that were or could have been raised in the Petition on behalf of any and all members, present or past, represented by the Association. The foregoing monies represent the full and final consideration to be paid for making this Release. The Association, on behalf of its members, accepts this amount in full satisfaction of any and all claims that were raised or could have been raised in the Petition.

2. **Release.** In exchange for the above consideration, the Association, on behalf of its members, hereby irrevocably and unconditionally waives, releases and forever discharges any claims, rights, demands, judgments, suits, causes of action or liabilities in tort, contract, by statute, whether known or unknown, that its members have or may have had against the Board, personally and officially, individually and collectively, its past and present Board members, officers, administrators, agents, employees, attorneys, and their successors, heirs and assigns, arising in any way out of the facts and circumstances as set forth in the Petition, including, but not limited to any and all claims for attorney's fees, contractual damages, pre and post judgment interest, back pay or front pay, any claims for emotional distress or pain and suffering, any

claims involving tax liability stemming from this Release, and any claims which could have been asserted up to this time in the Petition.

Releasor specifically releases the following claims:

> **Any and all claims for injuries, damages and consequential damages which are the subject of the Petition filed with the Commissioner of Education, currently pending in the Office of Administrative Law under docket number: EDU 12148-13.**

3. No Admissions This Agreement is entered into solely for the purpose of resolving disputed claims, and neither the execution, delivery, nor performance of this Agreement shall constitute or be construed at any time or for any purpose to be an admission of fact or liability by any of the parties; and the parties further agree that this Agreement and Release shall not be used as evidence in any judicial, administrative, or quasi-judicial proceeding, except to enforce the terms of the Agreement.

4. Assent to Terms. The parties hereto hereby acknowledge that they have signed this Agreement with a full understanding of their rights and that they were fully informed of the implications of this agreement by their counsel, Aileen O'Driscoll, Esq. for the Association and Katherine A. Gilfillan, Esq. for the Board. The parties acknowledge that they were given the opportunity to fully consider this Agreement.

5. Amendment; Materiality; No Waiver. This Agreement shall not be amended, changed or modified except in a writing signed by all parties. Each and every provision of this Agreement is material. In the event that any provision of this Agreement is determined to be illegal and unenforceable, the Parties agree, in advance, to reform the Agreement in good faith to provide each Party with the full benefit of each and every provision of the Agreement. Any failure to enforce any provision of this Agreement shall not operate as a waiver of such provision or of any other provision.

6. Authority/Indemnification. This Agreement is subject to Board approval. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board. The Association further represents that they have the full consent of its members to execute this Agreement on behalf of those represented in this matter as set forth in the Association's response to the Board's Interrogatories specifying the actual parties in interest in this Petition. In the event that any Association member institutes any action against the Board for any declaratory or monetary relief arising out of the same facts and circumstances giving rise to the allegations of the Petition herein, the Association agrees that it will hold the Board harmless and indemnify the Board for any loss, damages, pre or post judgment interest, and attorney's fees arising out of the Board's defense of such action.

7. Who is Bound. The Board and the Association members who have been named as parties in interest to this Petition are bound by this Release. Anyone who succeeds to the individual members' rights and responsibilities, such as their successors and assigns, is also bound. This Release is made for the Board's benefit and all who succeed to the Board's rights and responsibilities.

8. Entire Agreement. This Agreement constitutes the entire agreement between the parties with respect to the subject matters herein, and supersedes and integrates any and all prior representations, negotiations, discussions, understandings and agreements, whether oral or written. Each party acknowledges that the other parties, nor any agent or attorney of the other parties, have made any promise, representation or warranty whatsoever, express or implied, not contained in this Agreement to induce it to execute this Agreement.

9. Construction. The terms of this Agreement are not to be construed against any one party but are to be construed as if all parties prepared it equally.

10. Law Governing. This Agreement is governed by the laws of New Jersey.

IN WITNESS WHEREOF, the parties have executed this agreement consisting of four (4) pages as of the effective date.

LAKEWOOD EDUCATION ASSOCIATION

By: _____

Dated: 9/24/15

Witness: _____

Dated: 9/24/15

LAKEWOOD BOARD OF EDUCATION

By: _____
ADA GONZALEZ, BD. PRES.

Dated: 10/14/15

Witness: _____

Lakewood Board of Education
200 Ramsey Avenue, Lakewood, NJ 08701 Main Office: 732-364-2400 Fax: 732-905-3687

Laura A. Winters, Superintendent of Schools Thaddeus Thompson, Business Administrator

RESOLUTION

I. **Be It Hereby Resolved**, that the Board of Education approve the settlement in the matter captioned, *Lakewood Education Association v. Lakewood Township Board of Education*, OAL Dkt. No. EDU 12148-13, Agency Ref. No.: 163-7/13 in accordance with the terms of the Settlement and General Release provided to the Board which is on file in the office of the Business Administrator.

MOTION TO APPROVE BUSINESS AGENDA (passed)

Motion: Mrs. Gonzalez **Second:** Mr. Schwartz
6 Ayes: Mr. Jacobovitch, Mr. Rodriguez, Mr. Schwartz, Mr. Tift, Mr. Zlatkin, Mrs. Gonzalez
0 Nays:
0 Abstained:
2 Absent: Mr. Janklowicz, Mr. Weinberger

CERTIFICATION

I, Thaddeus Thompson, Business Administrator/ Board Secretary to the Board of Education of the Township of Lakewood, hereby certify the foregoing is a true copy of the Resolution adopted by the Board of Education of the Township of Lakewood, County of Ocean, at the public meeting held on the 14th day of October, 2015.

Thaddeus Thompson
Business Administrator/ Board Secretary

403-15

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

IN THE MATTER OF THE TENURE HEARING OF WAYNE WILLIAMS

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN Petitioner	:	Agency Dkt No. 282-9/15
and WAYNE WILLIAMS Respondent	:	ORDER DISMISSING CHARGES AS MOOT PURSUANT TO N.J.A.C. 6A:3-5.6

Before: Carol F. Laskin, Esquire, Arbitrator

APPEARANCES:

For the Petitioneru
Joseph G. Antinori, Esquire
Brown and Connery, LLP

For the Respondent
Cristal Holmes-Bowie, Esquire
Michael A. Armstrong and Associates, LLP

WHEREAS, the State Operated School District of the City of Camden ("District") or ("Petitioner") opened the above captioned matter by certifying Tenure Charges (the "Tenure Charges") against Wayne Williams ("Respondent") with the Commissioner of Education (the "Commissioner") for inefficiency in accordance with the statutory and regulatory provisions of the "TEACHNJ Act"; and

WHEREAS, the Commissioner referred the charged to the undersigned arbitrator pursuant to *N.J.S.A. 18A:6-16* as amended by *P.L. 2012, c.26;* and

WHEREAS, the hearing on the Tenure Charges commenced on

November 16, 2015 before this arbitrator; and

WHEREAS, the Respondent on November 22, 2015, notified the District that he was resigning from his employment position with the District effective November 23, 2015 and that he no longer wished to proceed with the tenure charge proceedings; and

WHEREAS, the Respondent submitted to the District a letter of resignation with a resignation date effective November 23, 2015, a copy of which attached hereto as "Exhibit A"; and

WHEREAS, the Petitioner by letter dated November 23, 2015 accepted the Respondent's resignation pursuant to *N.J.S.A. 18A:28-8*, a copy of which is attached hereto as "Exhibit B"; and

WHEREAS, the Tenure Charges against Respondent are now moot as a result of Respondent's unilateral resignation;

Therefore, it is on this 2nd day of December, 2015, hereby ORDERED that the Tenure Charges against Respondent are **DISMISSED AS MOOT.**

DATED: December 2, 2015

Carol F Laskin
CAROL F. LASKIN, ESQUIRE
ARBITRATOR

STATE OF NEW JERSEY:

COUNTY OF CAMDEN:

I CERTIFY that on 12-2-15
CAROL F. LASKIN, personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as his or her act and deed.

DATED: 12-2-15

Lynda A Green
NOTARY PUBLIC

LYNDA A GREEN
ID # 2316329
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires June 28, 2019

404-15

404-15L

State of New Jersey

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

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

DAVID C. HESPE
Commissioner

December 11, 2015

Aileen M. O'Driscoll, Esq.
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
150 West State Street
Trenton, NJ 08608

Bryant L. Horsley, Esq.
2151 Route 38 East, Unit 205
Cherry Hill, NJ 08002

Re: *Camden Education Association, on behalf of its members v. State-Operated School District of the City of Camden, Camden County*
Agency Dkt. No. 219-8/15

Dear Counsel:

Upon review of the Petition of Appeal filed in connection with this matter and based upon the respondent's failure to submit an Answer to the Petition that complies with *N.J.A.C.* 6A:3-1.5, I have determined to grant summary decision in favor of petitioners.

On August 7, 2015, the petitioners filed their Petition of Appeal pursuant to *N.J.A.C.* 6A:3-1.3, claiming that they had acquired tenure under *N.J.S.A.* 18A:17-2 as clerical and/or secretarial employees and that respondent violated their tenure rights by abolishing their positions and replacing them with non-tenured employees. In the Petition of Appeal, petitioners sought an order directing respondent to reinstate – retroactive to June 30, 2015 – the following petitioners to full-time clerical and/or secretarial positions, together with back pay, benefits and emoluments: Tracey Allen, Sandra Baratta, Warrenett Hines, Loureen Walker, Glenda Ezell, Annette Johnson-Nichols, Shannon Nelson, Dale Lampkin, Karen Merrill, and Evelyn Holland.[1] A copy of the Petition was served upon the District on August 7, 2015 via regular mail, as was an acknowledgment of filing and notice – dated August 10, 2015 – that an Answer to the Petition was due within 20 days. *N.J.A.C.* 6A:3-1.5.

Because the District failed to respond to the initial notice, a second notice was sent on September 2, 2015, via certified and regular mail, clearly indicating that – absent receipt of an Answer to the Petition within 10 days – each count in the Petition would be deemed admitted and the matter may be decided on a summary basis pursuant to *N.J.A.C.* 6A:3-1.5(e).

[1] Petitioners Yvette Williams and Christine McKim have been reinstated to positions in the District and have withdrawn from this action, pursuant to *N.J.A.C.* 6A:3-1.13(a). Petitioners have also indicated that Stacey Mills has likewise withdrawn from this action, but it appears that her name was not included in the original petition.

The certified mail return receipt card indicates that the September 2, 2015 notice was delivered to the District on September 4, 2015. The District failed to respond to the second notice. A third notice, which reiterated the information contained within the prior notice and also copied the District's attorney, was sent on September 18, 2015. The certified mail return receipt card indicates that the September 18, 2015 notice was delivered to the District on September 21, 2015. The District failed to respond to the third notice.

On October 5, 2015, a letter was sent to counsel for petitioners indicating that, due to a lack of notarized verifications for several petitioners, the matter would not move forward until that deficiency was cured. On November 10, 2015, petitioners submitted the necessary notarized verifications.

Thereafter, a final notice – sent to the District's attorney via certified and regular mail on November 12, 2015 – directed the District to file an answer within 10 days and indicated that should an answer not be filed within that time, each count in the petition would be deemed admitted and the matter may be decided on a summary basis pursuant to *N.J.A.C.* 6A:3-1.5(e). The certified mail return receipt card indicates that the November 12, 2015 notice was delivered to the District's attorney on November 16, 2015. A copy of the final notice, sent to the District via regular mail on November 12, 2015, was never returned to this office.

To date, no Answer has been filed on behalf of the District. Accordingly, petitioners' claim that the District's termination of their employment violated their tenure rights under *N.J.S.A.* 18A:17.2 is deemed admitted. It is hereby ordered that petitioners Allen, Baratta, Hines, Walker, Ezell, Johnson-Nichols, Nelson, Lampkin, Merrill, and Holland are hereby reinstated to their full time clerical and/or secretarial positions, together with retroactive salary, benefits and emoluments.

IT IS SO ORDERED.[2]

Sincerely,

David C. Hespe
Commissioner of Education

c: Louis R. Lessig, Esq.
County Superintendent
State District Superintendant, Camden City School District
State Law Library

DCH/MKD/BON

VIA REGULAR MAIL

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

405-15

In the Matter of Arbitration Regarding the Tenure Charge for Inefficiency	Opinion and Award
Michael Wilson	)
-and-	) Agency Docket No. 302-10/15
The State Operated School District of the City of Newark, Essex County	) December 12, 2015

Ruling on Respondent's Motion to Dismiss

Hearing Days (Telephonic): December 7, 2015
December 9, 2015

Appearances: Teresa L.Moore, Esq.
Riker Danzig Scherer
Hyland & Perretti, LLP
For the Petitioner

Nicholas Poberezhsky, Esq.
Caruso, Smith Picini, P.C.
For the Respondent

Lewis R. Amis
Arbitrator

BACKGROUND

The Respondent, Michael Wilson, has been employed by the State Operated School District of Newark since 1996. He acquired tenure and until the 2013-14 school year taught mathematics at the eighth grade level. During that time, his performance evaluations were consistently satisfactory. Beginning in the 2013-14 school year, the district transferred Wilson to the Ivy Hill Elementary School and assigned him to teach science and social studies at the seventh and eighth grade level.

In the school years of 2013-14 and 2014-15, respectively, the school district gave Wilson summative evaluations of "partially effective" and "ineffective." Those evaluations became the basis for the principal of the Ivy Hill Elementary school to file a charge of inefficiency against Wilson as required by P.L. 2012, as amended by P.L. 2015, C.109, chapter 26, the TEACHNJ Act. The principal requested his dismissal from his tenured position and suspension without pay. The State District Superintendent, on September 30, 2015, confirmed the charges against the Respondent, finding probable cause to credit the supporting evidence and that if true the charge was sufficient to warrant dismissal or salary reduction. The superintendent

determined, as well, that the Respondent should be suspended as requested.

The matter was then forwarded to the commissioner of Education for hearing. The Respondent replied to the charges on October 13, 2015. The Commissioner advised the parties' counsel on October 23, 2015, that the matter was being referred to arbitration:

> Dear Counsel:
>
> IN THE MATTER OF THE **TENURE** HEARING OF MICHAEL WILSON, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY, AGENCY DKT NO. 302-10/15
>
> Please be advised that, following receipt of respondent's answer on October 13, 2015, the above-captioned tenure charges have been reviewed pursuant to N.J.S.A 18A:6-17.2, subject to determination by the arbitrator of respondent's defenses and any motions which may be filed with the arbitrator.
>
> The balance of the charges have been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to determination by the arbitrator of respondent's defenses and any motions which may be filed with the arbitrator, including, but not limited to, whether N.J.S.A. 18A:6-17.2 and 6-17.3 now provide the exclusive mechanism for bringing inefficiency charges. The arbitrator shall review those charges brought pursuant to N.J.S.A 18A:6-16- which are not dismissed as the result of a motion- under the preponderance of the evidence standard.
>
> Accordingly, on this date, the charges are being referred to Arbitrator Lewis R. Amis pursuant to N.J.S.A 18A:6-16 as amended by P.L.2012,c.26 and P.L. 2015,c.109.

The Act provides as follows at C.18-A: 6-17.1, 22, b. (3)

> (3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses. Discovery shall not include depositions, and interrogatories shall be limited to 25 without subparts.

Further, Section f. of this paragraph provides:

> f. Timelines set forth herein shall be strictly followed...

In a letter dated November 5 citing Section (3) above, the Respondent's attorney claimed that the school district had not timely presented all of its evidence as required by statute, primarily the witness list with a complete summary of the testimony to be presented. Respondent included an arbitration award: Tenure Hearing of Marie Ebert, Agency Docket No. 267-9/14, in support of its position and requested a briefing schedule for a motion to dismiss.

The school district responded on November 6, 2015, with additional evidentiary materials, including a list of witnesses with summaries of their testimony and copies of the *Framework for Effective Teaching* for 2013-14 and 2014-15 describing the teacher performance evaluation system for those years. Petitioner also argued that any motion to dismiss should be denied because the Respondent had actual or constructive knowledge of all the evidence upon which the district would rely.

The Respondent filed a Motion for Summary Dismissal and a letter brief on November 27, 2015 citing the following grounds:

A. Petitioner failed to abide by its disclosure obligations as mandated by law.

B. Respondent's summative evaluation for the 2014-15 school year was improperly derived, thereby rendering the tenure charges defective.

C. Petitioner's tenure charges were filed pursuant to incompatible provisions of the TEACHNJ Act, thereby rendering them defective.

At the initial arbitration hearing in this matter held by telephone on December 7, 2015, the issue was reduced to whether the Petitioner disclosed pertinent mandated evidence in a timely fashion and if not, what should the remedy be?

The Petitioner contends that Respondent's motion should be denied because Petitioner complied with its disclosure obligations under New Jersey law. Petitioner would have the Arbitrator reject the Respondent's timeliness argument because

he had the information regarding witnesses and their testimony as early as September 1, 2015, when he was served with detailed documents pertaining to the Respondent's evaluations, including the identity of the evaluators, whom he could assume would be witnesses in Petitioner's presentation. Petitioner thus argues that the Respondent was in no way injured by any delay in its producing the evidentiary basis for its case.

The Respondent contends that the Petitioner did not meet its statutory disclosure obligations under N.J.S.A 18A:17-3 (b)(3). The Respondent argues that the statute is clear as to when disclosure is required--at the time the matter is referred to arbitration--and as to the requirement that timeliness be strictly observed. In neither case, the Respondent argues, did the Petitioner meet its statutory obligations; therefore, the tenure charges should be dismissed.

DISCUSSION AND FINDINGS

The Respondent shall prevail in this matter. The Act is clear that all evidence to be used by the Petitioner must be presented upon referral of a case to arbitration. In this case, that would have been on October 23, 2015. The Act also plainly states that evidence presented by the parties prior to the hearing is the only evidence allowed at the hearing except for the purpose of impeaching witnesses.

Petitioner did not submit a witness list with complete summaries of testimony as specified in 18A:6-17.1(3) until November 6, 2015. In addition, Petitioner added other documents not previously provided to the Respondent.

The Act is also clear that all timelines must be strictly adhered to. They were not in this case; therefore, I must find the Petitioner to have been in violation of the specific and general requirements for submitting its evidence in a timely manner.

The Act is a radical attempt to improve educational outcomes by improving the quality of instruction, using as one vehicle a system for teacher evaluations the legislature believes is superior to previous systems. The Act has strict rules for eliminating teachers who do not meet the standards of the evaluation system, and it has its own appeals procedures for adjudicating tenure disputes that are separate and distinct from standard grievance and arbitration procedures that might be found in collective bargaining agreements.

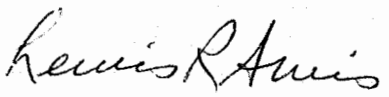
Perhaps the most notable aspect of the appeal process is that arbitrators are specifically excluded from reviewing an evaluator's determination of the quality of an employee's classroom performance. Otherwise, the arbitrator's function is largely to determine that the evaluation procedure is substantially followed, that the outcome is not influenced by considerations extraneous to the legitimate pedagogical goals of the school district, and that the procedures set forth in the Act for processing

appeals are followed. In short, the arbitrator's job, though it does not include any assessment of the judgments of professional educator/evaluators, is to assure that the due process provisions written into the Act are followed.

The Act's timelines and procedures for presenting evidence are rigid and are designed to provide sufficient but not unlimited time for parties to prepare their cases so that a fair and expeditious conclusion can be achieved. Any significant delay in the presentation of salient evidence by one party prejudices the other party's ability to represent its client. In this case, the Petitioner delayed presenting certain evidence it would use for fourteen days after the matter was referred to arbitration. That significantly curtailed the time Respondent had to prepare and present its evidence which was due within ten days of the first hearing--a hearing that must be and was scheduled forty-five days after the arbitrator's appointment as provided in 18A:6-17.1b(1). The Petitioner clearly failed to observe statutory timelines and offered no basis for that lapse; therefore, the Respondent's Motion for Dismissal will be granted

AWARD

The Respondent's motion for dismissal is granted based on the school district's failure to meet the requirements of N.J.S.A. 18A:6-17.1b(3). Michael Wilson shall be reinstated as a teacher with full back pay and benefits.



Lewis R. Amis, Arbitrator

December 12, 2015

406-15

406-15

H.F., ON BEHALF OF MINOR CHILD, D.F.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

The petitioner in this matter disputed the February 2015 decision of the Interim Executive County Superintendent for Bergen County (ECS) that minor child D.F. is not a "homeless child" pursuant to *N.J.A.C.* 6A:17-1.1 *et seq.* and the McKinney-Vento Homeless Education Assistance Act (McKinney-Vento Act). Petitioner's minor child, D.F., is currently enrolled in the respondent Board's school district, but attends school in an out-of-district placement pursuant to his individualized education program (IEP). The ECS also determined that H.F. and D.F. are currently domiciled in the Borough of Cliffside Park, and D.F. is consequently entitled to a free public education from the Cliffside Park Public School District. Respondent Teaneck Board of Education filed a motion for summary decision.

The ALJ found that the residency decision that the petitioner sought to appeal was rendered by the ECS at the request of H.F., and the respondent Board was not a party to the ECS's decision. The ALJ concluded that there is no factual basis for petitioner's alleged claims against the respondent Board; accordingly the ALJ granted respondent's motion for summary decision, and dismissed the petition.

Upon full review and consideration of the record and the ALJ's Initial Decision, the Commissioner determined to remand this matter to the OAL for further proceedings to determine the threshold issue of whether D.F. is a "homeless" child under applicable federal and state law. In reaching this determination, the Commissioner found, *inter alia*, that: the ALJ's decision to grant the respondent's motion for summary decision and dismiss the petition was premature; a dismissal of the case at this juncture would unjustly short-circuit the petitioner's right to appeal the ECS's determination pursuant to *N.J.C.A.* 6A:17-2.7; the respondent Board is – at the least – an interested, if not indispensible, party to this action, as D.F. continues to be enrolled in respondent's school district; and respondent's motion to consolidate this action with a related matter – *Board of Education of the Township of Teaneck, Bergen County v. Board of Education of the Borough of Cliffside Park, Bergen County and H.F., on behalf of minor child, D.F.*, OAL Dkt. No. EDU 9966-15 – indicates Teaneck recognized that an outright dismissal of this petition could be problematic. Accordingly, the Commissioner denied respondent's motion for summary decision, granted respondent's motion in the alternative to consolidate EDU 7964-15 with EDU 9966-15, and remanded the matter to the OAL for further proceedings, including rendering the requisite findings of fact to facilitate a determination of whether D.F. is a homeless child under applicable statutes and regulations.

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

December 14, 2015

406-15

OAL DKT. NO. EDU 7964-15
AGENCY DKT. NO. 79-4/15

H.F., ON BEHALF OF MINOR CHILD, D.F.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions. For the reasons stated herein, the Commissioner is constrained to remand the matter to the OAL for further proceedings in order to determine whether D.F. is a "homeless child" under applicable federal and state law.

In this action, petitioner disputes the February 3, 2015 decision of the Interim Executive County Superintendent (ECS), who concluded: 1) minor child D.F. is not a"homeless child" pursuant to *N.J.A.C.* 6A:17-1.1 *et seq.* and the McKinney-Vento Homeless Education Assistance Act (McKinney-Vento Act), 42 *U.S.C.* §§ 11431 *et seq.*; and, therefore 2) D.F. is not entitled to a continuation of his education in respondent's (Teaneck) district.[1] Petitioner contends that D.F. does meet the definition of a "homeless child" and, therefore, should be permitted to continue his education in Teaneck.[2]

[1] The ECS further determined that H.F. and D.F. are presently domiciled in the Borough of Cliffside Park.

[2] D.F. is presently enrolled in the Teaneck School District, but attends school at an out-of-district placement pursuant to his individualized education program (IEP). According to the record, Teaneck has historically provided transportation for D.F., and covered the tuition costs associated with his out-of-district placement. The present controversy arose when, upon learning that H.F. and D.F. were allegedly residing in Cliffside Park, Teaneck engaged in discussions with Cliffside Park and the ECS in an attempt to identify D.F.'s present school district of

Parents or guardians are entitled to appeal an ECS determination regarding a child's homeless status to the Commissioner. Pursuant to *N.J.A.C.* 6A:17-2.7(a), "If a dispute remains between the parent and the involved school district(s)" following the ECS's determination as to a child's homeless status, "the parent...may appeal to the Commissioner for determination" under *N.J.A.C.* 6A:3.

Generally, children in New Jersey are entitled to attend public school – free of charge – at the school district within which they are domiciled, known as the school district of residence. *N.J.S.A.* 18A:38-1a; *N.J.A.C.* 6A:22-1.1 *et seq.* An unemancipated child's domicile is determined by that of his or her parent, custodian or guardian. *N.J.A.C.* 6A:22-3.1(a)1; *P.B.K. v. Board of Education of the Borough of Tenafly*, 343 *N.J. Super.* 419, 426-27 (App. Div. 2001). When it is alleged that a child's parent, custodian or guardian lacks a domicile, however, determining the child's district of residence – and where that child may attend public school free of charge – requires a different analysis. Under those circumstances, a fact-specific inquiry must be made to determine if the child meets the legal definition of a "homeless child."

Homelessness determinations in this context are dictated by both federal and state law, and further influenced by state regulations. Under the McKinney-Vento Act, 42 *U.S.C.* §§ 11431 *et seq.*, homeless children are defined as "individuals who lack a fixed, regular and adequate nighttime residence," examples of whom include children sharing housing with other people due to loss of their own housing, economic hardship, or a similar reason; children living in motels, hotels, trailer parks or campgrounds due to lack of other accommodations; children living in emergency or transitional shelters; and children living in cars, parks, or other public spaces. Similarly, under state law, a "homeless child" is a child who lacks a fixed, regular and

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residence. Ultimately, on January 20, 2015, petitioner himself requested a determination from the ECS as to D.F.'s homeless status pursuant to *N.J.A.C.* 6A:17-2.7(a).

adequate residence pursuant to *N.J.S.A.* 18A:7B-12 and *N.J.A.C.* 6A:17-2.2. The corresponding state regulations, which substantially reiterate the illustrative examples contained in the McKinney-Vento Act, provide additional guidance for the fact-finder:

> *N.J.A.C.* 6A:17-2.2 Determination of homeless status
>
> (a) A district board of education shall determine that a child is homeless for purposes of this subchapter when he or she resides in any of the following:
>
> 1. A publicly or privately operated shelter designed to provide temporary living accommodations, including:
>
> i. Hotels or motels;
> ii. Congregate shelters, including domestic violence and runaway shelters;
> iii. Transitional housing; and
> iv. Homes for adolescent mothers;
>
> 2. A public or private place not designated for or ordinarily used as a regular sleeping accommodation, including:
>
> i. Cars or other vehicles including mobile homes;
> ii. Tents or other temporary shelters;
> iii. Parks;
> iv. Abandoned buildings;
> v. Bus or train stations; or
> vi. Temporary shelters provided to migrant workers and their children on farm sites;
>
> 3. The residence of relatives or friends where the homeless child resides out of necessity because his or her family lacks a regular or permanent residence of its own;
>
> 4. Substandard housing; or
>
> 5. Any temporary location wherein children and youth are awaiting foster care placement.

Thus, any homelessness determination is, necessarily, fact-sensitive and case-specific. The Commissioner has recognized that "an evaluation of 'homelessness' cannot rest upon a simple calculation of the amount of time that children have spent in a particular location or municipality. The reasons for the children's homelessness, their living conditions, and the resources and intentions of the parents or custodians are relevant." *M. O'K. v. Board of Education of the Borough of Cresskill, Bergen County*, OAL Dkt. No. EDU 14830-13, Commissioner Decision No. 325-14, issued August 12, 2014, at 3.

If a child is deemed homeless, then that child's school district of residence[3] is defined by law as the school district in which the child's parent or guardian resided *prior* to becoming homeless; it may or may not coincide with the school district in which the child currently resides. *N.J.S.A.* 18A:7B-12c; *N.J.A.C.* 6A:17-1.2. Identifying a homeless child's school district of residence is crucial, for it is the district of residence which is responsible for deciding where the homeless child should be enrolled – upon assessment of the child's best interests and the parent's wishes, with due attention given to continuity of the child's educational program. *N.J.A.C.* 6A:17-2.5. The homeless child's school district of residence is also responsible for payment of tuition, pursuant to *N.J.S.A.* 18A:38-19, if the child attends school in a different district, and the child's transportation. *N.J.A.C.* 6A:17-2.3. But, before any disputes concerning enrollment or tuition can be addressed, the threshold determination as to whether the child meets the definition of a "homeless child" must be made – based upon a comprehensive, fact-specific examination of the family's circumstances. *See, e.g., Board of Education of the Town of Hammonton, Atlantic County v. Board of Education of the City of Gloucester, Camden County*, OAL Dkt. No. EDU 18573-13, Commissioner Decision No. 311-14, issued July 31, 2014, at 4.

Following this petition's transmittal to the OAL, Teaneck filed a Motion for Summary Decision, arguing that it was not a properly named party and that "petitioner's appeal should be directed to the County Superintendent, who made the decision[.]" (Teaneck's Motion, at 2) Teaneck further explained that the only involvement it had with the ECS's determination was "the provision of documents relevant to the matter." (Teaneck's Motion, at 2) In the alternative, Teaneck requested consolidation of this action, pursuant to *N.J.A.C.* 1:1-17.1, with a

[3] The McKinney-Vento Act utilizes the term "school district of origin" when referring to a homeless child's school district of residence.

related matter it filed seeking tuition reimbursement and other relief captioned *Board of Education of the Township of Teaneck, Bergen County v. Board of Education of the Borough of Cliffside Park, Bergen County and H.F., on behalf of minor child, D.F.*, OAL Dkt. No. EDU 9966-15. Teaneck asserted that both actions involve common questions of fact and law as well as common parties and noted "the disposition of both claims touch upon the validity" of the ECS's homelessness determination. (Teaneck's Motion at 7)

Ultimately, the Administrative Law Judge (ALJ) granted Teaneck's Motion for Summary Decision, finding that Teaneck "was not a party to the Interim County Superintendent's decision" and concluding "there is no factual basis for petitioner's alleged claims against respondent relating to the Interim County Superintendent's determination as to petitioner's residency and asserted homeless status." (Initial Decision at 3) The ALJ did not address the consolidation of this matter with EDU 9966-15.

Upon careful review of the record and the parties' submissions, the Commissioner finds that the ALJ's decision to grant Teaneck's Motion for Summary Decision and dismiss the petition was premature, and must be rejected. A Motion for Summary Decision is appropriate where "the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1:1-12.5. There is nothing in the present record to indicate that there are no genuine issues of material fact in dispute. More specifically, no findings of fact – disputed or undisputed – were made by the ALJ in connection with D.F.'s alleged homeless status, and no stipulations of fact were presented; instead, the Initial Decision merely recites the matter's procedural history and summarizes the ECS's determination, which is challenged by petitioner. A determination as to whether D.F. meets the legal definition of a

"homeless child" can only be made upon a thorough examination of the family's past and present living arrangements and attendant circumstances – which, absent a joint stipulation from the parties, may require an evidentiary hearing with testimony and documentary evidence. Thus, the granting of Teaneck's Motion for Summary Decision was premature.

