State of New Jersey

Department of Education

Trenton

NEW JERSEY

SCHOOL LAW DECISIONS

January 1, 1969, to December 31, 1969

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

Neptune Education Association, by its President, Leo Galcher, and Mathew L. Ciricolo, Howard B. Peterson, Joseph C. Curto, P. Ovala, Catherine A. Hoffman, Evelyn H. Paskow, Todd J. Materna, Viola T. Lovett, Helen L. Jenkins, Eleanor T. Watson, Irene Batdorf, Helen Schwartz, Jean Atkins, Lolla B. Pratt, Joseph D. Parker, Helen Z. Rick, Carolyn Scially, Teresa E. Little, Alta P. Gongloff, Ruth F. Montgomery, Dorothy Bone, Allen L. Jones, Glendoln Pizza, Virginia L. Cox, Janet J. Ross, Celeste F. Miller, Charles H. Jackson, Jr., Paul Mudrick, Marian L. Kresge, Ruth M. Thompson, B. Cunningham, Anna Bozzelli, May E. Cooper, Martin Fischbein, Edward J. Morton, Frank A. Ruggiero, And Charles W. Riley,

Petitioners,

v.

Board of Education of the Township of Neptune, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioners, Joseph N. Dempsey, Esq.

For the Respondent, Stout and O'Hagan (Sidney Hertz, Esq., of Counsel)

Petitioners in this case complain that a resolution of respondent Board adopted subsequent to the adoption of a salary guide deprives certain teachers in the system of increments due them under the salary guide. Respondent denies the allegation, contending that its resolution interprets the salary guide consistent with established policy and tradition, and in accord with its intent in adopting the guide.

A hearing in the matter was conducted on October 30, 1968, at the office of the Monmouth County Superintendent of Schools, Freehold, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Petitioners in this case are the Neptune Education Association (hereinafter "the Association"), an organization of employees of the Neptune Township school system which negotiated an agreement, including a salary schedule, with the Board, and several teachers, who claim that they have 20 or more years, or 25 or more years of teaching experience, including, in some cases, military service. By agreement of counsel the names of Charles W. Riley and Mathew L. Ciricolo were removed from the list of petitioners.

The testimony of all witnesses establishes that for some time prior to the end of the 1967-68 school year, and certainly under the Board's 1966-68 salary guide for teachers (P-2) a "super-maximum" salary increment of $300 was awarded to teachers for long years of teaching service in the Neptune Township

school system. The President of the Board testified that this super-maximum increment was awarded in the discretion of the Board upon the recommendation of the Superintendent. Testimony on this point varied only on the question of whether such awards were made after 20 or 25 years of local service, and the hearing examiner finds no need to make a finding on this question.

In a series of meetings culminating on December 7, 1967, the Association, through its representatives, including its President, and the Board negotiated the terms of an agreement constituting, at least in part, a salary schedule (Schedule A of the petition). This agreement was signed by the Presidents of the Board and of the Association on December 7, 1967, and included a provision that the guide would be adopted by the Board shortly thereafter. (Schedule A, *supra*, and Tr. 50) The guide contained, *inter alia*, provision for salary increases at several "steps" up to a twelfth or thirteenth step (depending on the level of professional training). It further provided, at Step 20, an "Increment of $300", and at Step 25 an "Increment of $200." Thereafter, on March 4, 1968, the Board adopted, at the request of the Superintendent for official clarification and guidance (Tr. 35, 53), the following resolution:

> "* * * that 20 and/or 25 year service increments for educational employees apply only to service in Neptune Township which is consistent with past Board policy."

It is petitioners' contention that the agreement as negotiated and signed by the parties thereto, and subsequently adopted by the Board, contains no restriction on where the years of employment for Steps 20 and 25 were served. The President of the Association testified that at one point in the negotiations the Board submitted a counter-proposal (P-3) which offered the increments at Steps 20 and 25 for "years in our system." This counter-proposal was rejected by the representatives of the Association at the final negotiating session, he testified, and the Association's proposed schedule, as finally adopted, became the "working copy" for the negotiations. It is beyond question that the schedule as agreed upon and mutually signed contains no such limitation. The President of the Board agrees that the Board's counter-proposal was rejected, but testified that she was not aware that the phrase "years in our system" had been struck from the schedule as finally accepted (Tr. 30), and that it was her intention that only service in Neptune Township would be recognized, as in the past. The Superintendent testified that he had prepared the counter-proposal (P-3) at the Board's request, and that he had explained to the Board what the teachers were requesting. (Tr. 33) He testified that in the preparation of a "Guide: Policies for Teachers, 1968-69" (P-1) he had included the following paragraph as a result of the resolution of March 4, 1968, *supra:*

> "Teachers qualifying for: twenty years of service in Neptune Township School System shall advance to the Service Experience Level in the amount of $300.00; twenty-five years of service in the Neptune Township School System an additional sum of $200.00 will be made a part of the contracted salary." (at page 49)

In summation, the hearing examiner finds that notwithstanding a prior policy of awarding super-maximum increments based on years of service in the Neptune Township school system, and notwithstanding any belief of the Board

that such a policy was to be preserved in the 1968-69 agreement and salary schedule, the terms of that schedule are clear and unambiguous, and do not limit the increments provided in Steps 20 and 25 to years of service in Neptune Township. The hearing examiner concludes therefore that the Board's resolution of March 4 has no force or effect to modify the terms of an agreement made and ratified on or about December 7, 1967.

* * * *

The Commissioner has reviewed the findings and conclusions of the hearing examiner and concurs therein.

The resolution of this matter turns on the question of whether the long-standing policy of the Board to grant increments for long years of service to the Neptune Township school district will prevail over the clear language of the signed agreement between the Board and the Association, subsequently adopted by the Board as its salary schedule. The Commissioner is convinced that whatever might have been the intention of the Board, by its own action it approved a salary schedule which does not restrict the granting of increments at Steps 20 and 25 to service within the district. The circumstances leading to the consummation of the agreement, as set forth by the hearing examiner, leaves no room for doubt that the Board knew, or could have known, the differences between its counter-proposal and the salary schedule which became a part of its agreement adopted by the Board.

> "* * * We are not at liberty to introduce and effectuate some supposed unrevealed intention. The actual intent of the parties is ineffective unless made known in some way in the writing. It is not the real intent but the intent expressed or apparent in the writing that controls.* * *" *Newark Publishers' Association v. Newark Typographical Union*, 22 *N.J.* 419, 428 (1956)

The Commissioner considered the question of the effect of a long-standing, but unwritten, policy on the application of a salary schedule in the case of *Ross v. Board of Education of Rahway*, decided by the Commissioner, February 19, 1968, affirmed State Board of Education, October 9, 1968. In that case petitioner had been denied the full salary increment and adjustment provided by the Board's salary schedule because of a long-standing policy of the Board limiting the amount of a teacher's salary increase to $600 in any one year. In holding that the salary schedule adopted by the Board expressed no such limitation, the Commissioner said:

> "* * * In the Commissioner's judgment, the fact that such a traditional practice was well known to petitioner does not diminish the effect of respondent's failure to include it in its statement of policy. Only by expressly so stating its practice could all know of it and be equally bound by it * * *."

The Commissioner therefore holds that, pursuant to *N.J.S.A.* 18A:29-4.1, respondent Board of Education adopted a binding salary schedule which provides for all teachers at Step 20 an increment of $300 and at Step 25 an increment of $200, without regard to whether the years of employment needed to reach those steps were served in the Neptune Township school district or elsewhere. He therefore directs respondent to adjust the salaries of petitioning teachers consistent with this determination, effective for the 1968-69 school year.

COMMISSIONER OF EDUCATION

January 14, 1969

J. Michael Fitzpatrick,

Petitioner,

v.

Board of Education of the Borough of Montvale, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Donald C. Ohnegian, Esq.

For the Respondent, Parisi, Evers & Greenfield (Irving Evers, Esq., of Counsel)

Petitioner is a teacher in respondent's school system who alleges that he was improperly denied a salary increment for the 1968-69 school year. Respondent admits that petitioner's salary was not increased but denies that the increment was withheld unlawfully or for improper reasons.

The facts in this case were presented at a hearing before the Assistant Commissioner in charge of Controversies and Disputes at the Fieldstone Elementary School, Montvale, on October 3, 1968. Counsel subsequently submitted briefs. From the testimony of witnesses and documentary evidence the following facts are clear.

The school system has a salary policy adopted by the Board of Education which provides a schedule of salaries based on number of years of employment. There are no written policies implementing this schedule, but practice has been for the principal to prepare a written evaluation of each teacher under his supervision and a recommendation with respect to salary. The evaluation and recommendation is transmitted to the Superintendent who makes his report to the Board of Education.

Petitioner teaches social studies in the upper grades of the elementary school. His principal rated petitioner's work "Very Good" during the 1965-66 school year and "Excellent" in 1966-67. On March 8, 1968, however, he

submitted a rating for petitioner of "Unsatisfactory." In his analysis of petitioner's performance the principal stated that "in the area of classroom instruction, Mr. Fitzpatrick does a highly satisfactory job" and commended his teaching techniques highly. He found the teacher, however, guilty of "very irresponsible and damaging actions in the area of staff relations, staff-administrative relations, and staff-board-community relations." The evaluation concluded with a recommendation that petitioner's increment for the 1968-69 school year be withheld.

The Superintendent received the principal's evaluation and recommendation and in a letter, dated March 14, 1968, enumerated several instances in which he alleged that petitioner had created dissension and friction in the school staff, had questioned the authority of the Superintendent and had been insubordinate. The Superintendent also recommended to the Board of Education that petitioner be denied a salary increment for the ensuing year.

The Board of Education met, received the recommendations of the Superintendent and took action to withhold the salary increment for petitioner. The following letter, dated March 19, 1968, was sent by the Secretary of the Board and was received by petitioner on March 21:

> "By direction of the Board of Education of the Borough of Montvale, I am authorized to advise you that the employment increment and the adjustment increment that would be due under the salary guide for the 1968-69 school year have been withheld for the reasons set forth below:
>
> 1. Improper conduct in connection with staff relations, staff administrative relations and staff-board-community relations
> 2. Causing a friction among staff
> 3. Insubordination
> 4. Ignoring of directives from the administration
> 5. Attack upon the professional integrity of staff members and consultants
> 6. Making of improper charges and accusations against the Superintendent
> 7. Improperly seeking to interfere with the exercise of the prerogatives of the Superintendent
> 8. Intemperate conduct
> 9. Assailing the integrity of members of the board
> 10. Ignoring established policy
> 11. Ignoring board policy and showing contempt for board policy
>
> "Your salary for the 1968-69 school year will be $8,100. This amount includes your credit for 3 years of military service.
> "You are advised that in the event you are dissatisfied with the determination of the board that you may appeal the board's action with the Commissioner of Education, pursuant to the provisions of *R.S.* 18A:29-14."

In the same mail petitioner received a copy of the evaluation and recommendation made by the principal, dated March 8. (Exhibit R-4) Petitioner thereupon filed the within appeal.

Petitioner contends that the denial of his normal salary increment was not based on good cause because his proficiency as a teacher has been consistently rated high; that he was never confronted by those who accused him of improper conduct; that he was not afforded an opportunity to present a defense to any charges made against him; that such action was taken because of his position as spokesman for a group of teachers and was aimed at putting a stop to any interchange of ideas and grievances between the teachers and their administrators and employer; and that the action was arbitrary, unreasonable and capricious.

Respondent denies that it withheld petitioner's increment because of his position as a teacher representative or on any other grounds than the reasons set forth in the letter of March 19, *supra*. It contends that petitioner has been guilty of inequitable, unconscionable and defamatory conduct as a member of the teaching staff and is not, therefore, entitled to any relief. Respondent urges that its action to deny petitioner an increment was in accordance with the statutes and argues, therefore, that petitioner had no entitlement to be confronted by his accusers since in any case his appeal to the Commissioner affords him any such alleged opportunity.

The hearing in this matter, by agreement of counsel and the Assistant Commissioner, was limited to the single issue of the procedural validity of respondent's action to deny petitioner a salary increment.

With respect to this issue, respondent contends that a board of education may withhold a salary increment for good cause. The Commissioner agrees. There is in fact no law or rule which holds that a teacher is entitled to a salary increase by virtue of having taught one more year, absent a salary policy providing for such increase, as long as the minimum salaries set forth in *N.J.S.A.* 18A:29-7 are met. Respondent also correctly points out that the Commissioner is limited in the scope of his review to a determination of whether the Board had a reasonable basis for its factual conclusion and is constrained from substituting his judgment for that of the Board. It relies on such precedents as *Kopera v. West Orange Board of Education*, 1958-59 *S.L.D.* 96, affirmed by State Board of Education, *ibid*, remanded to Commissioner of Education, 60 *N.J. Super.* 288 *(App. Div.* 1960), decided by the Commissioner of Education, 1960-61 *S.L.D.* 57, affirmed by Superior Court, Appellate Division, January 10, 1963; *Wachter v. Millburn Board of Education*, 1961-62 *S.L.D.* 147; *Massaro v. Bergenfield Board of Education*, 1965 *S.L.D.* 84, affirmed by State Board of Education, 1966 *S.L.D.* 243, affirmed by New Jersey Superior Court, Appellate Division, September 23, 1966; and *Myers v. Glassboro Board of Education*, 1966 *S.L.D.* 66, and points out that in each case the denial of a salary increment was upheld.

It must be noted, however, that the instant matter is distinguishable from all the cases cited *supra* in two significant respects. Firstly, the denial of a salary increment in each of those cases was based solely on inadequate teaching performance while in the subject case the reasons are separate and apart from petitioner's competence as a teacher. Secondly, in each of the cases cited the teacher was clearly informed by his superiors of his shortcomings, was given opportunity to present his own point of view, and was notified in advance that a recommendation would be made to withhold salary. In the instant matter

petitioner was not so informed and learned of his salary denial and the basis of such refusal only after the action was taken.

From the testimony it is clear that the principal and the Superintendent were dissatisfied with some aspects of petitioner's behavior as a member of the school's professional staff entirely unrelated to his performance in the classroom. The precise ground of their disapproval was not disclosed because of the limitations placed on the scope of the hearing. In the communications from the principal to the Superintendent (Exhibit R-4) and from the Superintendent to the Board (Exhibit R-5), however, petitioner is accused of creating friction and disharmony in the school staff. Petitioner denies, however, that neither the principal nor the Superintendent ever discussed these or any other alleged shortcomings with him and his testimony on this point is unrefuted. Neither was he informed by either superior that they intended to recommend withholding of his salary increment. Petitioner received a copy of the principal's evaluation (Exhibit R-4) in the same mail which delivered the notice from respondent that his increment was withheld and these documents constituted the first notice to petitioner that his performance was less than satisfactory. Petitioner also testified that he still does not know what specific behavior is complained of because general charges such as "intemperate conduct" set forth in the Board's notification (Exhibit R-4) give him no clue to actual instances on which such an accusation rests.

The Commissioner cannot support respondent's action in this case. Even though a board of education has the power to withhold a salary increment, such authority cannot be wielded in a manner which ignores all the basic elements of fair play. Conceding further that a salary increment may be denied for reasons other than unsatisfactory teaching performance, the most elemental requirements of due process demand at least that the employee to be so deprived be put on notice that such a recommendation is to be made to his employer on the basis of the unsatisfactory evaluation and that he be given a reasonable opportunity to speak in his own behalf. This is not to say that deprivation of a salary increase requires service of written charges, entitlement to a full scale plenary hearing or the kind of formal procedures necessary to dismissal of tenured employees. But certainly any employee has a basic right to know if and when his superiors are less than satisfied with his performance and the basis for such judgment. Without such knowledge the employee has no opportunity either to rectify his deficiencies or to convince the superior that his judgment is erroneous.

The testimony fails to reveal any such communication between petitioner and the school administration. Petitioner's denial of knowledge of his unsatisfactory rating and the reasons therefor prior to respondent's action to deny his salary increment, is unrefuted. The testimony is clear that the principal caused his evaluation and recommendation to be typed on March 8; that he sent it to the Superintendent without showing it to or discussing it with petitioner; that the Superintendent also made a written recommendation unknown to petitioner; that the Board accepted the recommendation and acted to withhold salary; and that petitioner's first knowledge of the principal's unsatisfactory rating came at the same time he received notice of respondent's action. Under

such circumstances, the Commissioner must find that respondent's action was unreasonable and arbitrary and will be set aside.

Respondent cites, however, the existence of procedure for the handling of grievances and argues that petitioner having failed to avail himself of that recourse, has not exhausted his readily available remedies. Respondent urges that petitioner was aware of the existence of a grievance procedure and had he invoked it he would, by its normal operation, have had an opportunity to confront his accusers. But respondent overlooks the fact, pointed out by petitioner, that in its letter to petitioner of March 19 (Exhibit R-6) quoted *supra*, respondent specifically directed petitioner to take an appeal to the Commissioner of Education if he were dissatisfied with the action of the Board. Petitioner argues meritoriously that under such a directive he could discover no point in employing the usual grievance process.

The Commissioner will make no finding with respect to the merits of petitioner's entitlement to a salary increment but confines his determination herein to the question of procedural validity. On that issue and for the reasons stated, the Commissioner finds that the procedure followed by the school administrators and the Board of Education to deny petitioner his normal salary increment was, under the circumstances, so lacking in fair treatment as to be arbitrary and unreasonable. This matter is therefore remanded to the Montvale Board of Education with the directive that petitioner be paid the salary for the 1968-69 school year to which he would normally be entitled. If the Board still desires to deny him such salary this may only be accomplished after the completion of procedures in accordance with the principles enunciated herein.

COMMISSIONER OF EDUCATION

January 24, 1969

Board of Education of the Township of Madison,

Petitioner,

v.

Mayor and Council of the Township of Madison, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

Decision on Motion

For the Petitioner, Cohen, Hoagland & Cohen (Richard S. Cohen, Esq., of Counsel)

For the Respondent, DeMaio & Yacker (Vincent C. DeMaio, Esq., of Counsel)

Petitioner, the Board of Education of Madison Township (hereinafter "the Board") has moved before the Commissioner for an order directing the Mayor and Council of Madison Township (hereinafter "the Township") to pay to the Board the monies which the Commissioner, in a decision dated June 3, 1968, ordered restored to the 1968-69 Madison Township school district budget.

Argument on petitioner's motion was heard on November 6, 1968, at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

In the decision in the case of *Board of Education of Madison Township v. Mayor and Council of Madison Township,* dated June 3, 1968, the Commissioner ordered the restoration to the 1968-69 school budget of $295,895 for current expenses and $42,000 for capital outlay. He directed the Mayor and Council to add these amounts to the certification made by the Council to the Middlesex County Board of Taxation. By the time the Commissioner's decision was filed, however, the school district tax rate for 1968 had been struck, so that the additional sums could not be raised by taxation in 1968.

Counsel for petitioner reports that during July and August 1968 the Township Treasurer made monthly payments to the Board based on the increased appropriations resulting from the Commissioner's decision. Since that time, however, payments have been made on the basis of the Mayor and Council's lower appropriations as they had been originally certified to the Board of Taxation, reduced further by the amount of the "over payments" made in July and August. As a result, the Board contends, its expenditures planned on the basis of the Commissioner's restoration of $337,895 to the budget have now run far ahead of the payments received from the Township, and it now finds itself in difficult financial straits. Demand for payment of the increased amounts has been made by the Board upon the Township, which has thus far refused to make the increased payments.

It is the position of the Board that it is entitled to receive from the Township all the moneys appropriated in the 1968-69 school budget which have now been certified to the County Board of Taxation, and that the Township is obligated to pay over to it all such moneys. If the Township does not have the money, the Board contends, it should borrow it under the authority of *N.J.S.A.* 40A:4-46, which reads as follows:

> "A local unit may make emergency appropriations, after the adoption of a budget, for a purpose which is not foreseen at the time of the adoption thereof, or for which adequate provision was not made therein. Such an appropriation shall be made to meet a pressing need for public expenditure to protect or promote the public health, safety, morals or welfare or to provide temporary housing or public assistance prior to the next succeeding fiscal year."

Petitioner further contends that it has no power in itself to borrow to meet its needs in anticipation of receipt. It points to sections of Title 18A of the New Jersey Statutes which deal with the power of a board of education to borrow money in anticipation of receipt of taxes *(N.J.S.A.* 18A:22-40,41,42) which

give boards of education authority to borrow on tax anticipation notes only after a successful public referendum on a question of raising *additional* sums over and above the amounts fixed in the annual school budget. These statutes have no reference to the instant situation, where the money in question has already been appropriated by the Commissioner's decision in the annual school budget for 1968-69, and is in no sense an *additional* sum.

Finally, petitioner avers that the Commissioner has power to direct the municipal governing body (here, the Township) to raise and pay over the full amounts of the school tax certification. Petitioner cites the case of *Town of Montclair v. Baxter*, 76 *N.J.L.* 68 *(Sup. Ct.* 1908), in which the Court held that the State Superintendent of Schools (now Commissioner of Education) had jurisdiction over the question of whether the Town Council should be required to pay over to the Board of Education moneys certified by the board of school estimate to be appropriated by the Town for school purposes. Petitioner also contends that if the Commissioner is given authority under the statutes to decide controversies arising under the school law, and by the direction of the courts *(cf. Board of Education of East Brunswick v. Township Council of East Brunswick*, 48 *N.J.* 94 (1966) to decide appeals from budget reductions made by municipal governing bodies, he must necessarily be clothed with power to make his decisions effective.

Respondent's argument is directed essentially at petitioner's contention that the municipal governing body can and should borrow the money, if necessary, to pay the additional appropriations authorized by the Commissioner's decision. Respondent urges that the emergency borrowing power authorized by *N.J.S.A.* 40A:4-46, *supra*, is limited to "pressing needs" of the municipality, not the school district. While the money to support the school budget is raised *through* the municipal governing body, respondent says, it is not a part of the municipal budget. Therefore, emergency expenditures to protect or promote the public health, safety, morals or welfare authorized by the statute are those which are a part of the municipal budget.

Moreover, respondent points out, even if it could borrow such emergency moneys for public school purposes, the amount required would exceed three percent of its current budget and thus would be subject to review and approval of the Director of the Division of Local Finance. *N.J.S.A.* 40A:4-49 (Documentation was supplied by counsel for respondent subsequent to the hearing that three percent of the Township's operating budget amounts to $68,889.25.)

The hearing examiner notes that prior to the general revision of the education statutes, approved as Title 18A on January 11, 1968, a board of education organized as a Chapter 7 school district under Title 18 (now Type II) had the power to borrow up to one-half of its current expense budget. *R.S.* 18:7-60 provided as follows:

> "The board may borrow, after July first and before January first, a sum not exceeding one-half of the amount appropriated for the current expenses of the schools and for the repair of schoolhouses under its

control, and execute and deliver promisory notes therefor, and pay the amount so borrowed together with interest thereon, at a rate not exceeding six percent per annum."

When Title 18A was adopted, however, this authority was granted only to Type I (formerly Chapter 6) districts by the provisions of section 25 of Article 3A of Chapter 22 (18A:22-25). Subsequent to the hearing of this matter, the Legislature extended the same authority to Type II districts by the enactment of *Chapter* 384, *Laws* of 1968, which became effective December 27, 1968. Apparently, the effective date of this legislation came too close to the January 1 deadline to permit petitioner to take advantage of it. The hearing examiner also notes that a board of education may issue interest-bearing warrants when there are no funds in the hands of the custodian to pay the same. *N.J.S.A.* 18A:19-12

The hearing examiner concludes that there was no statutory authority prior to December 27, 1968, by which a board of education in a Type II district could borrow or otherwise raise funds to support an approved budget under such circumstances as are present in this case. He further concludes that the statutes governing municipalities coterminous with Type II school districts do not provide authority for the governing bodies thereof to make emergency appropriations for the funding of a school budget which has already been certified to the appropriate county board of taxation. Finally, the hearing examiner concludes that the authority of the Commissioner which the Court considered in *Town of Montclair v. Baxter*, *supra*, is not relevant here, since the statutory scheme by which a board of school estimate certifies the budget to the municipal governing body in a Type I district creates a different fiscal relationship from that which exists in a Type II district.

* * * *

The Commissioner has considered the findings and conclusions of the hearing examiner set forth above. He concurs in the conclusions that the statutes do not give the Township the authority to provide on an emergency basis the additional sums which the Commissioner approved and directed to be included in the 1968-69 school budget. In the absence of such clear statutory authority, the Commissioner can find no basis for directing the Township to endeavor to accomplish an act which is not within the legislative scheme.

Petitioner's application is accordingly dismissed.

COMMISSIONER OF EDUCATION

January 24, 1969

George Slaughter and Hazel Slaughter,

Petitioners,

v.

Board of Education of the Township of Willingboro, Burlington County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioners, *Pro Se*

For the Respondent, Sidney W. Bookbinder, Esq. (John S. Fields, Esq., of Counsel)

Petitioners in this matter have alleged certain improper and unlawful conduct by respondent in connection with the education of their children. Respondent has entered a general denial of the allegations of the petitioners.

The case was routinely referred to the Division of Controversies and Disputes for such procedures as might be necessary to bring the matter before the Commissioner for his determination. On December 2 and December 6, 1968, petitioners addressed letters to the Commissioner complaining of the manner in which their case was being handled by the Division of Controversies and Disputes, and alleging bias in favor of respondent. The Commissioner replied on December 16 that his investigation produced no support for petitioners' allegations, and called petitioners' attention to the pre-hearing conference scheduled in this matter for December 19, 1968.

On December 26, the hearing examiner to whom this case had been assigned submitted a report to the Commissioner which set forth the following findings, conclusions, and recommendations:

> "1. The petition herein was filed before the Commissioner of Education on October 22, 1968, and was forwarded to the Division of Controversies and Disputes on the same day.
> 2. The petition was accompanied by a certified mail return receipt showing that service of a copy of the petition upon respondent was accomplished on October 15, 1968.
> 3. Respondent was directed by the Division of Controversies and Disputes to file and serve its answer to the petition within 20 days of October 24, 1968.
> 4. Respondent's counsel filed the answer to the petition on November 1, 1968.
> 5. Respondent's counsel represents to the hearing examiner that an effort to serve a copy of the answer upon petitioner by certified mail was unsuccessful. Counsel has in his possession the undelivered certified mail returned to him by the Postmaster.
> 6. Thereafter, at the suggestion of this hearing examiner, respondent's counsel caused personal service of the answer to be made upon Hazel

Slaughter, a petitioner. An affidavit of personal service has been filed in this Division.

7. Service of respondent's answer has been accomplished.

8. In telephone conversations and correspondence petitioners have refused to attend a preliminary conference, designated in this Division as a "conference of counsel," for the purpose of stating the issues and determining such other procedures as may be required to bring this matter before the Commissioner for his final determination.

9. Petitioners' stated reason for such refusal is that they have not received a copy of respondent's answer by certified mail.

10. The first date attempted to be arranged for a conference was December 5, 1968. This date was not confirmed because of petitioners' refusal to accept the arrangement for the reason heretofore stated.

11. On December 4, 1968, the hearing examiner notified petitioners by letter, with a copy to respondent's counsel, that a conference would be convened at 10 a.m. (on December 19) at the State Department of Education, Trenton. This date was affirmed in a letter from the Commissioner to petitioners dated December 16, 1968.

12. A conference was convened at 10 a.m. on December 19, 1968, with respondent's counsel, this hearing examiner, and Mr. Fred H. Combs, Jr., of this Division present. Petitioners did not attend, nor were they represented. The conference was adjourned without action at 10:45 a.m.

The hearing examiner concludes from the facts set forth above, supported by extensive correspondence, that petitioners have failed to comply with reasonable procedures necessary for the prosecution of their petition.

The hearing examiner therefore makes the following recommendations:

1. That the petition herein be dismissed for want of proper prosecution.

2. That the parties herein be served with copies of this report by certified mail, return receipt requested.

3. That the parties be granted 15 days from the mailing of this report to file and serve (a) written exceptions to the findings of the hearing examiner as reported herein; and/or (b) a request for a hearing by the Assistant Commissioner in charge of Controversies and Disputes with respect to the recommendation that the petition be dismissed."

Accordingly, on December 26, 1968, the Commissioner addressed to petitioners, as counsel *pro se*, and to counsel for respondent, a letter embodying the hearing examiner's concluding recommendation (No. 3) as a directive of the Commissioner.

Petitioners have filed a letter under date of January 6, 1969, which constitutes a summation of the correspondence which they have addressed to the Commissioner, the Assistant Commissioner, and the hearing examiner since the inception of this petition. The Commissioner finds it unnecessary to reproduce this letter herein.

The burden of petitioners' exceptions to the hearing examiner's findings is that he has not given proper weight to their assertion that respondent was required to serve its answer *by certified mail*, and only in that manner. It is clear

to the Commissioner that respondent's counsel did send to petitioners a copy of the answer by certified mail, that petitioners apparently were not at home when delivery was attempted, and that petitioners did not thereafter claim the mail at the postoffice. The Commissioner further finds as a fact that personal service of a copy of the answer was effected by an investigator in the employ of respondent's counsel, whose affidavit is on file as a part of the record in this case. Petitioners allege that such personal service was improperly made, and state that a criminal complaint has been filed against the investigator. Plainly the Commissioner may not comment upon this complaint. Nor does the Commissioner find it improper that the hearing examiner suggested that counsel attempt personal service in order that the matter might be moved forward.

The remainder of petitioners' statement of exceptions makes no attack on any significant aspects of the procedures attempted in this case. What is significant to the Commissioner is that petitioners have seized upon what they have conceived to be a procedural fault – namely, the precise method of service of respondent's answer upon them – to hinder and forestall the efforts of the Commissioner's staff to bring this matter on for determination on the merits. The Commissioner holds that the effect of petitioners' actions has been to interfere with and unnecessarily delay effective determination of this matter to such a degree as to warrant dismissal of the petition for want of proper prosecution.

Neither party to this matter having elected the option afforded them for further hearing to show cause why the petition should not be so dismissed, it is therefore the order of the Commissioner that the petition herein be dismissed for want of proper prosecution.

COMMISSIONER OF EDUCATION

February 11, 1969

Clarence Edmond, *Petitioner,*

v.

Board of Education of the Shore Regional High School District, Monmouth County, *Respondent.*

COMMISSIONER OF EDUCATION

Decision on Motion to Dismiss

For the Petitioner, Joseph N. Dempsey, Esq.

For the Respondent, Potter and Gagliano (S. Thomas Gagliano, Esq., of Counsel)

Petitioner, a teacher not under tenure, appeals from an action of respondent to terminate his employment on the grounds that such dismissal was based on statutorily proscribed reasons. Respondent denies the allegations of unlawful conduct and has moved to dismiss the appeal. Argument on the motion was

heard by the Assistant Commissioner in charge of Controversies and Disputes at the State Department of Education, Trenton, on October 31, 1968. Counsel also submitted briefs.

Petitioner asserts that he was employed as a teacher by respondent for the 1966-67 and 1967-68 school years. On March 22, 1968, he received a contract re-employing him for the year 1968-69. By its terms the contract was subject to termination by the Board of Education on thirty days' notice. On June 21, 1968, respondent, by a vote of 6 to 3, voted to terminate its contract with petitioner. Petitioner alleges that the decision to terminate his employment was based on complaints of parents whose children had failed in his classes and on the fact that he is a Negro. He contends that the reasons reported to the Board were unsound, unprofessional and inadequate, and its decision to dismiss him was therefore unlawful, unreasonable, frivolous and arbitrary. Petitioner maintains also that his dismissal was based on his color, a discriminatory employment practice which is statutorily proscribed.

Respondent moves to dismiss this appeal on the grounds that (1) petitioner has not acquired tenure status and was not therefore protected in his employment or entitled to a hearing or a statement of reasons for his dismissal; and (2) the Commissioner of Education is without jurisdiction to hear and determine charges of unlawful discrimination in employment practices, which function is assigned to the Division of Civil Rights within the Office of the Attorney General.

In its argument, respondent takes the position that petitioner's allegations of arbitrary and frivolous reasons are similar to those advanced by almost any non-tenured teacher whose employment is not continued. It contends that to open up entitlement to a hearing on such bare allegations would be to rewrite the law and afford the same kind of protection to teachers who have not acquired tenure as is enjoyed by those who have gained such status. Respondent urges that there is no such entitlement in the statutes or in law and petitioner's appeal for a hearing should not be allowed.

Respondent further contends that the Commissioner's jurisdiction is restricted to controversies which arise out of the school laws and that petitioner's allegation of unlawful employment discrimination because of his race finds its statutory prohibition in the "Law Against Discrimination," originally *Chapter* 169, *Laws* of 1945. That legislation, which was at one time Chapter 25, Title 18, was transferred from the jurisdiction of the Commissioner of Education by *Chapter* 40 of the *Laws* of 1963 to the Department of Law and Public Safety, by which agency it is currently administered. For that reason, respondent holds, petitioner's complaint of unlawful employment discrimination for reasons of race is improperly before the Commissioner of Education and should be lodged with the Division of Civil Rights in the Office of the Attorney General.

Petitioner's position is that, even though he has not acquired tenure status, he is entitled to a hearing which will give him opportunity to prove that his

employment was terminated for frivolous and discriminatory reasons. He makes no suggestion that respondent prove the propriety of its action but on the contrary agrees that the burden of proving unlawful discrimination or frivolous and arbitrary considerations, having no relationship to the purpose to be served, is to be carried by petitioner.

Until a school board employee has attained the legislative status of tenure, he has no entitlement to employment beyond the terms of whatever contract or agreement was entered into. Continuation of employment is a matter lying wholly within the discretionary authority of the board. *Zimmerman v. Newark Board of Education*, 38 *N. J.* 65 (1962) The employment, once begun or renewed, can be terminated at the discretion of either party by whatever terms have been agreed upon. (If no provisions for termination are included the agreement runs, of course, for its full length.) According to a copy of the contract entered into by petitioner and respondent on March 22, 1968, and made part of the pleadings, it was agreed that respondent could terminate the contract by giving 30 days' notice. In this case respondent exercised its option according to the agreed upon terms, gave petitioner 30 days' notice and terminated the relationship.

Board of education employees who have acquired tenure status have a statutory right to a statement of charges and a hearing thereon before dismissal can occur. No such entitlement exists for probationary employees whose employment protection extends no further than the terms of the contract under which they were employed. Petitioner, therefore, has no entitlement to a statement of reasons underlying respondent's decision to exercise its option to terminate the agreement according to its terms nor to a hearing on charges. *Zimmerman v. Newark Board of Education*, 38 *N.J.* 65 (1962); *Amorosa v. Bayonne Board of Education*, 1966 *S.L.D.* 213; *Branin v. Middletown Township Board of Education*, 1967 *S.L.D.* 9; *Ruch v. Greater Egg Harbor Regional District Board of Education*, decided by the Commissioner of Education, January 29, 1968; *Schaffer v. Fair Lawn Board of Education*, decided by the Commissioner of Education, September 16, 1968 See also *Taylor et al. v. Paterson State College*, 1966 *S.L.D.* 33, and cases cited therein.

Petitioner in fact makes no claim that respondent is obligated to state its reasons for ending his employment and to afford him an opportunity to be heard in defense. He alleges rather that respondent's action was based on frivolous, capricious and arbitrary considerations having no relation to the purpose to be served and asserts a claim to a hearing in order that he may prove these allegations. But such naked allegations, unsupported in any way, are not sufficient to create an issue and establish a right which does not otherwise exist. *U. S. Pipe and Foundry Co. v. American Arbitration Association*, 67 *N.J. Super.* 384 *(App. Div.* 1961) To hold otherwise would open the door to any dismissed employee to enforce his demand for a hearing, despite the clear ruling of the courts that such an entitlement does not exist, by the mere device of pleading arbitrary or unreasonable action by his employer. What cannot be done directly cannot be accomplished by indirection. *Sastokas v. Freehold*, 134 *N.J.L.* 305

(Sup. Ct. 1946) The Commissioner holds that respondent is entitled to prevail on its motion to dismiss with respect to the first count of arbitrary or unreasonable conduct.

With respect to the second charge of improper termination of employment based upon race, the Commissioner finds that petitioner is not without remedy but that his recourse is to be found in another agency. The question of unlawful discrimination in employment practices because of race properly lies within the function of the Division of Civil Rights. The Courts have made it clear that the Commissioner's jurisdiction to hear and decide controversies is restricted to those arising under the school law. *N.J.S.A.* 18A:6-9; *Reilly v. Camden Board of Education*, 127 *N.J.L.* 490 *(Sup. Ct.* 1941); *Fox v. Newark Board of Education*, 129 *N.J.L.* 349 *(Sup. Ct.* 1943) Discrimination in employment on the basis of race is declared an unlawful practice in *R.S.* 10:5-12. A person claiming to be aggrieved by such practice by an employer may file a complaint with the Attorney General. *R.S.* 10:5-13 The Attorney General may then proceed in a variety of ways, including a hearing, to resolve the problem. *R.S.* 10:5-8h, 10:5-15 The Commissioner holds, therefore, that petitioner's allegation that respondent terminated his employment because he is a Negro raises an issue not governed by Title 18A-Education, but under the provisions of Title 10 - Civil Rights. Inquiries to the Division of Civil Rights have disclosed that a complaint filed by petitioner with that agency is being held in abeyance pending disposition of the instant appeal before the Commissioner. The Commissioner, therefore, declines jurisdiction and leaves petitioner to his remedies before the Division of Civil Rights in the Department of the Attorney General.

For the reasons stated the Commissioner finds and determines that petitioner has failed to state a cause of action before the Commissioner of Education, and respondent is entitled to prevail on its motion for judgment on the pleadings. Respondent's motion is granted and the petition is dismissed.

COMMISSIONER OF EDUCATION

February 21, 1969

In the Matter of the Annual School Election Held in the School District of the Township of Eagleswood, Ocean County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the balloting for one member of the Board of Education for a full term of three years at the annual school election held in the school district of the Township of Eagleswood, Ocean County, on February 11, 1969, were as follows:

Regina Stratton	33
Joseph Jackson	33

Pursuant to a letter request dated February 19, 1969, from candidate Jackson, a recount of the votes cast was conducted by an authorized representative of the Commissioner of Education at the office of the Ocean County Superintendent of Schools in Toms River on February 27, 1969.

The Commissioner's representative reports as follows:

All of the votes cast for the candidates in this election were write-in votes. At the conclusion of the recount the tally stood:

32 ballots properly voted for candidate Stratton

33 ballots properly voted for candidate Jackson

9 ballots (six for Stratton and three for Jackson) on each of which the voter had written in the name in the blank space for that purpose but had not marked a cross (x), plus (+) or check (✓) in the square to the left and in front of the name. On one of these ballots the voter had marked a cross (x) *after* the name of candidate Stratton.

The Commissioner finds that each of the nine ballots on which the voter failed to place a proper mark in the square to the left and in front of the name of the candidate written in, cannot be counted for such candidate. The marking of a cross (x), plus (+) or check (✓) mark is a mandatory requirement in order for a vote to be recorded. *N.J.S.A.* 18A:14-55, *R.S.* 19:15-28, 16-3d

The conclusion that a voter who wishes to cast a personal choice vote must not only write or paste in his candidate's name but must also put a proper mark in the appropriate square was reached by the New Jersey Supreme Court in the case of *In re Lavallette*, 9 *N.J. Misc.* 25 in 1930. See also *In the Matter of the Annual School Election in Jackson Township, Ocean County*, 1938 *S.L.D.* 187, 188; *In re Keogh-Dwyer*, 85 *N.J. Super.* 188 *(App. Div.* 1964), reversed on other grounds, 45 *N.J.* 117 *(Sup. Ct.*, 1965); *In the Matter of the Annual School*

Election Held in the School District of Easthampton Township, Burlington County, decided by the Commissioner of Education, February 21, 1968, affirmed by the State Board of Education, September 4, 1968.

The Commissioner finds and determines that Joseph Jackson was elected February 11, 1969, to a seat on the Eagleswood Township Board of Education for a full term of three years.

COMMISSIONER OF EDUCATION

March 5, 1969

In The Matter of the Annual School Election Held in the School District of the Borough of River Vale, Bergen County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the balloting for two members of the Board of Education for full terms of three years each at the annual school election on February 11, 1969, held in the school district of the Borough of River Vale, Bergen County, were as follows:

	AT POLLS	ABSENTEE	TOTAL
Gertrude Siegel	519	0	519
Ruth Dodge	451	0	451
J. Howard Bratt	429	0	429
Robert Madsen	569	0	569

Pursuant to a letter request dated February 22, 1969, from candidate Dodge, an authorized representative of the Commissioner of Education conducted a recheck of the voting machines on February 25, 1969, at the warehouse of the Bergen County Board of Elections in Carlstadt. The recheck confirmed the previously announced results above.

Candidate Dodge alleges that before the election held on February 11, 1969, she was not notified or otherwise afforded an opportunity to inspect the voting machines and to see that they were in proper order for the election, as provided by *N.J.S.A.* 18A:14-42:

> "The voting machines shall be prepared for use and shall be used at such election in the same manner, and the superintendent of elections or the county board of elections, as the case may be, * * * shall perform the same duties, as are required when the same are used in elections held pursuant to Title 19, Elections, of the Revised Statutes, except that * * *

b. Written notice of the time and place when the machines will be prepared for use at the election shall be mailed to each candidate to be voted upon at such election, stating the time and place where the machines may be examined, at which time and place said candidates shall be afforded an opportunity to see that the machines are in proper condition for use in the election * * * ."

While the Commissioner regrets that this duty was not performed by the officials responsible therefor, no evidence has been offered or educed that the voting machines were in any way improperly prepared for the election. In the absence of such a charge and proof of fraud the election result remains unaffected. In any event such a charge, directed as it must be to the operations of the county board of elections in preparing the machines, is outside the scope of the Commissioner's jurisdiction.

The Commissioner finds and determines that Robert Madsen and Gertrude Siegel were elected on February 11, 1969, to seats on the River Vale Borough Board of Education for full terms of three years each.

COMMISSIONER OF EDUCATION

March 5, 1969

In the Matter of the Annual School Election Held in the School District of the Township of Weymouth, Atlantic County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the balloting for three members of the Board of Education for full terms of three years at the annual school election held on February 11, 1969, in the Township of Weymouth, Atlantic County, were as follows:

	AT POLLS	ABSENTEE	TOTAL
Alfred R. Merrill	80	0	80
Wilson M. Turner, Jr.	77	0	77
Charles Schroder	63	0	63
John N. Ruggiero	61	0	61

A recount of the ballots cast, authorized by the Commissioner of Education pursuant to a letter request from Mr. Ruggiero, was conducted by the Assistant Commissioner in charge of the Division of Controversies and Disputes at the office of the Atlantic County Superintendent of Schools on March 3, 1969.

The tally of the uncontested votes, with three ballots remaining to be determined, produced the following result:

Alfred R. Merrill	78
Wilson M. Turner, Jr.	74
Charles Schroder	59
John N. Ruggiero	60

On the three ballots in question the voter has placed a "sticker" or "paster," on which the name Charles Schroder is printed, over the names of candidates whose names appear on the ballot instead of in one of the three blank spaces provided for "personal choice" or "irregular" votes. These ballots cannot be counted for Mr. Schroder.

"In cases where sticker for personal choice candidate was not placed in personal choice column but over rival candidate's printed name, such votes could not be counted." *In re Keogh-Dwyer*, 85 *N.J. Super.* 188 *(App. Div.* 1964) See also decision of the State Board of Education on appeal *In the Matter of the Annual School Election in the School District of Easthampton Township, Burlington County*, decided September 4, 1968.

The ballots in question, while invalid with respect to candidate Schroder, must be counted for the other candidates properly marked. To be added to the tally, therefore, are 1 vote for Mr. Merrill, 2 votes for Mr. Turner, and 1 vote for Mr. Ruggiero. The final tally thus stands:

Alfred R. Merrill	78
Wilson M. Turner, Jr.	74
Charles Schroder	59
John N. Ruggiero	60

The Commissioner finds and determines that Alfred Merrill, Wilson M. Turner, Jr. and John Ruggiero were elected at the annual school election on February 11, 1969, to seats on the Weymouth Township Board of Education for full terms of three years each.

COMMISSIONER OF EDUCATION

March 6, 1969

In the Matter of the Annual School Election Held in the School District of the Borough of Somerdale, Camden County.

COMMISSIONER OF EDUCATION

Decision

For Candidate Evelyn Casey, Stephen M. Gretzkowski, Jr., Esq.

The announced results of the voting for three members of the Board of Education of the Borough of Somerdale, Camden County, for full terms of three years each at the annual school election on February 11, 1969, were as follows:

Charles E. Ogg	300
Elizabeth J. Caswell	278
Katherine A. Rice	155
Evelyn Casey	148
Ruth Kurz	2

There was also one write-in vote for each of several other persons.

Pursuant to a letter request dated February 17, 1969, from Stephen M. Gretzkowski, Jr., Esq., counsel for candidate Evelyn Casey, the Commissioner of Education directed that the ballots cast for Board members be recounted. The recount, which was limited to a determination of the ballots cast for candidates Casey and Rice, was conducted on February 26, 1969, at the office of the Camden County Superintendent of Schools in Pennsauken, by an authorized representative of the Commissioner. The Commissioner's representative reports that at the conclusion of the recount of the uncontested ballots, with 23 ballots referred to the Commissioner for his determination, the tally stood as follows:

Katherine A. Rice	148
Evelyn Casey	144

The Commissioner makes the following determination with respect to the 23 ballots referred to him:

Exhibit A - 4 ballots, on each of which the placement of a large-size "paster" or "sticker" bearing the printed name of candidate Casey causes the name to appear in the blank space below the space which is preceded by the square containing a cross (x) made by the voter. The fact that the size of the paster causes the name to appear one space below the space which is preceded by the square in which the voter placed the cross (x) does not invalidate these votes. The intent of the voter on each of these ballots to cast his vote for candidate Casey is clear. The votes will, therefore, be added to the tally for candidate Casey.

Exhibit B - 1 ballot, on which it appears as though the voter had marked a cross (x) in the square to the left and in front of the name of candidate Rice and then obliterated the cross (x) by filling the square with heavy scribbled markings. This ballot cannot be counted for candidate Rice because the statutory requirement of a proper mark in the square to the left and in front of the candidate's name has not been met. The Election Law, Title 19, to which the Commissioner looks for guidance, at *R.S.* 19:16-3c provides:

> "No vote shall be counted for any candidate * * * unless the mark made is substantially a cross (x), plus (+) or check (✓) and is substantially within the square."

See also *In the Matter of the Recount of Ballots Cast In the Annual School Election in the Township of Union, Union County*, 1939-49 *S.L.D.* 92; *In re Recount of Ballots Cast at the Annual School Election in the Township of Monroe, Gloucester County*, 1957-58 *S.L.D.* 79. *In the Matter of the Annual*

School Election Held in the Borough of South Belmar, Monmouth County, 1966 *S.L.D.* 27.

Exhibit C - 8 ballots, on each of which the voter has drawn a pencil line through the name of the candidate not voted for, and on one of which the letters "Pres" appear after the "written-in" name of candidate Casey. On these ballots the voters cast seven votes for candidate Casey and two for candidate Rice. The Commissioner is satisfied that the lines drawn on these ballots are not intended to identify or distinguish the ballots and, therefore, he finds that these ballots shall be counted and seven votes will be added to the tally for candidate Casey and two to the tally for candidate Rice. See *In re Middlesex Borough Annual School Election*, 1938 *S.L.D.* 161; *In the Matter of the Recount of Ballots Cast in the Annual School Election in the Township of Union, Union County, supra; In re Recount of the Ballots Cast in the Annual School Election in the Borough of Bloomingdale, Passaic County*, 1955-56 *S.L.D.* 103.

Exhibit D - 5 ballots, on three of which the marks made by each voter in the square to the left of the name of candidate Rice consists of a single diagonal line extending from within the square and beyond the margin of the square; on another, the mark is a diagonal line falling completely within the square in front of the name of candidate Rice and on another, a diagonal mark, beginning outside the square and extending entirely through and beyond the opposite side of the square, appears before the name of candidate Rice. It is the opinion of the Commissioner that these ballots cannot be counted for candidate Rice for the reason that the mark made in each case is not substantially a cross (x), plus (+) or check (✓). *R.S.* 19:16-3g See also *Petition of Wade*, 39 *N.J. Super.* 520 *(App. Div.* 1956), 121 *A. 2d* 552 (1956); *In re Keogh-Dwyer*, 85 *N.J. Super.* 188 *(App. Div.* 1964); *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Township of Berkeley Heights, Union County*, 1952-53 *S.L.D.* 76.