Although Teaneck argues that dismissal of the petition is appropriate due to petitioner's failure to state a claim against the district, a dismissal at this juncture would unjustly short-circuit petitioner's right to appeal the ECS's determination to the Commissioner pursuant to *N.J.A.C.* 6A:17-2.7.[4] Teaneck is – at least – an interested party to this action (if not an indispensable party), as D.F. continues to be enrolled in that district. Furthermore, Teaneck's potential right to tuition reimbursement from Cliffside Park (a claim which Teaneck raised in the related, pending petition) – and its potential responsibility to continue providing D.F. with a free public education – will be directly affected by the Commissioner's final determination as to whether D.F. is considered homeless under the law. By moving in the alternative for consolidation of this action with EDU 9966-15, Teaneck apparently recognized that outright dismissal of this petition could be problematic from a procedural perspective.

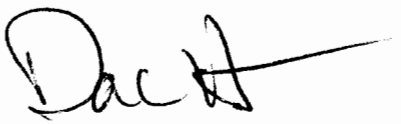
In summary, D.F.'s homeless status is a threshold question that must be resolved by the Commissioner – through adoption or rejection of the ECS's determination – before the Commissioner can then decide whether D.F. may continue to be enrolled in the Teaneck School District, and further establish which district is responsible for the cost of D.F.'s education. Based upon the present record – which does not contain any findings of fact as to H.F. and D.F.'s past or present residences, domiciles and/or temporary living arrangements – the Commissioner is unable to determine whether D.F. meets the legal definition of a "homeless child." Absent the

[4] While it might have been permissible for petitioner to name the ECS as a respondent in this matter, nothing in the controlling statute or regulations requires petitioner to do so.

requisite findings of fact, the Commissioner is constrained to remand the matter to the OAL for further proceedings. In addition, for the reasons advanced by Teaneck in its Motion, the Commissioner finds this matter should be consolidated with EDU 9966-15 pursuant to the standards delineated in *N.J.A.C.* 1:1-17.3.[5]

Accordingly, Teaneck's Motion for Summary Decision is denied; Teaneck's Motion in the Alternative to Consolidate EDU 7964-15 and EDU 9966-15 is granted, and this matter is remanded to the OAL for further proceedings – including rendering of the requisite findings of fact – which will facilitate a determination as to whether D.F. is a "homeless child" under applicable federal law, state law and regulations cited herein. Said determination will then allow for subsequent disposition of the claims raised within EDU 9966-15, and resolution of this controversy in its entirety.

IT IS SO ORDERED.[6]



COMMISSIONER OF EDUCATION

Date of Decision: 12/14/15

Date of Mailing: 12/15/15

[5] *N.J.A.C.* 1:1-17.3 provides: "In ruling upon a motion to consolidate, the judge shall consider: 1) the identity of parties in each of the matters; 2) the nature of all the questions of fact and law respectively involved; 3) to the extent that common questions of fact and law are involved the saving in time, expense, duplication and inconsistency which will be realized from hearing the matters together and whether such issues can be thoroughly, competently, and fully tried and adjudicated together with and as a constituent part of all other issues in the two cases; 4) to the extent that dissimilar questions of fact or law are present, the danger of confusion, delay or undue prejudice to any party; 5) the advisability generally of disposing of all aspects of the controversy in a single proceeding; and 6) other matters appropriate to a prompt and fair resolution of the issues, including whether a case still pending in an agency is contested or is ripe to be declared contested." All factors weigh in favor of consolidating the two matters at issue here.

[6] Final determinations of the Commissioner may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), in accordance with applicable court rules.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 07964-15
AGENCY DKT. NO. 79-4/15

H.F. o/b/o D.F.,
Petitioner,
v.
TEANECK BOARD OF EDUCATION,
Respondent.

H.F., petitioner, pro se

Marian Cricoli, Esq., for respondent (Machado Law Group, attorneys)

Record Closed: October 19, 2015 Decided: November 4, 2015

BEFORE **EVELYN J. MAROSE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner is appealing a residency decision rendered by the Interim Executive County Superintendent for the Department of Education. During an initial prehearing telephone conference, respondent stated that the District wanted to file a Motion to Dismiss. Deadlines for the submission of papers were detailed and discovery was

stayed pending the hearing of initial motions by both parties. Based upon the request of petitioner, the initial deadlines were extended.

On August 21, 2015, respondent filed a Motion for Summary Decision. On October 2, 2015, petitioner filed Opposition papers. On October 13, 2015, respondent filed a Reply to petitioner's Opposition papers. Oral argument was conducted on October 19, 2015.

STANDARD FOR SUMMARY DECISION

Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issues to the trier of fact. R. 4:46-2.

The standard for granting summary judgment (decision) is found in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995). In Brill, the Supreme Court adopted a standard that "requires the motion judge to engage in an analytical process essentially "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Id. at 533 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 251-252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)). To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed worthless and will serve no useful purpose." Brill, supra, 142 N.J. at 541.

The Court stated that the motion judge is to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine

whether there is a genuine issue for trial." Id. at 540 (quoting Liberty Lobby, supra, 477 U.S. at 251-252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214).

FACTUAL DISCUSSION AND FINDINGS

On February 3, 2015, Norah E. Peck, Interim Executive County Superintendent issued a determination, pursuant to petitioner's January 20, 2015, request and based upon all of the documentation submitted by H.F., by and on behalf of the Teaneck Public Schools and by and on behalf of the Cliffside Park Public Schools. The Interim County Superintendent listed all of the documents that she reviewed in her determination.

The Interim County Superintendent found that H.F. and his son moved from Teaneck to a specific location in Cliffside Park, where they resided nightly, approximately one year and a half prior to her determination. Accordingly, she determined that D.F. was not homeless and entitled to the services and considerations outlined in the McKinney–Vento Homeless Act, 42 U.S.C.A. 11431 et seq., and N.J.A.C. 6A:17-2.5(a)(2), which "continues a child's education in the school of origin for the duration of his homelessness." Ms Peck determined that D.F. was domiciled in Cliffside Park, and consequently entitled to a free public education from the Cliffside Park Public School District. She expressly noted that if petitioner disagreed with this determination, he could file a Petition of Appeal with the Bureau of Controversies and Disputes according to the procedures detailed in N.J.A.C. 6A:3-1.1 et seq.

I **FIND** that respondent was not a party to the Interim County Superintendent's decision. The residency decision that petitioner seeks to appeal was rendered by the Interim County Superintendent, at the request of H.F. Accordingly, I **CONCLUDE** that there is no factual basis for petitioner's alleged claims against respondent relating to the Interim County Superintendent's determination as to petitioner's residency and asserted homeless status.

ORDER

Based on the foregoing, it is **ORDERED** that the District's request for summary decision is **GRANTED**.

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

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

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

Nov. 4, 2015
DATE

EVELYN J. MAROSE, ALJ

Date Received at Agency:

Date Mailed to Parties: NOV 10 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

407-15

IN THE MATTER OF THE TENURE HEARING	:	
OF CHRISTINE GILLESPIE,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION ON REMAND
OF THE CITY OF NEWARK,	:	
ESSEX COUNTY.	:	

SYNOPSIS

This case dates back to 2003, when the petitioning Board filed tenure charges of incapacity and excessive absenteeism against respondent, a tenured teacher, and sought to terminate her employment with the district. The matter was transmitted to the Office of Administrative Law, but the tenure hearing was delayed for several years due to the pendency of a related workers' compensation case. The case was restored to the active list in January 2011. Thereafter, respondent failed to appear at a hearing scheduled for June 10, 2011. Respondent subsequently submitted a written explanation of her failure to appear, and the Commissioner found that the facts surrounding her absence did not warrant summary decision by default. The case was remanded to the OAL in August 2011 for fact finding and legal recommendations, with a directive from the Commissioner that respondent provide the OAL and petitioner with specific contact information for communicating with Ms. Gillespie, and that: "*...respondent will not be excused if she fails to reply to notices, pleadings and communications sent to the phone numbers and addresses that she provides.*"

Following the Commissioner's remand, two hearing dates were scheduled (in December 2011 and May 2012) and subsequently adjourned by the OAL before the matter was again put on the inactive list pending resolution of the workers' compensation case. The case was reactivated in May 2015, and counsel for petitioner indicated in June 2015 that the workers' compensation case had been dismissed for lack of prosecution. Subsequently, OAL sent a notice to the parties that the remand hearing was scheduled for November 4, 2015. Respondent once again failed to appear, and also failed to offer any explanation of her non-appearance; accordingly, it seems that respondent has abandoned her defense of the tenure charges.

The Commissioner found, *inter alia*, that pursuant to *N.J.A.C.* 1:1-14.4(d) and applicable case law, an Initial Decision is required in tenure charge cases that were filed prior to the enactment of the TEACHNJ Act, *P.L.*2012, *c.*26 (C.18A:6-117 *et al.*). In cases such as this one, the judge may enter an Initial Decision on the merits based on *ex parte* proofs, provided the failure to appear is memorialized in the decision. Accordingly, the Commissioner remanded the matter to the OAL for an *ex parte* proof hearing proof hearing pursuant to *N.J.A.C.* 1:1-14.4(d), followed by the issuance of an Initial Decision with findings of fact and legal recommendations as to the merits of this tenure matter.

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

Issued 12/17/15

OAL DKT. NO. EDU 9195-11
(EDU 3399-03 ON REMAND)
AGENCY DKT NO. 67-2/03

IN THE MATTER OF THE TENURE HEARING	:	
OF CHRISTINE GILLESPIE,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION ON REMAND
OF THE CITY OF NEWARK,	:	
ESSEX COUNTY.	:	

For the Petitioner, Cherie L. Adams, Esq., Adams Gutierrez & Lattiboudere, LLC
Respondent, Christine Gillespie, *pro se*

Upon review of the record in this longstanding tenure matter, the Commissioner is constrained to remand it to the Office of Administrative Law for an *ex parte* proof hearing pursuant to *N.J.A.C.* 1:1-14.4(d), as an Initial Decision is required in tenure charge cases that were filed prior to the enactment of the Teacher Effectiveness and Accountability for the Children of New Jersey (TEACHNJ) Act, *P.L.*2012, *c.*26 (C.18A:6-117 *et al.*).[1] *See, e.g., In the Matter of the Tenure Hearing of Irandokht Toorzani, School District of the Borough of Elmwood Park, Bergen County*, OAL Dkt. No. EDU 9713-11, Commissioner Decision No. 49-12, Issued February 8, 2012; *Rowley v. Bd. of Educ. of Manalapan-Englishtown Reg. Sch. Dist.*, 205 *N.J. Super.* 65, 76 (App. Div. 1985).

This case began as a controversy before the Commissioner in February 2003, when the District filed tenure charges against respondent alleging excessive absenteeism, absence without leave/abandonment of her position, and/or incapacity pursuant to *N.J.S.A.* 18A:6-11 *et seq.* and *N.J.S.A.* 18A:7A-39 *et seq.* Following receipt of respondent's answer, the matter was transmitted to

[1] Under *N.J.S.A.* 18A:6-17.5, "Any tenure charge transmitted to the Office of Administrative Law pursuant to *N.J.S.A.* 18A:6-16 prior to the effective date of *P.L.*2012, *c.*26 (C.18A:6-117 *et al.*) shall be determined in accordance with the provisions of sub article B of Article 2 of chapter 6 of Title 18A of the New Jersey Statutes, *N.J.S.*18A:6-10 *et seq.*, as the same read prior to the effective date of *P.L.*2012, *c.*26 (C.18A:6-117 *et al.*). Here, the tenure charges were transmitted to the OAL in 2003.

the OAL, but the tenure hearing was delayed for several years (with the parties' consent) due to the pendency of respondent's workers' compensation claim and related proceedings.[2] Ultimately, as of January 2011, the tenure matter had been restored to the active list. Respondent filed a motion to dismiss the tenure charges, arguing that the OAL lacked jurisdiction; petitioner cross-moved for summary decision; and the Administrative Law Judge (ALJ) denied both motions. *In the Matter of the Tenure Hearing of Christine Gillespie, State-Operated School District of the City of Newark*, Initial Decision, OAL Dkt. No. EDU 3399-03, issued April 27, 2011. Thereafter, respondent failed to appear for a scheduled hearing at the OAL on June 10, 2011 and the file was returned to the Department for disposition pursuant to *N.J.A.C.* 1:1-3.3(b).

On August 3, 2011, the Commissioner remanded this matter to the OAL for fact finding and legal recommendations following respondent's failure to appear. *In the Matter of the Tenure Hearing of Christine Gillespie, State-Operated School District of the City of Newark*, Commissioner Decision No. 313-11, issued August 3, 2011. At that time, the Commissioner found that the facts surrounding respondent's absence from the scheduled June 10, 2011 hearing date – which were explained by respondent in writing – did not warrant summary decision by default. To avoid any further miscommunication, however, the Commissioner ordered: "Respondent shall provide the OAL and petitioner with specific contact information within 10 days of the mailing date of this order, the OAL and petitioner shall use only that contact information to communicate with respondent, *and respondent will not be excused if she fails to reply to notices, pleadings and communications sent to the phone numbers and addresses that she provides*."

Following the Commissioner's remand, two hearing dates (one in December 2011 and one in May 2012) were scheduled and subsequently adjourned by the OAL. On May 18, 2012,

[2] The protracted procedural history will not be reiterated at length herein, since it is recited in detail within ALJ Gerson's Order denying the parties' motions to dismiss and for summary decision. *In the Matter of the Tenure Hearing of Christine Gillespie, State-Operated School District of the City of Newark*, OAL Dkt. No. EDU 3399-03, Initial Decision issued April 27, 2011.

the ALJ signed an order placing the case on an inactive list for six months – with the parties' consent – due to respondent's pending workers' compensation case and appeal. Another order was entered on September 18, 2013, continuing the case on the inactive list – with the parties' consent – for six more months. On May 12, 2015, the ALJ notified the parties in writing that the order of inactivity had expired and further inquired about the status of the related workers' compensation matter. On June 3, 2015, counsel for petitioner replied and indicated that respondent's workers' compensation case was dismissed for lack of prosecution. Respondent submitted a letter to the ALJ confirming that she no longer had a workers' compensation action pending – although she expressed disagreement with the notion that she failed to prosecute it.

In any event, on June 9, 2015, the parties were sent a notice from the OAL indicating that the remand hearing was scheduled for November 4, 2015 at 9 am. Respondent failed to appear at the scheduled hearing. The OAL then sent respondent a notice – pursuant to *N.J.A.C.* 1:1-3.3(c) – advising that she had 13 days to proffer an explanation in writing to the Department as to why she did not appear, and once again returned the file to the Department for disposition pursuant to *N.J.A.C.* 1:1-3.3(b), without an Initial Decision on the merits. Although respondent was undoubtedly familiar with this process – as she had offered a written explanation for her non-appearance in 2011 – no such explanation was received in regard to her recent non-appearance. A once-active participant in this matter, as reflected by the large volume of written submissions found in the record, respondent appears to have abandoned her defense of the tenure charges.

N.J.A.C. 1:1-14.4(d) provides that "If no explanation for the failure to appear is received, and the circumstances require a decision on the merits, the judge may enter an initial decision on the merits based on the *ex parte* proofs, provided the failure to appear is memorialized in the decision." Despite respondent's failure to appear, the Commissioner finds that an Initial Decision on the merits is required from the OAL in order to bring this longstanding matter to an orderly conclusion. Two prior decisions lend support to the Commissioner's determination herein. First, the

Appellate Division held that "the orderly function of the administrative process" requires the merits of a tenure matter "to be first addressed by the administrative law judge and then reviewed by the Commissioner." *Rowley v. Bd. of Educ. of Manalapan-Englishtown Reg. Sch. Dist.*, 205 *N.J. Super.* 65, 76 (App. Div. 1985). Second, in a case with striking similarities to the present controversy, the Commissioner held that tenure matters filed prior to the enactment of TEACHNJ require an Initial Decision on the merits. *In the Matter of the Tenure Hearing of Irandokht Toorzani, School District of the Borough of Elmwood Park, Bergen County*, OAL Dkt. No. EDU 9713-11, Commissioner Decision No. 49-12, Issued February 8, 2012.

Toorzani, a *pro se* respondent, answered the tenure charges brought against her and submitted multiple filings – including a Motion to Dismiss, which was denied by the ALJ – but subsequently failed to appear despite having received appropriate notice of the OAL hearing date. After holding the matter for a day as required by *N.J.A.C.* 1:1-14.4(a) in order to provide respondent with an opportunity to explain her non-appearance, and having received no explanation, the ALJ held an *ex parte* proof hearing as per *N.J.A.C.* 1:1-14.4(d). The District submitted a brief and proposed findings of fact, based on the *ex parte* hearing, and the ALJ subsequently issued his Initial Decision and returned the matter to the Department. In his final decision, the Commissioner held – over respondent's objections – that "the ALJ's proceeding with an *ex parte* hearing was entirely appropriate" under the circumstances and "because the District required an Initial Decision on its tenure charges, the ALJ was well within his authority, pursuant to *N.J.A.C.* 1:1-14.4(d), to take *ex parte* proofs from the District with respect to its charges and to render his Initial Decision based on these *ex parte* proofs." *Toorzani*, *supra*, at 7-12.

Upon careful review of the record, the Commissioner finds that respondent was notified in writing almost five months in advance of the November 4, 2015 scheduled hearing date, yet has offered no reason to the Department, as permitted by *N.J.A.C.* 1:1-3.3(c), for her failure to appear. Therefore, under these circumstances – akin to those in *Toorzani* – the District is now

required to present its *ex parte* proofs in support of the tenure charges to the ALJ so that an Initial Decision can be issued addressing the merits of this case.

Accordingly, the Commissioner is constrained to remand this matter to the OAL for an *ex parte* proof hearing pursuant to *N.J.A.C.* 1:1-14.4(d), followed by the issuance of an Initial Decision with findings of fact and legal recommendations as to the merits of this tenure matter.[3]

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 12/17/15

Date of Mailing: 12/17/15

[3] On December 11, 2015, the Bureau of Controversies and Disputes received a letter from the District's attorney requesting that the Commissioner summarily dispose of this matter. The Commissioner declines to do so for the reasons expressed herein.

[4] Commissioner decisions may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1) and applicable court rules.

409-15

EDWARD ECKER,	:	
PETITIONER,	:	
v.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the New Jersey State Department of Education (Department), Criminal History Review Unit disqualifying him from working on a school construction project based upon a criminal history review. Petitioner was notified in March 2015 that a fingerprint search had revealed a criminal conviction permanently disqualifying him from employment with any educational institution under the supervision of the Department. Pursuant to *N.J.S.A.* 18A:6-7.1, public schools may not employ an individual in any position which involves regular contact with students if he or she has been found to have a disqualifying criminal conviction. Petitioner herein did not challenge the accuracy of his criminal record, but asserted that he should not be disqualified because his employment would not involve regular contact with pupils.

The ALJ found, *inter alia*, that: petitioner has been employed for 23 years by a construction company that primarily does public construction projects, including numerous school projects; petitioner is a job-site construction superintendent, and has managed many projects at public schools during his career; a criminal history check revealed that petitioner was arrested in 1989 and pled guilty to an offense involving a "controlled dangerous substance," for which he was sentenced to two years of probation; as a result, petitioner was disqualified from serving as the job-site superintendent on one of his company's school construction projects; petitioner, however, would not have had any contact with pupils and there are safeguards to insure that contact with students would not occur; as a result of his disqualification, petitioner has been assigned temporary alternate work by his employer, but because 80% of the company's work is school construction, he will be laid off if he remains disqualified; the record contains no evidence that petitioner would have access to or contact with students in his role as job-site superintendent; to the contrary, the record indicates the opposite to be true. Accordingly, the ALJ concluded that petitioner should not be disqualified from employment on the school construction project in question, and ordered that the Department's determination disqualifying him from employment be reversed.

The Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision as the final decision in this matter.

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

Issued 12/18/15

OAL DKT. NO. EDU 07832-15
AGENCY DKT. NO. 95-4/15

EDWARD ECKER,	:	
PETITIONER,	:	
v.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the New Jersey State Department of Education, Criminal History Review Unit (CHRU).[1]

In its exceptions, the CHRU does not dispute the factual findings of the Administrative Law Judge (ALJ), but instead cautions that a final decision in this matter should be applied only to the specific facts of this case. Furthermore, the CHRU suggests that moving forward, local districts are in the best position to make the initial determination of whether contractors are likely to have contact with students during the course of their jobs.

Upon a comprehensive review of the record in this matter, the Commissioner agrees with the ALJ that – as petitioner's current construction project will take place in a fenced-off construction site or in the school only when school is not in session – petitioner will not have regular contact with pupils. Thus, for the reasons thoroughly set forth in the ALJ's decision, petitioner should not be disqualified from working on his current construction project pursuant to

[1] The Commissioner was not provided with a transcript of the September 28, 2015 hearing at the OAL.

N.J.S.A. 18A:6-7.1, despite that the CHRU's fingerprint search revealed that petitioner has a criminal conviction in a 1989 drug-related offense. The Commissioner agrees with the CHRU that this final decision is only applicable to the specific facts of this case.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 12/18/15

Date of Mailing: 12/18/15

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 07832-15
AGENCY DKT. NO. 95-4/15

EDWARD ECKER,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,
Respondent.

Scott G. Kearns, Esq., for petitioner (Peckar & Abramson, attorneys)

Geoffrey N. Stark, Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: September 28, 2015 Decided: November 10, 2015

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Edward Ecker, appeals the determination of the State of New Jersey Department of Education (Department), Criminal History Review Unit (CHRU)

disqualifying him from working on a school construction project based upon a criminal history review.

By letter dated March 16, 2015, the Department notified Ecker that a fingerprint search conducted through the New Jersey State Police and the Federal Bureau of Investigation in accordance with N.J.S.A. 18A:6-7.2, N.J.S.A. 18A:6-4.13 or N.J.S.A. 18A:12-1.2 revealed a criminal conviction permanently disqualifying him from employment with any educational institution under the supervision of the Department or with a contracted service provider under contract with such school or educational facility. (R-2, R-3.) By letter dated April 14, 2015, Ecker appealed the Department's determination. By letter dated April 20, 2015, the Department notified Ecker of further requirements for his appeal. By letter dated April 27, 2015, Ecker submitted his petition, affidavit, and certification of service. On May 28, 2015, the Department filed its answer to the petition. The Department transmitted the case to the Office of Administrative Law (OAL), where it was filed on June 1, 2015. The hearing was held on September 28, 2015, on which date the record closed.[1]

TESTIMONY AND FACTUAL DISCUSSION

Petitioner testified on his own behalf. Keith Brian Hackett testified on behalf of respondent. Based upon a review of the evidence presented, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS** and accept as **FACT** the testimony hereinafter detailed:

Keith Brian Hackett, a retired New Jersey State Police captain, is employed by the Department as a special investigator in the CHRU. The CHRU conducts criminal record background checks on applicants seeking employment in public schools. The process of conducting the background check begins at the school district's request that the applicant submit fingerprints. Thereafter the applicant goes online and completes an Applicant Authorization and Certification (AAC) form, and pays the fee. (R-1.) The form is transmitted electronically to the CHRU. The applicant is thereafter fingerprinted

[1] Prior to the hearing petitioner filed a motion for summary decision, which is hereby denied.

and if there is a criminal record from the New Jersey State Police or Federal Bureau of Investigation, the record is sent to the CHRU for review and is assigned to an investigator. The investigator then determines based upon offenses enumerated in the statute (N.J.S.A. 18A:6-7.1) whether the applicant is qualified or disqualified.

Edward Ecker is fifty-six years old. He is the father of three adult children. He resides with his wife and his mother, for whom he is the sole provider. He has been employed by ABC Construction[2] for approximately twenty-three years. ABC Construction primarily does public construction projects, such as State, Turnpike, and schools projects. Ecker is a job-site construction superintendent. In that capacity, Ecker coordinates, organizes, and is responsible for all the subcontractors and site safety. Ecker has managed numerous projects at public schools and boards of education since 1989. (P-1 at 2.) In connection with ABC Construction's current project at XYZ Public School,[3] Ecker submitted a completed AAC form. (R-1.) Ecker's Criminal History Review revealed that petitioner was arrested in 1989 and thereafter pleaded guilty to an offense involving a "controlled dangerous substance," for which he was sentenced to two years of probation. (R-3.) Ecker was to be the job-site superintendent at XYZ Public School, but was disqualified by the Department.

Since his arrest in 1989, Ecker has had no further problems with the law, has not been arrested, and has not been charged with any crimes. The owner of ABC Construction provided a letter of reference for Ecker. (P-2.)

In connection with the XYZ Public School construction project, Ecker would not have any contact with pupils, and there are safeguards to insure that contact with pupils would not occur. The construction project specifications provide, in part, as follows: "All renovation work required to be performed within the existing [School] is to be scheduled by the general contractor during the schools summer break. For additional information, please reference the attached [School] Calendar." (P-3.) There are four phases of the construction project, and phase one was completed during the summer break. Presently, the pupils are back in school and all work taking place now is within the

[2] A fictitious name is used herein.
[3] A fictitious name is used herein.

fenced-in area outside the school. The project documents specify that when the children are in school, the work takes place in the fenced-in area, and when the children are not in school, the work takes place inside the school. There will be work inside the school next summer, concurrent with work within the fenced-in area outside. Construction would not take place within the building with students in the building. Ecker is OSHA-certified and OSHA has very strict rules for maintaining a safe environment. Contact with students is avoided because of construction safety issues.

The Phasing Plan shows the new construction work is separate from the existing building. (P-4.) The new construction area is the fenced-in area outside the school. The fenced-in area ties into the corners of the existing school, so no one can access the construction area and the school doorways are sealed off and inoperable. No non-construction personnel are permitted within the chain-link fence, which has signs stating "DANGER CONSTRUCTION AREA KEEP OUT." Presently, the construction project is at the phase of blasting rock for the foundation, which is outside the school.

As a result of the disqualification, Ecker has been either working at the owner's home or working at the ABC Construction office on project bids. Approximately eighty percent of ABC Construction's work is school construction. The three projects that ABC Construction had bid on in the three weeks prior to the hearing were all schools. The owner of ABC Construction has been nursing Ecker along, but the work at the owner's home or at the office is not long term. If Ecker remains disqualified, he will be laid off.

LEGAL ANALYSIS AND CONCLUSIONS

With respect to criminal record checks in public school employment, N.J.S.A. 18A:6-7.1 provides, in pertinent part, as follows:

> A facility, center, school, or school system under the supervision of the Department and board of education which cares for, or is involved in the education of children under the age of 18 shall not employ for pay or contract for the paid services of any teaching staff member or substitute teacher, teacher aide, child study team member, school physician, school nurse, custodian, school maintenance worker,

> cafeteria worker, school law enforcement officer, school secretary or clerical worker **or any other person serving in a position which involves regular contact with pupils** unless the employer has first determined consistent with the requirements and standards of this act, that no criminal history record information exists on file in the Federal Bureau of Investigation, Identification Division, or the State Bureau of Identification which would disqualify that individual from being employed or utilized in such capacity or position . . . .
>
> An individual, except as provided in subsection g. of this section, shall be permanently disqualified from employment or service under this act if the individual's criminal history record check reveals a record of conviction for any crime of the first or second degree; or
>
> . . .
>
> b. An offense involving the manufacture, transportation, sale, possession, distribution or habitual use of a "controlled dangerous substance" as defined in the "Comprehensive Drug Reform Act of 1987," N.J.S.2C:35-1 et al. or "drug paraphernalia" as defined pursuant to N.J.S.2C:36-1 et seq.;
>
> . . .
>
> [Emphasis added.]

Petitioner does not challenge the accuracy of his criminal record. Rather, petitioner contends that he should not be disqualified because his employment would not involve "regular contact with pupils." In this regard, the Commissioner of Education determined that the phrase "or any other person serving in a position which involves regular contact with pupils" must be understood to encompass "any position with potential for access to students comparable to that of the enumerated positions." Chavis v. New Jersey State Dep't of Educ., Office of Criminal History Review, EDU 8547-07, Initial Decision (April 21, 2008), rejected, Comm'r (May 30, 2008), <http://njlaw.rutgers.edu/collections/oal/>. The positions enumerated in the statute are teaching staff members, substitute teachers, teacher aides, child study team members, school physicians, school nurses, custodians, school maintenance workers, cafeteria workers, school law enforcement officers, school secretaries, and clerical workers.

Here, the record is bereft of any evidence that Ecker would have such access or contact with pupils. To the contrary, the work inside the school is performed while students are not present, OSHA compliance would require safety measures to avoid injuries to the public/students, the outside construction takes place within a chain-link fenced-in area, and the doors to the school within that area are inoperable. Accordingly, I **CONCLUDE** that because Ecker will not have regular contact with pupils or access to students comparable to the positions enumerated in the statute, he should not be disqualified from employment at XYZ Public School.

ORDER

It is hereby **ORDERED** that the determination of the Department disqualifying Ecker from employment on the school construction project is **REVERSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

11/10/15
DATE

Kelly J. Kirk
KELLY J. KIRK, ALJ

Date Received at Agency: November 10, 2015

Date Mailed to Parties: November 10, 2015

db

APPENDIX

Witnesses

For Petitioner:

Edward Ecker

For Respondent:

Keith Brian Hackett

Exhibits

For Petitioner:

P-1 Resume of Edward Ecker

P-2 Email, dated June 30, 2015

P-3 Contract Specifications

P-4 Phasing Plan

P-5 Photographs (P5A-D)

P-6 Certification of Edward Ecker, dated July 13, 2015

For Respondent:

R-1 Applicant Authorization and Certification

R-2 Letter from Department, dated March 16, 2015

R-3 Addendum A

410-15

BLOOMFIELD EDUCATION ASSOCIATION ON BEHALF OF THE CHILD STUDY TEAM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner Bloomfield Education Association (Association) challenged the action of the respondent Board in contracting with Delta-T Group North Jersey, Inc. (Delta-T) – a private entity – to supply child study team (CST) services to students in the Bloomfield school district, in violation of the tenure rights of Association members. In April 2013, the Board had approved a reduction in force (RIF) for reasons of economy, which included District-employed school social workers, school psychologists and learning-disability teacher consultants; the Board did not employ any District staff in these positions during the 2013-2014 school year. Subsequently, the Board entered into an agreement with Delta-T for "Supplemental Child Study Team Services" for the 2013-2014 school year; the contract provided for 21 Delta-T employees to provide CST services to the District, including school social workers, school psychologists, and learning-disability teacher consultants. The Association sought rescission of the contract with Delta-T, and re-employment of those members whose prior duties were assumed by Delta-T personnel, with back pay retroactive to the date of the reduction in force (RIF). The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue, and the matter is ripe for summary decision; the April 2013 RIF was effectuated for reasons of economy and efficiency, and all tenured employees subject to the RIF – except those who retired – remained on a preferred eligibility list for rehire; Delta-T is approved by the New Jersey Department of Education to deliver services to public school students, but is expressly limited to providing "second opinions" on CST evaluations and providing CST diagnostics to supplement existing District CST services; since all members of the District's CST had been RIF'd, Delta-T was neither supplementing existing services, nor providing only "second opinion" services, notwithstanding the fact that its contract with the Board stated that Delta-T was retained to provide "supplemental child study team services"; during the 2013-2014 school year, Delta-T supplanted the CST members in Bloomfield, and performed the services previously performed by the District's RIF'd CST members; all of the terminated members of the CST were tenured employees; and their eliminated positions were required under *N.J.S.A.* 18A:46-5. The ALJ concluded that by outsourcing all CST services to Delta-T, the Board violated *N.J.S.A.* 18A:46-5.1; accordingly, the ALJ determined that CST members affected by the RIF during the 2013-2014 school year are entitled to lost salary and benefits and emoluments, less mitigation.

Upon review of the record and the Initial Decision, the Commissioner concurred with the ALJ's findings and conclusions. Accordingly, the Initial Decision was adopted as the final decision in this matter.

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

Issued 12/18/15

OAL DKT. NO. EDU 18705-13
AGENCY DKT. NO. 290-11/13

BLOOMFIELD EDUCATION ASSOCIATION ON BEHALF OF THE CHILD STUDY TEAM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the Bloomfield Board of Education (Board) and the Bloomfield Education Association's (Association) reply thereto. In this matter, the Association is appealing the Board's decision to eliminate the tenured members of the child study team (CTS) through a reduction in force (RIF) and enter into a contract with Delta-T – a private entity – to provide CTS services to the students in the District for the 2013-2014 school year.

The Board's exceptions substantially reiterate the substance of its submissions at the OAL, recasting the arguments therein to support the contention that the Administrative Law Judge (ALJ) erroneously found that the contract entered into with Delta-T violated the provisions of *N.J.S.A.* 18A:46-5.1 and as a result was *ultra vires*. At the outset, the Board maintains that the ALJ erred by entering an Order on May 1, 2014 denying its motion to dismiss the petition of appeal filed by the Association. The Board asserts ALJ wrongfully found that the petition was

not time barred under *N.J.A.C.* 6A:3-1.3(i), and that the Association had standing to bring the cause of action on behalf of its members.

The Board also takes exception to the ALJ's decision granting summary decision in favor of the Association. The Board maintains that Delta-T was only retained by the Board to provide CST diagnostic services to supplement existing services. Additionally, the Board restated its reliance on *Impey v. Board of Education of the Borough of Shrewsbury*, 142 *N.J.* 388 (1992) to argue that boards of education have considerable latitude in providing essential education services. Further, *N.J.S.A.* 18A:28-9 allows boards of education to reduce force to effectuate economies and for other good cause. Finally, the Board suggests that even if it is determined that it improperly implemented the RIF and outsourced the CST services, it does not owe any back pay to the Association members who were the subject of the RIF. The Board contends that the Association's only avenue of relief is the cancellation of the contract, which is now a moot point because the Board's contract with Delta-T was not renewed after 2013-2014.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ - for the reasons thoroughly set forth in the Initial Decision - that the Board's decision to RIF the CST members and outsource their work to Delta-T was *ultra vires* and a violation of the staff members tenure rights.[1] The objections raised in the exceptions filed by the Board generally reiterate the arguments previously made before the ALJ, which were clearly taken into account by her in determining that the Association was entitled to summary decision. Although the Board maintains that Delta-T was only retained to supplement existing CST services, it is clear from the record that the Board outsourced all CST functions to Delta-T

[1] With respect to the Board's contentions that the ALJ erred by denying its motion to dismiss for lack of standing and timeliness, the Commissioner is in accord with the ALJ – for the reasons outlined in her May 1, 2014 Order - that the petition of appeal was neither barred for standing or untimely under the 90-day rule.

in violation of *N.J.S.A.* 18A:46-5.1.[2] Despite the Board's assertion that the Association members are not entitled to compensation, it is undisputed that the affected members[3] were tenured at the time of the 2013 RIF, and as such the Board's *ultra virus* contract with Delta-T was a violation of their tenure rights.

Accordingly, the Initial Decision is adopted as the final decision in this matter. The Board is ordered to make the affected staff members whole for any lost salary and benefits or emoluments of employment during the 2013-2104 as directed in the Initial Decision.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 12/18/15

Date of Mailing: 12/18/15

[2] It should be noted that the relevant statutory and regulatory provisions do permit school districts to enter into joint agreements for CST services with other school districts, educational services commissions or county special services school districts. See, *N.J.S.A.* 18A:46-5.1.; *N.J.A.C.* 6A:14-5.1(a)(1). However, there is no provision that enables a school district to outsource all of its CST services to a private entity.

[3] In the Initial Decision the ALJ discusses the specific Association members who are entitled to be made whole for any salary and benefits or emoluments of employment lost during the 2013-2014 school year.

[4] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 18705-13
AGENCY DKT. NO. 290-11/13

BLOOMFIELD EDUCATION ASSOCIATION
ON BEHALF OF THE CHILD STUDY TEAM,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP
OF BLOOMFIELD, ESSEX COUNTY,
Respondent.

Samuel Wenocur, Esq., and **Gail Oxfeld Kanef**, Esq., for petitioner (Oxfeld Cohen, attorneys)

Cheri Adams, Esq. for respondent (Adams, Gutierrez and Lattiboudere, attorneys)

Record Closed: October 14, 2015 Decided: November 9, 2015

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the Bloomfield Education Association (the Association) challenges the action of the Bloomfield Board of Education (the Board) in contracting with Delta-T Group North Jersey, Inc. (Delta-T), a private entity, to supply child study team (CST) services to the students of Bloomfield. In its prayer for relief, the Association seeks rescission of this contract, and the reemployment of those of its members whose prior duties were being performed by Delta-T personnel, with back pay retroactive to the date of the reduction in force (RIF).

The petition of appeal was filed with the Commissioner of Education (the Commissioner) on November 27, 2013. On December 24, 2013, the Board filed a motion to dismiss in lieu of an answer, asserting that the Association lacked standing to bring its claims, and that its petition was untimely filed. The matter was transmitted to the Office of Administrative Law (OAL) on December 26, 2013. On February 27, 2014, the Association filed a brief in opposition to the motion to dismiss, together with a cross-motion for leave to amend its petition. Via order dated May 1, 2014, the motion to dismiss was denied, and the cross-motion seeking leave to amend the petition was granted. The Board filed an answer to the amended petition on June 11, 2014.

The parties filed a joint stipulation of fact on July 10, 2015, and cross-motions for summary decision on September 8, 2015. Replies were filed on September 25, 2015. In discussions with counsel, it was initially agreed that the issues raised by the pleadings would be bifurcated, with a decision first being rendered on the validity of the Delta-T contract; and a decision on the rights of the affected staff to be made only in the event that it was determined that the Delta-T contract was ultra vires. Upon reviewing the submissions of the parties, however, I felt that the bifurcation originally discussed seemed unnecessary, and that the record was complete. I wrote to counsel via letter dated October 7, 2015, advising them as such, but invited them to reply by October 14, 2015, if they thought otherwise. Counsel for petitioner did not reply; counsel for the Board replied via letter dated October 14, 2015, and asked that if I were to determine that the tenure rights of the CST members were violated, the record remain open to address their entitlement to damages, and consider issues of mitigation. I duly

considered her submission, but as will be more fully set forth below, I **CONCLUDED** that this matter is ripe for summary decision as to all the issues raised by the pleadings. Accordingly, I closed the record as of October 14, 2015.

FINDINGS OF FACT

The parties stipulated to the pertinent facts and I **FIND** as follows:

1. The Bloomfield School District (the District) is a public school district with administrative offices located at 155 Broad Street, Bloomfield, New Jersey.

2. The District is comprised of eleven schools educating students in grades pre-kindergarten through twelfth grade.

3. The Bloomfield Education Association (the Association) is an organized labor union which represents all full-time and part-time certified teaching staff members employed by the District.

4. In or about April 2013, the District approved a RIF for the 2013-2014 school year, which included District employed school social workers, school psychologists and learning-disability teacher consultants. The District did not employ any social workers, school psychologists, and learning-disability teacher consultants CST members during the 2013-2014 school year.

5. School social workers, school psychologists, and learning-disability teacher consultants are ten-month positions.

6. The RIF was effectuated for reasons of economy and efficiency. All tenured RIF'd employees remained on a preferred eligibility list for rehire unless they retired from their positions.

7. In or about April 2013, the District advertised a Request for Proposals (RFP) for CST services for the 2013-2014 school year and received proposals from several vendors.

8. On or about June 11, 2013, the District entered into an agreement with Delta-T Group North Jersey, Inc. (Delta-T) for "Supplemental Child Study Team Services" with the District for the period commencing July 1, 2013, through June 30, 2014. The contract provided for the provision of 21 Delta-T employees to provide CST services to the District, including 6.5 Full-Time Equivalent (FTE) school social workers, 7 FTE school psychologists, and 7.5 FTE learning-disability teacher consultants.

9. Delta-T's CST services during the 2013-2014 school year included school social workers, school psychologists, and learning-disability teacher consultants.

10. During the 2013-2014 school year, the District employed a Director of Special Services. In addition, District staff conducted speech evaluations and provided speech services.

11. David Tiene's position as a CST member was eliminated effective June 30, 2013, as a result of the District's RIF.

12. David Tiene retired effective June 30, 2013.

13. Claudette Wassil's position as a CST member was eliminated effective June 30, 2013, as a result of the District's RIF.

14. Claudette Wassil retired effective June 30, 2013.

15. Louis Petronico's position as a CST member was eliminated effective June 30, 2013, as a result of the District's RIF.

16. Louis Petronico retired effective July 1, 2013.

17. Ruth Schuster's position as a CST member was eliminated effective June 30, 2013, as a result of the District's RIF.

18. Ruth Schuster served as a CST Coordinator for the District from September 3, 2013, until her retirement on January 31, 2014.

19. Gail Turner served as an elementary teacher for the District during the 2013-2014 school year.

20. Gail Turner retired effective June 30, 2014.

21. Susan Farrell's position as a CST member was eliminated effective June 30, 2013, as a result of the District's RIF.

22. Susan Farrell was employed by the Bridgewater-Raritan School District during the 2013-2014 school year.

23. Susan Farrell was notified of her recall rights and was formally reappointed by the District as a CST member effective September 1, 2014.

24. Karen Cooney's position as a CST member was eliminated effective June 30, 2013, as a result of the District's RIF.

25. Karen Cooney was employed by Delta-T and Bergen County during the 2013-2014 school year.

26. Karen Cooney was notified of her recall rights and was formally reappointed by the District as a CST member effective September 1, 2014.

27. Nautama Sandesara's position as a CST member was eliminated effective June 30, 2013, as a result of the District's RIF.

28. Nautama Sandesara worked as a substitute social worker for the Freehold Township Board of Education for approximately three months during the 2013-2014 school year.

29. Nautama Sandesara was notified of her recall rights and was formally reappointed by the District as a CST member effective September 1, 2014.

30. Melissa Dupree's position as a CST member was eliminated effective June 30, 2013, as a result of the RIF.

31. Melissa Dupree was employed by the Greenburgh Central High School District during the 2013-2014 school year.

32. In 2014, Melissa Dupree received a recall rights letter from the District but failed to respond.

33. Elyse Greenbaum's position as a CST member was eliminated effective June 30, 2013, as a result of the District's RIF.

34. Elyse Greenbaum was employed by the Titusville Academy during the 2013-2014 school year.

35. In 2014, Elyse Greenbaum received a recall rights letter from the District but failed to respond.

36. Susan McDonald's position as a CST member was eliminated effective June 30, 2013, as a result of the District's RIF.

37. Susan McDonald was employed by the School District of the Chathams during the 2013-2014 school year.

38. In 2014, Susan McDonald received a recall rights letter from the District but failed to respond.

39. Kristen Niemczyk-Kistner's position as a CST member was eliminated effective June 30, 2013, as a result of the District's RIF.

40. Kristen Niemczyk-Kistner was employed by the Montclair Board of Education during the 2013-2014 school year.

41. Kristen Niemczyk-Kistner received a recall rights letter from the District but did not accept the offer.

It is uncontroverted, and I **FIND**, that the contract with Delta-T was not renewed after the 2013-2014 school year. Delta-T is approved by the New Jersey Department of Education to deliver services to public school students, but its authorization to do so is expressly limited to providing the following:

- Independent Child Study Team Evaluations – Second Opinion Only
- Child Study Team Diagnostic Services to supplement existing district CST services
- Occupational Therapy
- Physical Therapy
- Home Instruction
- Speech Therapy

Since all the CST members had been RIF'd, clearly Delta-T was neither supplementing existing services, nor providing only "second opinion" services, notwithstanding the fact that its contract with the Board stated that Delta-T was being retained to provide "supplemental child study team services." I **FIND** that during the 2013-2014 school year, Delta-T supplanted the CST members in Bloomfield, and

performed the services previously performed by the CSTs. Finally, I **FIND** that all of the terminated CST members held their positions of employment under tenure.[1]

CONCLUSIONS OF LAW

The Board is empowered to take only those actions authorized by the school laws and by rules promulgated by the State Board of Education. N.J.S.A. 18A:11-1. I **CONCLUDE** that the contract entered into with Delta-T, as implemented, violated the provisions of N.J.S.A. 18A:46-5.1, and accordingly was ultra vires. Psychologists, learning-disability teacher consultants (LDT-Cs), and school social workers are not optional members of a local public school district's staff. The statute speaks in the imperative, as follows:

> Each board of education and State-operated program shall separately or jointly with one more boards of education or State agencies provide for basic child study team services. The basic child study team shall consist of a school psychologist, a learning-disability teacher consultant, and a school social worker . . . .
>
> [N.J.S.A. 18A:46-5.1.]

Department of Education regulations elaborate upon and clarify this requirement. N.J.A.C. 6A:14-3.1(b) provides that "[a]ll child study team members shall be employees of a district board of education, have an identifiable, apportioned time commitment to the local school district and shall be available to provide all needed services during the hours students are in attendance." Relative to fulfilling this obligation via joint services agreements, N.J.A.C. 6A:14-5.1(a)(1) is likewise quite specific, and provides that "[j]oint agreements for child study team services may be entered into with local education agencies including other local school districts, educational services commissions, jointure commissions and county special services school districts." The regulation offers no option to outsource all child study team functions to a private entity, as the Board did here. Accordingly, in doing so, the Board exceeded its authority.

[1] Exhibit B to the certification of counsel for petitioners attaches a record of employment for the affected child study team members, and their employment history reveals that they all achieved tenure. The Board in its reply submissions at no time challenges this point.

Case law has strictly construed these statutory and regulatory requirements. In Elson v. Hudson County Area Vocational-Technical School Board of Education, 96 N.J.A.R.2d (EDU) 229 (1995), the Commissioner confirmed that a local district may not outsource basic CST services. While that decision acknowledges that these services can be supplemented by private outside entities, outsourcing the duties of a school psychologist to a private entity following a RIF was deemed improper. See also Vicenzino v. Bedminster Bd. of Educ., 97 N.J.A.R.2d (EDU) 356, aff'd, 312 N.J. Super. 243 (App. Div. 1998) (which likewise found it improper to outsource the duties of a school social worker). The Board's reliance on Impy v. Board of Education, 142 N.J. 388 (1995), is misplaced. There a local board outsourced the duties of a speech correctionist, a position that is not a part of the basic CST.

The Board argues unsuccessfully that, notwithstanding its action in improperly outsourcing CST services, it owes no back pay to the affected employees. The staff members who were RIF'd at the end of the 2012-2013 school year held their positions of employment under tenure, and per N.J.S.A. 18A:28-5 they could be dismissed or reduced in compensation except in the manner prescribed by law. The Board urges that N.J.S.A. 18A:28-9 allows boards of education to reduce force to effectuate economies, and for other good cause. But as the administrative law judge held in Vicenzino under facts analogous to those presented here:

> [t]he integrity of the reduction in force was vitiated by the virtually contemporaneous decision to contract for additional Child Study Team services that the team, as originally constituted would have otherwise performed. That being the case, the reduction in force decisions were properly voided, the full-time positions reinstated and petitioners restored to those positions . . . .
>
> [Vicenzino, supra, 97 N.J.A.R.2d at 370-71.]

Accordingly, I am unpersuaded that since the Board could have correctly effectuated a RIF, and simply chose not to do so, these petitioners are entitled to no relief. I **CONCLUDE** that the CST members affected by this RIF are entitled to be made whole for any salary, or benefits or emoluments of employment lost during the 2013-

2014 school year.[2] See also N.J.S.A. 18A:6-30 (which provides that "[a]ny person holding office, position or employment in the public school system of the state, who shall be illegally dismissed or suspended therefrom shall be entitled to compensation for the period covered by the illegal dismissal or suspension."). All the affected staff members were recalled and returned to the district for the 2014-2015 school year; or waived their rights to recall either by failing to respond to the recall notice, or by declining the offer to return to Bloomfield.[3] Thus, no additional compensation is owed to any of the CST members for work performed subsequent to the 2013-2014 school year.

Finally, in her letter of October 14, 2015, counsel for the Board asks that the record remain open to consider "issues of mitigation." But there are no outstanding mitigation issues that justify further delay in bringing this matter to closure, as the law and the facts relative to mitigation are both clear. The affected CST members are not entitled to a windfall. The court in Mullen v. Board of Education of Jefferson Township, 81 N.J. Super. 151 (App. Div. 1963), considered the precursor to N.J.S.A. 18A:6-30, and concluded that damages under the statute were intended to be compensatory in nature, and that accordingly, "an individual should not be awarded more damages than actually sustained." McCullough v. Trenton Bd. of Educ., EDU 6164-03, Initial Decision (March 29, 2005), mod., Comm'r (May 11, 2003), <http://njlaw.rutgers.edu/collections/oal/>. Indeed, as the Commissioner observed in McCullough, "[t]o find otherwise would violate public policy as [a] petitioner would be provided compensation in excess of his economic loss at public expense." Ibid.

The law is likewise clear that the RIF'd CST members were obliged to make reasonable efforts to secure alternative employment, notwithstanding their improper termination. McCullough, supra, EDU 6164-03 (citing Zielenski v. Guttenberg Bd. of Educ., 1981 S.L.D. 759; White v Twp. of N. Bergen, 77 N.J. 538 (1978)). The

[2] The following are exceptions: David Tiene, Claudette Wassil, and Louis Petronico all retired effective July 1, 2013, thus terminating their right to any compensation for the 2013-2014 school year. Likewise, any rights to back pay terminated effective January 31, 2014, for Ruth Schuster, who retired as of that date.

[3] Gail Turner was not invited to return to a child study team position, having worked for the District as an elementary teacher during the 2013-2014 year, because she retired effective June 30, 2014. Her right to continued employment or compensation terminated as of that date.

petitioners were so obliged regardless of whether the Board raised this issue in its pleadings. McCullough, supra, EDU 6164-03. But the stipulated record reveals that all of the affected CST members mitigated their damages by securing alternative employment in educational settings for the 2013-2014 school year.[4]

Accordingly, relative to back pay, I **CONCLUDE** that the RIF'd CST members are entitled only to the difference between what they could have earned in Bloomfield during the 2013-2014 year, and what they did earn in the educational settings in which they were employed. Similarly, the Board may deduct from their damages any moneys paid in unemployment benefits.[5]

ORDER

It is hereby **ORDERED** that the relief sought by the petition is **GRANTED**. Having concluded that the action of the Board in RIF'ing its CST members and outsourcing their work to Delta-T was ultra vires, the Board is directed to make the affected staff members whole for any lost salary, and benefits or emoluments of employment during the 2013-2014 school year, less mitigation.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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[4] Counsel did not specify when she alluded to "mitigation issues" whether a failure to mitigate was the Board's concern. Since clearly these staff members did not sit idly by while they awaited a decision from the Commissioner—there is no factual basis for such a contention. Moreover, it bears pointing out that had the Board wished to allege that the alternative jobs secured by these staff members insufficiently mitigated their damages, it was obliged to affirmatively raise this defense in its answer. It did not do so. See Goodman v. London Metals Exchange, 86 N.J. 19 (1981); Roselle v. La Fera Contracting Co., 18 N.J. Super. 19, 29 (Ch. Div. 1952).

[5] The Board will have a concomitant obligation to "pay back the mitigation amount to the unemployment system." McCullough, supra, EDU 6164-03.

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

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

November 9, 2015

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 9 November 2015

Date Mailed to Parties: NOV 10 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

411-15

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY

In the Matter of the Tenure Hearing of

JAMES TWEED

and

FREEHOLD REGIONAL SCHOOL DISTRICT
MONMOUTH COUNTY

Agency Docket No. 304-10/15

The above-entitled matter was submitted to the undersigned Arbitrator by letter dated October 26, 2015 from the Commissioner of Education through the Director of the Bureau of Controversies and Disputes, pursuant to N.J.S.A. 18A:6-16 as amended by P.L. 2012, c. 26. A hearing was held on December 3, 2015, during which the parties engaged in settlement discussions. Subsequent scheduled hearings were adjourned pending additional settlement discussions.

On December 15, 2015, the parties submitted an executed Settlement Agreement, Affidavits, and a Resolution of the Board of Education of the Freehold Regional School District approving the terms of the parties' settlement. These documents were submitted to the Arbitrator for examination and approval. After duly considering the nature of the tenure charges, the Respondent's fourteen-year record of service to the Freehold Regional School District, the absence of harm to any student for whom the Respondent was responsible, and the advantages and factors cited by the Board as the bases for its Resolution dated December 14, 2012, I hereby find that the terms and conditions agreed upon by the Board and Respondent, each of whom has been advised by counsel, are reasonable and in the best interest of both the parties and the public.

There being no charge against the Respondent of any moral turpitude, the return of the Respondent to employment under the terms and conditions negotiated by the parties under the parties' Settlement Agreement serves the best interest of the public and the students of the Freehold Regional School District and satisfies the criteria of N.J.A.C. 6A:P3-5.6 (a). Consequently, I accept the Settlement as proposed by the parties and hereby issue a Consent Award incorporating the terms of the Settlement Agreement executed by the parties, effective December 18, 2015, provided that Respondent has not revoked his execution of the

Settlement Agreement. Finally, I perceive no reason for the District to report or refer the particular facts of this matter to the New Jersey State Board of Examiners for further action.

Based on the facts elicited by the evidentiary record in the instant matter regarding Respondent James Tweed, and having examined the terms of the Stipulation of Settlement, I find that the terms and conditions set forth in the parties' Stipulation of Settlement dated December 10, 2015 appear to me to be reasonable, to be consistent with the terms and intent of the TEACHNJ Statute and applicable regulations, and to reflect that Respondent has not committed any conduct unbecoming a tenured teacher. I hereby endorse and approve the parties' Stipulation of Settlement as appropriate under the circumstances and as satisfying the requirements of the TEACHNJ statute.

December 18, 2015 Daniel F. Brent, Arbitrator

State of New Jersey
County of Mercer

On this 17th day of December, 2015 before me personally came and appeared Daniel F. Brent, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.

ELLEN BOSCOLA-WILSON
ID # 50024462
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires Oct. 2, 2020

SEPARATION AGREEMENT

THIS SEPARATION AGREEMENT ("Agreement") is made by and between James Tweed IV, (hereinafter referred to as "Mr. Tweed") and the **FREEHOLD REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION**, 11 Pine Street, Englishtown, NJ 07726, its predecessors, successors, individual Board members, officers, directors, administrators, representatives, employees, attorneys, agents, and assigns, individually, jointly and severally (hereinafter collectively referred to as "Board") pursuant to the following terms and conditions:

WHEREAS, Mr. Tweed is employed as a tenured Teacher by the Board;

WHEREAS, the Board has filed Tenure Charges with the Commissioner of Education against Mr. Tweed seeking his dismissal;

WHEREAS, Mr. Tweed has filed an opposition to those Tenure Charges and refutes the allegations asserted in the Tenure Charges;

WHEREAS, the parties wish to avoid the expense and uncertainty of litigation or disciplinary proceedings;

WHEREAS, by the terms of this Agreement, the employment of Mr. Tweed is to end effective June 30, 2016;

NOW, THEREFORE, in consideration of the mutual covenants herein contained and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Mr. Tweed and the Board hereby agree as follows:

1. Mr. Tweed, for and in consideration of the undertakings of the Board as set forth herein, and intending to be legally bound, does hereby remise, release and forever discharge the Board and its officers, members, employees and agents, and their respective successors and assigns, heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which he ever had, now has, or hereafter may have, known or unknown, or which his heirs, executors or administrators hereafter may have by reason of his disability, any failure to accommodate his disability, any actual or perceived discrimination, his entire employment relationship and/or the termination of his employment relationship and/or affiliation with the Board, including, but not limited to the following:

- All claims of discrimination, harassment and retaliation based upon age, race, color, religion, gender, sex, sexual orientation, handicap, disability, national origin or any other legally protected class, including claims arising under the Age Discrimination in Employment Act, 29 U.S.C. § 621 through 29 U.S.C. § 634, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., the Americans with Disabilities Act, 42 U.S.C. §12101, et seq.,the Civil Rights Act of 1866, as amended, 42 U.S.C. §1981, et seq., Executive Order 11246, as amended,, the Older Workers Benefit Protection Act, 29 U.S.C. §626(f), the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1002, et seq., the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq., the New

Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq., the New Jersey Family Leave Act, N.J.S.A. 34:11B, et seq., COBRA, the Federal Family and Medical Leave Act, 29 U.S.C. §2601, et seq. & 5 U.S.C. §6381, et seq., the National Labor Relations Act, as amended, The Equal Pay Act, as amended, the New Jersey Wage and Hour Law, as amended, the New Jersey Worker Health and Safety Act, as amended, as well as any other anti-retaliation provision of any statute or law, and any other applicable federal, state or local, constitutional or statutory provision, order or regulation, arising from any event or act of omission or commission;

- All claims for breach of contract, whether express or implied;
- All tort claims, including claims for libel, slander, negligence, invasion of privacy, intentional or negligent infliction of emotional distress, fraud, interference with actual or prospective contractual rights or relations, and violation of public policy;
- All claims for wrongful discharge or termination;
- All claims under any federal, state and municipal laws, regulations, ordinances or court decisions of any kind;
- All claims for wages and benefits (including bonuses, health and welfare benefits, vacation pay, sick pay and/or any other fringe benefits;
- All claims for any type of monetary damages, including back pay, front or prospective pay, compensatory damages, and punitive damages, except as otherwise provided in this Agreement;
- All claims for equitable relief, including injunctive relief and reinstatement; and
- All claims for attorneys' fees, litigation expenses and costs.

The sole exception to the waivers set forth above are as follows: claims arising under the Workers' Compensation Act, *N.J.S.A.* 34:15-1 *et seq.*, the Teachers' Pension and Annuity Fund Act, *N.J.S.A.* 18A:66-1 *et seq.*, the indemnity provisions of *N.J.S.A.* 18A:16-6 and 6.1 with regard to civil and criminal actions, claims by third parties, as well as claims arising from any breach of this Agreement. The Board does not waive any rights that it may have to oppose indemnification pursuant to *N.J.S.A.* 18A:16-6 and 6.1.

2. In consideration of the terms herein, Mr. Tweed will simultaneous with the execution of this Agreement execute and submit the attached letter, attached hereto as Exhibit "A," thereby ending his tenured employment with the Board as of the end of the day on June 30, 2016. Mr. Tweed agrees that his signature on this Agreement constitutes an acknowledgment that his rights to employment, including any and all tenure rights and any and all future rights to employment and/or re-employment with the Board will end as of the end of the day on June 30, 2016. Mr. Tweed acknowledges that his employment relationship with the Board is permanently and irrevocably severed. Mr. Tweed agrees he shall never again seek employment and/or reemployment with the Board. Mr. Tweed waives any and all rights or claim of right to be reinstated to his former or any other position with the Board and he agrees that he shall not at any time seek or accept future employment with Board. Mr. Tweed acknowledges that Board has no obligation, contractual or otherwise, to re-hire or re-employ his in any capacity. A breach of this paragraph by Mr. Tweed will constitute lawful and just cause to refuse to employ him or to terminate him if already employed, and he shall have no cause of action against the Board for such refusal or termination.

3. The Board will continue to employ Mr. Tweed as an employee through the end of the day on June 30, 2016. For the 2015-2016 school year, Mr. Tweed's suspension will be converted to a medical leave without pay from October 1, 2015 to December 31, 2015, and a medical leave with pay from January 1, 2016 to June 30, 2016. For the period of paid medical leave, the salary payments -- which will be in accordance with the Board's normal payroll procedures and will not contain any salary offsets or deductions other than normal and customary deductions -- will be paid based on Mr. Tweed's scheduled annual salary for the 2015-2016 school year of $87,500. In addition, the Board agrees that it will take action to rescind the resolution to withhold Mr. Tweed's increment for the 2015-2016 school year; however, the Parties agree that Mr. Tweed is not entitled to and will not receive any salary adjustment as a result of that action by the Board. The Board waives any notice of resignation requirements in connection with the June 30, 2016 employment end date or should Mr. Tweed tender his resignation prior to that date.

4. It is understood that the Parties agreed to be bound by the determination of the assigned arbitrator with respect to any reporting obligation to the New Jersey State Board of Examiners ("Examiners") in connection with Mr. Tweed 's resignation from the Board.

5. Mr. Tweed and the Board, its officers, agents, administrators will be bound by a covenant of good faith and fair dealing with respect to performance under this Stipulation.

6. The Board agrees that Mr. Tweed will be eligible to continue to receive his current level of health insurance benefits through the District's insurance carrier until August 31, 2016, subject to the Board's receipt of Mr. Tweed's mandated health insurance premium contribution by the fifth of each month. The Board agrees to the extent it is applicable that Mr. Tweed may be entitled to continued health care coverage thereafter under the *Consolidated Omnibus Budget Reconciliation Act*, ("*COBRA*"), 29 *U.S.C.* §§1161-1168, should he elect and pay for such coverage. The Board agrees not to oppose any application by Mr. Tweed for *COBRA* benefits.

7. Both parties agree and acknowledge that this Agreement does not constitute an admission of any kind by either party.

8. The Board agrees that it will respond to inquiries regarding Mr. Tweed from prospective employers with the written communication on Board letterhead attached as Exhibit "B." No other information is to be provided to prospective employers without the consent of Mr. Tweed. An original, fully-executed Exhibit "B" will be provided to Mr. Tweed within thirty (30) days of the date of the Board's approval of this Agreement. The Parties further agree that Mr. Tweed is permitted to solicit any letters of recommendation from past and current supervisory or administrative personnel in the District; however, such letters shall not be on District or Board letterhead.

9. Should Mr. Tweed have certain personal property on Board premises, he and his designated representative shall be permitted, on notice to school administration, and at a mutually convenient day and time, to come onto school property, and, if deemed necessary, meet with a representative of school administration and accompanied by a representative, designate

which property belongs to him and remove his personal property. The Board will cooperate in this regard.

10. Mr. Tweed agrees he shall never again seek employment with the Board. Mr. Tweed hereby waives any rights to seek any position, paid or unpaid, with the Board, and specifically promises not to apply for any position with the Board or the Released Parties. Mr. Tweed agrees that any attempt to obtain a position with the Board or the Released Parties will constitute a breach of this agreement and the Board may rely on the breach in rejecting the application or refusing to employ, reemploy, appoint, nominate, or contract with Mr. Tweed.