Exhibit E - 2 ballots, on one of which the size of the paster containing the printed name of candidate Casey causes a blank part of the paster to overlap the printed name of candidate Rice in the space above, and also an arrow drawn by the voter, with pencil, points from the name of candidate Casey to the square in front of her name in which the voter marked a cross (x). On the other ballot the paster similarly overlaps the name of candidate Rice, but the cross (x) made by the voter is in the square to the left and in front of the covered name of candidate Rice. This exhibit will be discussed at the conclusion of this determination.

Exhibit F - 2 ballots, on each of which the voter has placed a sticker on which the name of candidate Casey is printed over the name of candidate Rice, whose name is imprinted on the ballot, instead of in one of the three blank spaces provided for a "personal choice" or "irregular" vote. This exhibit will be discussed at the conclusion of this determination.

Exhibit G - 1 ballot, on which the voter has placed a cross (x) in the square before the name of candidate Casey in a "personal choice" space and has written

the word "No" in the square in front of the name of candidate Rice. This ballot has a cross (x) in the square in front of the name of candidate Casey. In the absence of any intention to use the word "No" to distinguish or identify the ballot, the vote must be counted for candidate Casey. *In the Matter of the Recount of Ballots Cast in the Annual School Election in the Township of Union, Union County, supra*

When the ballots in Exhibits A, B, C, D and G are added to the previous total, the result is as follows:

		EXHIBITS					
	UNCONTESTED	A	B	C	D	G	TOTAL
Katherine A. Rice	148			2			150
Evelyn Casey	144	4		7		1	156

Since the inclusion or exclusion of the ballots in Exhibits E and F would not change the outcome of the election, it is unnecessary to determine their validity.

The Commissioner finds and determines that Charles E. Ogg, Elizabeth J. Caswell and Evelyn Casey were elected to full terms of three years each on the Board of Education of the Borough of Somerdale, Camden County, at the annual school election on February 11, 1969.

COMMISSIONER OF EDUCATION

March 18, 1969

In The Matter of the Annual School Election Held in the School District of the Township of Voorhees, Camden County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the balloting for three seats on the Board of Education for full terms of three years at the annual school election held February 11, 1969, in Voorhees Township, Camden County, were as follows:

	AT POLLS	ABSENTEE	TOTAL
John Spina	340	0	340
Donald H. Denight	223	0	223
W. Rodman Derr, Jr.	184	0	184
Robert Anderson	233	0	233
Joseph Hann	227	0	227

Pursuant to requests to the Commissioner of Education a recount of the votes cast was authorized and was conducted by the Assistant Commissioner in charge of Controversies and Disputes at the office of the Camden County Superintendent of Schools, Pennsauken, on March 4, 1969.

Candidates Spina, Denight, and Derr filed nominating petitions prior to the election and their names appeared on the ballot on the voting machines. The votes received by Messrs. Anderson and Hann were irregular ballots cast by writing in their name on the paper roll under the slots provided for such purpose. Examination of the paper rolls reveals that irregular ballots were cast at all three polling places, that the names of the persons appeared in a variety of forms and spellings, and that the votes were written in at various lines on the roll.

Inspection was made of the voting machines used in this election at the warehouse of the Camden County Board of Elections. It was determined that the names of the candidates for the three-year terms appeared on the ballot on each machine at the first three levers and opposite write-in slots 1, 2 and 3 respectively. The name of a candidate for an unexpired term of one year appeared at lever four and opposite slot No. 4. Instructions to voters were opposite levers five and six which were locked out and immovable. Levers 7 to 14 were to be used for affirmative or negative votes for four budget authorizations.

To cast a vote for a three-year term for one or more persons whose name did not appear on the ballot, the voter had to open one or more of the first three slots opposite the names of the candidates whose names appeared on the ballot as aspirants for such a full term and write in the name of the person for whom the ballot was to be cast. A name written in the slot opposite the fourth candidate and fourth lever would appear on the paper roll on line 4 and is obviously a vote for the person named by the voter for an unexpired term of one year. Similarly, votes written in on other lines except the first three must be ruled as not cast for a candidate for a three-year term and cannot be counted therefor.

"An irregular ballot must be cast in its appropriate place on the machine, or it shall be void and not counted." *N.J.S.A.* 19:49-5 See also *Application for Recheck of Irregular Ballots, Borough of South River*, 26 *N.J. Super.* 357 *(Law Division* 1953). Noted also was the fact that a few voters had written in two names on one line. In such case both votes must be voided for the reason that the voter, by placing two names under a single slot, could vote for more than three persons.

In conducting the recount, only single votes appearing on lines one, two or three were counted. Votes written in on other lines or double votes on one line were voided. Votes were counted where the spelling or designation of given name or use of initials were sufficiently clear to reveal the intent of the voter. See also 29 *Corpus Juris Secundum* §180.

The recount tallied almost exactly with the report of the election officials in districts one and two. In district three, however, it is apparent that votes were tallied regardless of placement and a number of ballots had to be voided on recount.

The recount of votes for candidate Hann, with all writings such as J.W. Hann, Joseph Hahn, Joe Hann, etc., counted for him, produced a total of 195 votes. It is obvious, therefore, that Mr. Hann did not prevail in this election.

The recount of votes for candidate Anderson reveals 134 votes for Robert W. Anderson and 78 votes for Robert Anderson or a total of 212. While it is reported that there is another resident of the district whose name is Robert Anderson, there has been no showing that such other person sought a seat on the Board of Education or in any way was a candidate at the subject election. In the absence of such evidence, the Commissioner assumes that the intent of those who cast write-in ballots for Robert Anderson was to vote for Robert W. Anderson, and he so decides.

The tally at this posture of the recount stood:

John Spina	340
Donald H. Denight	223
W. Rodman Derr, Jr.	184
Robert Anderson	212
Joseph Hann	195

There being no need to decide other votes cast for "Anderson," "Robert J. Anderson," "W. Anderson," etc. for the reason that their inclusion or exclusion cannot alter the results, no determination will be made with respect to them.

The Commissioner finds and determines that John Spina, Donald H. Denight, and Robert W. Anderson were elected to seats on the Voorhees Township Board of Education at the annual school election on February 11, 1969, for full terms of three years each.

COMMISSIONER OF EDUCATION

March 20, 1969

Beatrice M. Jenkins, Individually, and as Parent and Natural Guardian of Brenda Marie Jenkins and Bruce Rodney Jenkins, Infants; Clifford G. Burton; Charles C. Jamison, Jr., Individually, and as Parent and Natural Guardian of Charles C. Jamison, III and Alexander B. Jamison; Theodore B. King, Individually, and as Parent and Natural Guardian of Anthony Crocker King, Infants; Valerie M. Kowalski, Individually, and as Parent and Natural Guardian of Steven A. Kowalski and Leland A. Kowalski, Infants; S. Lloyd Newberry, Individually, and as Parent and Natural Guardian of Robert W. Newberry and Lynne V. Newberry, Infants; Inge Nierenberg, Individually, and as Parent and Natural Guardian of Mark D. Nierenberg, an Infant; and Ernestine Ritchie, Individually, and as Parent and Natural Guardian of Wanda C. Ritchie, an Infant,

Petitioners,

v.

The Township of Morris School District and Board of Education, The Town of Morristown School District and Board of Education, The Township of Harding Board of Education, and the Borough of Morris Plains Board of Education,

Respondents.

COMMISSIONER OF EDUCATION

Decision

For the Petitioners, MacKenzie and Harding (Frank F. Harding, Esq., of Counsel)

For the Respondent Morris Plains, Bangiola & Van Houten (Paul Bangiola, Esq., of Counsel)

For the Respondent Morristown, Meyner and Wiley (Stephen B. Wiley, Esq., of Counsel)

For the Respondent Morris Township, Bertram Polow, Esq.

This is an appeal to the Commissioner by eight persons, seven of whom are parents of children attending public elementary schools in Morristown and Morris Township. Five of petitioners are residents of Morris Township and three live in Morristown. They allege that a violation of their statutory and constitutional rights is threatened by the decision of the Morris Township Board of Education to withdraw its high school pupils from Morristown High School when their present contract expires and by the failure of both Boards of Education to effect a consolidation of the two school districts. They maintain that unless a permanent merger of the school districts is accomplished, an unlawful racial imbalance in Morristown's public schools will be the inevitable result of two separate school districts. Petitioners further contend that withdrawal by Morris Township will result in immeasurable and permanent harm to the educational program of both school districts for the reasons that each will

lose the economic advantages inherent in a larger unit and that pupils in both school systems will be deprived of the opportunity to attend racially integrated schools. They demand that the Morris Township Board of Education be ordered to cease and desist from proceeding with its plans to construct a separate high school, and that the Commissioner take whatever steps are appropriate and necessary to accomplish a consolidation of the two school systems and to effect a racial balance throughout their schools.

Respondent Morris Township Board of Education, hereinafter "Township," denies that its decision to seek the approval of its voters to build a high school constitutes a violation of the rights of petitioners or anyone else or that it has any intention of creating a racially segregated school system. It maintains that it seeks only to provide for the educational needs of the children of its district. It recognizes no power in the Commissioner or the State Board of Education to compel the formation of a consolidated school district or to prohibit the termination of its sending-receiving relationship with Morristown in 1972. It reserves the right to move to dismiss on the ground that petitioners have failed to state a cause of action or a claim upon which relief may be granted.

Respondent Morris Plains Board of Education, hereinafter "Morris Plains," admits that allegations of the petition and cross-petitions and joins in the request for relief, modified, however, to the extent that a limited purpose regional district for grades 9 to 12 comprised of the four respondent school districts be given study and consideration. Respondent Board of Education of Harding Township, hereinafter "Harding," says that since it has no present or foreseeable intention of withdrawing its high school pupils from Morristown and no relief against it is sought by petitioners, it should be dismissed as a party to this appeal. Respondent Board of Education of Morristown, hereinafter "Town," admits the allegations of petitioners, enters a cross-petition against the Township, and joins in the relief sought by petitioners.

The Town has now filed a motion for preliminary injunctive relief, in which petitioners join, asking that the Township be enjoined from proceeding with its proposal to erect a new high school and from withdrawing from Morristown High School, until a plan for merger of the Town and Township school districts shall have been adopted by both Boards of Education and submitted to the voters at a referendum. The Township has also filed a motion for judgment on the pleadings dismissing the petition and cross-petitions. Counsel for all parties except Harding filed extensive briefs relative to both motions. Argument thereon was presented before the Assistant Commissioner in charge of Controversies and Disputes at the State Department of Education, Trenton, on February 27, 1969.

A brief recital of the background of this controversy is necessary to illuminate the arguments advanced by counsel. The Town maintains a grades K-12 school program and has for many years received pupils in grades 9-12 from Morris Plains and Harding and in grades 10-12 from the Township. The Town and the Township entered into a contract, pursuant to *R.S.* 18:14-7.3 (now 18A:38-20), beginning September 1962, agreeing to be bound to such a sending-receiving relationship for a period of 10 years.

On January 11, 1968, the Township conducted a special referendum at which its voters were asked to indicate whether they favored a separate school district for grades K-12 or a complete merger of the Township and Town school districts. Separation was favored by a vote of 2164 to 1899. Since then the Township has proceeded to make plans for withdrawal of its pupils from the Town when its ten-year contract expires at the close of the 1971-72 school year. It has engaged an architectural firm to prepare schematic plans for a new high school and has scheduled a referendum for March 27, 1969, seeking authorization of the voters to issue bonds to finance the capital construction.

The Township has now moved for judgment on the pleadings on the grounds that (1) the petition and cross-petitions fail to state a claim upon which relief can be granted; (2) the Commissioner lacks the power to grant the relief sought; and (3) the allegations fail to set forth a justiciable issue. In its brief it accepts the factual allegations of the petition and cross-petitions as true for purposes of this motion but maintains that even so, no cause of action on which relief can be granted has been established.

Conceding, *arguendo*, that the racial composition of the two school districts is as claimed by petitioners (which term now and hereinafter will include both petitioners and cross-petitioners unless specifically indicated otherwise), the Township contends that it does not necessarily follow that unlawful or improper racial imbalance now exists or will inescapably occur if the Township completes the withdrawal of its pupils. It argues that the term "racial imbalance" defies precise definition, and that it applies, in any case, to imbalance within a given school system and not to a general community of separate districts. Neither can it be defined statistically, the Township urges, but only upon a showing that the situation results in a denial of equal educational opportunities. It cites the holding of the Supreme Court in *Booker v. Plainfield Board of Education*, 45 *N.J.* 161 (1965), that the point at which racial imbalance threatens a denial of educational rights "may be well above 50% but well below the Commissioner's and State Board's 100% or nearly 100%." It is not alleged that the Town's schools are now predominantly Negro, or will become so upon the Township's withdrawal, the Township points out, or that adequate and equal educational opportunities are not now provided. That being so, the Township argues, there does not exist a condition of racial imbalance which would justify the Commissioner's intervention, and the petition and cross petitions should be dismissed for failure to state a cause of action upon which relief can be granted. The Township contends further that petitioner's contention that a level of improper racial imbalance, even though not yet existent, will inevitably occur in the near future is not factual but only conjectural and that such speculative prognostications of future racial ratios are insufficient to establish a justiciable issue and must be rejected.

Moreover, the Township asserts, it is the function of the Board of Education, as the policy-making authority for the school system, to decide which of the two proposals, independent school system or merger, will be submitted to its voters. It contends that the Commissioner's role is

administrative only, limited to review and approval of the plans for construction, and does not extend to the power to determine the proposal to be acted upon by the electorate.

Further, the Township argues, the Commissioner is without power to prevent the termination of the sending-receiving relationship between the Town and the Township at the expiration of the existing contract. There is no necessity, the Township asserts, to obtain the Commissioner's consent for withdrawal of pupils from the Town when the contract is ratified, if the Township erects its own high school facilities, and it has an absolute right to provide the kind of education facilities for its children as the citizens of the district may direct. In any case, it says, the issue is not ripe for determination for the reason that the voters may not wish to authorize a separate high school and may reject the proposal at the referendum, in which case there would be no issue remaining to be considered.

Finally, the Township contends, the Commissioner lacks the power to alter or eliminate school district boundary lines or to order the merger of school districts. Authority with respect to boundary lines resides exclusively in the Legislature, the Township argues, and regionalization can be accomplished only by approval of the voters of the districts proposing to merge. Any attempt of the Commissioner to order the elimination of the boundaries separating the Town and Township school districts or to compel their consolidation would be to usurp and exercise powers which he does not possess, in the township's opinion. For all of these reasons, the Township moves that the petition and cross-petitions be dismissed.

Petitioners reject the Township's contention that the question of racial imbalance is not yet present and need not be dealt with now. They maintain that it is normal practice to consider projections as a basis for action and cite instances in which various tribunals have looked to future developments and their effect and have taken appropriate prospective action. Moreover, petitioners assert, although minority race predominance is not the test of improper imbalance, the situation approaches such a predominance now in part and almost certainly in full a few years hence. They allege that Morristown's elementary schools are now 41% Negro and that that figure will be 54% by 1974 and 70% in 10 years. If the Town is permitted to withdraw its high school pupils, petitioners claim that the percentage of Negro pupils in Morristown High School will immediately double from 15% to 30% and will become 44% in 1974 and 55% in 1980. Such circumstances not only permit but require corrective action immediately, in petitioners' opinion.

Petitioners contend further that the Commissioner and State Board are endowed with the power to prevent the Township's withdrawal from the Town and to effect a merger of the two school districts. They allege that the Township Board of Education abdicated its duty to make decisions in the best interests of the school system when it permitted a non-binding advisory referendum to dictate its course of action, and that such failure to exercise its own best judgment requires correction by the Commissioner in the form of ordering a

study of merger. Moreover, they urge, merger is mandated by New Jersey constitutional doctrine as it pertains to racial imbalance and equal educational opportunity. The Commissioner, petitioners say, has taken an oath to uphold the New Jersey Constitution, and the New Jersey Supreme Court has held that the Commissioner has an affirmative duty pursuant to the Constitution to eliminate or mitigate racial imbalance in the public schools, regardless of cause. Petitioners argue that under the principles established by the Courts and by the Commissioner himself in a number of decisions governing racial imbalance, the Commissioner is empowered and required to effect a merger of the Morristown and Morris Township school systems. District lines established by statute must give way, they contend, when their maintenance violates constitutional rights. Local school districts, petitioners aver, are mere instruments in a broad legislative scheme to achieve the constitutional objective of a thorough and efficient system of public education based on equal opportunity, and the primary authority for accomplishing that constitutional mandate rests in the Commissioner of Education and the State Board. In their opinion the existing school boundary lines between Morristown and Morris Township are no more of a barrier than neighborhood school attendance area lines created by the statutory authority of a board of education, which must yield when the preservation of constitutional rights so dictates.

Petitioners urge that they have asserted additional claims for relief which the Township's motion does not reach. They cite that part of the petition which requests the Commissioner and the State Board to exercise their broad administrative, supervisory, investigative and rule-making powers to improve the racial balance in the Town and Township school districts and to find solutions to the educational problems they jointly face. Further, petitioners say, the Township's motion ignores Morris Plains' request that a limited purpose regional district be considered.

Finally, petitioners contend that the Township, while stating that all allegations of fact are accepted for purposes of its motion, has raised issues such as the definition of what constitutes racial imbalance, what is meant by "community," and questions with respect to the validity of the affidavits and arguments submitted by petitioners. These terms, as well as matters set forth in their affidavits, are proper factual issues, petitioners aver, on which they should have the right to present evidence and testimony in a plenary hearing. In order to prevail on its motion to dismiss, petitioners point out, the Township must show that there is no genuine issue of material fact, and the Township, in petitioners' opinion, has failed to sustain that burden. For these reasons, petitioners urge that the Township's motion for judgment be denied.

After careful consideration of all of the arguments of counsel the Commissioner concludes that the motion for judgment on the pleadings must be denied. It is well established that in such a motion the movant must exclude any reasonable doubt as to the existence of any genuine material fact. *Judson v. Peoples Bank, etc.*, 17 *N.J.* 67 (1954) In the Commissioner's opinion, petitioners have raised important issues of fact and of law which cannot be dismissed on

motion and which petitioners should be entitled to present at a full hearing. The Township's motion for judgment is therefore denied.

To be considered next is the Town's motion for preliminary relief in which petitioners and Morris Plains join.

Petitioners seek two objectives: (1) disapproval of the Township's establishing a separate high school and withdrawing its pupils from the Town, and (2) a complete merger of the Town and Township into a single school district. (Morris Plains concurs in these goals but asks further consideration of a limited purpose regional district organization for high school purposes which would include it and Harding as constituents.) By their motion for preliminary relief they seek to stay the Township from proceeding with its plans for a new high school in order to preserve the opportunity for a full hearing on the merits of their appeal. Such a hearing and the relief sought will be severely prejudiced, petitioners urge, if the Township is permitted to take successive steps toward implementation of its proposal, in particular the holding of the scheduled referendum on March 27.

The motion asks the Commissioner (1) to direct the consolidation of all proceedings, applications and requests by the Township with respect to a new high school in the instant matter to insure that all relevant papers or other matters be provided to the parties herein; (2) to restrain and enjoin the Township from holding a public referendum to authorize capital expenditures for a new high school and from taking any other steps to provide such a separate secondary school until the instant litigation has been finally determined or until a plan for merger of the two school districts has been framed, submitted, and approved by the voters of each district; (3) to determine that the Township is required by law to make application to exceed its debt limit before it can proceed with plans to erect its own high school; (4) to determine that the findings which are required to be made before an extension of credit is granted, with respect to more economical, alternative methods of providing school facilities, cannot be accomplished until a plan for consolidation has been perfected and submitted to the electorate; and (5) to determine that the existing sending-receiving relationship between the Town and Township cannot be altered without approval of the Commissioner and to direct that such relationship continue until a plan for merger shall have been submitted to the voters.

Petitioners' first contention is that the Township's proposed referendum on March 27 must be stayed in order to preserve an opportunity for a full hearing on the questions involved in their plan to withdraw from the Town and establish a new high school. They contend that under *N.J.S.A.* 18A:38-13 the Township cannot withdraw its pupils from the Town's high school without the approval of the Commissioner; that the Township has a borrowing limit of only 3½% under *N.J.S.A.* 18A:24-19 and can only go to 4% with the Commissioner's certification; and that *N.J.S.A.* 18A:45-1 requires approval of the State Board before the Township can erect a new separate high school, which approval it has

failed to seek or obtain. Petitioners allege and submit affidavits designed to show that there will be a substantial case on final hearing with respect to disapproval of the Township's proposed withdrawal and construction of a new high school.

In their opinion sound reasons for withdrawal of the Township are either non-existent or highly questionable, while such considerations and equities as racial balance, socio-economic balance, size, finance and educational quality are overwhelmingly against separation. Such matters, petitioners urge, can be established only by resort to a full hearing on the merits of their appeal. Unless the referendum scheduled for March 27 and all matters pertaining to it are stayed, petitioners claim their opportunity for a full and final hearing and the ability of the Commissioner to implement a decision in their favor after such a hearing would be irremediably impaired.

As their second point petitioners claim that the Township's actions leading toward separation must be stayed if an opportunity for full hearing is to be afforded with respect to compelling reasons for a merger of the two school districts and the power of the State to promote and require such a development. They point to the referendum in the Township on the question of merger held January 11, 1968, which produced a narrow margin of votes in favor of separation and allege that such a so-called non-binding election is contrary to law, that it produced an erroneous result for the reason that no study or investigation preceded it and voters were misinformed, and that even though purporting to be non-binding the Township Board of Education has accepted the result as a mandate and proceeded accordingly. Such an abdication of its duties to inform the voters adequately, to exercise and implement its best judgment of the most suitable course to be taken to serve the interests of all the citizens and their children, and to substitute the results of an unauthorized and defective opinion poll for a considered determination based on all the facts, opens the door to corrective action by the Commissioner, petitioners contend. Petitioners take the position, as recited earlier *supra*, that the Commissioner and State Board are endowed with broad powers under the statutes and constitutional doctrine to effect necessary corrective action. Such powers, they aver, encompass all the steps necessary to promote a complete K-12 consolidation including ordering such a merger. Moreover, petitioners assert, the affidavits filed in support of their motion show that there will be a substantial factual case on final hearing with respect to State action to promote and require school district consolidation. By these affidavits petitioners attempt to demonstrate that Morristown and Morris Township are essentially a single community divided only by an artificial, political boundary line but mutually complementary and interdependent. The affidavits also contain statements with respect to racial and social factors and the effects of merger or separation on the total community. The factual contentions set forth in these affidavits should be established at a full hearing of this appeal, petitioners argue, and allowing the Township to proceed with its referendum will prevent a full and final hearing and make inapplicable the relief which they seek. They point out that establishment of a separate high school by the Township, if permitted to continue, will fix decisions with respect to the organization of secondary education in the area, the size and location of the separate facility, and others, none of which may lend

themselves to subsequent approval of a merged school system. For all of these reasons, petitioners urge that the Township's plans be ordered held in abeyance *pendente lite*.

Petitioners' third point is that the Township should not be permitted to bypass what they allege is an obvious need for an extension of credit and should be required to make an application to exceed its debt limit in connection with its proposal to erect a high school. Petitioners allege that the Township's most pressing need is for elementary school facilities; that it has placed the proposal for a new high school first in order to avoid applying for an extension of credit and the necessary approvals thereunder; that construction of the high school will exhaust its statutory debt limit; and that it will have to apply immediately thereafter for permission to exceed its debt limit in order to build elementary classrooms which will be needed before the high school is required. Petitioners question whether a school district should be permitted to bypass the necessary inquiries related to approval of credit extension by taking its building program out of order. Under such circumstances, petitioners aver, the Township should be required to submit to the inquiries attendant upon an extension of credit application and secure approval of its plans and proposals before submitting the proposition to the voters at a referendum.

Finally, petitioners ask that the informal arrangements in effect until now, by which the Assistant Commissioner has agreed to supply all pertinent matters to the parties, be formalized by an order consolidating all proceedings involving common questions of law or fact involving one or more of the parties hereto. Such an order is essential, petitioners say, to give proper protection to the parties and to promote efficient disposition of the matters at issue.