11. The parties agree that this Agreement may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

12. It is understood between the parties that neither party has relied upon any representation, express or implied, made by any other party or their counsel or any of their representatives, and that this Agreement constitutes the entire understanding of the parties and cannot be modified except in writing signed by all of the parties hereto.

MR. TWEED ACKNOWLEDGES THAT HE HAS BEEN ADVISED THAT HIS LEGAL RIGHTS AND RESPONSIBILITIES WILL BE AFFECTED BY EXECUTING THIS AGREEMENT AND HE ACKNOWLEDGES THAT HE IS REPRESENTED BY HIS OWN ATTORNEY AND HAS CONSULTED WITH HIS ATTORNEY PRIOR TO EXECUTING THIS AGREEMENT.

13. In the event that any section or part of this Agreement shall be found to be void or unenforceable, such section or part shall be deemed to be surplusage and the remainder of the Agreement shall remain in full force and effect.

14. This Agreement, including the letters attached as Exhibit "A" and "B", respectively, is contingent upon Board approval.

15. The parties agree that this Agreement shall be interpreted in accordance with the laws of the State of New Jersey. All disputes arising under or relating to this Agreement or the breach of this Agreement shall be brought exclusively in the State courts of the State of New Jersey.

16. This Agreement may be executed in counterparts, which shall be taken together as the entire agreement of the Parties hereto. This Agreement may also be exchanged by the Parties via electronic mail for the purposes of securing signatures and will be fully enforceable as an original document.

17. By signing this Agreement, each signatory represents that he or he is a Party or has been duly authorized by a Party to sign on that Party's behalf and that this Agreement is duly authorized, approved and consented to as to terms.

18. Pursuant to the requirement of the Older Workers Benefit Protection Act, 29 U.S.C. § 626 et seq., Mr. Tweed acknowledges that he has been given the opportunity, if he so desires, to consider this Agreement for twenty-one (21) days before executing it. In the event that Mr. Tweed executes this Agreement within less than twenty-one (21) days of the date of its delivery to him, Mr. Tweed acknowledges that such decision was entirely voluntary and that he had the opportunity, if he had so desired, to consider this Agreement for the entire twenty-one (21) day period. Mr. Tweed further acknowledges that for a period of seven (7) days from the date of his execution of this Agreement, he shall retain the right to revoke this Agreement by written notice to Mark G. Toscano, Esquire, Comegno Law Group, PC, 521 Pleasant Valley Avenue, Moorestown, NJ 08057, and that this Agreement shall not become effective or enforceable until the expiration of such revocation period.

Intending to be legally bound hereby, Mr. Tweed and the Board execute the foregoing Agreement as indicated below.

WITNESS:

Stefan D. Hunter
ATTORNEY AT LAW
State of New Jersey
12/10/15

JAMES TWEED IV
DATED: 12/10/15

WITNESS:

BOARD SECRETARY

FREEHOLD REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION

HESHY MOSES
BOARD PRESIDENT
DATED: 12-14-15

James Tweed IV
215 Tennyson Avenue
Toms River, NJ 08753

Mr. Charles B. Sampson, Superintendent
Freehold Regional High School District Board of Education
11 Pine Street
Englishtown, NJ 07726

Re: Ending of Employment
Effective June 30, 2016

Dear Mr. Sampson:

Please be advised that I agree to the ending of my employment as a Teacher for the Freehold Regional High School District Board of Education effective at the end of the day on June 30, 2016.

Very truly yours,

James Tweed IV

EXHIBIT A

(ON BOARD LETTERHEAD)

Dear Sir/Madam:

James Tweed was employed as a Special Education Teacher for the Freehold Regional High School District Board of Education for approximately fifteen (15) years. His final salary was $87,500 per year.

Sincerely,

_____

Charles B. Sampson, Superintendent

EXHIBIT "B"

412-15

J.B., ON BEHALF OF MINOR CHILD, E.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent Board that his daughter, E.B., did not reside within the school district, and was therefore not entitled to a free public education in Springfield Township schools. Petitioner asserted that he is a domiciliary of Springfield, and owns a house in the township which was rendered uninhabitable by a fire on January 27, 2011; subsequently, he and his daughter lived temporarily with petitioner's father in Mountainside before moving to one – then another – apartment in Springfield. The Board contended that E.B. was not residing at the Springfield address provided by the petitioner, and sought repayment of tuition for the period of E.B.'s ineligible attendance. Hearings in this matter were conducted in the Office of Administrative Law (OAL) on January 15, 16 and 23, 2015, and on August 19, 2013.

The ALJ found, *inter alia*, that petitioner's daughter was not eligible for a free public education in Springfield schools and ordered that petitioner reimburse respondent for the cost of tuition for the period of E.B.'s ineligible attendance, specifically the following periods of time: December 2010 through June 2011; April 25, 2012 through June 2012; September 2012 through June 2013; and January 14, 2014 through June 2014.

Upon comprehensive review, the Commissioner cannot ascertain from the Initial Decision – because of inconsistencies in the record – when petitioner resided in Springfield and the exact amount of tuition due to the respondent Board. Accordingly, the Commissioner was constrained to remand this matter to the OAL for determination of: 1) the exact period when the minor child was ineligible to attend school in Springfield; and 2) calculation of tuition costs owed to the District for E.B.'s ineligible enrollment pursuant to *N.J.S.A.* 18A:38-1b and *N.J.A.C.* 6A:22-6.3.

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

Issued 12/28/15

OAL DKT. NO. EDU 14713-13
AGENCY DKT. NO. 229-9/13

J.B., ON BEHALF OF MINOR CHILD, E.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The parties did not file exceptions.

Upon such review, the Commissioner cannot ascertain from the Initial Decision – due to inconsistencies in the record – when petitioner resided in Springfield, and the exact amount of tuition owed to the District. For example, the Administrative Law Judge (ALJ) made a finding of fact that appellant's testimony regarding where he lived in Springfield was credible. Although the Commissioner does not have the transcript of petitioner's testimony, it appears from the Initial Decision that petitioner testified that he lived at 317 Morris Avenue in Springfield for three months beginning in August 2011, before moving into an apartment at Short Hills Village in Springfield.[2] Nevertheless, the ALJ ordered petitioner to reimburse the

[1] The Commissioner was provided with a transcript of the January 23, 2015 hearing at the OAL, but was not provided with transcripts of the other three hearings, which were held on January 15 and 16, 2015, and August 19, 2015.

[2] Notwithstanding petitioner's testimony, the lease agreement indicates that petitioner's lease at Short Hills Village began in September 2012. Furthermore, petitioner informed the District by letter dated August 26, 2011 (R-4) that he was living in Mountainside and was still renovating an apartment at 317 Morris Avenue. Accordingly, petitioner's testimony is inconsistent with the record.

District for the cost of tuition from April 25, 2012 through the end of the 2011-2012 school year,[3] as well as for the entire 2012-2013 school year, because petitioner lived outside of the Springfield School District during that time – despite petitioner's contention that he lived in Springfield during that period.[4]

The ALJ then found that petitioner and the minor child resided in the Springfield School District during the first half of the 2013-2014 school year, at his apartment in Short Hills Village. However, the lease on that apartment started in September 2012 – not during the summer of 2013 – and there is no evidence in the record indicating that petitioner moved into the apartment during that summer. Accordingly, the Commissioner is unable to determine when petitioner resided in Springfield and for what period the minor child was ineligible to attend school in Springfield. The present record lacks information required to calculate the amount of tuition monies owed to the District – specifically, the exact number of days of ineligible attendance by the minor child.[5]

Because it is impossible to ascertain from the record the correct amount of tuition that is owed to the Board, the Commissioner must remand this matter to the OAL for

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[3] The District sent petitioner a letter dated April 25, 2012 (R-7) which assessed tuition for the period of September 2011 through June 2012. However, that letter did not comply with *N.J.A.C.* 6A:22-4.2, which requires that notices of ineligibility include a statement of the applicant's right to an appeal before the Commissioner within 21 days and that if an appeal is not filed, the student will not be permitted to attend school beyond the 21st day following the notice date. The April 25, 2012 letter simply assessed tuition without informing petitioner of his right to an appeal of that determination; further, the District's letter did not inform petitioner that his minor child was no longer permitted to attend school in Springfield. To the contrary, the minor child continued to attend school in Springfield for the 2012-2013 and 2013-2014 school years. Accordingly, the first valid notice of ineligibility that petitioner received was in August 2013, which resulted in the instant appeal.

[4] It is undisputed from the record that the minor child did not attend school in Springfield after the 2013-2014 school year.

[5] While the parties stipulate to the district's tuition rates for 2010-2011, 2011-2012, 2012-2013 and 2013-2014, this fails to establish the total number of days of ineligible attendance. Pursuant to *N.J.S.A.* 18A:38-1b, "tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local school district multiplied by the number of days of ineligible attendance."

determination of: (1) the exact period when the minor child was ineligible to attend school in Springfield; and (2) calculation of tuition costs owed to the District for E.B.'s ineligible enrollment pursuant to *N.J.S.A.* 18A:38-1b and *N.J.A.C.* 6A:22-6.2 and 6.3.[6]

Accordingly – for the reasons expressed herein – this matter is remanded to the OAL for determination of the period of ineligible enrollment and calculation of tuition costs due to the District.

IT IS SO ORDERED.[7]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/28/15

Date of Mailing: 12/29/15

[6] It should be noted that the current version of the relevant regulations did not take effect until December 16, 2013. Because the instant appeal was filed prior to that date, tuition shall be assessed in accordance with the regulations effective as of January 19, 2010.

[7] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 14713-13
AGENCY DKT. NO. 229-9/13

J.B. O/B/O A MINOR CHILD, E.B.,
Appellant,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,
Respondent.

Fredric H. Pearson, Esq., representing appellant (Pearson and Shapiro, attorneys)

Kerri A. Wright, Esq., representing respondent (Porzio, Bromberg and Newman, attorneys)

Record Closed: October 5, 2015 Decided: November 13, 2015

BEFORE **SANDRA ANN ROBINSON**, ALJ:

STATEMENT OF THE CASE

Appellant, J.B., was the custodial parent of his twelve-year-old daughter, E.B. between 2010 and March 2011. E.B. started attending school in the Springfield School District, Union County, on September 25, 2010. Appellant wrote to respondent,

Springfield Township Board of Education (Springfield BOE), with information that his home at 646 South Springfield Avenue in Springfield (646) had burned in a fire on January 27, 2011, and was uninhabitable. He informed respondent that he would be staying with his father in Mountainside until repairs were completed and requested respondent's permission for his daughter to be transferred within the district from the Sandmeier Elementary School to the James Caldwell Elementary School (Caldwell School) because that school is closer to his father's home in Mountainside. Appellant indicated that since the length of time to repair 646 was unknown that he would renovate an apartment in Springfield so he and his daughter could move back into the district by January 2012. On August 31, 2011, the Superintendent of Schools, Michael Davino, granted appellant's request to transfer E.B. to Caldwell School with the understanding: (1) The Mountainside living arrangement was temporary, (2) Appellant would transport his daughter to and from Caldwell School, and (3) Appellant and his daughter would move back to Springfield once repairs /renovations were complete. Superintendent Davino informed appellant that tuition charges would be assessed if he and E.B. did not move back to Springfield.

Appellant did not move back to Springfield by January 2012 and asked for additional time to find an apartment. David Rennie, the principal of Caldwell School, allowed appellant additional time and informed him that tuition charges would be issued if he did not return to reside in Springfield. During January 2012, E.B.'s mother contacted the district to report that J.B. and E.B. never lived in Springfield and have been residents of Mountainside. On January 30, 2012, appellant contacted Mr. Rennie and provided him with an address in Springfield. Mr. Rennie instructed appellant to provide proof that he was domiciled at the address given. During March 2012, appellant provided the district with a copy of a lease for an apartment in Springfield and copies of water and electric bills. The lease was not signed by appellant and did not have his name on it. Names of family members who were renting the property appeared on the lease and on the bills.

In April 2012, the district began to investigate appellant's residency and determined there was no domicile in Springfield. On April 25, 2012, respondent notified

appellant that tuition was due and provided a payment schedule. One year later, during April 2013, respondent hired an independent investigator to conduct a residency investigation. The investigation occurred on nine days during April, with the last day of surveillance on April 30, 2013. The investigator reported never seeing appellant or his daughter overnight at the Springfield apartment. The investigator observed appellant and his daughter leaving the Mountainside address on two occasions. The investigator opined that although appellant had a residence in Springfield, his domicile was in Mountainside.

On August 6, 2013, Superintendent Davino notified appellant that it appeared he [appellant] and his daughter were no longer domiciled in Springfield. The letter informed appellant that if he disagreed with the determination of the Springfield BOE he could appeal and have a hearing before the BOE. Appellant's BOE hearing was held on August 26, 2013. Appellant did not speak at the hearing and did not present documents to assist with proving his domicile is in Springfield. The Board concluded that appellant and his daughter were not domiciled in Springfield and passed resolutions authorizing the removal of appellant's daughter from the district's school and the assessment of back tuition in the amount of $51,920. Appellant appeals the Board's determination that tuition reimbursement is warranted.

PROCEDURAL HISTORY

The Department of Education Bureau of Controversies and Disputes transmitted this case to the Office of Administrative Law (OAL) on October 11, 2013, for a hearing pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14 F-1 et seq. The undersigned was assigned to the case on October 23, 2013. On November 7, 2013, respondent's counsel requested OAL to reschedule the testimony commencement date from December 11, 2013, to January 27, 2014, and to assign consecutive hearing dates to avoid disruption of testimony. The December 11 date was removed and OAL offered January 27, February 3, 10, and 28 as hearing dates. Appellant did not confirm any of the dates and on November 25, 2013, respondent contacted OAL for additional dates. OAL offered March 5 and 7, 2014, as new dates. On January 27, 2014, respondent

informed OAL that appellant had not provided discovery and was not responding to telephone messages to provide dates for scheduling conferences. On February 12, 2014, respondent notified OAL that appellant's discovery still had not been provided. The undersigned scheduled a February 19, 2014, conference with the parties. Appellant announced during the conference that he was in the process of retaining counsel. Attorney Fredric Pearson telephoned OAL on the same day, February 19, 2014, with information that appellant had reached out to him and that time was needed to meet with appellant before determining if he [Pearson] would take the case.

Status conferences were completed on February 26, 28, and March 18, 2014. On March 18 the parties announced that a resolution may be possible. On April 10, 2014, respondent provided a case status report and suggested the scheduling of hearing dates since effort to resolve the matter had not been fruitful. On April 11, 2014, respondent requested leave to amend the Answer filed on October 9, 2013. Leave was granted and respondent submitted a counterclaim for back tuition for the period of E.B.'s ineligible attendance in the Springfield School District. During status conferences held on April 16, and May 20, 2014, respondent committed to completing discovery by no later than May 22, 2014. The undersigned informed the parties that testimony would go forward on June 2, 18, and 19, 2014.

On May 27, 2014, during a status conference appellant's attorney disclosed that appellant had been admitted, four days earlier, to Morristown Memorial Hospital and would be in rehabilitation for thirty days after discharge. The hearing dates scheduled for June were cancelled. A status conference was held on August 28, 2014, and appellant's attorney informed all that appellant was still in the hospital. Another status conference was held on September 4, 2014, and it was reported that in October 2014 appellant should be medically able to move forward with hearings at the OAL. On September 4, 2014, respondent wrote to OAL to request consecutive dates in October. OAL offered: October 3, 30; November 24; and December 24. The parties had conflicts with the dates.

On January 6, 2015, the undersigned held a status conference during which it was Ordered that appellant complete discovery by no later than 4:00 p.m. on Wednesday January 7, 2015. On January 7, 2015, respondent received appellant's witness list and responses to Interrogatories. The parties agreed to hearing dates on January 13 and 16, 2015. However, at the request of respondent's counsel the January 13 date was adjourned to afford time for respondent to review and respond, as needed, to appellant's discovery submissions. The hearing dates for January 15 and 16 were not changed. On January 14, 2015, respondent wrote to appellant's counsel and the undersigned to report that insufficient information was provided for some interrogatory responses and that no documents were produced. Requests for additional adjournments of this matter were not recognized. Testimony commenced on January 15 and continued on January 16 and 23, 2015. Another date was required for the investigator's testimony. OAL offered dates but was unsuccessful in obtaining consent from appellant's attorney for any of the suggested dates.

On April 20, 2015, respondent submitted a Motion To Dismiss based on alleged witness tampering and fraud upon the court by appellant. On April 22, 2015, respondent notified OAL that going forward Kerri A. Wright, Esq., would be handling the case, replacing Okechi C. Ogbuokiri, Esq. On April 22, 2015, respondent contacted OAL with a request for the undersigned to rule on the Motion To Dismiss prior to continuing testimony. The undersigned noted that OAL had not received a response from appellant's attorney and was awaiting same before deciding to make a ruling. On April 22, 2015, F. Pearson, appellant's attorney, notified OAL that he had undergone major surgery on April 1, 2015, and first had knowledge of the Motion to Dismiss on April 21. Appellant's counsel disclosed that he would be recuperating for six weeks. He requested an adjournment and time to respond to respondent's Motion. On April 23, 2015, OAL notified the parties that the adjournment was granted and time was extended, to May 11, 2015, for a reply from Attorney Pearson. On May 13, 2015, respondent wrote to Attorney Pearson and the undersigned to advise that a reply to the Motion to Dismiss had not been received. On July 1, 2015, the undersigned notified the parties that with the completion of testimony from seven witnesses, and one witness

remaining that the case will be completed with the last witness to provide testimony on August 19 and 28, 2015, at noon.

On August 19, 2015, counsels argued the motion for dismissal and or sanctions. Appellant acknowledged that his daughter's mother allowed him to speak with his daughter the day before the daughter testified. Appellant acknowledged that he asked his daughter whether she would be comfortable testifying and he mentioned that her mother's demands cuts into her [the daughter's] college funds.[1] Prior to appellant's daughter's testimony, on January 23, 2015, she was asked several questions to determine her understanding of conveying and or perceiving the truth and understanding the requirement to tell the truth on and off the witness stand. The undersigned determined that E.B. comprehended the inquiries made of her and understood the definition and meaning of veracity. The content of the daughter's responses caused the undersigned to decide that all credible testimony should be given consideration, especially her [E.B.'s] recollection of where she lived and when, in comparison to the recollections of other witnesses. There was no proof that the daughter's responses under oath on January 23, 2015, had been influenced by her father. In instances, the daughter's testimony provided clarity to other testimony. The motion to dismiss and or sanction was denied.

Richard Mickles, the last witness, who is no longer employed by the Board of Education, was subpoenaed to testify. Mr. Mickles's testimony was completed on August 19, 2015, and the exhibits listed in the Appendix were marked into evidence. A deadline for receipt of written summations at OAL was established. An extension of the deadline was made with the parties agreeing to submit joint stipulations on tuition rates per day for each Springfield school E.B. attended indicating the school year and name of the school. On September 4, 2015, respondent wrote to appellant's counsel and the undersigned to advise that appellant was not cooperating with the completion of the joint stipulation. On September 4, 2015, respondent submitted a written summation. On October 5, 2015, OAL received the fully executed joint stipulation and the hearing record was closed.

ISSUES

Did appellant and his daughter reside in Springfield, New Jersey during all or any segment of the 2010-2011, 2011-2012, 2012-2013 and 2013-2014 school years? If domicile is not established in Springfield for all or any portion of any of the school years then, what amount is due to Springfield for tuition reimbursement?

SUMMARY OF TESTIMONY

(ELLYN ATHERTON)

Ellyn Atherton has been an administrator for the Springfield Board of Education for eleven years. She is the Director of Human Resources and the Chief Officer for Affirmative Development. Her employment duties are at the discretion of the Superintendent and include responsibility for oversight of state policy on residency issues, attendance, personnel and board of education matters. Administrator Atherton testified as follows,

> Acceptable proofs of residency include Lease Agreements, Affidavits, DYFS placements and more. A child must reside in Springfield to attend Springfield District Schools. Sixty days upon entry to a school district proofs must be provided. After sixty days there is a twenty day appeal period to the board of education. Following the twenty days is another twenty day appeal period to the New Jersey Department of Education.
>
> I have had several experiences of excluding students due to residency issues. Appellant came to me in the summer of 2011 to request that his daughter be allowed to attend Caldwell School that is closer to Mountainside where they would be temporarily living. Caldwell School serves third through fifth grades.
>
> Appellant and his daughter moved out of Springfield prior to the January 2011 fire, but Springfield did not know it.

[1] The word "demands" concerned content for a possible settlement agreement pertaining to the within matter.

> Appellant would have had to reestablish residency and would not have been granted an accommodation for his daughter to attend Caldwell School.
>
> An internal investigation commenced based on the Superintendent's August 31, 2011 letter requiring appellant to move to 317 Morris Avenue once renovations on that apartment was completed. In January 2012, appellant provided proof to the BOE that he had a residence in Springfield. During an August 2013, Board of Education meeting, appellant presented bills and offered testimony through his brother. Board members noted that appellant's driver's license showed Denville, New Jersey, as his place of residence. The Board members voted to remove appellant's daughter from school and request retro-active tuition. Springfield does not accept tuition paying students.

On cross-examination, Ms. Atherton responded,

> I reviewed records, files and procedures before requiring Mr. Richard A. Mickles to commence an investigation. I knew about the divorce action and that Denville was the previous marital home.

(RICHARD MICKLES)

Richard Mickles has been in law enforcement with suburban New Jersey police agencies for more than thirty-two years. For fifteen years he held supervisory and senior department leadership positions. He was a Student Residency Investigator for the Springfield Board of Education from April 2013 through June 2013. Officer Mickles is currently with the Bernardsville Police Department. He testified as follows,

> I completed seven residency investigations for the Springfield Board of Education. It was my responsibility to determine which persons live outside the school district. I have interacted directly with appellant and his family when having to intercede about parking problems at his place of business, the Springfield Truck Center. When starting this assignment and others, I first review all records and documents given to me by the BOE.
>
> My nine day investigation of this matter began on April 11, 2013 and ended on April 30, 2013. The enrollment

documents and Lease Agreement listed a home address located at 47C Forest Drive Short Hills Village in Springfield, New Jersey. However, a Mountainside address was given to me by the Springfield Board of Education, with a location at 373 Upland Road. The owner is listed as M.F.B, who is appellant's deceased mother. There was much activity and many vehicles at the Upland Road address. I did surveillances with binoculars, long distance view lenses, and use of other methods such as testing the moisture [condensation] on car windows that stayed parked overnight.

I reviewed Mountainside Police Reports and learned that on seven occasions between 2009 and 2013, appellant was at the Upland Road house when he phoned for police to assist there. At 8:18 p.m., on July 26, 2009, J.B. phoned the police because his brother and father were quarreling and fighting. At 9:28 a.m., on February 16, 2010, J.B. and his daughter's mother [ex-wife] were both at the Upland Road house and had a run-in that prompted the mother to go to the police department to report what happened. At 7:24 a.m., on November 27, 2011, J.B. phoned the police for assistance at Upland Road because his brother was drunk and kicking down doors. At 7:31 p.m., on June 14, 2012, J.B. phoned the police from Upland Road because his brother was unconscious and acting-out due to intoxication. At 2:37 a.m., on September 24, 2012, J.B. phoned the police and filed a Domestic Violence Complaint against his brother. The police report indicates that J.B. told the police that he [J.B.] and his brother live there together. J.B.'s daughter was there during the incident. At 11:10 a.m., on October 26, 2013, J.B. phoned the police from Upland Road. At 8:30 p.m., on December 14, 2013, J.B. phoned the police to come out to investigate a possible trespasser on the Upland Road property.

My written four page Investigation Report ends with my statement, "[I]t is in my professional opinion based on my training, experience and the information gained, notwithstanding that [J.B.] maintains an apartment in Springfield, the facts and observations developed in this investigation substantiate the reports that [J.B.] and his daughter [E.B.'s] primary residence is 373 Upland Road in Mountainside."

On cross-examination, Officer Mickles responded,

> Of the seven cases I investigated for the Springfield BOE, three were not residents, two were referred to DYFS, and one was a resident of Springfield.
>
> During my interview with agents at Short Hills Village in April 2013, I was told that appellant had not moved out, but his Lease had run-out. My investigation took place over a period of nine dates. I never interviewed appellant's ex-wife. On one day the child's mother reported her daughter was sick and that is when I learned of the visitation rights. I have no listing of who drove the black Denali, other than appellant? I only saw him driving it. I do not specifically know who may have driven the silver passenger van. I never spoke to anyone about the operators of the vehicle(s). I did not have the resources to run the plates. My comments about dew or moisture are based on my own knowledge about vehicles.
>
> I saw appellant's daughter coming out of the Upland Road house in Mountainside on two occasions. The child's after school activities and plans are unknown to me. I know appellant maintains an apartment in Springfield.

(CARLO PALUMBO)

Carlo Palumbo is the chief of the Springfield Fire Department. Chief Palumbo testified as follows,

> I know appellant's family; they have a local business in town. I have been with the Springfield Fire Department for sixteen years. In 2014, I became chief. On January 27, 2011, the date of the fire at 646, I was a Captain and acting as Deputy Fire Chief on that date, therefore I took command of the scene. I went in the two-family residential house after the fire. It did not appear that the first floor was being renovated. The building was heavily damaged and no one was allowed in. Appellant did not ask to enter the building on the night of the fire. I learned through a conversation with the police that 646 is owned by the appellant. I do not know if appellant was occupying the building or not. When I asked appellant for contact information he provided me with an address on Upland Road in Mountainside, New Jersey. I

prepared a written "Report of Fire," which is done for every emergency call.

On cross-examination, Chief Palumbo responded,

I know appellant and I am familiar with the Truck Center shop since we inspect it. On the night of the fire I asked appellant for a contact address and he gave me Upland Road in Mountainside.

(DAVID RENNIE)

David Rennie, principal of Caldwell School, testified as follows,

I have been in the school system for twenty-three years and a principal for nine years. As school principal, I am responsible for observing and evaluating teachers, operating the building on a daily basis, and handling attendance and residency issues.

I had a telephone conversation with appellant and asked him to provide documents to prove residency. He gave me a hand written Lease for 317 Morris Avenue [commencing February 2011] and several bills that did not have his name on them. He told me that 317 Morris was owned by his father, therefore the reason his father's name appears on the document. I knew the custody arrangements between the parents and that the child sometimes stays overnight with her mother during the weekday and spends every other weekend with the mother.

On August 31, 2011, Springfield Superintendent of Schools, Michael A. Davino, acknowledged in a letter to appellant, the acceptance of his [appellant's] request to have his daughter live in Mountainside and continue attending school in Springfield because of displacement from housing in Springfield due to fire.

On April 25, 2012, Matthew A. Clarke, Springfield Public Schools Business Administrator and Board Secretary wrote to appellant to inform him that $12,347 is due for his daughter's education in Springfield, while he [appellant] was not a resident of Springfield. I spoke with appellant about the number of properties owned in Springfield by his family

> or him, but he never told me he lived in Springfield. Appellant never provided me with any evidence of his and his daughter's permanent residency in Springfield.

On cross-examination, Mr. Rennie responded,

> It was late during the summer of 2011, when appellant visited me about being displaced and requested that his daughter be permitted to attend Caldwell School while property in Springfield was being repaired/renovated.

(B.B.)

B.B., appellant's father, testified as follows,

> I live at 373 Upland Road in Mountainside, New Jersey. In 2011, I was employed at Springfield Truck Center, where I am one of the owners. Appellant, who is my son, was working for me. I do not recall exactly where my son was living during all of 2011, but he was living with me sometimes. I have a bedroom at my place for my granddaughter and another for my son. My son comes to dinner at any time, there is no set rule.
>
> This was a period when my son was going through some things; he was undergoing a divorce, his apartment in Springfield caught fire and he was trying to get a Condo in Springfield.
>
> I own properties in Springfield, including a two-family unit on Keler Street, a two-family unit on Caldwell Place, a five-family house at 317 Morris Avenue and a house on Salter Street. When my son and his first wife got married they lived at 317 Morris Avenue in a small apartment. His father-in-law and me moved a bedroom set, dresser, desk, sofa and chairs into that apartment.
>
> The two properties I own outside of Springfield include Turkey Hill Inn in Summit, New Jersey and property in Palm Beach, Florida. My son stayed at Turkey Hill Inn for a while. I go to Florida in the winter, from December to late spring. I was in Florida when the fire happened in January 2011. The Springfield Truck Center is directly across the street from the house at 646.

On redirect, appellant's father testified,

> My main property is on Upland Road in Mountainside. One of my son's takes care of the property when I am in Florida.

(E.B.)

E.B., appellant's daughter, was born on October 13, 2003. At the time of her appearance for this case she was eleven years old and in sixth grade. E.B. was sworn under oath and testified as follows,

> In 2010-2011, I was in second grade and I lived with my dad a little.[ii] I attended Edward Lee Walton School in Springfield. My teachers were Ms. Funk and Ms. Perdomo. While in second grade, half the time I spent with dad and half the time with mom. I would be with my mom on Monday and Thursday and with my dad on Tuesday and Wednesday. My dad bought a house at 646 Springfield Avenue, in Springfield, but I did not stay there many times because I did not like it and it burned down. I hardly stayed at 646.[iii] I lived almost full time with my dad when in second grade, for a total of166 days.[iv]
>
> In 2011-2012, I was in third grade and attended Caldwell School, in Springfield. My teachers were Ms. Stone and Ms. Kaplan. I stayed in Mountainside and at 317 Morris Avenue in Springfield a couple of times per week. My grandfather made me breakfast in Mountainside, then my dad drove me to school. After school I went to the family business at 311 Morris Avenue, did my homework in the office then went to Mountainside. On Mondays and Thursdays, Scott, my mother's driver, picked me up and drove me to Pequannock so I could play soccer.
>
> In 2012-2013, I was in fourth grade at Caldwell School and my teacher was Ms. Powis. I lived with both my mom and my dad, as I did in third grade. When I was with mom, I was in Pequannock and when I was with dad I stayed at my grandad's in Mountainside. My dad or grand-dad drove me to school. After school I sometimes play with friends on the playground, then went to the business to do my homework,

[ii] When E.B. was asked if she could live with her mother in 201-2011, she [E.B.] said: "I don't want to answer."
[iii] During a prehearing interview E.B. told respondent that she never resided at 646.
[iv] When E.B. was asked how she arrived at 166 days, she refused to answer.

and leave with my dad or grand-dad for home in Mountainside. At the end of fourth grade I lived both in the house on Upland Road in Mountainside and in the condo at 47C Forest Drive, Short Hills Club Village, in Springfield (47-C). The condo at 47 C had one bedroom. I slept in the bedroom or on the sleeper-sofa. I stayed there two nights a week. I had very little clothing in Springfield. In Mountainside I had a bed. Most of my belongings are in Mountainside. Dad stayed with me in Mountainside because I wanted him to be there.

In 2013-2014, I was in fifth grade and my teacher was Mr. Warzwig. When school started at Caldwell School in September 2013, I stayed with my mom sometime and with my dad sometimes until January 2014. In January 2014, I started totally living with my mom in Peequanock. I am now in sixth grade and attend Pequannock Valley Middle School.

This is a picture of the house at 373 Upland Road in Mountainside. I live there with my dad, my grandpa Bruce, my grandpa's girlfriend Claudia, my uncle Keith, my uncles Keith's girlfriend Jan and my pets: Brandy a medium size mixed beagle and Drizzle a turtle.

This next picture is 317 Morris Avenue in Springfield. I sort of lived there because my dad wanted me to live there, so I could go to school there. I did not like it because the place was too small. I stayed there once or twice per week.

This is a picture of the 47C Short Hills Village condo, in Springfield where we stayed a lot.[v] But, we also stayed in Mountainside in my grand-dad house where I have lots of space, my own room and my pets.

This is a picture of where my dad worked when I was in second, third and fourth grade and at least the beginning of my fifth grade. It is located at 311 Morris Avenue in Springfield. It is the family place of business. I went to dad's job before and after school since it is four houses down from Caldwell School. All the time, I did my homework at the family business and when I finish I would go to Mountainside.

On cross-examination, E.B. responded,

[v] On cross-examination, E.B. would not respond to an inquiry about who lived in the condo with her and her father.

The house that burned down, I stayed there once or twice. Starting January 2014, I was with my dad two nights each week and every other weekend. My dad would drive around the condo to avoid the school bus. I walked to the business sometimes after school. If I attended an after-school program or soccer practice, I would be picked-up from school.

I went with my dad to look at a place in Jersey City and to look at Turkey Hill in Summit, New Jersey. Turkey Hill is a hotel my family owns. We stayed there during Hurricanes Irene and Sandy since the place never lost electricity.

When I was in fifth grade, my mom asked me if I wanted to go to school in Peequanock. I told her I wanted to wait to sixth grade since I was already in fifth grade in Springfield. I lived with my dad at 47C from January 2013 thru June 2014. I played at the condo, but there were not many kids, I had one friend. Sometimes after school I went to my cousin's house that is close to the business.

During second, third, and fourth grades and the first half of fifth grade, my uncle Keith's girlfriend's sister, Julie (who is a police officer) would sometimes pick me up from school.

My dad phoned me yesterday and we spoke about three minutes on the phone.[vi] He was asking me whether I wanted to testify or not. I said I wanted to testify. He said if I felt uncomfortable with any question asked of me that I should say I do not want to answer. He was saying to me do you remember where you lived and when. I already remembered where I lived, he was just asking me if I did remember. He did not really ask me questions. I remember my dad said to me, "Remember living at 317 Morris Avenue." He was not really asking a question. He made a statement to see if I remembered. I stayed at 317 Morris, but I really did not live there. I stayed there because my dad wanted me to.

My dad did tell me the money would come out of my college fund. I felt scared and was crying because of what he told me. My mother saw me crying and asked me why. I told her I do not want to lie, but I do not want to cost my dad all this money. He said it was coming out of the college fund.

On redirect, E.B. testified,

[vi] E.B. testified on January 23, 2015. Her dad spoke with her on the phone on January 22, 2015.

My dad never told me what to say here today. I spoke to the two [attorneys for respondent] a couple of times. I did not go to their offices, we talked at my mom's house in Pequannock. In January 2014, I started staying with my Mom all the time because shared custody ended.

(Julie Biondi)

Julie Biondi, appellant's current wife, testified as follows,

I know appellant and his family. My knowledge of him goes back to when I was sixteen years old when I was living in Scotch Plains near the border of Mountainside. I went to Scotch Plains High School and graduated in 1984. I now reside in Bernardsville, New Jersey.

When appellant's mother had an asthma attack eight years ago I became reacquainted with him. We began dating in the fall of 2007. He moved from Denville in 2007 or 2008 when he left his wife. I know he had a place in Springfield, New Jersey on South Springfield Avenue. It was a multi-family unit and appellant lived on the top floor until the house burned down in the winter of 2011. Six months after the fire he moved to one of his father's places on Morris Avenue, in Springfield. He and his daughter, E.B., stayed there for two months. E.B. had her own bedroom. More space was needed so appellant moved into a condominium located at 47C Short Hills Village in Springfield and stayed there for two years. I visited the condo in Short Hills Village and saw E.B.; she had her own bedroom. She went to school in Springfield. When appellant and his former wife started joint custody, E.B. would stay with each parent fifty percent of the time.

I have never had a conversation about E.B. with school officials. Appellant usually took E.B. to school in the morning and sometimes I did. When E.B. stayed overnight with her mother, then her mother transported her to school in Springfield.

On cross-examination, Julie Biondi, replied as follows,

In September 2010, I started staying overnight with appellant two or three nights each week at the 317 Morris Avenue

property. On July 1, 2014, he moved into my house in Bernardsville, after being discharged from the hospital. I am still romantically involved with appellant.

In the insurance claim, on the 646 house fire, I did testify that appellant did not live at 646 because 646 was used for storage purposes. 317 Morris Avenue is owned by the appellant's father. I heard that appellant's brother reported to the Springfield Board of Education that appellant never moved into 317 Morris Avenue. I only know where appellant was when I was with him. I think all properties owned by appellant and or his father are in Springfield.

In September 2013, E.B., was in school in Springfield. I do not know what school system she attended during the 2014-2015 school year.

(J.B.)

J.B., appellant, born June 9, 1966, testified as follows,

I moved to Springfield, New Jersey in 1990 and always lived there until I moved to Bernardsville on July 1, 2014. Prior to 1990, I lived in several apartments in North Carolina, Maplewood, Summit and Springfield.

I was married in 2003, the year my daughter was born. We resided at 553 Moonachie Road in Denville, New Jersey. In 2009, I moved into Turkey Hill Inn, which is a hotel in Summit, New Jersey. I stayed there three months before moving again in 2009 to 646 South Springfield Avenue in Springfield.

In 2009, my daughter was in her mother's custody and they lived in Ridgewood. She was evicted from the Ridgewood residence and moved to Pompton Plains. We were divorced by 2010, when she received three Driving While Intoxicated (DWI) tickets.[vii] I was given custody of my daughter and enrolled her in the Springfield School District for the 2010-2011 school year. My daughter and I lived at 646. I supplied school personnel with copies of my water bill and electric bill. We had moved out of the 646 house in December 2010, before the January 27, 2011 fire and temporarily moved to my father's house. The fire totally demolished the 646 house and made it uninhabitable.

[vii] Around the time appellant was given custody his former wife was incarcerated.

I told Principal David Rennie about the fire and that we were displaced. Mr. Rennie said, "If displaced no problem, just keep me abreast of what is happening." In June 2011, Mr. Rennie told me I had to get back into Springfield. Since 317 Morris Avenue, Springfield is a family property, I furnished it and moved in during August 2011 with the help of my father, brother and some friends. My daughter lived with me and went to Caldwell School. We were at 317 Morris Avenue for three months before leasing an apartment at Short Hills Village.[viii] The Short Hills Village apartment was larger than 317 Morris Avenue and rented for $1,450 utilities not included. On July 1, 2014, I moved from Short Hills Village to Bernardsville.

After the fire, my daughter stayed the same place I did. My father owns Springfield Truck Center, which is a truck garage located at 311 Morris Avenue, in Springfield. I have used the 311 address as my address. When I lived in Denville I gave 311 as my address, most of the time for convenience. I ate at my father's house three times per week. Periodically, I slept over at my father's if I worked late and my daughter slept over. My job includes working on trucks and school busses and having them repaired for service on the next day.

My father was my head baby-sitter. The Truck Center closed at 7:00 p.m., so my daughter ate dinner with her grandfather. The distance between the Springfield border and my house is one-half mile.

On cross-examination, appellant replied,

When I registered my daughter for school I gave the 646 house address as her address. During 2010 and 2011, I worked at 311 Morris Avenue, at the Springfield Truck Center, now I am unemployed and live in Bernardsville.

The address on my driver's license is 47C Short Hills Village. I went to have the address on my driver's license changed, but I did not have enough proof of residency, I needed more supporting documents.

On redirect, appellant testified,

[viii] The Short Hills Village apartment is sometimes referred to hereon as the "condo", especially by E.B.

When residing temporarily on Upland Road in Mountainside my daughter went to Caldwell School in Springfield with permission from the Springfield BOE. I wanted my daughter in a school closer to where we would be temporarily residing. Principal Rennie had me to write a letter to explain my situation.

I attended the Board of Education meeting but I cannot remember everything because of the lapse of time. I do not believe I was under the influence of drugs or alcohol at the meeting.

317 Morris Avenue is owned by the [B.]'s Brothers, LLC, my family. My father and uncle allowed me to live at 317 Morris. Five families were living there, including my daughter and I.

I am now married to Julie Biondi.

JOINT STIPULATIONS

The parties stipulated to the following,

- For the duration of the 2010-2011 school year, E.B. was enrolled in second grade at the Edward V. Walton School in Springfield, New Jersey;

- For the duration of the 2011-12 school year, E.B. was enrolled in third grade at the James L. Caldwell School in Springfield, New Jersey;

- For the duration of the 2012-13 school year, E.B. was enrolled in fourth grade at the James L. Caldwell School in Springfield, New Jersey;

- For the duration of the 2013-14 school year, E.B. was enrolled in fifth grade at the James L. Caldwell School in Springfield, New Jersey;

- The school year is 180 days per State law;

- The approved tuition rates for Springfield for the following years are:

2010-2011: $13,877

2011-2012: $12,347
2012-2013: $12,284
2013-2014: $13,420

- Respondent seeks tuition for all of the aforementioned years;

- Appellant seeks to pay reimbursement only for the 2012-2013 school year and the first half of the 2013-2014 school year.

FINDINGS OF FACT

Based on the law, the credible testimonial and documentary evidence, I **FIND** the following as **FACTS** in this matter:

1. Appellant married in 2003, the year his daughter, E.B., was born;

2. The marital home was located at 553 Moonachie Road in Denville, New Jersey;

3. In 2009, appellant left his wife and moved from Denville to Summit, New Jersey, where he resided for three months at the Turkey Hill Inn, a hotel owned by appellant's family;

4. When appellant moved from the hotel he resided at 646 South Springfield Avenue in Springfield;

5. In 2009, appellant's daughter was in her mother's custody and they lived in Ridgewood;

6. In 2010, E.B.'s mother was evicted from their Ridgewood residence and moved to Pompton Plains;

7. During 2010, E.B.'s mother received three DWI tickets;

8. Commencing the beginning of the 2010-2011 school year, appellant became the primary custodial parent of his daughter, E.B.;

9. On September 25, 2010, appellant enrolled E.B. in the Springfield Public School District;

10. For the duration of the 2010-2011 school year, E.B. was enrolled in second grade at the Edward V, Walton School in Springfield, New Jersey;

11. On January 27, 2011, appellant's home at 646 South Springfield Avenue in Springfield burned in a fire and was uninhabitable;

12. Appellant wrote to respondent, Springfield BOE, with information about 646 and informed respondent that he would be temporarily staying with his father in Mountainside until repairs were completed;

13. Appellant requested respondent's permission for his daughter to be transferred within the district from the Sandmeier Elementary School to the James Caldwell Elementary School because Caldwell School is closer to his father's home in Mountainside;

14. Appellant indicated that since the length of time to repair the house at 646 was unknown that he would renovate an apartment in Springfield so he and his daughter could move back into the district by January 2012;

15. On March 4, 2011, custody arrangements for E.B. were modified by Court Order to joint physical custody and the parents started sharing overnights two nights each weeks and alternating weekend visits;

16. On August 31, 2011, Michael Davino, Superintendent of Schools, granted appellant's request to transfer E.B. to Caldwell School with the understanding:

(1) The Mountainside living arrangement was temporary, (2) Appellant would transport his daughter to and from Caldwell School, and (3) Appellant and his daughter would move back to Springfield once renovations/repairs were complete. Superintendent Davino informed appellant that tuition charges would be assessed if he did not move back to Springfield;

17. Appellant did not move back to Springfield by January 2012 and asked respondent for additional time to find an apartment;

18. Additional time was afforded appellant by David Rennie, principal of the Caldwell school. Mr. Rennie informed appellant that tuition charges would be posted if he and E.B. did not return to reside in Springfield;

19. During January 2012, E.B.'s mother contacted respondent and reported that J.B. and E.B. "never" lived in Springfield and have been residents of Mountainside;

20. The disclosure of E.B.'s mother about her daughter's and ex-husband residency "never" being in Springfield is not supported by the evidence;

21. On January 30, 2012, when appellant provided Principal Rennie with a Springfield address, the principal instructed appellant to provide proof that he was domiciled at the address;

22. During March 2012, appellant provided respondent with a copy of a lease for an apartment in Springfield and copies of water and electric bills. The lease was not signed by appellant and did not have his name on it. Names of family members who were renting the property appeared on the lease and on the bills. The offer of these proofs of residency was rejected;

23. In April 2012, respondent began to investigate appellant's residency and determined there was no domicile in Springfield;

24. On April 25, 2012, respondent notified appellant that tuition was due and provided a payment schedule;

25. For the duration of the 2011-12 school year, E.B. was enrolled in third grade at the James L. Caldwell School in Springfield, New Jersey;

26. For the duration of the 2012-13 school year, E.B. was enrolled in fourth grade at the James L. Caldwell School in Springfield, New Jersey;

27. During April 2013, respondent hired Richard Mickles, as an independent investigator, for three months, April 2013 - June 2013;

28. Investigator Mickles has not performed residency investigations for other school districts; however, he completed seven residency investigations for respondent;

29. Investigator Mickles's conducted appellant's residency investigation over a nine-day period between April 11 to 30, 2013;

30. Investigator Mickles's testimony that he "never" witnessed appellant or his daughter overnight at the Springfield apartment during his nine-day investigation, between April 11 and 30, 2013, is possible, even though the thoroughness of the process for making the determination is unknown - i.e. did Mickles or an assistant observe over-night, and if so, how many nights during the nine days. Also, was E.B. visiting her mom on the dates she was not overserved at the Springfield apartment, since joint physical custody started in march 2011;

31. Investigator Mickles's testimony that he only learned about visitation rights when the child's mother reported to Caldwell School that E.B. was sick on a particular day is not disputed;

32. Investigator Mickles's testimony that he observed appellant and his daughter leaving the Mountainside address on two occasions during his nine day investigation is credible;

33. Investigator Mickles's testimony that appellant's enrollment documents and Lease Agreement lists a home address located at 47C Forest Drive Short Hills

34. Investigator Mickles's testimony that when he interviewed the managers of Short Hills Village he was informed that appellant had not moved out, but that his Lease had run-out is not disputed;

35. Investigator Mickles's testimony that respondent provided him with an address at 373 Upland Road, Mountainside, is not disputed;

36. Investigator Mickles's testimony that the listed owner of 373 Upland is M.F.B, who is appellant's deceased mother is not disputed;

37. Investigator Mickles's testimony that he saw much activity and a number of vehicles at the 373 Upland is not disputed;

38. Investigator Mickles's testimony that he reviewed Mountainside Police Reports and learned that on seven occasions in four years, between 2009 and 2013, appellant phoned the Mountainside police from 373 Upland to request assistance, is not disputed;

39. Appellant's phone calls for police assistance suggests that on at least two occasions he and his daughter stayed at 373 Upland overnight – i.e.: 7:24 a.m., on November 27, 2011, and 2:37 a.m., on September 24, 2012;

40. Investigator Mickles's testimony that he never interviewed appellant's ex-wife is not disputed;

41. Investigator Mickles's testimony that he has no listing of who drove the black Denali, other than appellant because he only saw appellant driving it is not disputed;

42. Investigator Mickles's testimony that he does not specifically know who may have driven the silver passenger van is not disputed;

43. Investigator Mickles's testimony that he never spoke to anyone about the operators of the vehicles is not disputed;

44. Investigator Mickles's testimony that he did not have the resources to run the plates is not disputed;

45. Investigator Mickles's testimony that his comments about dew or moisture is based on his own knowledge about vehicles is not disputed;

46. Investigator Mickles's testimony that he knows appellant maintains an apartment in Springfield is not disputed;

47. Investigator Mickles's testimony that he does not know anything about E.B.'s after school activities and plans is not disputed;

48. Investigator Mickles's "Report of Investigation" dated April 24, 2013, was completed before the last day of surveillance on April 30, 2013;

49. Investigator Mickles no longer performs residency investigations, and is now with the Bernardsville Police Department;

50. Investigator Mickles's determination based on a nine day investigation during the month of April 2013 cannot determine domicile for all the dates in question in this case;

51. E.B.'s testimony that she looked at places to live with her dad and that they did stay in Springfield on some night of the week - is credible;

52. E.B.'s testimony that she and her father spent more time in Mountainside - is credible;

53. E.B.'s testimony that there came a time in 2011 when her parents obtained joint custody and she [E.B.] started spending half of her time with her mom and half with her dad, two nights with each parent every week and alternate weekends with each parent - is credible;

54. E.B.'s testimony that she did stay the at the 646, 317, 47C addresses in Springfield because her father wanted her to attend school in Springfield, but that she preferred to stay at her grandad's place in Mountainside because she had more space, a bedroom and her pets where there - is credible;

55. E.B.'s testimony about spending a lot of time at 47C and having a playmate there is credible;

56. B.B.'s, appellant's father's testimony about not knowing all of his son's living arrangements or information about the fire since he resides in Florida in the winter, from December to late spring is credible;

57. B.B.'s, testimony that there is a bedroom for his granddaughter and a bedroom for his son and that they are always welcome to come in eat, is not disputed;

58. Appellant's second wife's testimony about living at 47C and that sometimes she took E.B. to school, is not dispute;

59. Appellant's second wife's explanations about her husband's property in Springfield is mistaken in part;

60. Appellant's second wife's explanations about places of residence, during the time frame of this case, that appellant lived in is contradicted by her own testimony that she only knows where J.B. lived when she was with him;

61. Appellant's testimony about where he lived in Springfield, during the time frame of this case, is credible;

62. Appellant's and E.B.'s testimony complimented each other in regard to places they lived in Springfield, except that E.B. was adamant about not wanting to stay anywhere long because she did not like the places, except for Mountainside;

63. Fire Chief Palumbo's testimony that he did not know if appellant and E.B. resided in 646 is not disputed;

64. Fire Chief Palumbo's statement that a family was removed from the top floor has no impact on appellant's statement about previously living on the top floor. Appellant and E.B. moved-out of 646 in December 2010 and the fire occurred in January 2011;

65. On August 6, 2013, Superintendent Davino notified appellant that it appeared he [appellant] and his daughter were no longer domiciled in Springfield;

66. Commencing August 2013, appellant had notice from respondent that there was no continued accommodation for E.B. to reside in Moutainside and receive an education in Springfield;

67. On August 6, 2013, appellant learned that he could appeal the no-residency determination and have a hearing before the BOE;

68. A BOE hearing was held on August 26, 2013;

69. Appellant did not present documents at the BOE hearing to prove residency in Springfield;

70. At the BOE meeting, respondent passed resolutions authorizing the removal of appellant's daughter from the district's school and the assessment of back tuition;

71. For the duration of the 2013-14 school year, E.B. was enrolled in fifth grade at the James L. Caldwell School in Springfield, New Jersey without a waiver or accommodation from respondent;

72. During the 2013-2014 school year, E.B.'s mother obtained full custody via Court Order;

73. Commencing January 2014, E.B. started permanently residing with her mother in Pequannock, while still attending school in Springfield;

74. Commencing with the 2014-2015 school year, E.B. attended Pequannock Valley Middle School in Pequannock, New Jersey, Morris County;

LEGAL DISCUSSION

A student is eligible to attend a school free of charge if the student is domiciled within the school district. A student is domiciled in the school district when he or she is living with a parent or legal guardian whose permanent home is located within the district. A home is permanent when the parent or guardian intends to return to it after being absent from the home and has no present intent of moving from the home, notwithstanding the existence of homes or residences elsewhere. N.J.A.C. 6A:22-3.1(a) (1). Domicile may also be defined as a residence. N.J.S.A. 18A:1-1.

Consideration in proving residency for purposes of establishing eligibility for school district placement is found at N.J.A.C. 6A:22-3.4(a),

> (a) A district board of education shall accept a combination of any of the following or similar forms of documentation from persons attempting to demonstrate a student's eligibility for enrollment in the school district:
>
> 1. Property tax bills, deeds, contracts of sale, leases, mortgages, signed letters from landlords and other evidence of property ownership, tenancy or residency;
>
> 2. Voter registrations, licenses, permits, financial account information, utility bills, delivery receipts, and other evidence of personal attachment to a particular location;
>
> . . .
>
> 3. Court orders; State agency agreements; and other evidence of court or agency placements or directives;
>
> 4. Receipts; bills; cancelled checks; insurance claims or payments; and other evidence of expenditures demonstrating personal attachment to a particular location or to support the student;
>
> . . .
>
> 6. Affidavits, certifications and sworn attestations pertaining to statutory criteria for school attendance, from the parent, guardian, person keeping an "affidavit student," adult student, person(s) with whom a family is living, or others as appropriate;
>
> . . .
>
> 8. Any other business record or document issued by a governmental entity.
>
> (b) A district board of education may accept forms of documentation not listed in (a) above, and shall not exclude from consideration any documentation or information presented by a person seeking to enroll a student.
>
> (c) A district board of education shall consider the totality of information and documentation offered by an applicant, and shall not deny enrollment based on failure to provide a particular form of documentation, or a particular subset of documents, without regard to other evidence presented.

N.J.S.A. 18A:38-1(a) and N.J.A.C. 6A:22-3.1(a) sets forth the right of a student to a free public education, which in pertinent parts states:

> Public schools shall be free to the following persons over five and under twenty years of age:
>
> a. Any person who is domiciled within the school district[.]
>
> . . .
>
> (a) A student over five and under twenty years of age pursuant to N.J.S.A. 18A:38-1, or such younger or older student as is otherwise entitled by law to free public education, is eligible to attend school in a school district if the student is domiciled within the district.

In S.S. ex rel. A.S. and A.S. v. Bd. of Education of the Township of Marlboro, Monmouth County, EDU 192-12, Initial Decision (August 26, 2013), http://njlaw.rutgers.edu/collections/oal, evidence submitted by an investigator hired by the Marlboro New Jersey School District to determine whether certain minor children who were enrolled in the school district in fact were domiciled therein within the meaning of N.J.A.C. 6A:22-3.1(a) was sufficient to establish that the children in fact were not domiciled in the district during the period in question and, instead, supported a conclusion that the minors resided at their grandmother's home in Edison New Jersey. Even though their mother had submitted documentation of the type described in N.J.A.C. 6A:22-3.4(a) that supported her claim that the minors were domiciled in Marlboro, the circumstances of the mother's employment, which included late hours, was such that the minors were properly found to be residing with their grandmother. On that basis, the administrative law judge recommended that the Department of Education find the mother liable for tuition for the minors.

In K.L. v. Bd. of Educ. of Kinnelon, No. A-5671-07 (App. Div. January 4, 2010). Petitioners argue that the Commissioner erred in determining that their Kinnelon home was not their "domicile" for purposes of N.J.S.A. 18A:38-1(a). They argue that it was undisputed that they intended to occupy the Kinnelon home as soon as possible, but

they were delayed by unforeseen construction delays and by the approval and permitting processes.

Pertinent in the instant matter is N.J.A.C. 6A:22-3.1. Appellant provided the Springfield district with a Lease Agreement and bills that did not have his name on it. The bills in other family member's names were not acceptable. The apartment was rented to appellant's family members. No form of acceptable proof, as set forth in N.J.A.C. 6A:22-3.4 (a) were submitted by appellant. Without proof of residency or the presentment of credible evidence through testimony and documentation that residency exists then appellant's daughter is not entitled to a free public education in the Springfield district.

The issue of whether there is sufficient credible evidence to prove that residency existed for appellant and E.B. after a reasonable accommodation period ended must be determined based on the testimony deduced during the OAL hearing. Appellant and his family faced a unique emergent situation in 2010. The mother was charged with DWI, lost her home in Ridgewood, relocated to Pompton Plains, was incarcerated, lost physical custody of her minor daughter and saw her husband (estranged or divorced) gain custody of their daughter. The testimony strongly indicates that appellant wanted to care for his daughter and was trying to obtain housing in which she [his daughter] was comfortable. The facts show that appellant and his daughter searched for housing, but were unsuccessful until the daughter was comfortable with 47C and stayed there more than any other place except Mountainside. The chronology of moves from one place to another knits together, as does the situation that sometimes, after March 2011 when joint physical custody took effect, E.B. was with her mom two nights each week and every other weekend, in Pompton Plains or Pequannock. The only witness who briefly discussed visitation was Administrator Atherton, who said she knew about the Court Order visitation.

In December 2010, there was no indication that appellant intended to make Mountainside a permanent move. The reason for appellant's move from 646 in December 2010, was not disclosed during testimony; however, it is not disputed that by

January 27, 2011 he and E.B. would be forced to move from 646 because of the fire damage. It is not disputed that appellant and E.B. searched for an apartment in Jersey City and elsewhere after the move from 646. housing There was no indication that appellant intended to abandon the idea of residing permanently in Springfield as long as he had physical custody of his daughter. When appellant leased 47C he resided there with his daughter until she [E.B.] moved to Pequannock, New Jersey, permanently with her mother in January 2014. Appellant moved into his second wife's home in Bernardsville, New Jersey, on July 1, 2014.

In determining those periods of time that appellant and his daughter were residing in Springfield, consideration was given to Investigator Mickles's testimony that indicates his interview with agents at Short Hills Village, in Springfield, in 2013 revealed that appellant had not moved-out and has a lease agreement that has run-out. Consideration was given the Investigator's acknowledgment that he never interviewed appellant's ex-wife, never knew about visitation rights until one day when E.B.'s mother reported her daughter was sick, never determined who drove what vehicles because he did not have the resources to run plates and that his comments about dew or moisture were based on his own knowledge about vehicles.

CONCLUSION

I CONCLUDE based on the weight of the evidence that:

- Appellant and E.B. resided in the Springfield School District, during the first half of the 2010/2011 school year, until December 1, 2010;

- Appellant and E.B. resided outside of the Springfield School District, from December 1, 2010 to the end of the 2010/2011 school year;

- Respondent permitted appellant and E.B. to reside outside of the Springfield School District during the 2011/2012 school year;

- Respondent approved appellant's request for an extension of the accommodation allowing residency outside of the Springfield School District beyond January 2012;

- On April 25, 2012, respondent provided appellant with notice that an internal residency investigation had been completed and a determination made that tuition is due because proof of his [appellant's] and E.B.'s domicile in the Springfield School District was lacking;

- On August 26, 2013, the members of the Springfield BOE ratified the determinations made on April 25, 2012 by passing resolutions authorizing the removal of appellant's daughter from the district school and assessing back tuition;

- Commencing April 25, 2012, respondent no longer authorized an accommodation for E.B. to reside outside the Springfield School District while attending school in the district;

- Appellant and E.B. lived outside the Springfield School District from April 25, 2012 to June 2013, the end of the 2012/2013 school year;

- Appellant and E.B. resided in the Springfield School District, during the first half of the 2013/2014 school year, while both mom and dad effectuated the Joint Custody Order and had overnight visits from E.B. two nights each week and every other weekend. E.B. visited her mom in Pequannock and stayed with her dad at 47C Forest Drive, Short Hills Village, in Springfield;

- Appellant and E.B. did not reside in the Springfield School District, during the second half of the 2013/2014 school year. Commencing January 14, 2014, E.B. resided full time with her mom in Pequannock and attended school in the Springfield School District;

- Tuition reimbursement is due from appellant to respondent for (1) December 1, 2010 to the end of the 2010/2011 school year; (2) April 25, 2012 to June 2013,

the end of the 2012/2013 school year; (3) September 2013 to June 2014, the full duration of the 2013/2014 school year;

- Tuition reimbursement rates shall be at the annual tuition rate established for each Springfield district school attended by E.B. during the specified periods.

ORDER

It is **ORDERED** that the determination of the Springfield BOE that E.B. was not domiciled in Springfield for all of the 2010/2011, 2011/2012, 2012/2013, and 2013/2014 school years and thus owes tuition reimbursement for all of those S.Y.'s, be **MODIFIED** as follows:

It is **ORDERED** that appellant reimburse respondent for the dates E.B. attended school in the Springfield School District and resided outside the school district without an accommodation and / or authorization from respondent;

It is **ORDERED** that appellant reimburse respondent for December 1, 2010 to the end of the 2010/2011 school year; April 25, 2012 to June 2013 the end of the 2012/2013 school year; and September 2013 to June 2014, the full duration of the 2013/2014 school year.

It is **ORDERED** that the Springfield BOE be entitled to tuition reimbursement from appellant, at the annual tuition rate established for each Springfield district school attended by E.B. during the periods specified above:

Sandmeier Elementary School	2010-2011	$13,877
James Caldwell School	2011-2012	$12,347
James Caldwell School	2012-2013	$12,284
James Caldwell School	2013-2014	$13,412

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

November 13, 2015
DATE

SANDRA ANN ROBINSON, ALJ

Date Received at Agency: November 13, 2015

Date Mailed to Parties: NOV 17 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

APPENDIX

WITNESSES

For Appellant:

B.B. appellant's father

E.B., appellant's daughter

Julie Biondi, appellant's second wife

J.B., appellant

For Respondent:

Ellyn Atherton, Administrator Springfield Board of Education

Richard Mickles, Investigator Springfield Board of Education

Carlo Palumbo, Chief Springfield Fire Department

David Rennie, Principal of James Caldwell School

EXHIBITS

For Appellant:

A-1 **ORDER FOR SUPERVISED VISITATION:** Superior Court of New Jersey Chancery Division Family Part - Union County, New Jersey, signed by Camille M. Kenny, JSC, dated November 22, 2013

For Respondent:

R-1 Springfield Public Schools Registration Form For 2010/2011 school year, dated September 25, 2010

R-2 Examination Under Oath of Appellant on Thursday April 28, 2011 - Taken at Offices of Methfessel and Werbel, P.C., Attorneys for Franklin Mutual Insurance **(LIMITED CREDIBILITY)**

R-3 Springfield Public Schools 2010 / 2011 School Year Academic Calendar **(NOT ADMITTED)**

R-4 Appellant's Letter to Respondent Requesting Caldwell School Enrollment, dated August 26, 2011

(ID ONLY)

R-5 Springfield Board of Education Extract from Minutes of the Board of Education Meeting, dated August 26, 2013

R-6 Springfield Board of Education Closed Session Minutes, dated August 26, 2013

R-7 Respondent's School Business Administrator's Letter to Appellant, dated April 25, 2012

R-8 Earnings Statement for Appellant with Two Morris Avenue Addresses, dated March 9, 2012

R-9 Report from Fire-House by Chief Carlo Palumbo, dated January 27, 2011

R-10 Respondent's Superintendent's Letter to Appellant Approving Attendance at James Caldwell School in September 2011, dated August 31, 2011

R-11 ORDER CONSENT FOR TRANSFER OF VENUE: Superior Court of New Jersey Chancery Division Family Part – Bergen County, New Jersey, signed by Bonnie J. Mizdol, PJFP, dated March 4, 2011

R-12 Email to David Rennie, Principal of James Caldwell School, from Mary Ellen Basile, Administrative Assistant to the Superintendent Springfield Public Schools, dated January 26, 2012

R-13 Letter to Appellant from Michael A. Davino, Superintendent of Springfield Public Schools, dated August 6, 2013

R-14 Springfield Board of Education Extract from Minutes of the Board of Education Meeting "Tuition Rates 2011-2012," dated May 9, 2011

R-15 Approved Tuition Rate Chart for School years: 2010-2011, 2011-2012, 2012-2013, 2013-2014

R-16 Photo

R-17 Photo

R-18 Photo Short Hill Club Village

R-19 Photo

R-20 Resume - Richard A. Mickles

R-21 Report of Investigation, by Richard A. Mickles, dated April 24, 2013

R-22 (A) Incident Summary by Mountainside Police, dated November 27, 2011

(B) Incident Summary by Mountainside Police, dated January 18, 2012

(C) Incident Summary by Mountainside Police, dated June 14, 2012

(D) Report: Domestic Violence Investigation by Mountainside Police, dated September 24, 2012, supplemented September 29, 2012 and October 1, 2012

(E) Letter from DYFS to Mountainside Police Department, dated October 22, 2013

(F) Incident Summary by Mountainside Police, dated October 26, 2013

(G) Incident Summary by Mountainside Police, dated December 14, 2013

413-15

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
OFFICE OF THE COMMISSIONER

In the matter of the Tenure Arbitration between:

The State-Operated School District
of the City of Paterson, New Jersey

and

Ronald Pearson
Agency Docket No. 249 - 9/15

The respondent, Ronald Pearson. a tenured teacher in the Paterson School District, had been charged with inefficiency and was suspended. The respondent denied that the charges made by the District were justified. Pursuant to N.J.S.A.18A:6-17.2, the matter was moved to arbitration and Stephen J. Rosen appointed to hear the dispute.