In summary, petitioners ask for an order (1) staying all proceedings which would lead to the erection of a separate high school in the Township and to the withdrawal of Township pupils from the Town's high school pending a full hearing on all issues; (2) directing full consolidation of all proceedings; and (3) directing the Township to enter into study, consultation and investigation with the Town and the Commissioner and arrange for a proper merger referendum.

The Township opposes petitioners' motion for preliminary relief and argues that their requests must be denied for failure to meet the long-settled basic rules upon which injunctive relief may be granted.

First, the Township points out, in order to prevail on their motion petitioners must demonstrate that they will suffer irreparable harm if the restraint sought is not forthcoming. No such damage has been shown, in the Township's opinion. It reasons that even if petitioners were to prevail ultimately in this case, the mere holding of a referendum to build a new high school by the Township in the interim, whether approved or rejected, would not place the matter beyond the point of recall. If the referendum failed of approval, the question could be moot. If it were approved the time required for next steps would in any case prevent the taking of bids before October 1, 1969, affording ample time, in the Township's judgment, for the Commissioner to hear and

decide the merits of petitioners' appeal in ordinary course. Petitioners' assertion of irreparable injury, the Township suggests, is bottomed more on their fear that once the Township's voters approve a separate high school referendum, they will be less likely to consider and approve a merger proposal. Such an apprehension, it contends, does not rise to the status of irreparable harm and is insufficient to sustain a prayer for injunctive relief.

The Township's second argument is that the subject-matter of this appeal will not be destroyed or substantially impaired by denial of petitioners' request for preliminary restraint. Holding the referendum will neither create any new problem nor exacerbate the existing situation, the Township argues, and points out that it could resolve the problems of the subject litigation if the voters reject the referendum proposal.

The third point advanced by the Township is that it will suffer harm if a stay is ordered for the reason that any delay will set back its plans to provide adequate school facilities for its youth. In the Township's judgment the harm which it would sustain if its plans were delayed far outweighs any possible injury which would occur to petitioners by permitting the instant litigation to proceed in the usual course.

The Township's fourth contention is that petitioners' application for relief fails to meet accepted rules because the underlying legal bases of their claims are at best unsettled and doubtful. It suggests that no case can be found in support of petitioners' contention that the Commissioner has the power to order the continuation of the existing sending-receiving relationship or to compel the districts to consolidate. The very most that can be said of petitioners' merger issues, the Township argues, is that they raise novel questions. Such a basis for grounding an application for injunctive relief is not valid, according to the Township, and should be rejected.

Finally, the Township contends, petitioners have no standing to interfere in administrative matters between the Township and the State Department of Education. Consolidation of all proceedings on all relevant matters, as petitioners request, would serve only to encourage meddling in the internal affairs of the Township, second-guessing the Board of Education, and disrupting the orderly course of its conduct of the schools, the Township avers. Such a condition should be avoided, it urges, in order not to undermine the spirit of mutual co-operation among all the districts who are parties in this appeal which is essential to a sound resolution of the problems herein.

The general supervision and control of public education in New Jersey is vested in the State Board of Education. *N.J.S.A.* 18A:4-10 The Commissioner is its chief executive and administrative officer and is charged with supervision of all the public schools in the State. 18A:4-22, 23 The power to make the day-to-day decisions governing the operation of schools has been placed in the hands of locally chosen citizens who, living in the district, are in the best position to know the needs and aspirations of the community and are directly

responsible to the people to be served. On the other hand, it must be remembered that public education is a State function and responsibility, that each local school district is not a separate municipal entity but rather a component unit of a State-created, State-administered and State-supported school system. In creating such a system, the Legislature has seen fit to repose a large measure of local autonomy in local district boards of education but at the same time has endowed the State Board of Education and the Commissioner with broad supervisory powers to insure that the constitutional mandates pertaining to education are achieved. Existence of such powers has been clearly recognized by the courts. *Cf. Booker v. Plainfield Board of Education*, 45 *N.J.* 161 (1965); *Morean v. Montclair Board of Education*, 42 *N.J.* 237 (1964); *East Brunswick Board of Education v. East Brunswick Township*, 48 *N.J.* 94 (1966); *In re Masiello*, 25 *N.J.* 590 (1957); *Laba v. Newark Board of Education*, 23 *N.J.*364 (1957). Despite this clear delegation of authority, the Commissioner has moved with great reluctance to intervene in local school matters and has been constrained to do so only when the situation demands such action on his part.

In this case petitioners have raised important and far-reaching issues of fact and of law on which they ask for a full hearing. Extensive affidavits have been filed in support of their position that withdrawal of the Township as a completely separate school district will have irremediable adverse effects on all of the districts herein. The makers of the affidavits assert their belief that a rapid and inevitable result will be a "black" school system in the Town and a "white" school system in the Township; that the quality of education will deteriorate in both districts; that the entire area will be detrimentally affected financially, socially and economically; that once separation is accomplished it will fix the design of educational services for generations to come; and that any opportunity for consideration of merger or other solutions will be irretrievably lost. Petitioners contend that these problems, including racial balance, can be solved or at least mitigated, but not if the Township is allowed to persist in its headlong course to separate without having studied, considered and submitted the more effective remedy which petitioners urge merger would provide.

The Commissioner is convinced that the Township's present course should be preliminarily restrained in order that all of the parties may be afforded a full opportunity to be heard and the pertinent facts and applicable law determined. The effect which the Township's withdrawal as a separate school district will have upon the racial balance and the educational program of all the districts concerned are issued which cannot be denied such a hearing.

The Commissioner finds further that the hearing petitioners are entitled to cannot avoid impairment and be fairly conducted if the actions already set in motion by the Township are to continue without interruption. While conceivably the voters of the Township may reject the proposal to erect a new high school, and thereby open the door to consideration of a merger, such a result is by no means assured. Were the reverse to happen and the voters to approve the project, such an action could seriously impair a subsequent hearing and the relief sought.

The Commissioner cannot agree with the Township's argument that the referendum can have no effect upon the relief sought for the reason that the action taken, if illegal, is as invalid afterward as it was before. Once decisive action such as the Township proposes has been taken, it may be exceedingly difficult, if not impossible, to undo. Such action should not be taken at this time and prior to a proper hearing of the issues raised herein, and cannot be permitted to occur if petitioners' rights to a full hearing are to be preserved. The Commissioner will grant petitioners' request for a stay of the Township's proceedings to seek authorization of its voters to erect a high school.

In reaching this conclusion, the Commissioner is not unaware of the Township's claim that its program cannot be delayed without harming the educational opportunities of its children. It appears from the affidavits offered, however, that the Township has embarked on its program in ample time and that the delay which this ruling will create will not adversely affect the education of its pupils to any serious degree.

The decision to stay the Township's scheduled referendum has not been made lightly. The Commissioner entertains great respect for the judgment of local district boards of education. He is required, however, as the official charged with the overall supervision of the public schools to see that the discretionary powers vested in school board officials are exercised properly and fully. In this case the Commissioner is convinced that, in the light of the issues raised herein, the Township has moved with unnecessary haste and without sufficient consideration. Certainly all facets of this matter should be studied thoroughly while there is still opportunity to make choices in terms of the best way to go and to insure that the design for public education in the area is not fixed so rigidly that it will be unadaptable to changing conditions. Only after all of the advantages and disadvantages of each possible alternative have been determined and made known to the people can an intelligent judgment be made. It appears that this has not been done in this case and that only one course of action, a separate high school, has been selected to be offered to the voters of the Township. Nowhere does it appear that this possible solution of the educational problems of the district, or of any of the alternatives offering promise, have received the thorough study which is an essential antecedent of any decision having such far-reaching consequences as this one. Under such circumstances the Commissioner cannot stand aside and permit the educational opportunities in this area to become determined without first making sure that all facets of the problem have been studied and considered. He will therefore hold any further action in abeyance until a thorough study can be made and all of the relevant facts and issues of law can be determined. Such a course is necessary if the Township Board of Education is to exercise its discretion not only properly but fully.

Having determined that petitioners are entitled to be heard and that all proceedings leading to separation of the Town and Township and erection of a new high school can and are to be stayed and held in abeyance pending final adjudication without irreparable harm to any party, should the Commissioner grant petitioners' prayer that all proceedings relevant to the issues herein be

consolidated? The Commissioner concludes that such a request is proper and should be granted. Such action will not prejudice any of the parties and will insure that each of the litigants is fully informed and protected against the taking of any action which could have adverse effects upon its interests. The Commissioner therefore directs the consolidation of all proceedings, applications and requests made by any of the parties in this matter.

Petitioners also ask the Commissioner to find that the Township is required to make application to exceed its debt limit and to order its compliance. The Commissioner recognizes no necessity to reach this contention at this posture and finds that it may properly be dealt with in connection with a subsequent hearing and final adjudication.

Petitioners ask also for an order directing the Township to engage with the Town and the Commissioner in study, consultation, and investigation of the question of merger of the two school districts and arrange a referendum thereon. The Commissioner will decline to issue such an order at this juncture for the reason that if petitioners do not ultimately prevail and it is determined that the Township may lawfully separate and build its own high school, such an order would have been fruitless. On the other hand, if petitioners prevail in their contention that a merger study and referendum must precede any action to separate, much time will be saved if such study and investigation is completed or is, at least, well under way. The Commissioner urgently recommends, therefore, that the Township and the Town begin immediately to make a thorough study and investigation of an all purpose regional school district comprising the two municipalities, and such other alternatives as may appear appropriate. To implement this recommendation, he hereby directs the Morris County Superintendent of Schools to make himself available to initiate and carry out such a study with representatives of the two school districts.

Finally, the Commissioner wishes to emphasize that in reaching his conclusions herein he has not and does not make any findings or determination with respect to the issues petitioners have raised. Such findings and determinations can and will be made only after all of the facts are established and the applicable law is decided. The Commissioner's determination herein goes no further than to hold that the matter cannot be dismissed at this posture, that the issues raised are entitled to be heard fully and fairly, and that further actions which could impair such hearing must be postponed until the proceedings herein are completed. It should not be assumed that the Commissioner, in exercising his general supervisory powers to grant the injunctive relief sought by petitioners, and in denying the Township's motion, favors or accepts petitioners' position and arguments of fact and law at this point. Such an interpretation of the conclusions herein would be completely erroneous. The Commissioner has reached one conclusion only, namely, that if the Township Board of Education is to perform its duties properly and fully all actions relevant to the issues herein must be held in abeyance until more complete study is made and the matter is heard fully and adjudicated fairly.

In conclusion, the Commissioner finds and determines (1) that petitioners and cross-petitioners have raised substantial and significant issues of fact and of law which require a full and fair hearing and adjudication and that in such case the Township's motion for judgment on the pleadings or, in the alternative, summary judgment must be denied; (2) that petitioners' and cross-petitioners' right to a full hearing and the applicability of the relief sought by an adjudication thereof cannot and will not be preserved if the Township's proceedings leading to a withdrawal from the Town's school system and the erection of a separate high school are permitted to continue unchecked; (3) that consolidation of all proceedings relevant to the issues and involving the parties herein is necessary to insure that all litigants receive timely notice of actions which may affect their interests; and (4) that a thorough study of the advantages and disadvantages of the creation of an all purpose regional school district and such other alternatives as may appear appropriate should be commenced immediately and completed as expeditiously as possible.

Therefore, it is hereby ordered and directed that (1) the motion of Morris Township for judgment on the pleadings or, in the alternative, summary judgment, is denied; (2) a full hearing on the merits of the issues raised in these proceedings is scheduled for the week of June 9, 1969; (3) until the conclusion of such hearing and promulgation of the determination of the Commissioner, the Morris Township Board of Education is restrained from holding any referendum seeking authorization of capital expenditures to establish and erect a high school within the district and from proceeding with any plans to withdraw its secondary school pupils from the Morristown High School or to establish and construct a separate high school; (4) all proceedings, applications, requests and other matters relevant to the issues or the parties herein are consolidated in these proceedings and each of the parties is guaranteed timely notice of all such actions or documents; (5) the Morris County Superintendent of Schools is directed to make himself available to conduct a study with representatives of the Morristown and Morris Township school districts and with such assistance as he may request from the State Department of Education, of the advisability of merging the two school districts; and (6) such other relief requested in petitioners' and cross-petitioners' motion is hereby denied without prejudice to renewal of such requests at the hearing of this matter.

COMMISSIONER OF EDUCATION

March 21, 1969

Edward L. Burlew,

Petitioner,

v.

Board of Education of the Township of Madison, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Cassel R. Ruhlman, Esq.

For the Respondent, Alfred J. Hill, Esq.

Petitioner, who has been employed as an elementary school principal in respondent's schools since 1956, protests that his purported assignment as "Principal of the Evening School and Research Assistant" is a violation of his tenure rights. Respondent asserts that the transfer of petitioner to the new position was lawful and proper.

Counsel stipulate the facts as set forth in the pleadings and submit this matter for the Commissioner's determination on the facts as stipulated, and on briefs of counsel.

The facts as set forth in the pleadings are as follows:

1. Petitioner is the holder of a permanent Elementary School Principal's Certificate issued by the State Board of Examiners.
2. Petitioner has been employed by respondent since 1956 as an elementary school principal and holds tenure as such.
3. Respondent purported to remove petitioner from the position of elementary school principal and assign him to a position entitled "Principal of the Evening School and Research Assistant" effective July 1, 1968. Respondent has submitted as an exhibit attached to its brief a photocopy of a letter addressed to petitioner on June 27, 1968, by the Superintendent of Schools, reminding him of the effective date of his new assignment and directing him to report to the Assistant Superintendent at the conclusion of his vacation on July 30.
4. Petitioner has protested the Board's action and demands reinstatement in the position of elementary school principal, which respondent has refused to do.
5. Respondent notes in its brief that petitioner was granted an increase in salary with the transfer but that he failed to report for duties as assigned. Petitioner has not taken exception to this assertion of fact, although opportunity for rebuttal was afforded.

6. Counsel also stipulate the following to be the "Job Description" of the position to which petitioner was purportedly assigned:

"I. PRINCIPAL OF EVENING SCHOOL - (*75% OF TIME*)

The Principal of Evening School, under the direct supervision of the Assistant Superintendent for Personnel, and the general supervision of the Superintendent of Schools, performs the following duties:

A. Develops a philosophy of operation permeating all avenues of the program.

B. Establishes a contact with the people of the community.

C. Organizes and meets with an advisory committee to identify community needs and problems.

D. Encourages new approaches and experimentation with untried methods and techniques in adult instruction.

E. Screens, interviews, and selects teachers for the Evening School.

F. Develops a curriculum for the adults of the community dependent upon the needs of the people to be served.

G. Develops a sound public relations program which promotes and advertises a comprehensive adult education program. The need for interpreting the meaning and purpose of adult education should be accentuated.

H. Directs a pre-service and in-service program for staff personnel.

I. Prepares the financial phase of the adult program which shall include budget, fees, state and federal money, and salaries.

J. Prepares annual report for the adult evening program.

"II. RESEARCH ASSISTANT - (*25% OF TIME*)

The Research Assistant, under the direct supervision of the Assistant Superintendent for Instruction and the Superintendent of Schools will perform the following:

A. Prepare surveys and reports as requested.

B. Establish and coordinate a district-wide census program.

C. Receive and act upon requests for use of buildings.

D. Assist in budget preparation for the district.

E. Assist in the preparation of special teachers schedules.

F. Coordinate the requests for community resource people.

Performs all other duties requested by the Superintendent of Schools."

Petitioner cites the tenure statute, *N.J.S.A.* 18A:28-5, in support of his contention that since he is properly certificated as an elementary school

principal and has in fact been the principal of an elementary school in respondent's district since 1956, he cannot be removed from such a position except for cause, as provided in the Tenure Employees Hearing Act, *N.J.S.A.* 18A:6-10 *et seq.* No charges have been preferred or hearing held pursuant to that Act. Respondent's purported transfer of petitioner to a position other than that of principal of an elementary school, he avers, is unlawful because it is tantamount to a dismissal. Petitioner contends that numerous decisions of the Commissioner and the Courts establish that the power of a board of education to transfer a tenured teaching staff member is limited to a transfer to an equivalent position within the same field in which his tenure is protected and for which he holds appropriate certification. *Greenway v. Camden Board of Education*, 1939-49 *S.L.D.* 151, affirmed by State Board of Education 155, affirmed 129 *N.J.L.* 46 *(Sup. Ct.* 1942), 129 *N.J.L.* 461 *(E. & A.* 1943); *Cheesman v. Board of Education of Gloucester City*, 1938 *S.L.D.* 498, reversed by State Board of Education 500, affirmed 1 *N.J. Misc.* 318 *(Sup. Ct.* 1923); *Spadoro v. Coyle and Board of Education of Jersey City*, 1965 *S.L.D.* 134; *Viemeister v. Board of Education of Prospect Park*, 1939-49 *S.L.D.* 115, affirmed by State Board of Education 119, affirmed 5 *N.J. Super.* 215 *(App. Div.* 1949); *Downs v. Board of Education of Hoboken*, 1938 *S.L.D.* 515, affirmed in part, reversed in part by State Board of Education 519, affirmed 12 *N.J. Misc.* 345 *(Sup. Ct.* 1934), affirmed 113 *N.J.L.* 401 *(E. & A.* 1934)

But, petitioner contends, the position to which respondent has sought to transfer him is in no sense that of an elementary school principal. He refers to the Job Description, *supra*, to support his contention that the Evening School to which he is assigned for 75 per cent of his time is not an elementary school, but in fact an adult education program. Nowhere in the description, petitioner points out, is there any mention of or any necessary element of an elementary school program. Moreover, petitioner says, the position of Research Assistant to which he would be assigned for the remainder of his time bears no relationship whatsoever to any principalship, elementary or otherwise.

Respondent denies any attempt to violate petitioner's rights by an improper transfer. The cases cited by petitioner, respondent contends, are apposite only to the degree that they show that the Board of Education may in its sound discretion transfer personnel, provided that there is no attempted dismissal or demotion. As long as the transfer is within the category for which the employee is qualified, such a transfer is proper, respondent asserts. *DeSimone v. Board of Education of Fairview*, 1966 *S.L.D.* 43; *Fegen v. Board of Education of Fair Lawn*, 1966 *S.L.D.* 167 The principalship of the Evening School, respondent avers, is not a lesser job than an elementary school principalship. While indeed many of the pupils of the Evening School may be adults, respondent says, the program of the school in large part contains basic educational subjects for adults whose capacity or educational attainment may be on an elementary school level. Thus, it is asserted, the expertise of an elementary school principal is needed. Similarly, says respondent, the duties of research assistant require a person of the caliber of an elementary school principal.

The Commissioner does not find in the tenure statutes the basis for such a narrow interpretation as petitioner seeks to place upon his tenure status. The protection afforded to teaching staff members, including principals, by *N.J.S.A.* 18A:28-5, is the protection of employment "in positions which require them to hold appropriate certificates issued by the board of examiners * * *." The principal's certificate which petitioner now holds satisfies all certification requirements for the principalship of respondent's Evening School. It is conceded that petitioner has acquired tenure in the position of principal. His transfer to another principalship does not violate that status. A transfer is not a demotion or dismissal. *Lascari v. Lodi Board of Education*, 36 *N.J. Super.* 426 *(App. Div.* 1955) Petitioner will continue to be a principal and to perform the duties of a principal in his new assignment. He will suffer no salary reduction but will, in fact, receive an increase in pay. Consequently the transfer of petitioner from the principalship which he previously held to the principalship of the Evening School does not constitute a violation of petitioner's tenure rights. This is the principle uniformly established in the cases cited by petitioner, and the Commissioner holds that it is applicable herein.

Nor does the assignment of 25 per cent of the time of the incumbent as "Research Assistant" conflict with the assignment for the remainder of the time as "Principal of the Evening School." It has long been established that every school must have a principal. *Kelly v. Lawnside Board of Education*, 1938 *S.L.D.* 320, affirmed State Board of Education, 323; *Spadoro v. Coyle and Jersey City Board of Education*, *supra* But, as determined in *Kelly*, *supra*, the Board may assign other duties to the principal not inconsistent with his position and area of competence. The "Job Description" for the position of Research Assistant, *supra*, clearly lies within the administrative competence of a school principal.

The Commissioner finds and determines, therefore, that the transfer of petitioner to the position of Principal of the Evening School and Research Assistant was an act within the discretionary power of the respondent Board of Education, and constitutes no violation or impairment of petitioner's rights under the tenure statutes. The petition is therefore dismissed.

COMMISSIONER OF EDUCATION

March 25, 1969

In the Matter of the Annual School Election Held in the School District of the Borough of Bradley Beach, Monmouth County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the balloting at the annual school election held February 11, 1969, in the school district of the Borough of Bradley Beach, Monmouth County, for one member of the Board of Education for a term of two years, were as follows:

	AT POLLS	ABSENTEE	TOTAL
James G. Farry	219	9	228
John J. Dougherty	219	1	220

Pursuant to a letter request dated February 13, 1969, from candidate Dougherty, the Commissioner of Education directed an authorized representative to conduct a recount of the ballots cast in this election for Board members. The recount, which was limited to a determination of the ballots cast for candidates Farry and Dougherty for a term of two years, was conducted on March 7, 1969, at the office of the Monmouth County Superintendent of Schools in Freehold. The Commissioner's representative reports that at the conclusion of the recount of the uncontested ballots, with six ballots referred to the Commissioner for his determination, the tally stood as follows:

	AT POLLS	ABSENTEE	TOTAL
James G. Farry	217	9	226
John J. Dougherty	223	1	224

The Commissioner makes the following determination with respect to the six ballots referred to him:

Exhibit A - 1 ballot, on which the voter placed a cross (x) in the square to the left and in front of the name of candidate Dougherty. In addition, the voter wrote the name of Edward Siwakowski in the "personal choice" space for the two-year term, without placing a mark in the square to the left of the space, and then drew a heavy arrow to and placed a cross (x) above the area of the ballot pertaining to voting for a one-year term. It is the opinion of the Commissioner that the voter's intention was to cast a vote for Mr. Siwakowski for the one-year term, but he did not cast the vote properly. The Commissioner is satisfied that the arrow and improperly placed name and cross (x) are not intended to identify or distinguish the ballot. *R.S.* 19:16-4, which reads in part as follows, is relevant to this question:

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

The only basis for rejecting this ballot would be finding that it was so marked by the voter for the purpose of identifying his ballot. See also *In the Matter of the Recount of Ballots Cast in the Annual Election in the Township of Union, Union County*, 1939-49 *S.L.D.* 92; *In the Matter of the Annual School Election in the School District of Voorhees Township, Camden County*, decided by the Commissioner of Education March 20, 1968.

The Commissioner finds, therefore, that the vote for candidate Dougherty is valid and must be added to the tally.

Exhibit B - 2 ballots, on each of which it appears that the voter first placed a cross (x) in the square to the left of the name of candidate Farry; then, with an apparent change of mind, erased the cross (x) by drawing heavy random lines over it, and instead marked a cross (x) in the square to the left of the name of candidate Dougherty. However, it appears clear that each voter merely attempted to correct his vote because he made an error, changed his mind, or had some other reason. There is no reason to suspect that the marks were made with the intent to distinguish the ballots. *R.S.* 19:16-4, *supra* See also *In re Annual School Election in the Borough of Bloomingdale, Passaic County*, 1955-56 *S.L.D.* 103; *In the Matter of the Annual School Election in the Township of Waterford, Camden County*, decided by the Commissioner of Education March 14, 1968.

The votes will, therefore, be added to the tally for candidate Dougherty.

Exhibit C - 2 ballots, on each of which the mark made by the voter in the square before the candidate's name is somewhat less than perfectly made. In one instance the cross (x) in the square to the left of the name of candidate Dougherty is embellished with an additional line; in the other instance, the voter retraced the cross (x) in the square in front of candidate Farry's name several times. Thus, the marks in both cases were heavier or rougher than would appear normally.

It is the Commissioner's judgment that these votes must be counted. Although the marks are poorly and crudely made, they are substantially those required by *R.S.* 19:16-3g which provides in part as follows:

> "If the mark for any candidate or public question is substantially a cross x, plus + or check ✓ and is substantially within the square, it shall be counted for the candidate or for or against the public question, as the case may be * * *."