On November 6, 2015, a Pre-Hearing conference was held. The District was represented by Brenda C. Liss, Esq. of the law firm Riker Danzig. The respondent was represented by Sandford R. Oxfeld, Esq., of the law firm Oxfeld Cohen, P.C. Among other matters discussed the parties agreed to schedule hearings on December 4 and 22, 2015.

In a letter dated November 23, 2015, Mr. Oxfeld informed me that Mr. Pearson had retained the law firm Krumholz and Dillon and would be instituting action in Federal Court based upon claims of discrimination.

Mr. Oxfeld noted that N.J.S.A.18A:6-17.2 makes reference to the claim(s) Mr. Pearson would put forth in Federal Court. In consideration of this development, Attorney Oxfeld requested that the hearings be adjourned and held in abeyance pending outcome of the

civil suit. Ms. Liss asked that the matter not be adjourned and be heard on the dates agreed to by the parties.

In response to the opposing requests, I decided that the hearings proceed as scheduled. The parties were reminded that specific time constraints are contained in N.J.S.A.18A:6-17.2 for the resolution of tenure charges for inefficiency. In addition, the statute allows the respondent an opportunity to submit allegation(s) of discriminatory motive(s) to the arbitrator that materially affected the outcome of evaluations. Given these considerations, I informed the parties that the hearing proceed as scheduled.

On December 2, 2015, Mr. Pearson informed Mr. Oxfeld that he decided to resign his position as teacher in the Paterson School District. On the same day, Ms. Liss conveyed that the District had accepted Mr. Pearson's resignation. Based upon Mr. Pearson's resignation the matter is deemed moot.

12/16/15
Date

Stephen J. Rosen
Stephen J. Rosen

State of New Jersey}
County of Essex} ss:

On this 16th day of December, 2015, before me personally came and appeared Stephen J. Rosen to me known and known to be the individual described herein, who executed the foregoing document and acknowledged to me that he executed same.

Susan G Rosen
SUSAN G. ROSEN
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 8/4/2019

417-15

STATE OF NEW JERSEY
COMMISSIONARE OF EDUCATION

IN THE MATTER OF THE TENURE CHARGES OF:

STATE OPERATED SCHOOL DISTRICT, THE CITY OF NEWARK, NJ.

AND **AWARD AND OPINION**

RATIBA AHMED, RESPONDENT
Agency Docket No. 50-3/15

BEFORE: ERNEST WEISS, ARBITRATOR.

FOR THE RESPONDENT: NANCY I. OXFELD, ESQ.
OXFELD COHEN, P.C.

FOR THE DISTRICT: RAMON E. RIVERA, ESQ.
EUGENE LISS, ESQ.
SHANA T. DON, ESQ.
SCARINCI HOLLENBECK

BACKGROUND

Respondent's motion to dismiss was originally granted by the undersigned on January 20, 2015 under **Agency Docket No. 284-9/14** Subsequently, the District filed Amended Tenure Charges with the Commissioner, alleging inefficiency, deficient teaching performance and receiving negative summative evaluations.

On May 15, 2015, the District filed with the Superior Court of New Jersey, Appellate Division, **Docket No.: A-004115-14.** As a result, I placed the above matter in abeyance pending a determination by the Court. However, on September 9, 2015, the Notice of Appeal to the Court was withdrawn by the District.

On November 10, 2015 I urged the parties to agree to a date for a hearing in the above amended tenure charges. However, the parties failed to respond to my offer of three consecutive dates for the first hearing. Both parties submitted written briefs without scheduling a hearing. Respondent's brief is in support of a Motion for Summary Judgment. The District submitted a letter brief in response to the Motion of Respondent.

A written response by the District on June 15, 2015, argued in relevant part that "Respondent is essentially contending that she should be given a free pass for poor performance based upon a distortion of the applicable law." The District also points out that previously, "...the underlying matter was dismissed on the basis of a defect in filing the charges under Section 25 and no final decision on the merits was reached." Additionally, the District argued in its brief "...that this

matter should proceed to a hearing on the merits of these charges." However, both parties remained silent to my suggested hearing dates. Therefore, I have no alternative but to decide this matter on the basis of the received extensive written evidence submitted to me by Ms. Kathleen Duncan, Director of the Bureau of Controversies & Disputes and the briefs, submitted by both parties herein, which I considered.

POSITION OF RESPONDENT ON MOTION TO DISMISS

Ms. Nancy I. Oxfeld, Esq. argued in relevant part that this is the second time the State Operated School District of the City of Newark New Jersey has brought tenure charges based o the same factual allegations against the Respondent in a "Statement of Evidence " signed by Monique Cumberbatch-Jenkins on August 27, 2014. Ms. Oxfeld pointed out that, in both charges, of Respondent Ratiba Ahmed (248-9/14) as well as (50-3/15) the "Amended" charge is essentially identical and the subsections, a-v, are identical with only immaterial minor differences.

In Point One of the Respondent's brief she argues that the herein Amended Tenure charges must also be dismissed, because Section 25 of the TEACHNJ Act is the exclusive means through which a District can bring charges of inefficiency. It pointed out that the legislature clearly meant to allow only one legislated method of pursuing tenure charges of inefficiency against a tenured teacher.

Ms. Oxfeld, also argued in relevant part on behalf of Respondent, that the instant motion to dismiss the amended charges of inefficiency herein against Ms. Ratiba Ahmed, who is a tenured elementary

education teacher in the Newark public schools, are again premature and must be dismissed by the undersigned Arbitrator.

She again pointed out that." ...the arbitrator's area of review is statutorily limited." and shall only be considered whether or not:

(1) The employee's evaluation failed to adhere substantially to the evaluation process, including but not limited to providing a corrective action plan:

(2) There is a mistake of fact in the evaluation:

(3) The charges would not have been brought but for consideration of political affiliation, nepotism, union activity, discrimination as prohibited by state or federal law, or other conduct prohibited by state or federal law: or

(4) The Districts actions were arbitrary and capricious. N.J.S.A. 18A:6-17.2a.

The arbitrator's review is limited to the four factors above and the evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review. N.J.S.A. 18A:6-17.2c.

Respondent further argued that the decisions by other arbitrators support the herein claim that the claimed amended tenure charges against Ratiba Ahmed are premature and must be dismissed. It "cannot be converted into something else." Ms. Oxfeld pointed out that each arbitrator deciding the tenure charges in the same School District of the city of Newark decided that the charges were premature and cannot begin until after the start of the 2014-2015 school year. Additionally, each arbitrator considered herein, also provided a make whole remedy.

As a result, the tenure charges against respondent Ratiba Ahmed should be dismissed for having been filed in violation of TEACHNJ.

DISCUSSION AND OPINION

Having recently decided essentially the same issue herein in my previous decision involving Ratiba Ahmed, respondent of the same District, I cannot ignore the argument herein of MS. Oxfeld, regarding the prior decisions of arbitrators with practically identical issues. She convincingly points out that, the results of the prior arbitrators with essentially identical issues in the same District, rises to a "collateral estoppel" or "res judicata".

I am reminded that the amended tenure issues before me herein of Ratiba Ahmed, is relatively identical to the previously decided case by me on January 20, 2015, as well as a number of prior decisions in the same District.

Courts "have also recognized that the doctrine of Res Judicata, submitted by M. Oxfeld, may apply to arbitrations with strict factual identities."

In considering the recent awards by the above distinguished panel members, I agree with Arbitrator Gregory where he correctly quotes that *"....the precedential value of a prior award between the parties is to be determined by the subsequent arbitrator"* (Elkouri and Elkouri, How Arbitration Works (6th Edition) (at 598.)

I have previously observed in the previous decision in Ratiba Ahmed Award **(248-9/14)** that, in a March 28, 2012 letter, from Chief Talent Officer Peter Shulman, he updated resources for 2012-13 school

year, as a **"planning and capacity-building year"** and prepare for the implementation of the new system in the 2013-14 school year. He further advised that from January 2013 through August 2013, districts should test and refine implementation of the observation instruments and rubrics and prepare for full implementation in the 2013-14 school year."

I have previously decided that the tenure charges within the same District of Newark were premature and are therefore contrary to the TEACHNJ statute providing for a specific beginning in the school year2014 and having found that herein also the District prematurely invoked the new inefficiency evaluations prior to the legislated "beginning."

Respondent correctly argued that that the District herein, is not entitled to "a second bite at the apple"

Having thoroughly considered all the evidence and arguments submitted by both parties I, hereby grant the Motion to Dismiss the Amended Tenure Charges against teacher Ratiba Ahmed Of the State Operated School District of the City of Newark New Jersey, Essex County and I make the following Award.

STATE OF NEW JERSEY
COMMISSIONARE OF EDUCATION

IN THE MATTER OF THE TENURE HEARING OF RATIBA AHMED,
(RESPONDENT)

-AND- **AWARD**

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, N.J. COUNTY OF ESSEX
(DISTRICT)

AGENCY DOCKET NO. 50-3/15

The undersigned arbitrator having been randomly assigned pursuant to P.L. 2012 c.26, signed by Governor Christie on August 6, 2012, and was randomly appointed on, March 30, 2015, by M. Kathleen Duncan, Director of the Bureau of Controversies and Disputes, to hear and decide the above captioned tenure matter, AWARDS as follows:

For the above stated reasons, the amended tenure charges against Respondent Ratiba Ahmed are hereby dismissed.

The District is herby directed to reinstate Respondent Ratiba Ahmed to her teaching position and make her whole with respect to her salary and benefits.

ERNEST WEISS, ARBITRATOR.

On this 23rd day of December 2015, before me came and appeared Ernest Weiss to me known and known to be the individual described in and who executed the foregoing instrument and he acknowledged that he executed same.

JILL E. FARKAS
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires March 1, 2017

418-15

NEW JERSEY DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Hearing of Michelle Rhodes:

THE JERSEY CITY BOARD OF EDUCATION, HUDSON COUNTY

"Petitioner,"

- and -

MICHELLE RHODES

"Respondent."

Agency Dkt. No. 54-3/15

OPINION AND AWARD

Before
James W. Mastriani
Arbitrator

Appearances:

For the Petitioner:
John G. Geppert, Jr., Esq.
John A. Boppert, Esq., on the Brief
Richard E. Golden, Esq., on the Brief
Schwartz Simon Edelstein & Celso, LLC

For the Respondent:
Randi Doner April, Esq.
Oxfeld Cohen, P.C.

This proceeding arises from tenure charges filed by the Jersey City Board of Education [the "Petitioner" or "District"] against Michelle Rhodes [the "Respondent" or "Rhodes"], a tenured elementary school teacher. The tenure charges were filed with the Board on January 21, 2015 pursuant to N.J.S.A. 18A:6-11. On March 17, 2015, the Board determined that the charges were sufficient to warrant dismissal of the Respondent and pursuant to N.J.A.C. 6A:3-5.1(b)(4), filed the charges with the Commissioner of Education. The Respondent filed an Answer to the tenure charges on March 30, 2015 denying that all of the tenure charges constitute just cause for her termination and that all of the charges be dismissed. Pursuant to P.L. 2012, c. 26, I was appointed by the Department of Education to hear and decide the tenure charges on April 10, 2015.

Formal arbitration hearings were held on May 21, June 2, June 3 and June 16, 2015. At the hearings, each party argued orally, presented and cross-examined witnesses and submitted extensive documentary evidence into the record. The Board's witnesses included Principal Sandra Jones, Principal Shante Jones, Assistant Principal Martha Osei-Yaw, Assistant Principal Paulette Bailey, Teacher April Nelson, Principal Clerk Cindy Makwinski, Security Guard Angela Hudson, Assistant Principal Francine Luce, and RAC Coordinator Catherine Coyle. The Respondent's witnesses included Lisa Fantacone, JCEA

Member and Senior Building Director in P.S. #34 and Michelle Rhodes, Respondent. Each party filed post-hearing briefs on or about July 10, 2015.

BACKGROUND

Respondent Michelle Rhodes was initially employed by the Jersey City Board of Education in December 2000. She became a full-time teacher in September of 2001 and was then employed as an elementary school teacher at P.S. #38 for eight years. Her last position was a sixth grade teacher at P.S. #34.

The tenure charges are extensive in nature and segregated into eleven (11) separate charges. They include: unbecoming conduct, insubordination, and/or other just cause for dismissal related to failure to follow, and/or acting in defiance of, administrative directives and policies (21 counts); to unprofessional conduct and disrespect towards parents and students (10 counts); to altercations with co-workers and other staff (4 counts); to refusing to cooperate with and/or obstructing administrators in the performance of their duties (3 counts), to failure to follow proper protocol (6 counts); to failure to deliver instruction (4 counts); to misuse of time (3 counts); to misrepresentation to administrators (3 counts); for chronic/excessive absenteeism (11 counts); for chronic tardiness (8 counts) and for engaging in a pattern of unbecoming conduct over an extended period of time. In Respondent's testimony, she has agreed with a limited number of the Counts, had no recollection of others and denied engaging in the conduct complained of regarding those Charges and Counts that appear to form the main

basis for the tenure charges. She also denies being noticed or presented at any time with certain evidence that the Petitioner has offered in support of some of the charges presented during these tenure proceedings.

The charges encompass a wide spectrum of time beginning with events and incidents that occurred in 2004. The Respondent's increment had been withheld at the end of the 2005-2006 and 2006-2007 school years for school years 2006-2007 and 2007-2008 respectively for Conduct Unbecoming and Performance/Conduct Unbecoming. The Respondent objects to any weight given to evidence offered by the Board in this proceeding that relate to events that occurred prior to the 2007-2008 school year. She asserts that the Board, in this proceeding, is attempting to impose double punishment for the same events that it considered during the time that the aforementioned increments were withheld. Based upon this, Respondent seeks that Charge I Counts 1-10, Charge II Counts 1-10, Charge III Counts 1-2, Charge IV Count 1, Charge V Counts 1-3, Charge VI Counts 1-4, Charge VII Counts 1-3, Charge VIII Counts 1-3 and Charge XI all be dismissed. In response, Petitioner rejects the Respondent's claim that conduct prior to the increment withholdings constitutes "double jeopardy" based upon evidence that it contends reflects that the Respondent has engaged in misconduct of a worsening nature since the increment withholdings.

Initially, I address the parties' arguments concerning scope of the analysis of the time periods that are relevant for consideration of the events set forth in the tenure charges. Petitioner and Respondent offer citations to prior cases that pertain to the admissibility or weight to be given to evidence of prior disciplinary action in connection with whether such prior evidence can be considered to support a new disciplinary action.[1] Respondent contends that evidence of prior conduct in connection with the withholding of her increment for the 2006-2007 school year for "Conduct Unbecoming" and for the 2007-2008 school year for "Performance/Conduct Unbecoming" is either inadmissible or must be given no weight towards the Board's attempt to remove Respondent's tenure rights. After review of all of the arguments of the parties concerning this evidentiary dispute, I reach the following conclusions.

I agree with Respondent that she cannot be disciplined anew solely for performance or misconduct that occurred prior to July 1, 2007. Disciplinary action in connection with those events formed the basis for two consecutive increment withholdings. Respondent has been already disciplined for these events. Moreover, disciplinary action for any other events that were not considered at the time that the prior increment withholdings occurred cannot now be raised solely for the purpose of imposing new disciplinary charges for those

[1] Town of West New York v. Bock, 38 N.J. 500 (1962), I/M/O Stallworth, 208 N.J. 182, 199 (2011), Randolph Township Board of Education and Jill S. Buglovsky, Docket No. 265-9/12, Tenure Hearing of Desly Getty, 2009 N.J. AGEN LEXIS 319 (ALJ 2009), aff'd, Cmm'r (July 20, 2009), Tenure Hearing of R. Scott McIntyre, 96 N.J.A.R. 2d (EDUCATION) 718 (1995), aff'd, Cmm'r (June 7, 1995), Tenure Hearing of Lakhisha Wheeler, Docket No. 18-1/14 (June 23, 2014) (Lowitt), Tenure Hearing of Richard Graffanino, Docket No. 2232-9/13 (January 31, 2014) (DeTreux), Tenure Hearing of Frank Flood, Docket No. 97-5/13 (July 29, 2013) (Brown).

events. However, the prior increment withholdings are relevant in considering the level of discipline to be imposed in the event that the Petitioner establishes that further disciplinary action is warranted for conduct that occurred after the increments were withheld. Put another way, the increment withholdings, especially as they relate to performance and/or misconduct, may be considered as having served notice on Respondent that conduct of a similar nature thereafter may serve as a basis for determining whether cause exists for a level of discipline beyond that which had been previously imposed.

In Charge III, the Petitioner alleges that Respondent engaged in unbecoming conduct, insubordination and/or other just cause for dismissal related to altercations with co-workers and other staff. In Count 4, the Petitioner alleges that on or about October 17, 2014, during an emergency evacuation drill, and while in the presence of students, Respondent engaged in an altercation with Angela Hudson, a Security Guard at PS #20, telling her, "The next time I see you on Jackson Avenue I'm going to fuck your ass up bitch." Ms. Hudson filed an Incident Report on that day and also reported the incident to her principal and Respondent's principal. A few days later, Ms. Hudson filed a complaint in Jersey City Municipal Court against Respondent alleging harassment. Thereafter, Respondent filed a similar complaint against Ms. Hudson. This resulted in a court supervised Mediation Agreement stating "No contact. Effective at once, no physical, no phone, no text, no email, no social network. No physical or communication whatsoever." These terms applied to both individuals.

Petitioner's case on this allegation rests mainly on the testimony of Angela Hudson, a Security Guard at PS #20.[2] Ms. Hudson has been a Security Guard for 18 years. According to Ms. Hudson, an emergency evacuation drill was being conducted on October 17, 2014 at PS #34. Its students, including those of Respondent, were transported on foot towards PS #20. According to Ms. Hudson, this type of drill is routinely conducted during the first two months of school and included all staff and students. She testified that while she was outside she observed Respondent with her students and Respondent said to her "The next time I see you on Jackson Avenue I'm going to fuck your ass up bitch." Ms. Hudson said she felt threatened by the remark. Ms. Hudson then promptly reported the incident to her Assistant Principal at PS #20 and to Ms. Shante Jones, the Principal of PS #34. Ms. Hudson wrote a Security Department Incident Report on October 17, 2014 stating:

> At the above date and time P.S. #34 came to P.S. 20 for an evacuation walk, as the school filed out the court yard, the teacher by the name Ms. Michelle Rhodes walk pass me and said "The next time I see you on Jackson Ave. I'm going to fuck your ass up, bitch." I told her Principal Ms. Jones and my Asst. Principal Mrs. Dortrait.

Ms. Hudson testified that she filed the Incident Report in order to authenticate what she believed had occurred.

[2] Petitioner also cites testimony and documents from others in connection with events occurring after Ms. Hudson reported the incident to Principal Shante Jones.

In further support of Charge III, Count 4, Ms. Hudson also testified to prior incidents involving Respondent that she deemed inappropriate or threatening. According to Ms. Hudson, an incident occurred during the third week of August 2014 in a neighborhood store located on Jackson Avenue. While in the store, Ms. Hudson said she spoke to an unknown individual. At the time, she did not know that the person was a friend of Respondent nor that Respondent was in the store. According to Ms. Hudson, after she spoke to the person, Respondent turned around and said to her friend "every time she is in uniform, she thinks she is hot shit." Ms. Hudson said she responded, "are you speaking to me because I wasn't talking to you." Ms. Hudson also referred to another incident that occurred at PS #34 during the 2012-2013 school year. She testified that she went to PS #34 to pick up her son and her grandson who was a pupil there. According to Ms. Hudson, she came upon the Respondent and heard her tell her friend behind her back that Ms. Hudson was a "bitch".

In response to all of Ms. Hudson's testimony, Respondent denied that she ever said anything inappropriate or threatening to her. She acknowledged that PS #34 was conducting an evaluation drill on October 17, 2014 and that she was in the courtyard walking with her class. Respondent denied making the comment alleged by Ms. Hudson. She said that she was with her class and saw Ms. Hudson but that she was never next to her and that she had no conversation with her whatsoever. She testified that she felt harassed when she received Ms. Hudson's complaint filed in Municipal Court and that she then filed a counter

claim. Although Respondent acknowledged that she had previously seen Ms. Hudson in or around the store located on Jackson Avenue, she rebutted Ms. Hudson's testimony by denying that she said anything improper to Ms. Hudson in or around the neighborhood store on Jackson Avenue. Respondent testified that she was tutoring a student next to the store and while walking a parent to the car, she observed Ms. Hudson looking her up and down and rolling her eyes at her.

I conclude that the Petitioner has proven, by a preponderance of the evidence that Count 4 of Charge III occurred as alleged and that this altercation constituted unbecoming conduct. Ms. Hudson's testimony as to the incident was straightforward, consistent and credible. She was composed during direct and cross-examination and had a clear and vivid recollection of the events. She wrote an incident report immediately after the alleged incident occurred and reported it to the Principal of her school (PS #20) and the Principal of Respondent's school (PS #34). These reports prompted administrative investigations. She also promptly filed a complaint in Municipal Court. Her actions after the incident are consistent with the concern she had over Respondent's remark. I find no significance in a minor inconsistency between Principal Jones' written statement that Ms. Hudson told her that the remark was whispered to her compared to Ms. Hudson's testimony that the remark was louder than a whisper.

Respondent's denials have been carefully reviewed and evaluated including her testimony that she never spoke to Ms. Hudson that morning. A credibility determination is required over whether anything was said, and if so, what was said. Respondent's version of denial can only be credited if a determination can be made that Ms. Hudson made up the incident in its entirety due to her testimony that she never saw or spoke to Ms. Hudson. The record, however, does not support a finding that Ms. Hudson either invented the incident or lied about the events that occurred or did not occur. Ms. Hudson's testimony as to a prior separate incident on Jackson Avenue placed the October 17, 2014 incident in a context that confirmed that there had been a prior event between the two on Jackson Avenue a month or so prior and that it was Respondent that had shown hostility toward her. It also reflects that Respondent had negative feelings about Ms. Hudson relating to her position as a uniformed security officer and the manner in which Ms. Hudson conducted herself in that capacity. While the prior incident on Jackson Avenue in and of itself was not significant, its context in relation to the alleged threat made during the evacuation drill is significant as serving as support for Ms. Hudson's testimony that Respondent made a threat about what she would do if she saw Ms. Hudson in the future on Jackson Avenue. The 2012-2013 incident at PS #34 is also entitled to supporting weight for similar reasons. Moreover, the record contains no evidence reflecting that Ms. Hudson had any hostility whatsoever towards Respondent or did anything to provoke Respondent into making a threat.

The incident involved two co-workers on school property. While there is no evidence that students heard anything relating to this event, the lack of such evidence is not relevant to whether the remark was made. Any reasonable person would regard a remark such as the one made by the Respondent to a co-worker as evidence of intent, at minimum, to frighten and cause distress and one that reasonably could be construed as constituting a threat to cause physical harm in the future. Based on all of the above, I conclude that Petitioner has sustained Charge III, Count 4. I defer an analysis of disciplinary action until review of additional charges.

The events set forth in Charge III, Count 4 are related to and lay a context to review Charge IV, Counts 2 and 3, Charge I, Count 15 and Charge 1, Count 16 based on the Petitioner's view of events that ensued after Principal Jones began to investigate Ms. Hudson's complaint. In Charge IV, Count 2, the Petitioner alleges that:

> Respondent refused to cooperate and defiantly obstructed Principal Shante Jones in the performance of her duties when, in response to Principal Jones' investigation of Angela Hudson's complaint of even date that Respondent had threatened Ms. Hudson, Respondent "pulled her cell phone from out of the inside of her blouse and yelled out, 'I am now recording you because this is a litigation!'" Respondent then held her cell phone toward the Principal's face, shining a light at her.

In Charge III, Count 3, the Petitioner alleges that:

> On or about October 17, 2014, Respondent refused to cooperate and defiantly obstructed Principal Shante Jones in the performance

> of her duties when, in response to Principal Jones' instruction that Respondent wait in the main office while she investigated Angela Hudson's complaint that Respondent had threatened Ms. Hudson, Respondent declared the Principal was "taking too long," and left the office.

In Charge I, Count 15, the Petitioner alleges that:

> On October 17, 2014, Respondent declared the Principal was "taking too long" and left the main office, in defiance of the Principal's directive that Respondent wait there while the Principal investigated the complaint of another employee, Angela Hudson, that Respondent had threatened Ms. Hudson by stating, "The next time I see you on Jackson Avenue I'm going to fuck your ass up bitch."

In Charge I, Count 16, the Petitioner alleges that:

> On October 17, 2014, Respondent failed to follow the Principal's directives to report to the main office, and to sign out of the main office before leaving the building.

The separate charges above flow from the aftermath of Ms. Hudson's reporting to Principal Jones what Respondent said to her during the evacuation drill. After Ms. Hudson reported the incident to Principal Jones, Principal Jones wrote a lengthy same day incident report of her own describing what Ms. Hudson told her about the incident and the steps she took thereafter to investigate. Her description of the incident, in her report and in her testimony, parallels Ms. Hudson's report and testimony with the exception of stating in her report that Respondent's remark to Ms. Hudson came in a whisper as opposed to Ms. Hudson's testimony that it was louder than a whisper. In addition to describing the incident, Principal Jones testified that she spoke to Respondent on October

17, 2014 and after telling her that both administrators at each school would create their own incident report, Respondent pulled a cell phone out from inside her blouse and yelled that "I am now recording you because this is a litigation." Respondent said she did so because she was unable to bring an Association Representative with her to the meeting. Principal Jones testified that she told Respondent to put her cell phone away but Respondent continued to record. Principal Jones also stated in her report that Respondent held her cell phone up to her face with the light shining towards her. This incident regarding the cell phone was included separately in Petitioner's tenure charges at Charge IV, Count 2.

The testimony of Principal Jones was corroborated by Principal Clerk Ms. Makwinski. Ms. Makwinski testified to observing the statement and actions of Respondent as testified to by Principal Jones. Ms. Jones said that she told Respondent to put the cell phone away and asked her to wait in the main office while she checked with Dr. Michael Wings, Director of Division A, to see if it was appropriate to question Respondent's students pursuant to Respondent's request that she do so. After attempting to reach Dr. Wings, Principal Jones said that Respondent informed Ms. Makwinski that Principal Jones was taking too long and then went back to her classroom before Principal Jones could respond to Respondent's request. Principal Jones said that she attempted to reach Respondent to come back to the office but Respondent instead went to a different floor to confer with an Association Representative. After checking

Respondent's schedule, Principal Jones learned that it was Respondent's preparation period at the time.

In respect to the meeting with Principal Jones, Respondent acknowledged that she did use her cell phone as alleged because she wanted to have a video and audio recording of the meeting out of a fear that she would be improperly disciplined. She said she continued to use the cell phone to record for this reason. She also acknowledged saying that she did so "for litigation." She denied shining a light in Principal Jones' eyes and said she raised her hand holding the phone only for the purpose of recording the events. She said that her phone does not light up when recording and she demonstrated this at the arbitration hearing. She acknowledged that she may have been speaking in a louder tone than normal but that is her manner of speaking when she is on a video recording. She said she also felt frustrated because she felt she was being accused of saying something that she did not say.

There is no dispute that Respondent produced a cell phone for the purpose of having a video/audio recording of the interview with Principal Jones. Charge IV, Count 2 alleges that Respondent pulled the phone out of her blouse and yelled that "I am recording this because this is a litigation." This Count, even if true, does not establish an independent basis for discipline. There is little significance to where Respondent housed her cell phone. I also cannot find, on this record, that Respondent held the cell phone towards Principal Jones' face

while shining a light at her face. It should be noted that the Count implies that the light was for the purpose of intimidation. However, this suggestion does not contemplate that the cell phone could appear lit due to the normal video recording process. Even if there was a light, the distance between Principal Jones and Respondent, as testified to by Principal Jones and Ms. Makwinski, was such that the light could not have been for the purpose of intimidation or obstruction of the interview. The testimony does show that Respondent was in an agitated state as a reaction to Ms. Hudson's allegations against her and was somewhat defensive and confrontational. I attribute her raised voice to her hostility for the purpose of the interview rather than a raised tone that she said she would normally use when being recorded. Beyond this, Respondent's conduct during the interview has not been proven to have been obstructive or insubordinate. The Petitioner has not produced a policy or rule prohibiting the open recording of an interview nor was there testimony from Principal Jones that Respondent was directed to cease recording and that she refused to obey such direction. Further, Petitioner's allegation that Respondent's remark concerning her use of the cell phone was for the purpose of litigation has not been shown to be based upon a refusal to cooperate or to defiantly obstruct the investigation. Principal Jones testified that Respondent said "because this is a litigation" while Respondent acknowledged that she said it was "for litigation." I give the Respondent the benefit of doubt as to what was said and to her intent. Regardless of the version accepted, the remark was linked to Respondent's obvious intention to have a recording of the interview which, under the

circumstances in this case, has not been proven to violate any rule or policy, nor is there any evidence that Respondent was directed to refrain from recording the interview with disciplinary consequences for any such refusal. Accordingly, Charge IV, Count 2 is dismissed.

Charge I, Count 15 and Charge III, Count 3 both allege that Respondent was defiant, uncooperative and obstructive when she left the main office while Principal Jones was investigating Ms. Hudson's complaint. Respondent was alleged to have ignored a directive from Principal Jones to remain in the office and to have said to Ms. Matwinski that Principal Jones was "taking too long" to investigate the conduct prior to leaving the office.

This incident arose in the context of Principal Jones' checking with Dr. Wing as to whether she had the authority to question students as to whether they may have heard Respondent make a threatening statement towards Ms. Hudson. The testimony of Principal Jones reflects that she "asked" Respondent to remain in the office until she could contact Dr. Wing. The record does not reflect that Respondent received a directive to remain in the office within the common meaning of the term. Had this been the case, Respondent's departure from the room would clearly have been insubordinate. When Principal Jones returned to provide the results of her conversation with Dr. Wing, she was easily able to locate Respondent. Respondent left the office during a time that she had a preparation period. There is no indication her departure from the office was for

the purpose of terminating Principal Jones' investigation of Ms. Hudson's complaint or that Respondent thereafter refused to engage in any conversation that Principal Jones wished to have with her over the incident. Respondent's actions did give rise to suspicions of non-cooperation and reasonably could have been viewed as being uncooperative but there is no evidence that Respondent was insubordinate or obstructive. When this Count is reviewed as a whole, I do not find that it has been sustained and it therefore will be dismissed.

Charge I, Count 16 alleges that "on or about October 17, 2014, after the incident, Respondent failed to follow the Principal's directives to report to the main office and to sign out of the main office before leaving the building." At the time of this event, Principal Jones had been informed by the Board's General Counsel that Respondent should be sent home without any time being deducted from her attendance. Principal Jones contacted Respondent to tell her that she could sign out for the remainder of the day. The record reflects that Respondent left the building but did not sign out. Principal Jones testified that she had told Respondent that she needed to speak with her in the main office before leaving but Respondent did not appear. Petitioner contends that Respondent's actions support its charge that she failed to follow and acted in defiance of administrative directives and policies. The record developed on this point is insufficient to establish a refusal to follow a directive. There is no testimony as to what the purpose of the meeting would have been on the sign out issue. It is simply not clear that Respondent was directed to report to the office prior to leaving the

school. Ms. Makwinski testified concerning the existence of a Staff Daily Signed-Out/In Book. This provides that a staff member sign out and in and provide a reason for leaving the building on a PS #34 form. Respondent's name did not appear on the PS #34 form for October 17, 2014. Ms. Makwinski acknowledged that the book is not always signed despite teachers being required to. She was not aware that anyone had ever been disciplined for failure to sign out. Under the circumstances present on October 17, 2014, I do not find that the Petitioner has established that Respondent's failure to sign out was either an act of defiance or a deliberate failure to follow Board policy. The Petitioner was aware that Respondent would be leaving the school, had directed her to do so and was aware that she would no longer be present. Given all of the above, I conclude that the Petitioner has not sustained this Count and it will be dismissed.

In Charge III, Count 3, the District alleges that:

> On or about May 13, 2014, Respondent engaged in a threatening and confrontational altercation with April Nelson, a teacher, when, as Ms. Nelson entered the building in the morning, Respondent "paused in front of Ms. Nelson and whispered something in her face," whereupon Ms. Nelson replied, "What did you say?" to which Respondent stated, in a threatening manner, "Come upstairs and I will tell you."

Testimony concerning this incident was offered by Ms. April Nelson, a Mission Read teacher at PS #34. Ms. Nelson testified that after entering the building at 7:30 a.m., she observed Respondent at an exit door on her left. Respondent then changed direction and passed in front of her towards another

exit door while mumbling something to her. Ms. Nelson asked Respondent what she said and Respondent said "come upstairs and I'll tell you." Ms. Nelson regarded this as a threat. She responded "get out of my face" to the Respondent, walked away and went to Principal Shante Jones who wrote a report of the incident. Ms. Nelson testified that Security Guard Annie Dickson observed and heard the incident and told her that she heard Respondent tell Ms. Nelson to "come upstairs" in a low tone of voice and then Dickson rolled her eyes. Ms. Nelson filed a harassment complaint against Respondent with the Board. Respondent then filed a complaint against Ms. Nelson in Municipal Court. Ms. Nelson testified that a mediation session resolved the issues and each agreed to be civil to each other and there have been no problems ever since.

Respondent denied making a threatening remark to Ms. Nelson. She said that she felt harassed by Ms. Nelson causing her to file the complaint against Ms. Nelson in Municipal Court. According to Respondent, she admitted turning around and walking in front of Ms. Nelson but said the reason she did so was that she was texting her husband and said "excuse me" to Ms. Nelson prior to Ms. Nelson offering a nasty response. According to Respondent, her comment to Ms. Nelson was misinterpreted. She testified that she said that they could go up to her classroom if Ms. Nelson wanted to continue the discussion. Principal Shante Jones testified that Ms. Dickson wrote a report of the incident but that she could not find the report. Ms. Dickson did not testify. Principal Jones' report indicates that a Teacher's Aide, Frances McClean was asked to write a report

and wrote" no comment" but verbalized that "I was not listening to their conversation and everyone needs to grow up around here and act like adults."

There is no dispute that Respondent uttered the words "come upstairs" to Ms. Nelson, although Respondent asserts that it had a different connotation and purpose than what Ms. Nelson believed. Credibility determinations are required over what occurred and was said. I find Respondent's explanation that she inadvertently crossed over into Ms. Nelson's path to be implausible. It suggests that her path away from one exit door in front of Ms. Nelson would have occurred even if Ms. Nelson was not present. If the incident occurred as testified to by Respondent, it is unlikely that when Ms. Nelson asked Respondent what she had said to her that Respondent's answer would have been to "come upstairs." There is simply no logic nor any rationale at that point in time for Respondent, consistent with her testimony, to invite Ms. Nelson to come upstairs to meet her in her classroom in order to continue a dialogue when there was no evidence that an issue existed that would have formed a basis for a continued dialogue. I have considered Respondent's argument that no disciplinary action occurred at the time of the incident. I do not find this contention persuasive or a waiver of Petitioner's right to raise this incident in the tenure charges in light of credible record evidence that other events occurred that establish that Respondent has engaged in other conduct that is confrontational in nature. Accordingly, I conclude that the record evidence on this charge supports the sustaining of Charge III, Count 3.

In addition to the above performance and conduct related charges, the District has alleged that the Respondent has engaged in chronic/excessive absenteeism (Charge IX) and chronic tardiness (Charge X). It submits evidence of such absenteeism and tardiness for the last five years (July 1, 2010 through December 8, 2014) and for years prior. During July 1, 2009 through June 30, 2010, Respondent was absent 11 days, including 9 absences due to personal illness. During the same time period, Respondent was tardy 12 times. During July 1, 2010 through June 30, 2011, Respondent was absent 17.25 days, including 13.25 absences due to personal illness. During that same time period, Respondent was tardy 6 times. During July 1, 2011 through June 30, 2012, Respondent was absent 15.75 days, including 12.75 absences due to personal illness. During July 1, 2012 through June 30, 2014, Respondent was absent 10 days due to personal illness. During July 1, 2013 through June 30, 2014, Respondent was absent on 55 days, including 50.5 absences due to personal illness. During that same time period, Respondent was tardy 7 times. During July 1, 2014 through December 8, 2014, Respondent was absent on 13 days, including 9 absences due to personal illness. During the same time period, Respondent was tardy 2 times.

In respect to the issues of absenteeism and tardiness, the Board submits the following arguments in support of Charge IX and Charge X.

Chronic or excessive absenteeism may warrant removal even when the absences have been excused or caused by legitimate medical reasons such as long-term poor health, or work related injuries. See State-Operated School District of Jersey City v. Pellechio, 92 N.J.A.R.2d (EDUCATION) 267 (1992). This may be the case even when legitimate reasons, such as long-term health issues, caused the absences. Id. Also see, State-Operated School District of Newark v. Gillespie, 2011 N.J. AGEN LEXIS 226 (OAL 2011), modified Cmm'r (August 3, 2011), aff'd App. Div. (May 17, 2011) (stating "[c]learly, the mere fact that the absences were excused does not obviate the possibility that the teacher may be dismissed for excessive absenteeism"); In the Matter of the Tenure Hearing of Randi True, Willingboro Board of Education, 2011 N.J. AGEN LEXIS 839 (ALJ 2011), aff'd Comm'r (August 15, 2011).

Randi True, like the Respondent herein, was granted multiple leaves of absence for extended periods of time. Yet, both an Administrative Law Judge and the Commissioner sustained tenure charges for chronic absenteeism, among other infractions. The ALJ in True specifically cited In Re Reilly, 1977 S.L.D. 403, 414 to support a determination that chronic absenteeism must not be tolerated even when leaves of absence are granted:

> The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra effort, when the regular teacher returns to the classroom. Consequently, many pupils who do not have the benefit of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of schooling. . . . The entire process of education requires a regular continuity of instruction with a teacher directing the classroom activities and learning experiences in order to reach the goal of maximum educational benefit for each individual pupil. The regular contact of the pupils with their assigned teacher is vital to this process.

Legal precedent clearly establishes that "[E]ven if a teacher's performance in the classroom is sufficient . . . the absences may nevertheless be considered as material to the issue and can justify removal of the teacher." Tenure Hearing of Jeanne Cook, Old Bridge Board of Education, 2005 N.J. AGEN LEXIS 48, *14 (ALJ 2005), rev'd on other grounds, Comm'r, 2005 N.J. AGEN LEXIS 812 (June 9, 2005); citing Trautwein v. Bd. of Educ. of Bound Brook, 1980 S.L.D. 1539, cert. denied, 84 N.J. 469 (1980).

In the instant case, Respondent was absent from her post on over two hundred (200) occasions, primarily due to personal illness. (**FF 55-65, P-50-60**.) As established in Pellechio, supra, the fact that Respondent may have had legitimate medical excuse is completely immaterial to this analysis. Respondent's poor attendance has had a deleterious effect on the continuity of instruction, as the Board is then compelled to hire substitutes. (As indicated in the testimony of Principal Shante Jones, who declared that absenteeism interrupts the continuity of instruction for students.) For example, in the 2005-2006 school year, Respondent was absent for 34% of the school operating days. Yet again in the 2013-2014 school year, Respondent was absent for 31% of the school operating days. In five other school years (2009-2010; 2010-2011; 2011-2012; 2012-2013 and 2014-2015), Respondent either met or exceeded the annual contractual allotment of thirteen 13 sick days.

Excessive tardiness "may constitute both 'unbecoming conduct' and 'incapacity' such as to amount to 'just cause' warranting the suspension or termination of the teacher." In the Matter of the Tenure Hearing of Randi True, 2011 N.J. AGEN LEXIS 354, *56-*57 (June 29, 2011), adopted, Comm'r, 2011 N.J. AGEN LEXIS 839 (August 15, 2011); citing In re Kacprowicz, 93 N.J.A.R.2d 147, 151 (January 21, 1993). In True, the administrative law judge (AU) wrote that whether "absenteeism and tardiness are judged to be excessive fall within the reasonable judgment and discretion of the local school district."

When prosecuting tenure charges for both absenteeism and tardiness, a board of education must establish:

(1) that it considered both the number of days and the particular circumstances of the absences [and/or tardiness]; and
(2) the impact that the absences [and/or tardiness] had on the continuity of instruction during the period of time the absences occurred; and
(3) that the teacher received some warning that his or her supervisors were dissatisfied with the teacher's absences [and/or tardiness].

See Tenure Hearing of Sonia Velez, 2006 N.J. AGEN LEXIS 242, * 17 (ALJ 2006), adopted, Comm'r, 2006 N.J. AGEN LEXIS 654 (April 27, 2006). In the instant matter, the Board has easily met all three prongs of this test:

The Board considered the circumstances of Respondent's absenteeism and tardiness, by issuing to Respondent Summative

Evaluations on May 21, 2010; June 7, 2011; and June 4, 2012 in which she was cited as "needing improvement in the areas of attendance and punctuality." (**P47--P-49**). Had the Board simply acted on the raw number of absences and tardies, Respondent may have been subject to discipline at the time. However, the Board considered the totality of circumstances in its decision to continue employment with increment. Also, the Board granted extensive medical leaves on multiple occasions, to allow Respondent to resolve medical issues. (**P-51, P-59**). But as noted in Pellechio, supra, the legitimate medical concerns do not mitigate against chronic absenteeism from the classroom. Despite ameliorative measures by the Board (continued reemployment with increment, granting of extended leaves) Respondent's poor attendance and tardiness has continued all the way through to the most recent school year, 20 142015. (**P-58-60.**)

The Board considered the impact of the Respondent's absenteeism and tardiness, which force the Board to incur a significant daily cost for substitute teachers, in addition to the Respondent's salary and benefits. Moreover, Respondent's frequent absences prevent the satisfactory performance of the duties of her position. Board Policy 4151 - Attendance Patterns (P-65) clearly states that the "[R]egular presence of assigned personnel is vital to the success of the district's educational program. Consistent absenteeism or tardiness is unacceptable and subject to disciplinary action."

In Tenure Hearing of Randi True, supra, the ALJ noted that the petitioning board need not point to specific instances or examples supporting its contention; rather, it need only demonstrate the likely result of the absences." See also, In the Matter of the Tenure Hearing of Alicia Dugan, 2012 N.J. AGEN LEXIS 249 (May 7, 2012), adopted in part, modified in part, Comm'r, 2012 N.J. AGEN LEXIS 664 (June 14, 2012), where the mere fact of a teacher's absence for 197 days over a six year period was sufficient to infer a negative impact on students.

As noted above, Respondent has been warned about her persistent and unacceptable pattern of absenteeism and tardiness, in three Summative Evaluations, (P-47—F-49), yet the problem has continued unabated. Moreover, all teaching staff members are subject to Board Policy 4151 – *Attendance Patterns*, supra. The evidence proffered by the Board shows that sufficient warnings were given to the Respondent.

During the hearing on this matter, the Board presented uncontroverted testimony from Principal Shante Jones that when

> teachers are excessively absent, children do not receive instruction. Moreover, Jones noted during testimony that Respondent's chronic absenteeism made her unavailable for proper and thorough observation/evaluation.
>
> Accordingly, the Board has proven by a preponderance of the evidence that Rhodes engaged in numerous acts of insubordination and conduct unbecoming relating to failure to provide instruction. Therefore, dismissal from her position is warranted.

Respondent offers extensive argument contending that the Petitioner's charge of excessive absenteeism and tardiness must fail given its view that the Petitioner has not sustained its burden to prove that the absentee record was either excessive or had negative impact on the educational process. Respondent further notes that there was medical evidence to support approved leaves of absence. She submits that:

> In order for a Board of Education to terminate a tenured teacher for excessive absenteeism, it must demonstrate that it considered the number of days and the particular circumstances of the absences, the impact the absences had on the continuity of instruction and that the teacher received some warning. In re the Tenure Hearing of White, 92 N.J.A.R. 2d (EDU) 157. The nature of the warnings and the corrective actions taken are relevant in determining proper discipline. Passaic Bd. of Ed. v. Viani, 92 N.J.A.R. 2d (EDU) 76. Further, with regard to the claims of tardiness for years 2004-2005 through 2007-2008, the Board withheld Rhodes' increment twice for reasons that included absenteeism/tardiness and, as stated supra., cannot and should not be disciplined twice for the same offense.
>
> The Board inclusion of excessive absenteeism is absurd. First, every witness to this count acknowledged that there were only two school years in which Rhodes was absent in excess of the thirteen contractual days. The first one was during the 2005-2006 when she was on medical leave for her pregnancy and subsequent maternity leave. **Eight years later** she took two medical leaves of absence during the same school year, 2013-2014. These two years hardly exemplify / excessive absenteeism.

In the Matter of the Tenure Hearing of Gregory Short, District of the City of Elizabeth, Union County, Agency Docket No. 263-9/14, Arbitrator DeTreux found that while the Board established chronic absenteeism it was not sufficient to warrant termination. He noted that as per White, the Board had given warnings. Because the Board provided testimony regarding the issues that occurred when Short was absent, the arbitrator found that it proved adverse impact. The arbitrator then looked at the circumstances of the absences: work related injury illness of new born. Ultimately, the arbitrator found that as Short was an "average to above average teacher" with positive evaluations, he found that an increment withholding was appropriate. (See also In the Matter of the Tenure Hearing of Leslie Ann Ramos, District of the City of Elizabeth, Union County, Agency Docket No. 261-9/14 (despite almost 500 days absent over seven years, arbitrator returns teacher to the classroom with a suspension and an increment withholding due to her change in medical condition as well as testimony that she was a good teacher.)

As important as the failure to prove that the sheer number of days were excessive, the Board completely ignored the requirement that it prove the adverse impact that her absences had on the education process. Not a single Board witness testified as to the impact, either good or bad, that Rhodes' absences had on the educational process. On this point alone the charges related to excessive absenteeism must be dismissed. Surely, if the Board had any evidence that Ms. Rhodes' absence led to any educational issues (in fact Shonte Jones testified that she had no documentation of parental complaints) it would have so offered it. By failing to do so, this Arbitrator must accept that there is no such evidence, and Charge IX must be dismissed.

Similarly, Charge X must be dismissed as well. Tardiness issues are handled similarly as chronic absenteeism. In the Matter of Tenure Charges Against Vice Principal Lawrence F. Hawkins by the State Operated School District of the City of Newark, Agency Docket No, 24310/13, Arbitrator Laskin found that the Board was unable to prove excessive tardiness. She noted that In re Tenure Hearing of True, EDU 812-10, was determinative. In order to demonstrate tardies are excessive, the Board must prove:

> "(1) that it considered both the number of days and the particular circumstances of the absences; (2) the impact the absences had on the continuity of instruction during the period of time the absences occurred; and (3) that the teacher received some

> warning that his or her supervisors were dissatisfied with the [employee's] absences [or tardies]."
>
> Because the Board could not prove that Hawkins' tardiness affected the continuity of instruction, the claim failed.

The Respondent's record of absenteeism and tardiness commencing with the 2009-2010 school year was clearly a concern to the Board. Consistent levels of absenteeism, even if within contractual limits, can yield recommendations for improvement. However, prior to the 2013-2014 school year, I do not find the record on absenteeism and tardiness to form the basis for discipline or to support tenure charges. However, the record shows that the Respondent clearly had an excessive amount of absenteeism during the 2013-2014 school year. The sheer number of absences, 50.5 days, even if supported by medical documentation, does not render Respondent immune from disciplinary action. She was not in her classroom for almost one-third of the school year. The Petitioner need not establish the level of negative impact asserted by Respondent to be the required standard for disciplinary action. Even so, Petitioner has established through the testimony of Principal Shante Jones, that Respondent's absences caused interference with the proper evaluation of her performance, the ability of the Board to have Respondent's students graded in timely fashion as well as having to bear the substantial cost of teacher replacement. Although the number of absences and tardiness do not, standing alone, provide a basis for termination under the circumstances present, they are sufficient in number to support some level of disciplinary action for failure to achieve a minimum performance level over the entire 2013-2014 school year, including the withholding of an increment.

In further support of the tenure charges, the Petitioner cites to nine (9) instances of reprimand issued to Respondent between January 6, 2011 and December 10, 2014.[3] One involves bulletin boards and is dated January 6, 2011 (Charge I, Count 11). This was issued by Francine Luce, Principal of PS# 34. Another involves a late call in to report an absence and is dated September 16, 2011. (Charge V, Count 4). This was also issued by Francine Luce. Another involves late lesson plans and is dated February 11, 2012. (Charge I, Count 12). This was also issued by Francine Luce. Another involves a late reporting time and failure to sign in dated October 23, 2012. (Charge V, Count 5). This was also issued by Francine Luce. Another involves failure to timely complete several documents for administrative review dated November 13, 2014. (Charge I, Count 17). This was issued by Shante Jones and Assistant Principal Paulette Bailey. Another involves failure to timely complete several documents for administrative review dated December 1, 2014. (Charge I, Count 18). This was issued by Shante Jones. Another involves failure to comply with a PLC Committee Directive also dated December 1, 2014. (Charge I, Count 19). This was issued by Shante Jones and Assistant Principal Paulette Bailey. Another involves failure to submit documents and disrespectful conduct dated December 10, 2014. (Charge I, Counts 20 and 21). This was issued by Principal Shante Jones. Testimony in support of these charges was offered by Principal Luce,

[3] There are also several instances of reprimand dating back to 2004 and 2005 issued by Respondent's then Principal Sandra Jones. Because of their remoteness to the filing of the tenure charges and the fact that they predate the two increment withholdings, they will not be considered for reasons previously stated.

Principal Jones and Assistant Principal Bailey. Respondent rebutted their testimony and offered a document (R #8) disputing the events set forth in Petition exhibits dated December 1 and December 10, 2014.

Prior reprimands would normally be considered as final actions that do not warrant de novo review on their merits. Absent timely appeal, they are prior actions issued to Respondent and part of prior discipline. I find this to be the case with those that were issued between January 6, 2011 and February 11, 2012. However, because of the proximity of actions in November and December 2014 to the January 21, 2015 filing of the tenure charges, I will consider those reprimands on their merits as if they had been grieved by Respondent.

On November 13, 2014, Principal Shante Jones wrote a memo to Respondent stating the following:

> The following documents **have not been completed** for administrative review during the past requested due dates. Please review the information listed below and adhere to the revised due dates.
>
> 1. **Emergency Contact Form** (see attached) - Complete and hand it in on **Friday, November 14, 2014 by 2 pm to Cindy Makwinski (Principal Clerk)** in the main office.
>
> 2. **School Committee Selections Form** (see attached) - Complete and hand it in on **Friday, November 14, 2014 by 2 pm to Cindy Makwinski (Principal Clerk)** in the main office.
>
> 3. **Staff Needs Survey** (see attached) - Complete and hand it in on Friday, **November 14, 2014 by 2 pm to Cindy Makwinski (Principal Clerk)** in the main office.

4. **SGOs** - Submit **two tiered SGOs** both **electronically** (one copy to myself and Mrs. Bailey) and as a **hard copy** of each along with the students' scores on **Monday, November 17, 2014 by 9am to Cindy Makwinski** (Principal Clerk) in the main office.

5. **Bulletin Board** - Select one sixth grade classroom and post work up for every student in the homeroom. Follow the bulletin board guidelines **(CCSS, Graded Work, Constructive Feedback, Objectives, & Rubrics)** that were discussed at the staff meeting on October 9, 2014 and listed on the agenda. All new bulletin boards are due on **Tuesday, November 18, 2014 by 1:15 pm** in preparation for the upcoming Open House.

6. **Lesson Plans** - On a daily basis your lesson plans should be readily available for continuity in instruction and administrative review. You did not have them available for review on October 1st when asked by Mrs. Paulette Bailey, AP during her visit to your classroom or on October 15th during the district walk-throughs when asked by Mrs. Catherine Coyle, Director of The Regional Achievement Centers.

Thereafter, on December 1, 2014, another memo was sent by Principal Jones to Respondent alleging that Respondent had failed to comply with the November 13, 2014 memo:

> On November 13th, you received a memo in writing to follow through with completing the following tasks by a specific date and time:
>
> 1. **Emergency Contact Form** (see attached) - Complete and hand it in on **Friday, November 14, 2014 by 2 pm to Cindy Makwinski (Principal Clerk)** in the main office.
>
> 2. **School Committee Selections Form** (see attached) - Complete and hand it in on **Friday, November 14, 2014 by 2 pm to Cindy Makwinski (Principal Clerk)** in the main office.

3. **Staff Needs Survey** (see attached) - Complete and hand it in on **Friday, November 14, 2014 by 2 pm to Cindy Makwinski** (Principal Clerk) in the main office.

4. **SCOs** - Submit **two tiered SGOs** both **electronically** (one copy to myself and Mrs. Bailey) and as a **hard copy** of each along with the students' scores on **Monday, November 17, 2014 by 9 am to Cindy Makwinski (Principal Clerk)** in the main office.

5. **Bulletin Board** - Select one sixth grade classroom and post work up for every student in the homeroom. Follow the bulletin board guidelines **(CCSS, Graded Work, Constructive Feedback, Objectives, & Rubrics)** that were discussed at the staff meeting on October 9, 2014 and listed on the agenda. All new bulletin boards are due on **Tuesday, November 18, 2014 by 1:15 pm** in preparation for the upcoming Open House.

On Friday (November 14th) and Monday (November 20th) you called out for Personal Illness Days. However, today is Monday, December 1st and you have yet to hand in any of the requested documents above in the main office for my review. Also, your hallway bulletin board that is supposed to display student work for one of the classes you teach remains incomplete since both the October 14th and November 18th due dates.

On November 13th when I discussed the contents of the letter with you, you shared that you were not going to complete the Emergency Contact Form because you felt "unsafe" in this school building and are receiving text messages. In order to accommodate your concern, I explained that the only information that I did require that you complete on the Emergency Contact form was your list of current certifications in order to update your Highly Qualified Teacher status for the 2014-2015 school year. You responded by saying, "I don't have any certifications." I also need the description of your car and license plate number so you can be contacted in the event of an emergency since you park in our school lot.

When inquiring a out the reason for not handing in your state mandated SGOs, you stated that you did not understand the ".77 number." I told you that I did not know what number you were referring to and needed to see you SGO drafts in order to help you. I also asked why you didn't share with me that you needed assistance in the past few weeks so that I could have guided you

along the way. In addition to this, I informed you that I would have also invited the district supervisors (who presented the revised SGOs to our staff) to come back to help as needed. Your colleagues who received special SGO development training also turn keyed examples to the staff in all grade levels during morning PLC meetings; however; you stated that you thought your colleagues did not understand it either. Notwithstanding, you are still expected to submit two SGOs as directed.

This memo serves as a letter to document your insubordination and by Wednesday, December 3, 2014, all of the above requested documents are due by 9 am to the main office for my review so that I can assist you with your SGOs, materials/technology needs, and assign you to one of your three choices for the PLC Committees (depending on the number of participants who have already been assigned to each committee). Also, on Wednesday, December 3rd by 2 pm, your hallway bulletin board is also expected to be completed (see above guidelines for #5). Continued failure to adhere to my administrative directives may result in disciplinary action.

The issue concerning PLC committees was the subject of an additional December 1, 2014 memo. Principal Jones testified that the memo was written to confirm her direction to Respondent that she could not join the Health and Wellness Committee and that Respondent failed to comply with her directive. The memo stated:

On Thursday, November 20th, you and a few other teachers who were not on the original list of the morning PLC Committees were called down to the main office in order to review your three selections on the form that was due on the revised date of Friday, November 14th, by 2 pm in the main office. Upon your arrival to the main office with Ms. Lisa Fantacone (Teacher) as your JCEA Representative, I verbally asked you what three committees you chose since you still did not hand in the School Committee Selections Form. You then asked if we could meet in a more private area. I stepped outside of the main office with the two of you and asked the same question. You stated that you selected the Health and Wellness Committee. As I looked at my count of staff members on each committee, I informed you that the

committee you selected as your first choice was no longer an option due to its high number of participants who already handed in their forms on the original due date, therefore, I asked what your second and third choices were as well. At this point you referred to what happened last Thursday morning while I was out of the building. You said that Mrs. Bailey (the Assistant Principal) told you that you could select to sit in any committee you wanted to, therefore, by "default" you will remain on the Health and Wellness Committee. As I began to reiterate that the final list will be based on the number of participants on each committee and that Mrs. Bailey did not have that information last week, you repeated that the Health and Wellness Committee was the group that you were going to be a part of despite my explanation. When I stated that that committee was no longer an option, you said, "I feel like I'm being discriminated against." I then dismissed you by stating that I was not going to go back and forth with you over this situation because I needed to visit each committee meeting. Contrary to my directive, you proceeded to sit in the Health and Wellness Committee meeting in Room 102.

I followed up with Mrs. Bailey to inquire about what she said to you last Thursday in reference to your three selections. Mrs. Bailey stated that she in fact did not speak directly to you at all and instead made a general announcement to all staff members as a reminder that it was Committee Day. She also said that she announced that if there were any staff members who were not assigned to a committee yet, they could sit in on a meeting that morning until a final committee was assigned. This final assignment will be completed by me as your Principal solely based on balancing the number of participants in each group; this is why we asked every staff member to make three choices. You have been given the directive in another memo to complete the School Committee Selections Form by Wednesday, December 3rd at 9 am for my review so that I can place you in one of your other two selected committees (the Health and Wellness Committee is no longer an option as I told you on Thursday, November 20th). If you continue to fail to adhere to my directives, a disciplinary action may result.

On December 10, 2014, Principal Jones issued another memo to Respondent concerning her prior requests:

On Monday, December 1, 2014 you received two Failure To Comply letters directing you to once again hand in the five requested documents (Emergency Contact Form, School Committee Selections Form, Staff Needs Survey, and two state mandated SGOs) as well as complete your hallway bulletin board by December 3rd. None of the five documents have been handed in and the bulletin board remains incomplete.

On Wednesday, December 3rd, Mr. Charles Murphy (Technician from the Board of Education) informed me that he was going to install two new computers inside your classroom. As I attempted to reach out to you by calling your homeroom on the intercom, there was no answer. Therefore, I tried the computer lab and asked you to pick up the intercom phone. My first question to you was if you signed up to utilize the computer lab with Ms. Crystal Warren (Library Media Specialist) because I did not know where your class was located. You told me that you did not sign up to use the lab with Ms. Warren and wanted to stay there all day so your students could type and print. As I proceeded to remind you of the importance of signing up so that you have administrative approval and also so that your location would be told to the main office/security desk, you said, "O.K." and hung up the phone before I finished my sentence. I then called you back on the computer lab intercom phone to inform you about the installation of the two new computers and we continuously were disconnected. Once I was able to reach you a few minutes later, you picked up the computer lab's intercom phone and stated, "I will not talk to you unless I have union representation." You then hung up the phone once again. I called you back on the intercom phone and announced that Charles would be visiting your classroom to install two new computers.

Also, on Thursdays at 8 am - 8:30 am, all staff members signed up for three committee and were assigned to participate in one of them. On December 4th, you still did not hand in the requested committee selections form. As per my and Mrs. Bailey's observation while visiting all committee meetings that morning and reviewing all agenda sheets with the participant signatures, you did not report to any of the morning meetings.

As a result of your insubordination, it is recommended that you bring union representation upon your request) to meet with me on Thursday, December 11th at 2:30 pm (coverage will be provided) in the first floor conference room to discuss your refusal to hand in any of the requested paperwork, complete your hallway bulletin board, and disrespectful communication with me as the Principal. As your immediate supervisor, you will speak to me to discuss

> anything related to instruction like installing classroom computers without union representation being present because it is not warranted. Your disrespect to me as the Principal is unprofessional and will not be tolerated.
>
> If you continue to fail to follow my administrative directives, a disciplinary action may follow.

The testimony from Principal Shante Jones and Assistant Principal Paulette Bailey concluded that Respondent either did not adhere to, or comply with, the directives set forth in the memos sent by Principal Jones to Respondent. Respondent either denied failing to perform the directives or offered explanations as to why she did not or need not comply.