Such marks as these are not uncommon and are obviously the result of unskilled calligraphy, infirmity, poor vision or visibility, rough writing surface or some other cause rather than any attempt to distinguish the ballots. Each of the marks is substantially a cross (x), is substantially within the square and clearly was made for an improper purpose. *See In the Matter of the Recount of Ballots Cast at a Special School Election in the Township of Tewksbury, Hunterdon County*, 1939-49 *S.L.D.* 96; *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Borough of Watchung, Somerset County*, 1960-61 *S.L.D.* 170; *In the Matter of the Annual School Election Held in the Township of Randolph, Morris County*, 1965 *S.L.D.* 66.

The Commissioner finds and determines that, there being no reason to reject these ballots, they will be counted, with one vote being added to the tally for candidate Farry and one to the tally for candidate Dougherty.

Exhibit D - 1 ballot on which the marks made by the voter in the squares to the left of the names of his choices for the three-year terms and in the square to the left of "yes" for the public question are clearly check (✓) marks, but the marks in the squares in front of the name of candidate Farry for the two-year term and of the candidate for the one-year term appear at first glance to consist of a single, straight, heavily-made diagonal line running from near the lower left of the printed squares to the upper right thereof and beyond. Previous decisions of the Commissioner and the Courts have held that a single, straight diagonal line cannot be counted as a vote since the mark is not substantially a cross (x), plus (+) or check (✓) as required by *R.S.* 19:16-3*g*. *Petition of Wade*, 39 *N.J. Super.* 520 *(App. Div.* 1956), 121 *A.2d.* 552 (1956); *In the Matter of the Annual School Election Held in the Township of Stafford, Ocean County*, decided by the Commissioner of Education, March 26, 1968 In the case of *Keogh-Dwyer*, 45 *N.J.* 117 (1965), however, the Supreme Court held that where the mark in question is adequate to meet the test set forth in sub-section *g* of *R.S.* 19:16-3, *supra*, it is to be counted. Close examination of the two marks on this ballot indicates enough variation in the line at its lower end to be construed as a semblance of a check. It is the Commissioner's judgment, therefore, that these two marks meet the requirements of the statute and will be counted. One vote will, therefore, be added to the tally for candidate Farry. See *In the Matter of the Recount of Ballots Cast in the Annual School Election in theTownship of Union, Union County, supra; In the Matter of the Annual School Election Held in the Borough of South Belmar, Monmouth County*, 1966 *S.L.D.* 28.

When the votes in Exhibits A, B, C and D are added to the previous totals, the results stand as follows:

		EXHIBITS					
	UNCONTESTED	A	B	C	D	ABSENTEE	TOTAL
James G. Farry	217			1	1	9	228
John J. Dougherty	223	1	2	1		1	228

The Commissioner finds and determines that there was a failure to elect a member to a seat on the Board of Education for a two-year term. The Monmouth County Superintendent of Schools is therefore authorized under the provisions of *N.J.S.A.* 18A:12-15, and is hereby directed, to appoint from among the residents of the Borough of Bradley Beach a citizen, who holds the qualifications for membership, to a seat on the Bradley Beach Borough Board of Education, who shall serve until the organization meeting following the next annual school election.

COMMISSIONER OF EDUCATION

March 26, 1969

William A. Pepe,

Petitioner,

v.

The Board of Education of the Township of Livingston, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, William A. Pepe, *Pro Se*

For the Respondent, Riker, Danzig, Scherer & Brown (Peter N. Perretti, Jr., Esq., of Counsel)

Petitioner, a resident of the Livingston school district, charges respondent Board of Education with improper discrimination in denying transportation to and from school for his daughter while providing such service for children on the opposite side of the street on which he resides. He seeks relief by an order requiring respondent to furnish transportation to school for his child. Respondent denies discriminatory conduct and maintains that petitioner's daughter is not eligible for such transportation service.

The matter was heard by the Assistant Commissioner in charge of the Division of Controversies and Disputes at a hearing held March 26, 1969, at the office of the Essex County Superintendent of Schools, East Orange. A stipulation of facts submitted and the testimony educed disclose the following factual situation.

Petitioner lives at 270 East Cedar Street in Livingston. His home is on the west side of the street, the side nearest to the Collins School where his ten-year-old daughter attends the fifth grade. The school is approximately 1.2 miles from petitioner's residence. Prior to the 1968-69 school year no transportation was provided by respondent to any pupils living in petitioner's general area who attend Collins School. A few days after the opening of school in September 1968, respondent instituted school bus service to Collins School for children living on the east side of East Cedar Street but not for petitioner's daughter on the west side of the street. Petitioner has made requests to the school authorities to have the benefits of such transportation service extended to his child but to no avail.

Petitioner contends that the denial of transportation for his daughter, while such service is provided for children on the opposite side of the street, is discriminatory, unfair and unreasonable. He points out that the bus stops to load and unload children on the opposite side of the street not far from his house. For his daughter to board the bus would require her to walk a distance of only 65 feet: 40 feet along the west side of the street and 25 feet to cross to the opposite side. Instead, he contends, she is required to walk at least 6,200 feet by a route along which sidewalks are in poor condition. Petitioner calls attention to the fact that his fifteen-year-old daughter, who is provided transportation to and from the high school for reasons of health, is forced to cross East Cedar Street at a more distant point in order to board her bus. Such a situation where one child is required to cross the road in order to be transported and another is denied transportation because she would have to cross the same street, is improper discrimination within a single family, in petitioner's opinion.

Respondent denies any discriminatory or other improper conduct with respect to petitioner and says that it has merely implemented its transportation policy fairly and equably. That policy provides, respondent testified, for transportation of all K-3 grade children, of pupils in grades 4-9 who live more than 2 miles from school, and of 10-12 grade pupils who are more than 2½ miles away. Transportation for lesser distances is provided, respondent maintains, only when special circumstances such as the absence of sidewalks along main roads, unusual hazards, etc., make such exceptional service advisable. Such is the case herein, respondent argues.

The assistant secretary to the Board, one of whose duties is the supervision of transportation services, testified that he and the Superintendent of Schools had recommended the present arrangement because of the absence of sidewalks on the east side of East Cedar Street and the hazards of crossing it during the period of construction work currently going on. From his unrefuted testimony, it appears that East Cedar Street is in process of becoming part of a new main artery connecting Route 10 and Northfield Avenue. A new road, Shrewsbury Avenue, for which East Cedar Street will be an extension, has been under construction. Part of that construction has entailed the widening of East Cedar Street to the north and beyond petitioner's home. Sidewalks have not been installed as yet on the east side of the street, and children going to Collins School must therefore walk along the road and must cross the street at a point

which the school officials deem hazardous. The assistant secretary testified that under present conditions, as a result of observation of this condition during the late summer of 1968, he recommended that transportation be provided to children on the east side of East Cedar Street until the road project is completed, sidewalks are installed, and a school crossing guard is assigned at the corner where the children cross. Petitioner's daughter was not included in such arrangements, the witness testified, for three reasons: (1) there are sidewalks on the west side of East Cedar Street; (2) if petitioner's daughter were assigned to the bus route she would be required to cross the road when boarding or leaving it, negating the Board's purpose of insuring that no child has to cross this main road; and (3) to transport petitioner's daughter would violate respondent's transportation policy and would be unfair to other children in the community for whom no such exceptions are made.

Boards of education must provide for the transportation of pupils who live remote from school. *N.J.S.A.* 18A:39-1 In their discretion they may provide such services to children who are not remote. *N.J.S.A.* 18A:39-1.1 Such transportation may not be furnished on a discriminatory basis. *Klastorin v. Scotch Plains Board of Education*, 1956-57 *S.L.D.* 85; *Dorski v. East Paterson Board of Education*, 1964 *S.L.D.* 36, affirmed State Board of Education, 39

The Board of Education, in this case, has an established policy regulating pupil transportation. Its policy provides such services to pupils who are not remote under certain special circumstances, including lack of sidewalks on main roads and unusually hazardous conditions. Such a policy has been sustained as reasonable and a proper exercise of a board of education's discretionary authority. *Iden v. West Orange Board of Education*, 1959-60 *S.L.D.* 96 The Commissioner finds that respondent's rules governing transportation represent a proper exercise of its discretion.

The Board has seen fit to provide school bus service to certain children in petitioner's area. This service is furnished under the special circumstance provisions of its policy, *i.e.*, the absence of sidewalks on the east side of the street and the unusual hazards resulting from road construction work in the area. The transportation provided is temporary only, and will be withdrawn when the special circumstances no longer exist. In order to establish unlawful discrimination there must be a showing that one group in entirely the same circumstances as another is given favored treatment. There is no such showing herein. Petitioner's daughter is the only child attending Collins School who lives on the west side of East Cedar Street. In going to and from school there are sidewalks available to her and she is not required to cross East Cedar Street. Children on the East side, however, do not presently have sidewalks and must cross East Cedar Street to get to Collins School. Such differentiation in conditions furnishes sufficient grounds for separate classifications under which respondent may distinguish services.

> "* * * a board of education may, in good faith, evaluate conditions in various areas of the school district with regard to conditions warranting transportation. It may then make reasonable classifications for furnishing

> transportation, taking into account differences in the degree of traffic and other conditions existing in the various sections of the district." *Schrenk v. Ridgewood Board of Education*, 1960-61 *S.L.D.* 185, 188

See also *Livingston v. Bernards Township Board of Education*, 1965 *S.L.D.* 29; *Peters et al. v. Washington Township Board of Education*, New Jersey Commissioner of Education, March 8, 1968.

Respondent Board has inspected conditions in petitioner's general area and as a result of its observations has determined to provide bus service to children who encounter certain hazards in walking to and from school. Those hazards do not exist for petitioner's child. She is, therefore, in a reasonably distinct classification and for that reason has not been discriminated against in being denied a service provided to others who are situated differently.

Nor is there any unlawful discrimination with respect to petitioner's older daughter who is required to cross East Cedar Street to board a bus to the high school. Differences in age, school attended and bus loading point establish a distinct classification in this instance.

It is well established that the Commissioner of Education will not substitute his judgment for that of a local board of education in matters which lie within the exercise of its discretionary authority, or intervene unless there is a clear showing of abuse of such discretion.

> "When an administrative agency created and empowered by legislative fiat acts within its authority, its decision is entitled to presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." *Thomas v. Morris Township Board of Education*, 89 *N. J. Super.* 327 *(App. Div.* 1965)

See also *Boult and Harris v. Passaic Board of Education*, 1939-49 *S.L.D.* 7, 13, affirmed State Board of Education, 15, affirmed 135 *N.J.L.* 329 *(Sup. Ct.* 1947), 136 *N.J.L.* 521 *(E. & A.* 1948); *Fanwood v. Rocco*, 59 *N.J. Super.* 306 *(App. Div.* 1960). There is no such showing herein. Respondent's policy governing transportation services is reasonable, and its implementation of the policy in the instant situation has not been arbitrary, unreasonable, or discriminatory with respect to petitioner or his child.

The petition is dismissed.

COMMISSIONER OF EDUCATION

April 10, 1969

Paulsboro Community Action Committee,

Petitioner,

v.

Board of Education of the Borough of Paulsboro, Gloucester County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Peter J. O'Connor, Esq.

For the Respondent, Falciani, Cotton & Chell (Eugene P Chell, Esq., of Counsel)

This appeal is made by a group of citizens of Paulsboro who allege that a condition of improper racial imbalance exists in the local public elementary schools and that the respondent Board of Education is permitting the situation to continue and deteriorate further by its failure to take affirmative action to eliminate or alleviate the problem. Respondent denies that it is maintaining a racially segregated school system. The matter is submitted on testimony and evidence offered at a hearing before the Assistant Commissioner in charge of Controversies and Disputes on February 10, 1969, at the State Department of Education, Trenton, and on briefs of counsel.

Paulsboro is a residential community of approximately two square miles and is a Type II school district. It has a high school and two elementary schools, Billingsport and Loudenslager. These two schools are approximately a mile apart. The pupil assignment practice of the Board provides a stable attendance area surrounding each school with a "buffer" zone in between. Boundaries within the buffer zone are subject to change to stabilize enrollments between the schools and, in fact, have been altered for particular grades almost yearly for some time. No pupil transportation is provided for the reason that no child lives more than 2 miles from school.

The basis of petitioner's allegation of racial segregation in the elementary schools may be shown by the following enrollment statistics:

	Billingsport School			Loudenslager School		
Year	Enrol.	Negro Pupils	% Negro	Enrol.	Negro Pupils	% Negro
1960-61	438	77	16%	391	89	23%
1961-62	423	44	10%	409	83	20%
1962-63	485	56	12%	367	85	23%
1963-64	667	83	12%	389	94	24%
1964-65	542	72	10%	417	123	29%
1965-66	428	25	6%	632	272	43%
1966-67	495	37	7%	610	286	47%
1967-68	488	37	8%	615	296	48%

These data may be read as follows: in the Billingsport School in the 1960-61 school year there were 438 pupils of whom 77 or 16% were Negro children. In that same year 391 children were enrolled in the Loudenslager School of whom 89 or 23% were of the Negro race.

The following chart shows how the total number of Negro pupils of elementary school age have been distributed between the two schools:

PERCENTAGE OF TOTAL NEGRO ELEMENTARY SCHOOL POPULATION

Year	Billingsport	Loudenslager
1960-61	46%	54%
1961-62	34%	66%
1962-63	39%	61%
1963-64	46%	54%
1964-65	37%	63%
1965-66	8%	92%
1966-67	11%	89%
1967-68	11%	89%

These tables reveal that although at no time has the Negro enrollment at either school exceeded 48% of the individual school's total enrollment, the Negro enrollment at Loudenslager School, as a percentage of the total Negro elementary school enrollment in Paulsboro, has increased in almost regular progression to the point where 89% attend that school.

Both parties concede that housing developments within the community lie at the root of the subject problem. The Negro population has tended to concentrate in the southern section of the town near the Loudenslager School. As a result the black pupil population has dropped in the Billingsport School from 16% in 1960-61 to 8% in 1968 and has increased in Loudenslager from 23% to 48% in the same period. In 1967-68 Negro pupils of elementary school grade constituted about 30% of the total enrollment with approximately 11% of them attending Billingsport and 89% in Loudenslager.

Petitioner contends that such a condition where almost all of the black pupils in the community attend one school, even though the number therein does not represent more than half of the school's enrollment, constitutes a racially imbalanced school system which requires corrective action. It suggests that there is no precise, universally accepted definition of what constitutes an unlawful racial imbalance applicable to all situations and cites precedent litigation and treatises to illustrate that the criteria enunciated in one instance may not be viable in others. Petitioner concedes that neither of the Paulsboro elementary schools has a student population which is predominantly - that is to say more than 50% - Negro. But it does insist that where, as here, 89% of the black children attend one school and 11% the other, the schools are improperly racially balanced.

Petitioner makes no charge of deliberate intention on the part of respondent to create a racially segregated school system but it takes issue with what it alleges is a failure of the Board to recognize the situation and to take appropriate remedial measures. Petitioner says that the Board is proposing to build four additional classrooms on each school. Such a plan, it argues, does not meet the problem but only perpetuates it. Petitioner suggests, for instance, that if more classrooms were added to the Billingsport School and less to Loudenslager the attendance areas for the two schools could be redesigned to bring about both a numerical and a racial balance. It does not indicate that this is either the only acceptable solution or the plan of choice but insists, rather, that the Board must do something to correct present conditions. What that plan should be it leaves to respondent, implying that there are a number of acceptable solutions and that the formulation and choice of the best remedy is the function of the Board. In this case, however, petitioner contends, the Board has done nothing, although required by law to act, and it becomes the duty of the Commissioner, petitioner urges, to order the necessary corrective action.

Respondent takes the position that petitioner's allegations are premature for the reason that the Board of Education has not permitted the proportion of black pupils in the Loudenslager School to exceed 50% nor indicated that it will even allow such point to be reached. It asserts that in this school 48% of the pupils who are black are receiving education side by side and equally with 52% of the children who are white, with full opportunities to associate and communicate. Under such circumstances, respondent contends, racial imbalance does not exist in the Paulsboro schools to an extent which affects the education of children of the minority group. Therefore, respondent argues, it must be assumed that the Board of Education will fulfill its responsibilities to all of its students and will prevent or correct an adverse condition, which it avers has not yet arisen, when and if it occurs.

The law is well settled that racial segregation in public schools creates conditions of unequal educational opportunity and tends to affect adversely the learning of pupils so deprived. *Brown v. Topeka*, 374 *U.S.* 473 (1954); *Booker v. Plainfield Board of Education*, 45 *N.J.* 161 (1965) Similarly, the duty of a New Jersey school district board of education to take affirmative action to prevent, eliminate or at least mitigate such an undesirable and unlawful situation cannot be denied. *Fisher v. Orange Board of Education*, 1963 *S.L.D.* 123; *Morean v. Montclair Board of Education*, 42 *N.J.* 237 (1964) Nor can there be any question of the power of the Commissioner of Education to order the formulation and implementation of a plan to remedy the condition where a local district has neglected to take appropriate action. *Byers v. Bridgeton Board of Education*, 1966 *S.L.D.* 15, affirmed State Board of Education 1967 *S.L.D.* 341, affirmed Superior Court, Appellate Division December 18, 1967, cert. denied 51 *N.J.* 179(1968); *Elliott v. Neptune Township Board of Education*, 1966 *S.L.D.* 52, affirmed State Board of Education 54, affirmed 94 *N.J. Super.* 400 *(App. Div.* 1967); *Booker v. Plainfield, supra*

The central question in this appeal is whether racial imbalance exists in the Paulsboro school system to such a degree as to require remedial action. The Board of Education maintains that in the absence of a school with a student body comprised of more than 50% Negro pupils, no improper racial imbalance exists. Petitioners counter by asserting that when one school's population is 48% black and is attended by 89% of the Negro children in the community and the other school is 92% white and enrolls only 11% of the Negro pupils, the result is a racially imbalanced school system.

The Commissioner knows of no instance in which a precise definition of racial imbalance and the point at which it occurs has been laid down.In *Booker, supra*, the court made it clear that racial imbalance could be reached short of a concentration of minority group children approaching 100%. It indicated that such point might be found above 50% but well below 100%. Support may be found from various authorities for criteria such as 50% or 60%, or the ratio of the racial composition of the community or of the school pupils, or the point at which a school becomes characterized in the minds of the people as a Negro school, and others. The Commissioner has observed, in the cases brought before him involving an issue of de facto school segregation, many attempts to arrive at a statistical definition of unlawful racial segregation and has noted the consistent refusal of minority group leaders to become involved in any such "numbers game." From his study of the problem of racial imbalance the Commissioner is convinced that it cannot be reduced solely to statistical analysis or defined precisely in terms of numbers.

The test of racial balance is not properly expressed in terms of ratios or numbers but in terms of objectives. What is sought is not some acceptable statistic or formula but conditions which guarantee equality of educational opportunity, which enhance the climate for learning and which stimulate pupil growth rather than stultify it. The New Jersey Supreme Court in *Booker, supra*, had the following to say:

> "* * * In a society such as ours, it is not enough that the 3 R's are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in multi-racial and multi-cultural communities and the earlier they do so the better. It is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs. Recognizing this, leading educators stress the democratic and educational advantages of heterogeneous student populations and point to the disadvantages of homogeneous student populations, particularly when they are composed of a racial minority whose separation generates feelings of inferiority. It may well be, as has been suggested, that when current attacks against housing and economic discrimination bear fruition, strict neighborhood school districting will present no problem. But in the meantime the states may not justly deprive the oncoming generation of the educational advantages which are its due, and indeed, as a nation, we cannot afford standing by. * * * "

The test of racial imbalance is not so much, therefore, a question of ratios but a matter of the effect which the condition exerts upon the achievement of the goals of public education in the American democracy. The accomplishment of those objectives should not be thwarted by reason of the concentration in a school of pupils of one race; and when such a situation exists or is threatened and can be corrected or alleviated, a board of education is required to take remedial action.

Does such a condition exist in the Paulsboro schools? Obviously some form of imbalance exists by reason of the fact of a much greater proportion of Negro children in one school than the other. But whether that condition in itself constitutes an unlawful racial imbalance requiring correction or is so devoid of harm that it may remain undisturbed has not been clearly shown in this case. In any case, the Commissioner discovers no necessity to make such a finding under the circumstances herein.

It is apparent that there is a growing racial disproportion in the enrollments in the two schools and that whether or not an improper racial imbalance now exists, such a condition is threatened. The fact that the minority racial concentration in either school has not yet reached or passed an arithmetic majority is not necessarily significant. A board of education's responsibility is not fulfilled by the mere avoidance of a particular percentage point of racial saturation. It is the board's duty to provide the optimum conditions for learning for every child, and it is well established that that objective is more effectively achieved in a racially heterogeneous setting.

> "* * * the goal here is a reasonable plan achieving the greatest dispersal consistent with sound educational values and procedures." *Booker v. Plainfield Board of Education, supra*

It is further apparent in this case that a condition of improper racial imbalance can be avoided, the threat eliminated, and the situation improved by relatively simple measures. A more equitable racial distribution can be accomplished without great expense, drastic rearrangement of attendance areas or gross dislocation of the school system. Consideration of factors enunciated by the court in the *Booker* case such as safety, convenience, time economy, etc., appear to present no real difficulty herein. Petitioner has suggested a plan acceptable to it which appears feasible. There seems to be no reason in this case why the so-called Princeton plan would not also be workable. In fact, it appears that there are a number of possible remedies which could be implemented without great difficulty, and which would effectively remove any question of minority group segregation. The particular plan which would most effectively serve the best interest of all the children of the district is initially at least, a matter for determination by the Board of Education.

The Commissioner will make no finding that a condition of racial imbalance constituting an unlawful deprivation of equal educational opportunity exists at this time in the Paulsboro elementary schools. The Commissioner does find, however, that such a condition is threatened and is imminent in the school

district, that such circumstance is readily remediable, and that it behooves the Board of Education to take measures at this time to forestall any such development and to reduce the concentration of minority group pupils in the Loudenslager School. The Board of Education is directed, therefore, to formulate a plan to achieve a more equitable racial balance in its elementary schools and to submit its plan to the Commissioner for approval for implementation at the beginning of the 1969-70 school year.

COMMISSIONER OF EDUCATION

April 22, 1969

Alvin F. Applegate, Jr.,

Petitioner,

v.

Freehold Regional High School District, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Paul L. Blenden, Esq.

For the Respondent, Krusen & Dawes (W. Lawrence Krusen, Esq., of Counsel; William P. Murphy, Esq., on the Memorandum)

Petitioner, a teacher in respondent's schools, alleges that the withholding of a salary increment by respondent Board of Education was unlawful, an abuse of discretion, and in violation of his tenure rights. Respondent denies all allegations, and asserts that the withholding of the increment was in all respects lawful and proper.

A hearing in this matter was conducted at the office of the Monmouth County Superintendent of Schools in Freehold on December 8, 1967, March 13, 1968, and April 30, 1968, by a hearing examiner appointed by the Commissioner. The subsequent filing of memoranda by counsel was delayed by late delivery of the transcript of the final day's hearing. The report of the hearing examiner is as follows:

Petitioner has been employed as a teacher in respondent's schools since September 1962. During the 1966-67 school year he was paid at the rate of $8,300 annually, which was the salary provided for the tenth step at the master's degree level on respondent's salary schedule then in effect. On March 14, 1967, petitioner was notified by letter from the Superintendent of Schools that the Superintendent was "not able to recommend that you be granted the increment

for the coming school year." (P-2) In another communication similarly dated, and signed by both the Superintendent and the Board Secretary, petitioner was notified that at a meeting of the Board held on March 13, 1967, his salary for the school year of 1967-68 had been fixed at $8,300. (P-11) It was testified that under respondent's salary schedule for 1967-68, if petitioner had received the normal increment his salary would have been increased to $9,200, the eleventh step. On the 1967-68 scale, $8,300 was the salary for the eighth step. (P-13) Thus, petitioner contends he was not only deprived of the increment due him, but was also reduced from the eleventh to the eighth step on the salary schedule. This fact forms the basis for petitioner's allegation that his salary was in fact reduced, in violation of his tenure rights.

Respondent's salary policy (R-2 at A-6, and R-3 at A-22) provides that:

> "The Regional Board of Education may withhold the normal salary increment of any teacher upon recommendation of the Superintendent of the Regional High School district.
>
> "* * * The Superintendent shall inform teachers well in advance of such contemplated action and shall present, in writing, to the Board of Education at least sixty days prior to the close of school the reasons for recommending such a denial of increment, a copy of said notice being given to the teacher. Such a teacher may, of course, request a meeting with the Board to present arguments in his behalf."

The hearing examiner finds no evidence that the procedural requirements *supra*, for advance written notice and information were complied with in any respect. The Secretary of the Board of Education testified that the information on which the Board made its determination to withhold petitioner's increment was considered at a "work session" of the Board not more than a week prior to the March 13 meeting. He further testified that a memorandum from the high school Principal to the Superintendent recommending the withholding of petitioner's salary increment (R-4) had been sent out to Board members three days in advance of this work session. Nothing in the Board's minutes, the Secretary testified, sets forth the reasons for the Board's determination to withhold petitioner's increment.

The letter (P-2, *supra)* which the Superintendent sent to petitioner on the day *following* the Board's determination sets forth only in general terms that petitioner had not "followed through with the kind of cooperation that is necessary in many areas of responsibility." Petitioner responded, calling the Superintendent's letter an "unjust 'shock,' " and requesting a hearing before the Board of Education, with prior discovery of reports relevant to the Board's action. (R-1) In reply, the Superintendent refused to supply reports that had been submitted by the Principal and the head of the English department, but set forth the items considered by the Board as a summary of the "administrative communications" which had been sent to the Superintendent, as follows: (P-3)

"(1) On November 3, 1966, because of your not using English conference periods as they were intended, a memo was forwarded to you to 'Please schedule all conference periods in the English conference room.'

To date neither Miss Button nor Mr. Campbell have seen evidence of your compliance with this request. Also, in checking you in the faculty room, library, and/or cafeteria, you made no constructive attempt to service individual student needs.

"(2) You have repeatedly bypassed departmental meetings and on several occasions, before leaving the building, you have dropped excuse notes in the chairman's mail box. Also, on November 3, 1966, Mr. Campbell forwarded you a memo as follows: 'A conference between you and your department chairman should precede a scheduled departmental meeting—relative to your reasons why you cannot attend this particular meeting.' This directive was ignored. On some occasions you would appear at these meetings and then leave before the closing with no words of explanation, prior, during or after the fact.

"(3) You have repeatedly ignored departmental chairman's requests relative to turning in reports, having student compositions on file, meeting on an individual basis with Miss Button to discuss your classroom progress, grade system, over-all student achievement, and your daily lesson planning.

"(4) Despite repeated requests by Mr. Lubaczewski and his secretary from the beginning of the school year and to the present time, you have failed to update your emergency lesson plans and seating charts.

"(5) You have been most uncooperative and even insubordinate at times during the past school year.

"(6) You have refused to hold student conferences in the conference room after repeated requests by Mr. Campbell and Miss Button. There has been no evidence of conferences elsewhere to their knowledge. This refusal to meet the conference requirements places the conference privilege of the entire English department in jeopardy. You have refused to cooperate with the faculty member in the department who is responsible for text books and you have been delinquent in handing in all departmental records.

"(7) Your frequent absences and tardinesses have detracted considerably from your effectiveness as a teacher, particularly when you have provided no substitute plans. On tardy days you have been known to falsify your signing-in time in the office and you have given excessive excuses not to attend departmental meetings or, when you do attend, you leave prior to the completion of these meetings. You have expressed a resentment in doing most things which your immediate supervisor requests you to do and seemed to feel that you are singled out for abuse."

The testimony does not disclose that the "hearing" which petitioner requested of the Board was ever held. The Superintendent's letter (P-3) proposed a conference for April 10, 1967, but there is no conclusive evidence that such a conference took place on that date. There was testimony that a conference of an "informal" nature had been held in June of 1967, in which petitioner

participated, but there is nothing in such testimony to show the precise nature of that meeting, or that any conclusions or findings had issued therefrom. In any event, at no time prior to the Board's action was petitioner permitted to attend any "meeting with the Board to present argument in his behalf."

The hearing examiner finds that petitioner and his Principal had differed sharply about petitioner's handling of his duties as advisor of the student newspaper during the 1965-66 school year. He further finds that both the Principal and department chairman had consulted with petitioner on one or more occasions concerning particular aspects of his performance of his duties, prior to March 13, 1967. Thus it cannot be fairly concluded that petitioner was totally unaware that his immediate supervisors were observant of and not fully satisfied with his work. On the other hand, the record provides no basis for finding that petitioner knew that the department chairman and the Principal had submitted adverse reports and recommendations to the Superintendent concerning him and that copies of these reports (R-4, R-5) had been furnished to the Board. How these reports "were considered by the members of the Board of Education" is unknown; certainly petitioner was given no opportunity to be heard concerning them before the Board made its decision. Thus, although extensive testimony was presented at the hearing herein concerning the several items detailed by the Superintendent in his letter to petitioner (P-3), the hearing examiner will refrain from making any findings concerning the merit of any of these items, it being clear that whatever the reasons may have been for the respondent Board's denying petitioner his increment, he was initially denied the right to know the basis on which the withholding of the increment was recommended by the Superintendent, and the further right to be heard thereon, as provided by respondent's salary policy. (R-2, R-3, *supra*)

In a recent decision in which the hearing was limited to the single issue of the procedural validity of respondent's action to deny petitioner a salary increment, the Commissioner found that the procedures followed had given the petitioner no advance notice that his salary increment would be withheld, or any statement of his alleged shortcomings that would be the basis of the respondent Board's determination to withhold his salary increment. *Fitzpatrick v. Board of Education of Montvale*, Commissioner of Education, January 24, 1969 In setting aside the Board's denial of petitioner's salary increment in that case, the Commissioner said:

> "The Commissioner cannot support respondent's action in this case. Even though a board of education has the power to withhold a salary increment, such authority cannot be wielded in a manner which ignores all the basic elements of fair play. Conceding further that a salary increment may be denied for reasons other than unsatisfactory teaching performance, the most elemental requirements of due process demand at least that the employee to be so deprived be put on notice that such a recommendation is to be made to his employer on the basis of the unsatisfactory evaluation and that he be given a reasonable opportunity to speak in his own behalf. This is not to say that deprivation of a salary increase requires service of

written charges, entitlement to a full scale plenary hearing or the kind of formal procedures necessary to dismissal of tenured employees. But certainly any employee has a basic right to know if and when his superiors are less than satisfied with his performance and the basis for such judgment. Without such knowledge the employee has no opportunity either to rectify his deficiencies or to convince the superior that his judgment is erroneous."

The hearing examiner therefore concludes that the failure of respondent to follow a clearly defined procedure in the case herein constitutes a fault within the bounds of the Commissioner's determination in *Fitzpatrick*. It is therefore unnecessary to reach findings on the reasons, whatever they may have been, for the withholding of petitioner's salary increment. Such findings, the Commissioner has held in *Fitzpatrick*, *supra*, are the responsibility of the employing board of education, after the teacher has been afforded elemental due process.

It is accordingly the recommendation of the hearing examiner that the Commissioner direct the respondent Board to pay petitioner the increment to which he became entitled by virtue of reaching the eleventh step at the master's degree level of respondent's 1967-68 salary schedule.

* * * *

The Commissioner has reviewed and considered the report of the hearing examiner as set forth herein.

The Commissioner concurs in the finding that in withholding petitioner's salary increment for 1967-68, respondent did not follow the procedure established by its own salary policy for such an action. The Commissioner reaffirms the principles set forth in *Fitzpatrick v. Board of Education of Montvale*, *supra*, as quoted by the hearing examiner herein. The Commissioner calls attention also to the case of *Ross v. Board of Education of Rahway*, Commissioner of Education, February 19, 1968, affirmed State Board of Education, October 9, 1968, involving an "unstated" salary increment policy. In concluding that the respondent Board could not rely on such a policy, the Commissioner emphasized that when a salary policy is expressly stated, all could "know of it and be equally bound by it." In the light of respondent's failure to grant petitioner the procedural rights to which he is entitled by respondent's own rules, the Commissioner holds that any findings made by the hearing examiner on the merits of any reasons purportedly considered by respondent in withholding petitioner's increment would be violative of respondent's obligation to make such findings in the first place.

The Commissioner therefore determines that petitioner was improperly denied a salary increment due him under respondent's salary schedule for the school year 1967-68. He therefore directs that respondent pay petitioner the increment due him for 1967-68 with such further adjustment of petitioner's salary for 1968-69 as may be required under the circumstances.

COMMISSIONER OF EDUCATION

April 23, 1969

Jerome Trossman and Loretta Trossman, his wife; Wilson St. Bonnet and Barbara St. Bonnet, his wife; Rubin Barasky and May Barasky, his wife; and Robert Wilson and Eleanor Wilson, his wife,

Petitioners,

v.

Board of Education of the Borough of Highland Park, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioners, Valenti & Greenberger (Barry S. Greenberger, Esq., of Counsel)

For the Respondent, Harold J. Sklarew, Esq.

Petitioners are residents of the Borough of Highland Park and parents of children attending respondent's "Middle School." They allege that respondent has unlawfully and improperly failed to comply with the provisions of the statutes, either by providing their children a school "convenient of access" or by furnishing transportation to the Middle School. Respondent denies that it has failed to comply with the statutes as petitioners allege.

A hearing of this matter was conducted on October 29, 1968, at the Court House, New Brunswick, by a hearing examiner appointed by the Commissioner of Education. Briefs of counsel were subsequently filed. The report of the hearing examiner is as follows:

Petitioners reside in an area of Highland Park known as Cedar Lane Apartments. According to a map attached to respondent's answer, and conceded by petitioners to be a part of the record in this matter (Tr. 23, 24), the shortest route from the Cedar Lane Apartments to the Middle School is along Cedar Lane to River Road, then along River Road to Raritan Avenue, then along Raritan Avenue to South Second Avenue, then along South Second Avenue to Benner Street, along Benner Street to Grove Street, along Grove Street to the school playground and to a public entrance at the rear of the school. The testimony differed as to the distance to be traversed along the route to the school. The greatest distances measured were offered as a petitioners' exhibit (P-9) of a report submitted by a licensed surveyor, as follows:

"MIDDLE SCHOOL

MEASUREMENTS OF *WALKING DISTANCE* USING WALKS TO MIDDLE SCHOOL IN THE BOROUGH OF HIGHLAND PARK, MIDDLESEX CITY.

1. No. 124 Cedar Lane to *rear* of School = 9,724 Lin. Ft.
   No. 124 Cedar Lane to *front* of School = 10,060 Lin. Ft.
2. No. 40 Bartle Court to *rear* of School = 10,466 Lin. Ft.
   No. 40 Bartle Court to *front* of School = 10,802 Lin. Ft.
3. No. 24 Bartle Court to *rear* of School = 10,389 Lin. Ft.
   No. 24 Bartle Court to *front* of School = 10,725 Lin. Ft.
4. No. 164 Cedar Lane to *rear* of School = 10,266 Lin. Ft.
   No. 164 Cedar Lane to *front* of School = 10,602 Lin. Ft.

The above information was taped by my field crew, and is said to be true and accurate.

Mariano Bartolone, L.S."

The hearing examiner finds that no measurement from the most distant address of any petitioner herein to the rear door of the Middle School is as great as 10,560 feet (two miles).

The testimony also establishes that (1) along the described route are sections without sidewalks, (2) some of the roadway is in bad condition, (3) along portions of the route are vacant and uninhabited areas, (4) River Road passes under an archway of a railroad bridge, the roadway being at that point a two-lane road without sidewalks, and visibility through the archway and along the road being described as "not good." The Borough government, during the past year, has acquired a right-of-way through another archway of the same bridge, and has constructed a pathway through it, more-or-less paralleling River Road, so that persons using this pathway are not obliged to walk under the existing River Road arch. Use of this pathway adds to the distance to be traversed, by an undetermined amount.

Petitioners contend that the approach to the school from Benner Street through Grove Street and the school playground to a rear entrance of the school is not a proper access to the school, and that the measured distances should be to the front entrance via South Fourth Avenue and Mansfield Street. Such a route would be materially longer, involving distances in excess of 10,560 feet for some of petitioners' children. (P-9) Petitioners base this contention upon their assertion that the portion of Grove Street along the shorter route is but a "paper" street to provide access to private garages, and that the school grounds abutting Grove Street are in fact a parking lot rather than a school playground. The hearing examiner finds that Grove Street is in fact a public street, and that the respondent does not condone use of its grounds at the Grove Street area as a parking area. The hearing examiner therefore finds that the route defined in the sketch attached to respondent's answer, and described herein, is the shortest route from the nearest entrances of petitioners' homes to the nearest accessible entrance of the Middle School, using public roadways or walkways, and that no measured distance along such route equals or exceeds two miles.

It is not contested that petitioners, through their counsel, requested respondent to provide transportation for their children attending the Middle School, and that at a meeting in June 1968, respondent denied the request.

Petitioners contend that respondent has a duty pursuant to *N.J.S.A.* 18A:33-1 to provide school facilities convenient of access to their children, or, in the alternative, to provide transportation to school. "Convenience of access" as used in the statute, *supra*, they contend, must take into consideration not only distance, but also road conditions, hazards, and the age and sex of the children involved, and may not take into consideration the element of the cost of transportation. Petitioners assert that their testimony establishes undesirable and dangerous road conditions and extreme traffic hazards, and point to the fact that their children attending the Middle School are in the upper elementary grades, not older than in their early teenage years. Petitioners place reliance upon an early (1922) transportation case, *Piell et al. v. Union Township Board of Education*, 1938 *S.L.D.* 748, affirmed State Board of Education 750, in which the Commissioner said:

> "There are many other factors besides distance which go to make up remoteness from a schoolhouse and the State Board of Education has held in decisions rendered by it that not distance alone, but all the other factors of each individual case must be taken into consideration by a board of education in deciding the necessity for transportation."

The hearing examiner notes that in the *Piell* case the Commissioner found the distances under consideration "equaling or even exceeding two miles." Respondent urges this fact, citing the Commissioner's continued reliance upon the established minimums of two miles for elementary school pupils and two and one-half miles for high school pupils for determining remoteness as the essential requirement for mandated transportation. See *N.J.S.A.* 18A:39-1. Respondent quotes the Commissioner's finding in *Schrenk et al. v. Ridgewood Board of Education*, 1960-61 *S.L.D.* 185, 186, as follows:

> "There have been numerous appeals arising out of the interpretation of remoteness by local boards of education. In a series of decisions extending over a long period of time, a board of education has never been reversed for refusing transportation to an unhandicapped pupil residing within two miles of a schoolhouse in the case of elementary pupils and within two and one-half miles where high school pupils are concerned. These distances have become so well established that county superintendents have for many years based their approval of transportation for State aid on these limits. The State Board of Education has adopted these distances as a guide for the approval of State aid for transportation."

The hearing examiner finds that the testimony does not support petitioners' contention that the conditions of travel, including road conditions and traffic hazards, create a situation of time delay such as to warrant a conclusion that respecting petitioners' children, the Middle School is not convenient of access.

Nor is there support for petitioners' allegation that respondent made the cost of providing the transportation sought by petitioners a factor in determining convenience of access. The testimony establishes that the Board determined that the distances involved were less than two miles, and having so determined, found that no legal obligation to furnish such transportation was imposed by reason of remoteness. In considering further whether such transportation would be warranted within the discretionary power of the Board to provide transportation for less-than-remote distances, (*cf.* *N.J.S.A.* 18A:39-1.1) it is clear that respondent considered not only the cost for this particular transportation, but also the possible extension of the cost if it thereby became necessary to provide transportation elsewhere in the district on a non-discriminatory basis.

But, petitioners argue, in any event the route described by the Board, using the "rear entrance" approach through Grove Street and the school playground, must be defined as two miles, and therefore remote, within the meaning of State Board of Education guidelines for State reimbursement of transportation. Petitioners point to a resolution of the State Board, as amended, which provides that in computing distance for purposes of State transportation aid, the County Superintendent should employ this definition:

> "Miles from school - the shortest distance in miles and tenths from the pupil's home to his assigned school by an accessible public road or highway."

Thus, petitioners aver, the homes of two of petitioners being 1.98 miles and 1.97 miles respectively from the school (*cf.* P-9, *supra*), by the application of the State Board's guideline they must be determined to be two miles from the school, and therefore remote.

Respondent, on the other hand, calls attention to the organizational outline of the State Board's resolution, and argues that the definition which petitioner cites is a definition *only* for the purpose of computing State transportation aid (Section F of the resolution's guidelines) and is not applicable to the approval of the transportation for State aid purposes. Section A of the resolution's guidelines reads as follows:

> "The words 'remote from the schoolhouse' should mean 2½ miles or more for high school pupils and 2 miles or more for elementary pupils, except for pupils suffering from physical or organic defects. State aid for shorter distances for the sole reasons of traffic hazards should not be given, inasmuch as traffic hazards are a local responsibility."

The hearing examiner concludes that the use of miles and tenths of miles from school, as referred to in the State Board of Education resolution to provide guidelines for county superintendents, is for computational purposes only in figuring State transportation aid, and that there is no basis either in this resolution or in the numerous decisions of the Commissioner and State Board

over many years for using a measurement of less than 10,560 feet to establish remoteness from an elementary school for the purposes of the pupil transportation statutes. *N.J.S.A.* 18A:39-1 *et seq.* The State Board resolution (Section A, *supra*) also eliminates traffic hazards as a sole consideration of determining remoteness. In *Read et al. v. Roxbury Board of Education*, 1938 *S.L.D.* 763, 765 (1927) the Commissioner said:

> "Boards of education are not authorized by law to provide for the safety of children in reaching school. While a board should be concerned as to the safety of children and should report to the State Police or local officers the reckless use of highways, it is not directly responsible for the danger to pedestrians because of automobile traffic any more than it is responsible for sandy or muddy highways. Highways and street dangers demand parental concern and care of children to avoid accidents and also a civic enforcement of traffic laws rather than larger expenditures of public funds to provide transportation. * * * "

This position has been reaffirmed in numerous subsequent decisions. See, for example, *Iden v. Board of Education of West Orange*, 1959-60 *S.L.D.* 96; *Schrenk v. Board of Education of Ridgewood, supra; Frank v. Board of Education of Englewood Cliffs*, 1963 *S.L.D.* 229; *Livingston v. Bernards Township Board of Education*, 1965 *S.L.D.* 29; *Peters v. Washington Township Board of Education*, Commissioner of Education, March 8, 1968; *Friedman v. Board of Education of South Orange and Maplewood*, Commissioner of Education, March 19, 1968, affirmed State Board of Education, February 5, 1969.

* * * *

The Commissioner has reviewed and considered the findings of the hearing examiner as set forth herein. The findings disclose that the distances traversed by petitioners' children along the shortest route between their homes and the nearest entrance of the Middle School, using public highways, is less than two miles. The Commissioner concurs with the hearing examiner's conclusion, and so holds, that for purposes of determining remoteness from school the two-mile distance for elementary school pupils must be interpreted and defined to mean 10,560 feet and cannot include a lesser measurement, as petitioners urge. The Commissioner therefore determines that petitioners have not established that their children are entitled to transportation to the Middle School in Highland Park by reason of living remote from the school.

The Commissioner further determines that notwithstanding evidence of existence of traffic hazards and undesirable road conditions along the route traveled by petitioners' children, such conditions do not establish a requirement that transportation be furnished at public expense, when the distance to be traversed by petitioners' elementary school children is less than two miles. The Commissioner further finds that the conditions established by the proofs herein do not constitute failure of respondent to provide a school convenient of access to petitioners' children, as required by statute. The Commissioner reaffirms the position originally established in *Read v. Roxbury Board of Education,supra*, as

quoted herein, and as consistently reaffirmed in numerous decisions thereafter. In so reaffirming this position, the Commissioner is not insensitive to the concerns felt by petitioners herein, as well as all other parents, for the safety of their children as they travel to and from school. But, the Commissioner is constrained not only by the limits of existing law but also by the very practical limits of a board of education's authority and responsibility *vis a vis* the responsibility of other governmental agencies to provide for the safe conditions of travel for pedestrians, in this case school children.

Thus the question of whether transportation will be provided for petitioners' children becomes one lying within the exercise of respondent Board's discretion. *N.J.S.A.* 18A:39-1.1 It is well established that absent a clear showing of unlawful action or abuse of its discretion, the Commissioner will not interfere in a matter lying wholly within the discretionary authority of a board of education. *Thomas v. Morris Township Board of Education*, 89 *N.J.Super.* 327 *(App Div.* 1965); *Boult and Harris v. Passaic Board of Education*, 1939-49 *S.L.D.* 7, 13, affirmed State Board of Education 15, affirmed 135 *N.J.L.* 329 *(Sup. Ct.* 1947), 136 *N.J.L.* 521 *(E. & A.* 1948); *Pepe v. Livingston Board of Education*, Commissioner of Education, April 10, 1969 There has been no such showing here. Rather, the evidence establishes that respondent has evaluated conditions, including considerations of cost, and has determined that it will not provide the transportation sought by petitioners. The Commissioner finds no basis for interfering with that determination.

The petition of appeal is accordingly dismissed.

COMMISSIONER OF EDUCATION

May 1, 1969

Raymond C. Sylvester,

Petitioner,

v.

Board of Education of the Watchung Hills Regional High School, Somerset County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Wharton, Stewart & Davis (Sheldon B. Brand, Esq., of Counsel)

For the Respondent, Robert J. T. Mooney, Esq.

Petitioner, a member of the senior class in respondent's high school, alleges that he was suspended from school for violation of a regulation governing acceptable hair styles. He prays for an order reinstating him in school and setting aside the rule in question. Respondent denies that petitioner's suspension was in any way improper or that its rules governing pupil dress and appearance are unreasonable or unenforceable.

Concurrently with the filing of the petition herein, petitioner moved for an order of reinstatment in school *pendente lite.* Argument on the motion was heard on October 29, 1968, before the Assistant Commissioner in charge of Controversies and Disputes at Trenton. On November 8, the Commissioner, in a written decision, granted the motion and ordered petitioner's suspension vacated and petitioner reinstated in school immediately pending determination of the issues herein. Respondent refused to admit petitioner to school and appealed the Commissioner's order to the State Board of Education on November 13. Thereafter, on December 3, the Chancery Division of Superior Court ordered respondent to comply and petitioner was reinstated and has continued in school. After several adjournments at the request of counsel the matter was finally heard by the Assistant Commissioner in charge of Controversies and Disputes on April 14, 1969, at the office of the Somerset County Superintendent of Schools in Somerville. Counsel waived the filing of briefs and submit the issues for adjudication on the record.

Petitioner entered Watchung Hills Regional High School in September 1964 and during the 1968-69 school year has been a member of the senior class. Sometime in September 1968 the Superintendent of Schools discussed with petitioner the standards for pupil appearance adopted by the Board of Education and the fact that petitioner's hair length did not comply with the code. The Superintendent testified that he gave petitioner a week to think about it and that when petitioner reported back to him that he was not willing to change, the following letter, dated September 30, 1968, (P-3) was sent petitioner's parents over the signature of the Superintendent:

"Some time ago I informed your son that his hair as presently worn violated the school dress code and have given him until tomorrow, October 1, 1968, to correct this by having it cut or trimmed as necessary to comply with the code. This dress code was established by a committee composed of parents, faculty and students and then approved by the Watchung Hills Regional High School Board of Education. This code spells out reasonable minimum standards for students' appearance in school.

"Your son Ray has indicated that he will not comply with this code and so, much to our regret, he will be suspended from school starting Tuesday, October 1, 1968, until his hair is trimmed or cut to meet the code or unless the Board of Education decides otherwise at the conference session scheduled tonight.

"Your understanding of the Board of Education's position on this as elected representatives of the community is important. Therefore, they have asked me to invite you and your son to meet with them in private session tonight, September 30, at 9:00 P.M. to discuss this problem in full. Your son has been asked to deliver this by hand so that it will reach you soon enough for you to arrange to come tonight for this private session. However, if there is any conflict on this time and date, I would appreciate a phone call from you advising me of this."

Petitioner and his parents met with the Board on September 30, and on October 8, 1968, a second letter (P-4) over the signature of the Principal was delivered to them:

"The Watchung Hills Regional High School Board of Education has carefully considered the reasons your son gave in person to them at our Monday, September 30, 1968, conference session for not trimming his hair neatly in accordance with the school dress code which was approved by the Board of Education at its regular meeting on Monday, September 9, 1968.

"In the judgment of the Board these reasons are invalid and, therefore, they have directed me to suspend Ray beginning Tuesday, October 8, 1968, until such time as these requirements, in my opinion, have been met.