At hearing, Respondent offered an exhibit (R #8). This exhibit consists of two memos she said had been sent to Principal Jones on December 2, 2014 in response to the December 1, 2014 memos. Petitioner objected to the document pointing to the testimony of Principal Jones that she had never seen the memo. Petitioner also contends that the document was not properly produced pursuant to N.J.S.A. 18A:6-17. The first memo is entitled "Complied with PLC Committee Directive" and states:

> Thursday 11/20/14, during my Professional Learning Committee 8:00-8:30 morning meeting, I was called to the main office by Ms. Jones several times over the intercom. Upon arriving at the office with my JCEA representative Ms. Jones told me to choose another PLC committee. This took place in the presence of secretaries, staff and whoever else was present. Unfortunately public disclosing staff members' matters in the main office is common practice for Ms. Jones that is why I brought the Senior JCEA Representative Lisa Fantacone to accompany me to the office.

I asked Ms. Jones if we could we speak in private and she agreed. However, as I (*Mrs. Rhodes*) and Ms. Fantacone left the main office, Ms. Jones followed behind us stridently questioning me about a PLC committee. After entering the hallway Ms. Fantacone and I stopped walking and waited for Ms. Jones to escort us to a private area such as the conference room to conduct the meeting, instead Ms. Jones stationed us in the hall and continued to discuss my personal issue without regard for my right to privacy.

I'll have you know, I submitted the original PLC committee document and don't understand why my name wasn't added to the original roster of the Health and Wellness Committee I chose.

In addition it is important that you know I and Lisa Fantacone are the JCEA building directors for PS 34. This may be why my name was not added to the roster. Lisa Fantacone and I as JCEA union representatives are harassed together. We are often called to the office for hostile confrontations one after the other and receive written reprimands on the same day. Ms. Jones regularly exhibits anti-union behavior.

The morning of 11/20/14, I informed Ms. Jones that while she was not present the morning of 11/13/14 Ms. Bailey made an announcement over the intercom stating teachers whose names were not on the roster of a committee were to choose a committee to report to and their names would be added to the roster of that committee. In response to this information Ms. Jones retorted, "I'm the principal not Mrs. Bailey!" At that juncture I expressed to Ms. Jones I feel discriminated against.

Then I and my JCEA Representative returned to the Health and Wellness Committee. Ms. Jones vociferously commented as we were a distance from the main office but still in the corridor, "You can go today but you won't be on committee!" I didn't respond to the statement.

In conclusion I am being harassed for being a union representative and for speaking at the board meetings and standing up for fellow members, students and myself. At this time I will be pursuing legal action against Ms. Shante Jones.

A second memo from Respondent also dated December 2, 2014 is entitled "Complied" and states the following:

November 13th I received a memo in writing to follow through with completing the following tasks by a specific time and date

1. Emergency contact form: I don't park in the lot.
2. School Committee Selections Form: I submitted a hard copy.
3. Staff needs survey: I submitted a hard copy
4. SGO's: I gave Ms. Jones a hard copy when she came to my classroom
5. Bulletin Board – My bulletin board has a 3 part objective. Rubric, CCCs, graded work and constructive student feedback. However, every student's work is not on the bulletin board; because I have been absent due to Ms. Jones perpetual anti-union harassment and professional development workshops.

Absent

- September 25, 2014
- September 30, 2014
- October 29, 2014
- November 3. 2014
- November 5, 2014
- November 10, 2014
- November 14, 2014
- November 17, 2014

Workshop

- October 22, 2014
- October 27, 2014
- October 30, 2014
- November 21, 2014

Not counting the 2 half days, 7 days the district was closed, quarterly assessments, Moreover, November 20, 2014 was a Thursday

In conjunction with the absences; students academically perform at different levels and therefore work at different paces. Paramount to Ms. Jones' actions which stem from her anti-union partialities, I am bound by the federal government via No Child Left Behind (NCLB), Jersey City Public School district and curriculum to differentiate instruction.

In addition, prior to this written notice Ms. Jones and I spoke privately November 18, 2014 in reference to the bulletin board. I

> explained to Ms. Jones I have one working computer in my class (*Which was out of commission for several weeks*) and my goal is to have students hand written drafts and typed published essays displayed on the bulletin board, as the, work currently presented on the bulletin board. Ms. Jones acknowledged my dilemma and granted me extra time to put my class' essays up.
>
> However, she reneged on the agreement and accused me of insubordination. It is evident at this point Ms. Jones is either seeking tenure charges or means to withhold my increment.
>
> This isn't Ms. Jones first time falsely accusing me of not handing in work such as alleging on two different occasions that Assistant Principal Mrs. Paulette Bailey and Regional Achievement Center administrator (RAC) Cathy Coyle told her I didn't have lesson plans. In both cases this is a blatant lie.
>
> In conclusion I am being harassed for being a union representative and for speaking at the board meetings and standing up for fellow members, students and myself. At this time I will be pursuing legal action against Ms. Shante Jones.

I credit the testimony of Principal Jones and Assistant Principal Bailey that as of December 10, 2014, none of the documents or tasks that they requested had been fulfilled. The record clearly reflects that the bulletin board was not completed, that mandated personnel forms were not submitted and that Respondent resisted Principal Jones' direction not to join a committee that she did not want Respondent to join. Respondent contends that there were reasonable explanations for not doing what she was requested to do. Even if this were the case, Respondent was under an obligation to do what she was directed and then, if she deemed it appropriate, to challenge the directives in the grievance procedure. Accordingly, Petitioner has established a proper basis to sustain Charge I, Counts 18, 19, 20 and 21.

The Petitioner in Charge I, Count 13 alleges that:

> On or about September 22, 2014, Respondent notified the District that she would not comply with an administrative directive, given on September 9, 2014, to complete final grades and averages for the 2013-2014 report cards for Respondent's former sixth grade Language Arts classes, which Respondent had failed to complete in the prior year due to a leave of absence; Respondent further added, defiantly, that the Principal's directive was "harassing and of no value to anyone."

In support of this charge, the Petitioner offered exhibits and the testimony of Principal Shante Jones. She referred to the following September 9, 2014 document:

> As per our conversation on Thursday, September 4, 2014, Mr. Thomas Purwin (Director of Educational Technology) has informed me at the end of the day yesterday that you now have access for last school year's (2013-2014) report cards for your former sixth grade Language Arts classes (Room #s 201, 210, & 211) beginning today, Tuesday, September 9, 2014. This access will allow you to complete the Language Arts grades for all three homerooms that were unable to be completed due to your Leave of Absence from June 10, 2014 to June 26, 2014. All Language Arts final grades and averages for the sixth grade students of 2013-2014 should be completed and ready to be reviewed/printed by Wednesday, September 17, 2014 by 9am. Please confirm via email by Wednesday, September 10, 2014 that your access for the report cards is working for all three homerooms and let me know if you have any questions. Thank you for your cooperation!

Respondent went on a leave of absence from her sixth grade class on June 1, 2014. The leave ended on June 26, 2014, after the instructional school year had ended. Respondent gave no quarterly or final grades to her students. The grades were needed for the fourth marking period and for final grades for the year. When asked about the grades, Respondent maintained that she was on

leave and had left the grade book on her desk. According to Principal Shante Jones, Respondent's grades were needed in order to forward records to other schools. After not receiving a response from Respondent, the above written communication was made concerning the issue to Respondent on September 9, 2014. Respondent testified that she was on a medical leave at the end of the school year and told Principal Shante Jones that she left the grade book and lesson plans on her desk. She said she heard nothing more until September. When she received the September 9 letter from Principal Shante Jones, she deferred the letter to her attorney who, on September 22, 2014 offered the following response:

> I am attaching a copy of correspondence received on September 9, 2014 from Ms. Shante Jones, the Principal of Public School No. 34. As you know, I represent the JCEA and I respond to you as Ms. Rhodes' attorney.
>
> As the enclosed indicates, my client was on a leave of absence from June 1 through June 26, 2014. Obviously, she did not give final grades and all the material in which she can formulate these grades, is no longer available to her. Ms. Rhodes left her grade books, lesson plans and the like in her room, along with personal belongings and she has not recovered these items, to date.
>
> Accordingly, it is impossible for her to meet the request of Ms. Jones. Additionally, it would appear to me that since all the students have been promoted, the request is harassing and of no value to anyone.

Respondent testified that she was never disciplined over the incident, that the District formulated grades for the students and that none of the students were adversely affected by not receiving a timely grade.

I find that the Petitioner has proven that this incident warrants disciplinary action. The incident reflects that Respondent exercised extremely poor professional judgment on a matter of substantial educational impact, a lack of accountability and an unresponsive attitude towards school management and her students. While Respondent clearly had a right to seek Association advice, she gave no notice of same to Principal Jones who had a right to a more timely response to her inquiry. Moreover, the record does not reflect that Respondent was precluded in any way from completing and submitting student grades or, at minimum, engaging in professional communication directly with her principal to provide input concerning grading for instructional time while she actively worked prior to going on leave.

Charge 1, Count 14 alleges that:

> On or about October 15, 2014, Respondent refused to comply with the District Policy regarding maintaining a lesson plan book when, during a walkthrough of Respondent's sixth grade language arts classroom by Catherine V. Coyle, Regional Achievement Center ("RAC") Coordinator, Respondent stated to Ms. Coyle that "she does not write plans."

Testimony in support of this was offered by Principal Shante Jones, Paulette Bailey, Assistant Principal, PS #34 and Catherine Coyle, Director of Elementary Education and Regional Achievement Center ("RAC") for the New Jersey Department of Education. This issue arose on October 15, 2014. On this date, a walkthrough of Respondent's language arts classroom was conducted by Ms. Coyle. Ms. Coyle testified that she conducts such walkthroughs in all of the

18 schools in Jersey City. When she arrived in the classroom, she observed Respondent at a student desk. After not seeing a plan book, Ms. Coyle testified that she asked Respondent where it was and Respondent said "I don't do plans." Ms. Coyle testified that she was taken aback at the response. She further testified that there was "nothing going on with the students" and that Respondent looked at her and rudely asked "who are you?" Assistant Principal Bailey testified that she heard Respondent say to Ms. Coyle "I don't do lesson plans." She modified her response on cross-examination to recalling that the Respondent said "I don't have lesson plans."

On January 13, 2015, Ms. Coyle sent an email to Chief Academic Officer Jason Bing stating her recollections of her walkthrough.

> I am sending this email in reference to my experience in a classroom visited at #34 School on October 15, 2014 during a Walkthrough. Michelle Rhodes was the teacher in the sixth grade language arts classroom I am referencing.
>
> The teacher, Michelle Rhodes was seated at a student's desk and was whiting out some printing/writing/typed information on papers she had on the desk where she was seated. I approached to ask where I might locate her plan book and she asked, "Who am I speaking with"? I identified myself. Michelle Rhodes shared with me that she does not write plans. She remained seated and continued to white out printing/writing/typed information on the papers she had. Student work was not displayed around the room and student work folders and/or portfolios lacked student work. Students did not understand the assignment.
>
> I am extremely concerned with what I observed. I have shared this concern with the Division Director and the principal. It is apparent that Michelle Rhodes refuses to comply with the District Policy regarding maintaining a plan book.

Respondent denied that she failed to produce lesson plans when asked. She acknowledged asking Ms. Coyle who she was but denied doing so in a rude manner. Respondent points out that Ms. Coyle's memo occurred three months after the incident, that she was not disciplined and that an interim evaluation after the incident did not even refer to it.

I credit the testimony of Ms. Coyle that Respondent did not produce a lesson plan when asked. It is of little significance as to whether the response was "I don't do lesson plans" or "I do not have any lesson plans." The simple fact is that Board policy requires lesson plans and the Respondent did not produce a plan book when requested to do so. It is entirely logical that Ms. Coyle would, in her district-wide capacity, ask to see lesson plans during a walkthrough. I find no basis to conclude that she did not ask for the plans or that Respondent provided offered any other explanation that justified that the plans could not be produced. I also credit Assistant Principal Bailey's testimony that she heard Respondent's answer to Ms. Coyle's question. Respondent offers argument that had Petitioner believed this incident was of significance, reference to the incident could have been made closer to the time of the incident or in the evaluation of Respondent's performance after the incident. The arguments have been considered but do not serve to defend Respondent's failure to adhere to Board policy requiring lesson plans nor can they serve as a waiver of petitioner's right to refer to this incident in support of tenure charges relating to Respondent's overall conduct. Accordingly, I sustain Charge I, Count 14.

The Petitioner has proven, by a preponderance of the evidence, that Respondent engaged in conduct supporting Charge 1, Counts 11, 12, 13, 14, 17, 18, 19, 20 and 21; Charge V, Counts 4 and 5, Charge IX, Count 10 and Charge III, Counts 3 and 4. As such, Petitioner has established that Respondent engaged in unbecoming conduct and/or other just cause for dismissal. The record developed at hearings includes additional Charges and Counts alleging that there was additional conduct by Respondent that supports her removal from the District. After full review of these charges, I find that there is insufficient evidence to support these charges notwithstanding the presence of conduct that could support administrative action in the form of counseling of a non-disciplinary nature. All charges not sustained are dismissed.

Having found that Petitioner has, by a preponderance of the evidence, established a proper basis for disciplinary action, I next turn to the issue of evidence, penalty and whether the Petitioner has proven cause for removal.

In respect to penalty, I first observe that the Respondent previously received increment withholdings in two consecutive years for Conduct Unbecoming and Performance/Conduct Unbecoming. Short of filing tenure charges, these increment withholdings are the most severe penalty that a Board can impose. The increment withholdings served notice on the Respondent that future conduct of similar nature could yield additional disciplinary action at the

same or higher level. Petitioner has made a reasonable case that the incident involving Ms. Hudson could, standing alone, support the penalty of termination for conduct unbecoming. Petitioner has established that Respondent engaged in a threat of physical violence towards a security guard but the additional charges that Petitioner has sustained in addition to the one concerning Ms. Hudson renders such determination unnecessary.

The Petitioner has established that Respondent has engaged in a totality of conduct that represents a pattern inconsistent with the conduct, judgments and temperament required of a teacher within the educational organization and its supervisory structure. The individual acts of alleged misconduct have been reviewed and already analyzed in detail, including those that have been dismissed. Collectively, the charges that have been sustained amount to conduct unbecoming a teacher and represent a just cause basis for Respondent's dismissal pursuant to N.J.S.A. 18A:6-10.

Respondent has forcefully argued, among other things, that the incidents either did not occur, did not rise to the level of removal or that Respondent was either improperly noticed of conduct that warranted disciplinary action. On this latter point Respondent asserts or that Petitioner has, in essence, waived its right to file tenure charges due to a failure to discipline Respondent in timely fashion. I do not find these arguments persuasive. The prior disciplinary actions that led to the increment withholdings, not relitigated here, establish the existence of prior

conduct that amounted to conduct unbecoming or poor performance. Two separate and consecutive increment withholdings provided ample notice and warning to Respondent of potential job jeopardy. The Petitioner has also introduced a volume of counselings and reprimands subsequent to the increment withholdings that establish that Respondent has not responded with conduct that corrected her prior behavior that formed the basis for the previous disciplinary actions. I have also considered Respondent's contention that she may have been the recipient of harsh or disparate treatment due to the attitude of Principal Shante Jones towards her as an individual or as a teacher. I cannot draw any such inference based upon the record evidence and also due to evidence that several administrators and peers have interacted with Respondent and whose testimony reflects similar concerns to those expressed by Principal Shante Jones. It is also significant that Respondent worked under a different Principal and different administrators during the times that her increments were withheld in the past.

Accordingly, and based upon all of the above, I conclude that Petitioner has sustained its burden to prove that it had just cause for the dismissal of Michelle Rhodes.

AWARD

The Jersey City Board of Education had just cause to dismiss Michelle Rhodes from her tenured teaching position for conduct unbecoming pursuant to N.J.S.A. 18A:6-10.

Dated: December 28, 2015
Sea Girl, New Jersey

James W. Mastriani

State of New Jersey }
County of Monmouth } ss:

On this 28th day of December, 2015, before me personally came and appeared James W. Mastriani to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

John J. Blanchard
Attorney At Law
of New Jersey

420-15

NEW JERSEY DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Hearing of Marian Burns:

KINGSWAY REGIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY

"Petitioner,"

- and -

MARIAN BURNS

"Respondent."

DECISION APPROVING SETTLEMENT AGREEMENT

Agency Docket No. 207-8/15

Before
James W. Mastriani
Arbitrator

Appearances:

For the Petitioner:
Stephen M. Bacigalupo, II, Esq.
Schwartz, Simon, Edelstein & Celso, LLC

For the Respondent:
Kathleen L. Kirvan, Esq.
Selikoff & Cohen, PA

Pursuant to N.J.S.A. 18A:6-9, I was appointed to serve as arbitrator on August 27, 2015 to hear and decide the merit of tenure charges filed by the Kingsway Regional School District [the "Petitioner"] against tenured secretary Marian Burns [the "Respondent"] in accordance with N.J.S.A. 18A:10. Upon receipt of that appointment, I conducted a conference call with counsel, at which time the procedure for processing this case was discussed and agreed upon. As a result of this discussion, it was agreed that the matter should proceed directly to hearing.

Arbitration hearings in this matter were held on November 11 and December 15, 2015. At the November 11, 2015 hearing, the parties argued orally, examined and cross-examined witnesses and submitted documentary evidence into the record. Testimony was received from Craig Stephenson, Principal – Kingsway Regional High School, Robert Miles, Assistant Principal (former) – Kingsway Regional High School, Brian Tonelli, Principal- Kingsway Middle School and Dr. James J. Lavender, Superintendent of Schools, Kingsway Regional School District.

At the beginning of the December 15, 2015 hearing, Petitioner and Respondent voluntarily agreed to engage in informal discussions and mediation by the arbitrator on the issues raised in this proceeding. These discussions led to the development of tentative terms of resolution that eventually formed the basis for a Settlement Agreement, subject to approval by the Kingsway Regional Board of Education and the arbitrator. Those terms were signed by the Respondent on December 17, 2015 and formally approved and adopted by the Kingsway Regional

School District on December 17, 2015 as certified by Jason Schimpf, School Business Administrator/Board Secretary.[1] The terms of settlement are as follows:

1. **TENURE CHARGES TO BE WITHDRAWN/NO FURTHER BOARD ACTION**

   The Kingsway Regional Board of Education agrees that upon execution of the within Agreement by the parties and Ms. Burns-Dolan's fulfillment of the obligations as set forth herein, that the subject tenure charges shall be withdrawn and that no further action shall be initiated by the Kingsway Regional Board of Education regarding the underlying charges. Both parties fully reserve all rights in the event this Agreement is breached, as well as with respect to any third party claims that may be made against each party as a result of any acts and/or omissions by the other.

2. **RESIGNATION FOR RETIREMENT**

   Ms. Burns-Dolan, by signing this Agreement, hereby tenders her irrevocable resignation effective November 30, 2015 in furtherance of retirement, which is annexed hereto as Attachment A. Ms. Burns-Dolan's resignation shall be effective and irrevocable upon approval of this Agreement by the Board, whether or not the application for ordinary disability retirement is approved. It is hereby acknowledged that no one, including the parties to this Agreement, can guarantee that Ms. Burns-Dolan will receive a pension, and that only the Pension Board and its trustees can determine pension entitlement and benefit level. Ms. Burns-Dolan agrees that she will not seek any future employment or consultant relationship with the Kingsway Regional Board of Education in perpetuity and that the Board has no obligation, contractual or otherwise, to re-hire or re-employ her.

3. **RELEASE**

   In exchange for the above consideration, Ms. Burns-Dolan, her heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any and all claims or rights, up until the date of execution of the instant Agreement by both parties, whether known or unknown, which they have or may have against the Kingsway Regional Board of Education, personally and officially, individually and collectively, its past and present Board members, all officers and administrators, its attorneys, agents and employees, personally and officially, as well as their successors, and assigns, including, but not limited to any and all claims for attorneys' fees, back pay or front pay, any claims for emotional distress or pain and suffering, any and all claims involving tax liability stemming from this Agreement, and any

[1] An extension of time to conclude the proceedings was granted by the Department of Education.

and all claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions; Title VII of the Civil Rights Acts of 1871 and 1991; the Americans with Disabilities Act; the Age Discrimination in Employment Act; the Older Workers Benefit Protection Act of 1990; the Employee Retirement Income Security Act; the Federal Family and Medical Leave Act; the Fair Labor Standards Act; the Equal Pay Act; the Workers' Adjustment and Retraining Notification Act; the New Jersey Law Against Discrimination; the New Jersey Family Leave Act; the New Jersey Conscientious Employee Protection Act; the New Jersey Wage and Hour Law; the Employer-Employee Relations Act; any collective negotiations agreement; any common law claim and any and all other claims, that could be initiated in. any venue, for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim.

Specifically exempted from this release are any claims arising under the Workers' Compensation Act, N.J.S.A. 34:15-1 et and for health insurance continuation coverage under and pursuant to Consolidated Omnibus Budget Reconciliation Act (referred to hereinabove as "COBRA"). Ms. Burns-Dolan represents that she has not filed and does not intend to file a Workmen's Compensation claim related to her employment with the Kingsway Regional Board of Education. This release does not limit Ms. Burns-Dolan's right to seek indemnification, in accordance with N.J.S.A. 18A:16-6 and/or N.J.S.A. 18A:16-6.1, with respect to a claim filed against her for any act or omission arising out of and in the course of the performance of her duties as an employee of the Kings-way Regional Board of Education. The parties are not aware of the existence of any such claims.

Ms. Burns-Dolan also agrees to dismiss, with prejudice, any and all matters contesting any prior increment withholding(s) and/or alleging any unfair labor practice charge, including, but not limited to the matter entitled Kingsway Education Association v. Kingsway Regional School Board of Education, Docket No. CO-2016-25. Such a dismissal shall be filed with the agency in which said matter(s) is/are pending within thirty (30) days from the date this Agreement is approved by the Arbitrator.

It is expressly understood that the arrangement herein is predicated exclusively upon the special circumstances of this matter and shall not be construed to represent any policy or procedure of the Kingsway Regional Board of Education.

4. **NO ADMISSIONS**

The execution of this Agreement does not constitute an admission or acknowledgement by Ms. Burns-Dolan or the Kingsway Regional

Board of Education of any wrongful or otherwise improper conduct, nor as to the liability of any party. The parties mutually acknowledge that this matter has been resolved in good faith, and that this Agreement is entered into solely for the purpose of avoiding the time and expense attendant to any further litigation.

5. **COMPENSATION/BENEFITS**

Ms. Burns-Dolan shall receive a payroll check in an amount of Fifteen Thousand Three Hundred Thirty-Three Dollars ($15,333.00), which is equivalent to four (4) months' salary. Ms. Burns-Dolan acknowledges that from that amount customary deductions will be made. Besides this monetary payment, Ms. Burns-Dolan shall not be entitled to any further compensation, emolument of employment or fringe benefit of any kind and specifically waives her right to same, including, but not limited to, payment for accrued sick and vacation and personal days and all other emoluments of employment that otherwise may have been due to her as a result of any collective bargaining agreement, contract or Board Policy.

The Board shall send this payment to Selikoff & Cohen, P.A., counsel for Ms. Burns-Dolan, no later than thirty (30) days from the date this Agreement is approved by the Arbitrator.

Ms. Burns-Dolan shall be entitled to any benefits she would lawfully be entitled to under the Workers' Compensation Act or COBRA and she will have the same COBRA rights as any other former employee and shall be solely responsible for any and all costs associated with said COBRA coverage.

6. **NON-DISPARAGEMENT**

The parties and their agents shall refrain from public negative comments regarding each other, and each other's employees and/or agents. However, nothing in this Agreement shall be construed to limit the Kingsway Regional Board of Education and its agents' obligation to provide accurate information in response to legitimate requests for public information, nor to provide information requested by various State Agencies, including but not limited to the State Department of Education; the State Board of Examiners and its agents, including copies of the Tenure Hearing documents, witness list and information, proposed exhibits and work-product related thereto; the Division of Pensions and Benefits; and the Unemployment Compensation Board and/or their agents. Further, nothing in this Agreement shall be construed as affecting the Parties' ability to testify truthfully or fully.

7. **INQUIRIES**

The Kingsway Regional Board of Education agrees, through its Administration, to respond to post-employment inquiries regarding

Ms. Burns-Dolan by providing solely basic work history such as confirming the dates of Ms. Burns' employment within the school district, the amount of Ms. Burns-Dolan's salary in the final year of her employment, the positions that Ms. Burns-Dolan held within the District, and the date of Ms. Burns-Dolan's resignation. However, nothing herein shall be deemed to limit the Kingsway Regional Board of Education's actions in compliance with the Open Public Records Act, or its obligation to respond fully and accurately to any and all inquiries from State agencies such as, without limitation, the Public Employees Retirement System ("PERS"); TPAF; for example.

8. **DUE DILIGENCE**

Ms. Burns-Dolan has indicated that she will file an application for ordinary disability retirement benefits ("retirement application") with the Division of Pensions and Benefits. Ms. Burns-Dolan agrees to file her retirement application in accordance with the provisions of Section 1 of this Agreement. Ms. Burns-Dolan shall cooperate fully with the Pension Board and/or any other State or Local governmental body and comply promptly and completely with all requests and requirements. The Board too agrees that it will cooperate fully with the Pension Board and/or any other State or Local governmental body and will comply promptly and completely with all requirements and requests. In furtherance of that commitment, the Kingsway. Regional Board of Education will reply to Question 7 and its subparts of the Employer Certification that Ms. Burns-Dolan is not under suspension or any form of discipline.

Ms. Burns-Dolan acknowledges that the Kingsway Regional Board of Education has no decision-making authority with regard to her retirement application and that her resignation in furtherance of retirement is not contingent upon its approval.

9. **REQUIREMENTS PURSUANT TO *N.J.A.C.* 6A:3-5.6**

A. True copies of the Tenure Charges are annexed hereto as Attachment C.

B. True copies of Ms. Burns-Dolan's Answer to the Tenure Charges are annexed hereto as Attachment D.

C. Both parties have freely consented to the within Agreement, as evidenced by their respective signatures below.

D. Both parties have had the benefit of independent legal counsel and have been fully apprised of their rights and obligations, and have indicated their full understanding and acceptance of same, by their respective signatures below.

E. The within settlement will serve the public interest by avoiding the cost of further litigation guarantying the desired result.

F. The parties agree that nothing in the within Agreement shall restrict access to information or records deemed public by law. The Kingsway Regional Board of Education and its agents shall cooperate fully and honestly in responding to requests for information from government agencies and in response to requests from the public for information that it is legally required to provide.

G. The Kingsway Regional Board of Education has formally approved this Settlement Agreement, subject only to approval by the Arbitrator. A certified resolution is annexed hereto as Attachment B.

10. **NO RETALIATION**

Ms. Burns-Dolan shall take no retaliatory action of any kind against any student, parent, staff member, Board member or agent of the Board.

11. **ENTRY. ONTO BOARD PROPERTY**

Ms. Burns-Dolan may enter Kingsway Regional Board of Education Property when working with a private entity that has Kingsway Regional Board of Education approval for use of a facility for a particular event, or attendance at a venue or event that is open to the general public. In all other instances, Ms. Burns-Dolan shall first receive prior permission from the Superintendent of Schools before entering onto Kingsway Regional Board of Education Property.

12. **SURRENDER OF BOARD PROPERTY**

A. Ms. Burns-Dolan shall surrender all school keys and property in her possession to the Superintendent of Schools or his designee.

B. The Superintendent of Schools shall arrange an appointment for Ms. Burns-Dolan to retrieve her personal property, if necessary.

13. **BOARD APPROVAL**

This Agreement is subject to Kingsway Regional Board of Education approval. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Kingsway Regional Board of Education.

14. **ASSENT TO TERMS**

A. Ms. Burns-Dolan hereby acknowledges that she entered into this Agreement with a full understanding of her rights and that

she does so without duress and of her own free will and volition, and that she has consulted with independent legal, counsel prior to executing same.

B. Ms. Burns-Dolan acknowledges that she was given the opportunity to fully consider this Agreement for a period of at least twenty-one (21) days, and was given seven (7) (lays from the execution of this document to revoke this Agreement by delivering written notification to Stephen M. Bacigalupo, II, Esq., Schwartz Simon Edelstein & Celso, LLC, 100 South Jefferson Road, Whippany, New Jersey 07981,

15. **SUCCESSORS AND ASSIGNS**

This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

16. **ENTIRE AGREEMENT**

This Agreement constitutes the entire agreement between the parties with respect to the subject matters herein, and supersedes and integrates any and all prior representations, negotiations, discussions, understandings and agreements, whether oral or written. This Agreement shall not be amended, changed or modified except in a writing signed by all parties. Each party acknowledges that the other party, nor any agent or attorney of the other party, have made any promise, representation or warranty whatsoever, express or implied, not contained in this Agreement to induce it to execute this Agreement.

17. **SEVERABILITY**

In the event that a court or agency of competent jurisdiction shall deem any part of this Agreement to be contrary to law, the parties agree, in advance, to reform that provision to be legal, valid and enforceable in furtherance of the full benefit of the bargain, if possible, but in the event it cannot be reformed, then the remaining portions of this Agreement shall remain in full force and effect, except that the provisions of Paragraph 1 hereinabove shall be deemed to be material and of the essence of this Agreement. Should the provisions set forth in Paragraph 1 be compromised, then the entire Agreement shall be deemed to be null and void and the Kingsway Regional Board of Education shall be free to proceed with appropriate disciplinary action, up to and including the reinstatement and further prosecution of Tenure Charges.

18. **COUNTERPART**

This Agreement may be executed simultaneously in two (2) or more counterparts, each of which shall be deemed an original and all of which, when taken together, constitute one and the same document.

The signature of any party to any counterpart shall be deemed a signature to, and may be appended to, any other counterpart.

19. **GOVERNING LAW**

This Agreement and all provisions hereof shall he governed by and construed under the laws of the State of New Jersey.

The arbitrator, under N.J.A.C. 6A:3-5.6, is required to issue a decision approving the settlement of tenure charges and to explain why the arbitrator is approving the terms of settlement. I have approved these terms for the reasons that follow.

The issues that were raised in the Statement of Tenure Charges and the Statement of Evidence filed by the Petitioner and the Answer to Tenure Charges filed by the Respondent have been fully reviewed by this arbitrator in conjunction with the mutually agreed upon terms of settlement. After doing so, I am persuaded that the issues raised therein have been satisfactorily addressed by the terms of settlement. In addition to the fact that these terms are mutually acceptable to the parties, the interests of the public will be served by this approval of the settlement terms.

The parties have agreed that the interests of all concerned will be served by Respondent's separation from employment by voluntary resignation in furtherance of retirement and Petitioner's withdrawal of the tenure charges. The parties have acknowledged that these terms have been agreed upon without admission by either party as to the merits of the claims raised by either the tenure charges or by Respondent's defenses to those charges. The Board and the public will further

benefit by the budgetary savings achieved by avoiding the costs of further litigation which, based upon the approval of the settlement terms, will no longer be necessary. Accordingly, the Settlement Agreement is hereby approved.

Dated: December 28, 2015
Sea Girt, New Jersey

James W. Mastriani

State of New Jersey }
County of Monmouth } ss:

On this 28th day of December, 2015, before me personally came and appeared James W. Mastriani to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

John J. Blanchard
Attorney At Law
of New Jersey