"Ray may phone my office for an appointment whenever he has met the requirements and is ready to return to school."

Thereafter, on October 22, petitioner filed the appeal herein and was subsequently reinstated in school in early December pending the outcome of these proceedings.

The testimony reveals that some form of dress code has been in existence in respondent's high school for some years, that it has been periodically revised, and that the latest revision was adopted by the Board of Education on

September 9, 1968. The standards applicable to the hair of male pupils in prior years were not altered, however, and remained as follows:

> "Boy's hair must be neat and in good taste. The hairline in the back is to be above the collar; on the sides the hair is to be trimmed above the ears. Students are expected to be cleanly shaved." (R-1)

Petitioner testified that he had been wearing his hair at different lengths for the past four or five years and that while it may have been somewhat shorter than at present, he has generally kept it long. At the time of the hearing his hair was parted on the right side and hung on both sides of his face and in back to his shoulders. It appeared clean and was neatly combed.

It is stipulated that petitioner's suspension was based solely on his refusal to conform his hair style to the requirements of the school's code for pupil appearance. Requirements of the dress code, other than those applying to male hair length, were not placed in issue.

It is further stipulated that there have been no known instances of disorder or disruption in the school involving petitioner or his personal appearance. The school Superintendent and Principal expressed opinions with respect to the necessity for regulation of pupil dress and appearance and their concern for the proper administration of the school if certain standards are not maintained. They testified to their belief that unrestrained individuality in pupil appearance creates problems of deterioration in the general administrative control of the school, isolation of pupils in cliques, adverse community reactions, inability to recruit competent teachers, and personal cleanliness. No evidence was offered, however, that the manner in which petitioner wears his hair had created problems of discipline or disruption of the school program.

The issue raised here, *e.g.*, whether petitioner may be denied his statutory entitlement to attend the public schools of the district for the sole reason that he wears his hair in a long style in the absence of any evidence of threat to the welfare of other pupils because of disruption caused by such appearance or by lack of cleanliness, has already been determined. In the case of *Pelletreau v. New Milford Board of Education*, 1967 *S.L.D.* 35, reversed by the State Board of Education on other grounds *Ibid.* at page 45, the Commissioner said at page 41:

> "Accordingly, while respondent has the inherent power to enact rules to regulate pupil appearance, it may not act capriciously or unreasonably in doing so. Such rules must have as their purpose the realization of an educationally valid and desirable end and they must be reasonably designed to achieve that purpose. If respondent adopted its 'Guidelines,' for instance, in order to produce conformity of appearance of its pupils, or because members of the faculty or of the Board do not personally approve of particular styles affected by some young people, or in order to develop a sense of 'good taste,' or for similar reason, the validity of its action could be seriously questioned. Indeed, insistence upon conformity of appearance is repugnant to principles of good citizenship which our schools must seek

to instill in the future generation. It is also pertinent to question, in any attempt to legislate particular standards of dress or 'good taste,' whose standards are to serve as the norm. 'Good taste' is a matter of education, not legislation. Attempts by school authorities to impose arbitrarily determined standards of appearance upon pupils for the sole purpose of teaching 'proper' dress or producing greater uniformity in the student body, is a highly questionable excursion into the realm of parental responsibility, the purpose of which it would be difficult to sustain."

In reinstating the pupil in the *Pelletreau* case, *supra*, the State Board made these observations at page 47:

"It is essential to the orderly process of education that local boards concern themselves with the conduct of the students in their schools where such conduct constitutes a threat to the educational process. We are not satisfied that the record demonstrates that long-haired males present a significant threat to orderly discipline in the schools. The evidence does not indicate that the reaction of the other students was so grave as to be beyond control by the exercise of ordinary simple disciplinary measures.

"Nor do we believe that this case presents issues of sufficient importance to the management of the public schools to cause us to embark upon an examination of the constitutional limits of the authority of boards of education to regulate the conduct of pupils.

"We recognize that students live most of their lives outside the walls of their schools. During their out-of-school hours, they are subject to the discipline of their parents and must abide by the laws of the community. A school regulation forbidding long hair in effect regulates outside of school conduct. It is not possible to have short hair in school and revert to longer hair at home. A regulation relating to dress does not have this effect. A student may well comply with regulations as to what may or may not be worn during school hours and dress as he or his parents see fit during the non-school hours.

"We come to the conclusion that the portion of the 'Guidelines' resolution quoted above should be set aside. We are not convinced that the rule has a substantial relationship to a legitimate purpose. We cannot conceive that the threat to school discipline is sufficiently great to justify interference with the relatively harmless experimentation of students in the field of hair styling."

Finally, the Commissioner takes note of the recent decision of the U.S. Supreme Court in the case of *Tinker v. Des Moines Independent Community School District et al.*, 89 *S. Ct.* 733 (1969). While this decision deals with the guaranties of freedom of expression enunciated in the First Amendment of the U.S. Constitution and their application to the wearing of symbolic armbands, the following statements have relevance to the issue raised in the instant matter:

> "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that the exercise of the forbidden right would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."
>
> "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."
>
> "* * * the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression. * * *"

Such is the case herein. It is stipulated that petitioner caused no disruption or interference with school activities by reason of the manner in which he wore his hair. Denial of his right to attend school on such grounds is improper, therefore, and cannot be sustained.

Finally it should be noted that the decision herein is limited to the issue raised, namely, the right of a male pupil to wear his hair long, absent any showing of adverse effect upon the operation of the school program. In this connection the caution expressed by the State Board of Education in *Pelletreau*, *supra*, is repeated here:

> "Of course, the reasonable rules and regulations of a local board of education shall be enforced. We stress the limits of this decision and caution any ingenious and provocative New Jersey public school students that our concern for freedom of expression is tempered by our determination that the proper course of educational process not be impeded and that the high standards of our schools be maintained."

The Commissioner finds and determines that petitioner's rights to attendance at school were improperly suspended by respondent. Petitioner's reinstatement, already ordered *pendente lite*, is affirmed.

COMMISSIONER OF EDUCATION

May 20, 1969

Peter J. Saker, Inc., a body corporate of the State of New Jersey,

Petitioner,

v.

Board of Education of the Matawan Regional School District, Monmouth County, and Michael Riesz & Co., Inc., a body corporate of the State of New Jersey, Fords, New Jersey,

Respondents.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Parsons, Canzona, Blair & Warren (Theodore B. Parsons, Sr., Esq., of Counsel)

For the Respondent Board of Education, DeMaio & Yacker (Vincent C. DeMaio, Esq., of Counsel)

Petitioner is one of several contractors who submitted bids for the construction of additions to two of respondent Board's school buildings. He alleges that although he was the low bidder on one project respondent Board awarded the contract to another firm. He asks that the award be set aside and respondent be ordered to assign the contract to him.

A motion by respondent for summary judgment was denied in a written opinion by the Commissioner of Education on February 19, 1969. A hearing was held thereafter on February 28, 1969, before the Assistant Commissioner in charge of Controversies and Disputes at the Court House, Freehold. Counsel subsequently submitted briefs. The testimony and evidence disclose the following uncontroverted facts.

Respondent proposed and received voter approval for the erection of additions to its Ravine Drive School and Broad Street School. Both buildings are used for elementary school purposes and are located in the Borough of Matawan within approximately one mile of each other. The plans for each addition were prepared by separate architects and were submitted to and approved by the State Board of Education. Thereafter respondent advertised its construction proposals and invited bids on the work to be performed. Bidders were offered the opportunity to bid on only one of the school additions, on both projects separately, and/or on the combined additions in total. Bids were received as follows:

Bidder	Ravine Drive School	Broad Street School	Both Schools
Ingrassia	$241,000	$510,000	$748,000
Riesz	242,000	497,000	734,000
Saker	244,324	491,396	735,720

After considering the bids, respondent decided to award a contract to Michael Riesz & Company, Inc., hereinafter "Riesz," for the total project on the basis of its low bid for the combined jobs. That this did not represent the lowest possible award may be shown as follows:

Low Bid on Ravine Drive	$241,000	(Ingrassia)
Low Bid on Broad Street	491,396	(Saker)
	$732,396	
Low Bid on Combination	734,000	(Riesz)
Difference	$ −1,604	

At a special meeting on October 30, 1968, respondent took action to award contracts for various classifications of the work. The minutes of that meeting indicate that with respect to the structural steel, plumbing, and electrical work, separate contracts were awarded to different bidders on the two additions. Single contracts for the combined projects were awarded to one bidder for heating and ventilating and to Riesz for general construction. Bidders were notified by informal methods, such as conversations with the architects, of the action of the Board.

Thereafter, a "job meeting" was held on November 14, at which were present appropriate representatives of the Board of Education, the architects and the successful bidders. Various details related to performance of the contracts were discussed, and the contractors were directed to place orders for materials and schedule their delivery. Some delay was experienced in the actual execution of contracts, which were dated November 20, 1968, although the evidence reveals that they were not prepared or signed until early in December. The petition of appeal herein was served upon respondent on November 20, 1968.

Petitioner contends that he was the lowest bidder on the Broad Street School addition and as such is entitled to award of the contract. He argues that the Board violated the bidding laws in awarding the contract on the basis of the lowest bid on the combined additions. He cites the language of the statutes and argues that their reference to "any building" prohibits the taking of bids and awarding of contracts for other than work on a single building. Nowhere, petitioner claims, can authority be found for inviting bids on a combination of building projects.

Respondent's selection of a bidder on the basis of a low bid for all the work at two schools exceeds its authority, in petitioner's opinion. But even if, *arguendo*, respondent could accept bids on the total project, it is still bound by law to make its award in terms of the lowest bids received, petitioner urges. This, he claims, respondent did not do, for the reason that the bid as awarded exceeds the separate low bids by $1,604. Respondent is required, petitioner contends, to award the contract for Ravine Drive School to Ingrassia and for Broad Street School to petitioner, for the reason that the sum of their separate bids is lower than the bid of Riesz for the combined work.

Respondent answers petitioner's contention that it is without authority to solicit bids and award contracts on the basis of more than one project by saying that the mere lack of plurals in the statutes with respect to the word "building" does not create such a prohibition. It points to the fact that it is common practice when more than one building is involved for boards of education to invite and receive both separate and combined bids. Respondent also attacks petitioner's standing to bring the subject action on the ground that the attack is upon the specifications and contends that petitioner is, therefore, beyond the time when he can make timely and effective protest, having already submitted a bid. Moreover, respondent asserts, petitioner is in laches for the reason that although he had knowledge of the designation of successful bidders by at least November 1 he did not file the action herein until November 20. In that interval, respondent contends, the Board changed its position by directing the work to proceed, and the contractors incurred substantial obligations while petitioner did nothing.

Respondent defends its actions by contending that its award was, in fact, made to the low bidder. It asserts that it invited bids on three separate and distinct bases: (1) a bid for the Ravine Drive School project, (2) a bid for the Broad Street School project, and (3) a bid for the total project. All bidders were thus placed on an equal footing, were accorded equal treatment, and there was no opportunity for favoritism, respondent urges. If it had so chosen, respondent argues, it could have received bids solely on the basis of a total combined bid without asking for separate proposals on each of the schools. In such case, it says, Riesz would have been the low bidder without question. The fact that the Board decided to take various forms of bids and reserved the right to select the most advantageous in no way alters the situation, in respondent's opinion. It did no more than exercise its right to award the contract on the basis of either (1), (2), or (3) above, respondent contends, and once having elected to proceed under (3) it made its award to the contractor who submitted the lowest bid in that category.

Respondent admits to knowledge that its determination would result in an increased cost of $1,604 but contends that such a difference is negligible and that under the circumstances the Board was obliged to consider the non-monetary advantages of a single contract. It asserts that its major concern is the completion of the additions for use at the beginning of the next school year. It claims that in dealing with one contractor it will have more leverage to induce maximum performance and more flexibility to concentrate on one job project at the expense of the other, if necessary, in order to insure completion in time. The proper exercise of its discretionary authority required the consideration of all relevant factors, respondent argues, and the result of such deliberations was to award the contract on the basis of the total project. Absent any showing of fraud, corruption or favoritism, respondent asserts, the award must be deemed to have been properly made.

Petitioner rejects respondent's contention that the attack herein is directed at the validity of the specifications and is consequently out of time. In support he points to the acknowledgment in his petition of appeal that the

specifications for the Broad Street School were in accordance with the statutes. Petitioner asserts that his position has always been that respondent is required to award construction contracts to the lowest responsible bidder and in this case it failed to do so.

Nor does petitioner agree that he delayed in bringing his appeal. He points to the fact that the petition was filed on November 20, less than one week after the job meeting of November 14 and prior to the execution of contracts. Any substantial commitments made by respondent Riesz occurred after November 20, petitioner alleges, and were entered into at his own peril.

The statutes pertinent to the issues herein are as follows:

N.J.S.A. 18A:18-4

> "No contract for the construction, alteration, enlargement or repair of any building by a board of education of any school district, the entire cost whereof will exceed $2,000.00, shall be entered into without first advertising for and receiving proposals therefor and (a) separate bids, for the doing of the work and the furnishing of materials of each category, for which it is requisite that separate plans and specifications be prepared, and also (b) bids for all the work and materials required to complete the building to be included in a single over-all contract, in which case there shall be set forth in the bid the name or names of all subcontractors to whom the bidder will subcontract for the furnishing of any of the work and materials specified in subparagraphs a. through d. of section 18A:18-3, each of which subcontractors shall be qualified in accordance with section 18A:18-9.
>
> "If the sum total of the amounts bid by the lowest responsible bidder for each such branch is less than the amount bid by the lowest responsible bidder for all of the work and materials, the board shall award separate contracts for each of such branches to the lowest responsible bidder therefor, but if the sum total of the amount bid by the lowest responsible bidder for each such branch is not less than the amount bid by the lowest responsible bidder for all the work and materials, the board shall award a single over-all contract to the lowest responsible bidder for all of such work and materials. * * *"

N.J.S.A. 18A:18-19

> "The board shall prescribe, * * * the regulations under which advertisement for proposals shall be made and said advertisement shall be made accordingly."

N.J.S.A. 18A:18-20

> "No bid for the construction, alteration or repair of any building or for supplies shall be accepted which does not conform to the specifications furnished therefor and all contracts shall be awarded to the lowest responsible bidder."

It is to be noted that no question is raised with respect to the responsibility of any of the bidders. Both parties agree that all three contractors named herein are qualified and competent to perform the work proposed.

Petitioner's contention that boards of education may only solicit bids or award contracts on the basis of a single building project is without merit. The statutes, recited *supra*, refer to *any* building and are designed to indicate the point at which a school district must employ competitive bidding procedures in order to let contracts. The architect testified that in his experience it was customary to advertise for and accept bids on multiunit projects, and it is within the Commissioner's knowledge that such is common practice in New Jersey school districts. The Commissioner finds no such restriction in the statutory language as petitioner advocates. Nor does he find that respondent erred in soliciting bids in three ways or that bidders were placed at a disadvantage or on an unequal footing thereby. The scheme for submission of proposals was clearly set forth in the specifications and advertising and was plain to all. There is an absence of evidence of objection to the procedure by any bidder and it appears that all those interested understood and accepted the manner in which proposals could be made. The Commissioner finds no legal defect in respondent's decision to solicit bids on three separate proposals or the manner in which it advertised for and received such bids.

Petitioner's primary contention is that the contract herein was not awarded to the lowest bidder. Respondent's action in this respect is open to question and the Commissioner cannot condone it as sound or acceptable practice. The primary purpose of the competitive bidding statutes is to insure that the public's interest is safeguarded by having public work performed at the lowest cost. *Tice v. Long Branch*, 98 *N.J.L.* 214 *(E. & A.* 1922); *Waszen v. Atlantic City*, 1 *N.J.* 272 (1949) Respondent could have avoided any question on this score by advertising and receiving bids on a total project basis in the first instance or could have rejected all bids in order to readvertise on such a basis. Unfortunately this was not done and a question has been raised which clouds the action taken by the Board.

However that may be, the Commissioner finds no necessity to reach this issue for the reason that in any case there is no relief which can be afforded to petitioner. The testimony at the time of the hearing disclosed that work on the job had already progressed so far as to make it impracticable to consider voiding the contract executed with Riesz and reassigning it to petitioner. Such a course would be manifestly unfair to the other contractors engaged in separate phases of the work. It would also be unreasonable with respect to contractor Riesz who accepted respondent's award of the contract in good faith and proceeded to perform under it.

While it is true that Riesz is a party respondent to this action, it has taken no part in these proceedings. Its president was called as a witness by the Board of Education and testified to the work performed and commitments made prior

to the date of the appeal and up to the time of the hearing. From his testimony it is clear that Riesz entered into the contract with the Board in good faith and proceeded to employ personnel, organize its staff and order materials after the job meeting on November 14. It is also clear that little if any of those materials had been delivered or paid for on November 20, the date when petitioner instituted this litigation. If action had been taken at that time which would have effectively stayed any further performance under the contract until the issue of the award could be determined, a remedy would have been much more available. Respondents were not enjoined, however, and proceeded, apparently in the belief that they had acted correctly, to perform the work called for. As matters stood at the time of the hearing, the foundations, exterior masonry walls and some door bucks were already installed on the Broad Street School, and at Ravine Drive the concrete footings and half of the concrete piers and anchor bolts were completed. The testimony revealed further that work was in progress on such matters as the engineering work preliminary to fabrication of laminated wood arches and that various other commitments had been made for metal partitions, reinforcing bars, and other materials and supplies. What has been done cannot be undone at this juncture. *Taylor v. Gloucester Township Board of Education*, Docket No. A-180-55 *(App. Div.* 1956) The Commissioner knows of no practicable relief, therefore, which can be afforded in these circumstances.

While it is clear that petitioner instituted this action prior to the actual preparation and execution of the contract at issue, which did not occur until early December although dated November 20, the importance of the formal execution of the contract must be discounted. It was at the Board meeting on October 30, and the job meeting on November 14 that the significant commitments were made and the go-ahead instructions were given. The execution of the written contract some time later was no more than a formality confirming offers already made and acted upon in good faith. It is equally clear that petitioner knew of the Board's decision to award the total project contract to Riesz within two days after that determination was made at the meeting of October 30. Nevertheless he took no action then or thereafter to halt the flow of actions which had been set in motion until the filing of the subject appeal on November 20 asking for a determination of the validity of the Board's actions. The New Jersey Supreme Court has spoken recently with respect to those who seek to challenge the award of contracts on public work in the case of *Richardson Engineering Co. v. Rutgers et al.*, 51 *N.J.* 207, 219 (1968):

> "* * * When a party seeks review of the award of construction contracts for projects of the type involved here, the attack must be made with the 'utmost promptitude.' *Bullwinkel v. City of East Orange*, 4 *N.J. Misc.* 593 *(Sup. Ct.* 1926). Whenever public money is to be expended or if the successful bidder has made substantial preparations for the work, incurred considerable expenses and obligated himself still further in undertaking to carry out the contract, ordinarily, review of the award will be denied unless sought promptly. *Gunne v. Borough of Glen Ridge*, 11 *N.J. Misc.* 3 *(Sup. Ct.* 1932); *Brown v. Atlantic City*, 5 *N.J. Misc.* 397 *(Sup. Ct.* 1927); *Read v. Atlantic City*, 49 *N.J.L.* 558, 562 *(Sup. Ct.* 1887). * * *"

In terms of availability of practical relief, petitioner might well have sought to restrain respondents from proceeding until the issues raised were properly determined. Not having done so and the work having progressed to a point of no recall, the matter in essence becomes moot.

The Commissioner finds that whether or not Michael Riesz and Co., Inc., was the lowest bidder on the general construction proposal for additions to two elementary schools in the Matawan School District, the work already performed had proceeded to a point beyond recall before effective action was taken by petitioner. Under such circumstances the Commissioner finds that there is no practicable relief which he can afford to petitioner and therefore the contract will remain undisturbed as awarded.

The petition is dismissed.

COMMISSIONER OF EDUCATION

May 27, 1969

Pending before State Board of Education.

East Iselin Association,

Petitioner,

v.

Board of Education of the Township of Woodbridge, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Peter J. Selesky, Esq.

For the Respondent, Foley & Gazi (Francis C. Foley, Esq., of Counsel)

Petitioner is a civic association located in Woodbridge Township, consisting primarily of parents of school children affected by respondent's discontinuance of certain transportation routes. The petition herein was filed on behalf of the Association by its president, who is the father of a pupil so affected. The petition alleges arbitrary, capricious and discriminatory action by respondent in eliminating certain bus routes, and failure of respondent to make appropriate surveys upon which to base a fair and reasonable transportation policy. Respondent denies petitioner's allegations, and asserts that its actions were in accordance with law and in the exercise of its discretionary authority. Additional claims for money damages and for adjudication of proposed elimination of other bus routes were withdrawn by stipulation of counsel.

A hearing in this matter was conducted on November 19, 1968, at the Court House, New Brunswick, by a hearing examiner appointed by the Commissioner. Briefs of counsel were filed subsequent to the hearing. The report of the hearing examiner is as follows:

The 167 pupils around whom this petition is concerned reside in an area which petitioner calls East Iselin, shown on a Township map (R-1) as lying on the westerly side of U.S. Route 1, and testified to be less than two miles from School No. 26, to which the children are assigned. Upon completion of an addition to School No. 18, which is closer to the petitioner's homes, the affected children will be transferred to that school, consistent with the respondent Board's policy to assign children to neighborhood schools, when facilities are available.

From the beginning of the 1967-68 school year the 167 affected children were transported to School No. 26 along three transportation routes designated by respondent as routes 5-A, 5-P, and 5-S. On or about October 18, 1967, the parents of the children received from the Superintendent of Schools the following notice: (Tr. 13)

> "Dear Parent:
> "The Board of Education at a meeting on October 16, 1967 decided to discontinue transportation of your child/children to School No. 26 effective December 1, 1967. It is the Board's position that the distance involved does not require transportation at public expense."

See also Exhibit P-1. A committee of parents met with the Board, seeking a reversal of the determination to discontinue the transportation. As a result of that meeting, one of the committee members received the following letter, dated November 20, 1967: (P-5)

> "The Board of Education, at a conference meeting on November 16, 1967, discussed your request for the reinstatement of the bus route affecting the transportation of children from your area to School No. 26 in Iselin.
>
> "It was the Board's decision to allow the decision made at a regular Board Meeting on October 16, 1967, to stand as decided at that time.
>
> "It was further decided that the Board will vigorously support the enclosed resolution as submitted by the Board of Education of Madison Township to the Federated Boards of Education. They will also implement, immediately, a review of all of the present bus routes to eliminate inequities."

Petitioner's witnesses testified that members of the Association rode over other routes operated by respondent and determined that several other routes involved distances of less than two miles. It was testified that the criterion employed to select routes to be so surveyed was that of remoteness from the

school (Tr.51), and the hearing examiner finds that the testimony establishes that in various sections of Woodbridge Township, which covers some 27 square miles in area, bus routes have been established, and were continued after routes 5-A, 5-P, and 5-S were discontinued, where the distances from pupils' homes to schools were less than two miles.

The testimony of respondent, however, given by its Superintendent of Schools, establishes that distance alone is not the criterion for establishing transportation routes. While there is no evidence that respondent has had, either before or since the letter of November 20, 1967, (P-5) a written policy for transportation, the fact that there is a policy is demonstrated in the following excerpt from the Superintendent's testimony: (Tr. 71, 72, 73)

"Q. Do you know what the policy of the Board of Education is with respect to the transportation of pupils?
"A. Generally they follow the State regulations as far as the State policy on transportation as far as remoteness is concerned.

"Q. In other words, they follow the law with respect to granting transportation to those children where there is reimbursement. Is that correct?
"A. (The witness nods his head).

"Q. Are there other children that are transported?
"A. Yes.

"Q. What other children are transported?
"A. Children are transported on the basis of a State law or the State regulations and other children are transported because of hazardous conditions, some unusual condition that would make transportation necessary.

"Q. And what would be the procedure with respect to establishment of a route based on a hazardous condition?
"A. Well, if children were being transported out of their neighborhood, or if they were being assigned to a school, it would be the responsibility of the Superintendent to check the route and if, in his judgment, there was a hazard involved, a report would be made to the Board of Education. The Board of Education would then decide how they were going to handle it, whether they would allow transportation or not.

"Q. Is this something that there would be analysis on from year to year?
"A. Oh, yes. In Woodbridge this is quite necessary because hazards come and go. A hazard might not be there this year, but next year it might be there, or it might be removed, so it has to be reviewed."

While the Superintendent was unable to recall specifically the condition under which transportation for the children affected herein had been originally provided, there was testimony that sidewalks had been completed along the route from the East Iselin section to School No. 26 within the recent past. (Tr. 95) No testimony was elicited to show the existence of particular or unusual hazards along the route traversed by the affected pupils to and from School No. 26 of the same or similar nature as those described by the Superintendent to exist along other less-than-remote routes established by respondent. The hearing examiner finds no basis in the testimony for a conclusion that the pupils affected are in the same situation as other pupils who are transported for less-than-remote distances on account of hazardous conditions.

Petitioner complains that respondent has been derelict in not having made a complete and thorough survey of all transportation routes in the school district and thereafter establishing a fair and equitable policy for transporting all non-handicapped pupils in the district. There is no evidence that the "review of all of the present bus routes" which was indicated in the Superintendent's letter of November 20 (P-5, *supra)* was undertaken or completed, but the Superintendent testified that there is a "continual review" of hazardous conditions, "and if they are increased or decreased, they are dropped off, buses are dropped off or buses may be added on." (Tr. 78) Respondent urges that it is not required to perform the acts which petitioner seeks, and that as long as it acts within the law, there is no obligation that it develop a written transportation policy.

Respondent moves for dismissal, contending that the central issue is whether respondent has discriminated against petitioner, and that petitioner has failed to show that its children were treated differently from others similarly situated. In support of its position, respondent cites *Schrenk v. Board of Education of Ridgewood*, 1960-61 *S.L.D.* 185, 187, wherein the Commissioner said, respecting alleged discrimination in providing less-than-remote transportation:

> "* * * In order to establish discrimination, there must be a showing that one group in entirely the same circumstances as another is given favored treatment."

See also *Friedman v. Board of Education of South Orange and Maplewood*, Commissioner of Education, March 19, 1968, and *Frank v. Board of Education of Englewood Cliffs*, 1963 *S.L.D.* 229, 230.

Moreover, while not denying that many traffic hazards exist throughout Woodbridge Township, or that Green Street, the principal artery leading from the East Iselin area to School No. 26, is heavily trafficked, respondent asserts it has evaluated conditions in the Township and provides less-than-remote transportation where in its judgment hazardous conditions warrant. Such conditions, respondent urges in support of its motion, have not been shown to exist along the route (Green Street and Benjamin Avenue) from the East Iselin area to School No. 26, where sidewalks have been constructed. This is in

contrast to other routes checked by petitioner and described by the Superintendent as being hazardous in forms and manners not characteristic of the route followed by petitioner's children. *Cf. Peters et al. v. Board of Education of Washington Township*, Commissioner of Education, March 8, 1968, and cases cited therein.

Finally, respondent contends, assuming *arguendo* that it improperly terminated transportation being furnished to petitioner in the course of the school year, *i.e.* on December 1, 1967, the issue is moot for the school year 1967-68 since petitioner made no timely appeal, having filed the instant petition after the conclusion of the 1967-68 school year.

Petitioner rests its claim essentially on the argument that respondent's action in eliminating transportation provided for its children was purely arbitrary, since respondent offered no conclusive evidence of a basis on which its action was taken, no written policy on which determination of need for or right to transportation can be established, and no evidence that conditions along the route to School No. 26 were different on December 1, 1967, or now, from conditions existing while transportation was being provided. Conceding that a board of education may evaluate conditions of travel and provide transportation where, in its discretion, conditions warrant it, petitioner argues that there must be a reasonable basis for the exercise of such discretion. Respondent has failed to show that its action with respect to the affected children is so founded upon any reasonable basis, says petitioner. Speculation as to respondent's reason for discontinuing transportation does not avail, petitioner urges, where respondent has a duty to demonstrate to the Commissioner the sound exercise of its discretion.

* * * *

The Commissioner has reviewed and considered the findings of the hearing examiner and the report of the contentions of the parties as set forth herein.

The Commissioner concludes, and so holds, that petitioner has not shown that its children were "treated differently from others similarly situated." *Friedman v. Board of Education of South Orange and Maplewood, supra* The evidence supports a finding that respondent evaluated conditions of travel in the school district and established transportation routes where in its judgment hazardous conditions warranted transportation at local expense. It is well established that absent a clear showing of abuse of its discretion by a board of education in providing such transportation, the Commissioner will not substitute his discretion for that of the board. *Cf. Schrenk et al. v. Board of Education of Ridgewood, supra*, and cases cited therein; see also *Pepe v. Board of Education of Livingston*, Commissioner of Education, April 10, 1969; *Trossman et al. v. Board of Education of Highland Park*, Commissioner of Education, May 1, 1969.

Nor does the Commissioner find support for petitioner's contention that respondent's action in terminating routes 5-A, 5-P, and 5-S was purely arbitrary. The testimony of the Superintendent, as reported herein, is sufficient to show that respondent established transportation routes in accordance with a policy,

and that the need for such routes was reviewed on a continuing basis. That such a policy may not have been formalized into writing is not in itself determinative. The significant question is whether respondent has provided - or eliminated - transportation in an arbitrary or discriminatory manner. The findings herein do not support a determination that it has done so.

The petition is accordingly dismissed.

COMMISSIONER OF EDUCATION

May 27, 1969

Stephen H. Magnus,

Petitioner,

v.

Board of Education of the Township of North Bergen, Hudson County, and Alfred N. Tarallo,

Respondents.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Sydney I. Turtz, Esq.

For the Respondent Board of Education, Capone, Gittleman & Anastasi (Melvin Gittleman, Esq., of Counsel)

For the Respondent Tarallo, Morton Isaacs, Esq.; Joseph L. Freiman, Esq.

Petitioner appeals from a resolution of respondent Board of Education dismissing him as Secretary of the Board, in violation of his asserted tenure rights to that office. The Board of Education denies that petitioner is protected by tenure, and states that his dismissal was proper. Respondent Tarallo is made a party to this action because he was elected to fill the vacancy created by the dismissal of petitioner.

A hearing in this matter was conducted on November 14, 1967, and on January 23, June 24, September 30, and December 5, 1968, at the office of the County Superintendent of Schools, Jersey City, by a hearing examiner appointed by the Commissioner. Memoranda were subsequently filed by counsel. The report of the hearing examiner is as follows:

By resolution of the North Bergen Board of Education, petitioner was appointed as Secretary-Business Manager effective November 1, 1962, at an annual salary of $8,500. By subsequent appointments his salary was increased so that at the time of his dismissal his compensation was at the rate of $11,000 annually. On June 14, 1967, by a vote of 4-0, with one member, petitioner, abstaining, the Board of Education adopted a resolution dismissing petitioner from his position as Secretary of the Board, effective immediately. The petition herein was filed on June 22, 1967.

The petition is grounded on petitioner's claim that he had acquired tenure of office as Secretary, and therefore he cannot be dismissed except for cause. The statute establishing the tenure of board secretaries effective on June 14, 1967, *(N.J.S.A.* 18:5-51-now 18A:17-2) reads as follows:

> "No secretary, assistant secretary, school business administrator, or business manager of any board of education in any municipality devoting his full time to the duties of his office, after 3 years' service, shall be discharged, dismissed, or suspended from office, nor shall his compensation be decreased, except for neglect, misbehavior, or other offense and after a written charge of the cause or causes has been preferred against him, signed by the person or persons making the same, and filed with the secretary of the board of education having control of the school in which the service is being rendered, and after the charge has been examined into and found true in fact after a hearing conducted in accordance with the Tenure Employees Hearing Act. Charges may be filed by any person, whether a member of the school board or not."

The resolution purportedly dismissing him, petitioner asserts, is invalid since no charges were filed, and no proceedings conducted in accordance with the provisions of the statute.

The hearing examiner finds upon the preponderance of believable evidence that:

1. Petitioner customarily and with but limited exceptions devoted normal daytime business hours (from as early as 7:30 a.m. on some occasions to 4 p.m. or later) to the performance of his duties for the Board of Education.

2. Petitioner bore the title Secretary-Business Manager by virtue of his appointment as such, but did not in fact perform the duties of business manager as statutorily prescribed in *N.J.S.A.* 18:6-47 (now 18A:17-28). The unrefuted testimony of petitioner is that the Board, as a committee of the whole, exercised the functions of the business manager in connection with schoolhouse construction. The use of the title "Business Manager" on purchase order forms signed by petitioner in 1963 (R-15), and the title "Secretary-Business Manager" used on similar forms in 1964 and 1965 (R-16, R-17), and the signing of some correspondence over the title "Secretary-Business Manager," while other correspondence was signed over the title "Secretary," (R-18, R-19) loses

probative significance in the absence of affirmative evidence that petitioner did in fact perform the statutory duties of a business manager. Such evidence further supports petitioner's contention that the designation of "Business Manager" was titular only. See, for example, petitioner's use of the title "Secretary-Business Manager" in connection with his signing of the minutes of Board meetings (R-18, R-19), plainly a statutory function of the Secretary only. *N.J.S.A.* 18:6-32, now 18A:17-7 The hearing examiner does not find Exhibits R-13 and R-14 supportive of any contention that the term "Business Manager" was other than titular only. The hearing examiner therefore concludes, and so finds, that the duties performed by petitioner were those of Secretary of the Board of Education.

3. During the time he held Board office, petitioner also held office as secretary-treasurer of a labor union, and as administrator of the Welfare Fund of that union, and received salary and other compensation therefor. It was petitioner's unrefuted testimony that he performed the duties of these offices during lunch hour, after school business hours, and on weekends. He further testified that his duties in connection with the union and the Welfare Fund required from 10 to 15 hours of his time on an average weekly basis, plus attendance at three meetings of the Welfare Fund trustees annually, and five or six meetings of the union officers annually. These meetings required approximately two hours on weekday mornings. Petitioner also testified that he attended a 3 or 4-day convention in 1965, 1966, and 1967, in connection with union or Welfare Fund activities, for which he did not seek Board permission to attend. He further testified that he had taken no vacation from his duties as Board Secretary throughout his incumbency.

With respect to petitioner's union and Welfare Fund activities, it was his unrefuted testimony that from the time of his appointment in 1962, respondent Board was fully aware of his activities, and that at no time had there been criticism or complaint from the Board, or any request or directive that he give up any of these activities.

The hearing examiner finds that there is no evidence to show that petitioner's activities in connection with a labor union and its Welfare Fund were in conflict with or prevented petitioner from performing the duties of his office with the Board of Education, with such exceptions as are specifically set forth herein, which exceptions the hearing examiner concludes are not substantial to the issues in this case.

4. Nothing in the resolutions appointing petitioner, nor any other evidence was adduced to show that the respondent Board of Education at any time defined the office of Board Secretary, or Secretary-Business Manager, as either "full-time" or "part-time." Nor is there any evidence that the hours of work of such office were ever delineated by Board action.

Petitioner calls attention to two decisions of the Commissioner dealing with "full-time" employment of board of education secretaries. In one, *DePhillips v.*

Board of Education of Fairview, 1939-49 *S.L.D.* 102, the Commissioner found that the engagement by the Secretary in other employment in the evenings during the summer, and on three Saturdays and from 4 p.m. to midnight for a few weeks during the school year did not support a contention that the Secretary "did not devote his full time to his duties as district clerk." In the other case, *Grimm v. Board of Education of Hamilton Township*, an unpublished decision of the Commissioner, dated April 18, 1945, it was held

> "that a full-time district clerk (board secretary) is not required to devote every minute of the day to his duties, and that he is not precluded from holding another office as long as the duties of the two offices are not inconsistent and as long as the duties of the other office do not interfere with the faithful discharge of the duties of the office of district clerk."

Petitioner contends that there has been no showing that his union activities are in any way inconsistent with or interfere with his faithful discharge of his duties as Board Secretary.

Respondents, on the other hand, contend that the statutory limitation of tenure only to those secretaries who devote their full time to the duties of their office must be more narrowly construed to apply to persons who devote their duties and their loyalties to employment by a board of education as against any other source of income. The instant matter, say respondents, is to be distinguished from the *DePhillips* and the *Grimm* cases, *supra*, because DePhillips' extra employment was outside the employment hours specified by rule of his Board of Education, and because the time involved in Grimm's extra duties was not as substantial as that required by the union and Welfare Fund activities of petitioner herein. Respondents urge, therefore, that the phrase "his full time" in the statute (*N.J.S.A.* 18:5-51, *supra*) must, of necessity, exclude either the existence of, or the potential existence of a division of loyalties to more than one employer.

* * * *

The Commissioner has reviewed and considered the findings and conclusions of the hearing examiner reported herein.

The Commissioner concludes, and so holds, that petitioner has "devoted his full time to the duties of his office" as Secretary of the North Bergen Board of Education since assuming that office on November 1, 1962, and has therefore fulfilled the statutory requirement for acquiring tenure in that office. *N.J.S.A.* 18A:17-2 In so holding, the Commissioner finds that the construction previously given to the term "full time" in *DePhillips v. Fairview Board of Education*, *supra*, and *Grimm v. Hamilton Township Board of Education*, *supra*, is applicable here. In *Mastrangelo v. Board of Education of Palisades Park*, 1961-62 *S.L.D.* 77, affirmed State Board of Education 81, the Commissioner, commenting upon the holding in *Grimm*, said, at page 79:

> "* * * The matter did not depend on whether Grimm held one office or two, but rather on whether he was able to discharge the duties of a second, admittedly part-time office without interference to the faithful discharge of the duties of his full-time office of district clerk."

See also *Johnson v. Stoughton Wagon Co.*, 95 *N.W.* 394, 397, 118 *Wis.* 438 *(Sup. Ct.* 1903); *Cote v. Batchelder-Worcester Co.*, 160 *A.* 101 *(Sup. Ct.*, New Hampshire 1932); *Beaver Dam Coal Co. v. Hocker*, 259 *S.W.* 1010 *(Ct. of Appeals*, Ky. 1924) as cited in *Mastrangelo*, *supra*. The Commissioner further holds that the limited absences of petitioner to attend meetings of the officers of the labor union and the trustees of the union Welfare Fund, and his attendance at conventions related to those activities are not shown to have interfered with petitioner's discharge of his duties as Board Secretary, within the principles set forth in *Grimm*, *supra*.

Nor does the Commissioner accept the argument advanced by respondents that the term "full time," as used in the statute, must be so narrowly construed as to exclude either the existence of, or the potential existence of a division of loyalties to more than one employer. Beyond the broader construction found in *Grimm* and *DePhillips*, *supra*, the Commissioner observes that in *N.J.S.A.* 18A:29-6 the Legislature authorized the State Board of Education to determine by rule the meaning of "full time" for purposes of the State Salary Schedule for teachers. It is further noted that boards of education are authorized to require the superintendent of schools to "devote himself *exclusively* to the duties of his office" (*N.J.S.A.* 18A:17-18, emphasis added), which suggests a much more rigorous limitation than has been applied by the courts to the term "full time" as applied to the board of education secretary.

The Commissioner further concurs in the finding of the hearing examiner that notwithstanding the appellation "Secretary-Business Manager" applied to petitioner's office, the duties performed were those of Secretary, and did not extend to or include those of Business Manager. The Commissioner therefore holds that the petitioner is in fact Secretary of the Board of Education, and as such devoted his full time to the duties of his office for the period of time requisite to establish his tenure in that position.

Finally, the Commissioner finds and determines that petitioner was dismissed from his office by the resolution of respondent Board on June 14, 1967, without benefit of the procedural due process provided for by the Tenure Employees Hearing Act (*N.J.S.A.* 18A:6-10 *et seq.*) and that the dismissal was therefore illegal and must be set aside. Having so found, the Commissioner directs that petitioner be reinstated in his office as Secretary of the Board of Education, with all rights as to compensation and other benefits as may be provided by law.

COMMISSIONER OF EDUCATION

May 29, 1969

Jeffrey Goodman, by his parent and natural guardian, Samuel Goodman; Donald Strauss, by his parent and natural guardian, Dr. F. Strauss; Daniel Lippman, by his parent and natural guardian, Dr. H. E. Lippman; Kenneth Schachat, by his parent and natural guardian, Herbert Schachat; Gina Novendstern, by her parent and natural guardian, Leon Novendstern; Nancy Oxfeld, by her parent and natural guardian, Emil Oxfeld; Jill Kessler, by her parent and natural guardian, Edward Kessler; Peter Shapiro, by his parent and natural guardian, Dr. Myron J. Shapiro,

Petitioners,

v.

Board of Education of South Orange-Maplewood, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Warren, Chasan, Leyner & Holland (Lewis M. Holland, Esq., of Counsel)

For the Respondent, Cummis, Kent & Radin (Clive S. Cummis, Esq., of Counsel)

Petitioners are pupils attending the Columbia High School in the South Orange-Maplewood school district. They bring this action to contest the validity of a school regulation prohibiting distribution of leaflets by pupils on the school premises and ask the Commissioner to declare such regulation void. Respondent asserts that the rule is a proper exercise of its authority and necessary to the discharge of its obligation to insure the welfare of all of its pupils. At a hearing before the Assistant Commissioner in charge of the Division of Controversies and Disputes on May 19, 1969, at the East Orange High School and on May 23, 1969, at the office of the Essex County Superintendent of Schools, the following facts were elicited.

On March 27, 1969, petitioners stationed themselves both inside and outside of several entrances to the high school and offered a leaflet to pupils as they entered. The leaflet opposed continued participation in the war in Vietnam and urged attendance at a forthcoming rally in New York City. Petitioners testified that they had met on a prior evening to plan the distribution of the pamphlets; that they received a supply of the leaflets from one member of the group on arrival at school in the morning; that they made no attempt to force acceptance on any one but merely extended a copy while asking the pupil if he would like to have a leaflet; and that they retrieved those copies which were discarded in order to prevent any littering of the school property. After a few pamphlets had been handed out, petitioners were directed by a faculty member to cease and to report to the office of the principal. There the principal spoke to them, calling attention to a regulation prohibiting such activity without prior administrative approval. Each of the students was then suspended from school

for two days and was given a letter from the principal to take home to his parents, the pertinent portion of which read:

> "Your son is being sent home for being disobedient. He may return to classes Monday if he agrees to obey the rules and co-operate with staff members responsible for his education and custody.* * *"

Later that same day, a telephone request was made to the Commissioner of Education on behalf of the students by the Executive Director of the American Civil Liberties Union, asking that the suspension of the pupils be stayed pending a hearing to determine the legal rights of the parties. In the absence of the Commissioner, the Assistant Commissioner in charge concluded that there was no showing of irreparable harm by reason of the two-day suspension and declined to intervene. Application was then made to the Law Committee of the State Board of Education, which granted the stay *ex parte*, and petitioners were permitted thereby to return to school the next day. Counsel for petitioners thereafter sought injunctive relief from continued operation of the regulation in issue, but agreed to proceed to an expeditious determination on the merits in lieu thereof.

The hearing revealed that the inception of this problem occurred at the time of the November 1968 general election when one of the petitioners attempted to distribute election materials in the school. He was enjoined from doing so by the school administration and was informed that such activity was proscribed by law. Some of his friends subsequently prepared and distributed circulars in protest which dealt with the subject of freedom of speech and of press. Thereafter, on December 16, 1968, the principal adopted a rule prohibiting the distribution of circulars, handbills, leaflets, etc., on school property. He testified that prior to this school year the school authorities had not experienced this kind of communication with the exception of commercial announcements and advertisements being placed under automobile windshield wipers on the parking lot with resulting litter. Such exploitation of the school premises, the pupil incidents in November and the present climate of tension and hostility led him, the principal testified, to the conclusion that it was necessary that he supervise and control all such activity in the best interests of the school and all of its pupils. As a result he promulgated the following regulation dated December 16, 1968:

> "The distribution of handbills, leaflets, advertisements and other similar items is not permitted on Columbia High School grounds, or in the school building while the building is opened, or the grounds available to the secondary teaching program activities, or sports."

Petitioners allege that the regulation is arbitrary and capricious and that it restrains and abridges their rights to free speech in contravention of the First and Fourteenth Amendments to the Constitution of the United States and of Article I, paragraph 6 of the Constitution of New Jersey. They contend that their activity in handing out leaflets caused no disruption in the good order or discipline of the school. They maintain that no one was forced to accept a

pamphlet, the flow of student traffic in the lobby and corridors of the school was not impeded, there was no littering, and no disorder of any kind. Absent such adverse effects on the peace of the school, petitioners assert their constitutionally guaranteed right to free speech and ask that the principal's regulation be declared invalid and set aside.

Respondent contends that the regulation in issue was not designed to prohibit a particular expression of opinion, to restrict speech-connected activities, or to limit expressions of sentiment except those officially approved, nor does it violate guaranteed constitutional rights. In the operation of the school curriculum, respondent urges, it has not limited or regulated personal intercommunication among students nor is the contested rule aimed at such a prohibition. The regulation, respondent alleges, is intended only to prevent interference with appropriate discipline, the disruption of class work or the invasion of the rights of other students to be secure and to be let alone. According to respondent's administrative staff the school plant is inadequate for the number of pupils enrolled, resulting in overcrowded conditions in the lobby, corridors, exits and other places where pupils move about freely. Permitting the distribution of leaflets without regard to their contents under such conditions constitutes an immediate danger to the health and welfare of the student body, in the principal's opinion. Moreover, the principal testified, in view of the school's physical limitations, the overcrowding in the halls, and the difficulty of controlling pupils which such conditions impose upon the faculty, he believes there would be a real threat of physical disorder and physical harm to students if the leaflets distributed contained material which offended even a small segment of the school's population. Such opinions and sentiments, in the principal's judgment, are able to be and are better expressed under controlled academic conditions such as in classrooms, in assemblies, or in extra-curricular activities where teachers are present to supervise and guide behavior. Respondent argues further that petitioners are minors who are under the jurisdiction of respondent during school hours and as such they are required to submit to regulations adopted by those in authority absent an express demand or request by their parents to be exempted therefrom. Finally, respondent alleges, permitting pupils to distribute leaflets without prior demand, approval or authorization by their parents, imposes upon respondent a burden of responsibility and possible liability for damages in the event of physical harm which it does not choose and is not willing to bear.

There can be no question of the correctness of the principal's initial action to restrain one of the petitioners from distributing election materials in November 1968. Such activity in public schools is specifically prohibited by law:

> "No literature which in any manner and in any part thereof promotes, favors or opposes the candidacy of any candidate for election at any annual school election, or the adoption of any bond issue, proposal, or any public question submitted at any general municipal or school election shall be given to any public school pupil in any public school building or on the grounds thereof for the purposes of having such pupil take the same to his home or distribute it to any person outside of said building or grounds,

> nor shall any pupil be requested or directed by any official or employee of the public schools to engage in any activity which tends to promote favor or oppose any such candidacy, bond issue, proposal, or public question. The board of education of each school district shall prescribe necessary rules to carry out the purposes of this section." *N.J.S.A.* 18A:42-4

The leaflets subsequently distributed by petitioners on March 27, 1969, were not related to any election, however, and as a result the action underlying this controversy does not come within the ambit of the above statute.

The statutes invest a board of education with broad authority to make rules governing the day-to-day operation of the schools under its jurisdiction. *N.J.S.A.* 18A:11-1 reads in part as follows:

> "The board shall—
>
> * * * c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes; and
>
> d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district."

It is also clear that a principal has the power to enact rules and regulations for the proper conduct of the schools in his charge. In *McCurran v. Trenton Board of Education*, 1938 *S.L.D.* 577, affirmed State Board of Education 578, the Commissioner said:

> "The principal * * * has authority under the law to make rules and regulations that tend to the better control and discipline of this school."

To this the State Board added, at page 579

> " * * * The school children are in charge of the principal when not under the direct supervision of their parents."

Such rules, whether adopted by the Board or the principal, may not be inconsistent with the law. The crux of this matter is petitioners' contention that the rule forbidding distribution of leaflets without prior approval is in conflict with and violates their constitutional rights as set forth in the First and Fourteenth Amendments to the U.S. Constitution, and Article I, paragraph 6 of the Constitution of New Jersey, the relevant portions of which read:

United States Constitution:

> "Article I. - Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."
>
> "Article XIV - * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."
>
> *New Jersey State Constitution*
>
> "Article 1, paragraph 6 - Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.* * *"

That these constitutionally guaranteed freedoms are not absolute under all circumstances has been recognized by our highest courts:

> "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." *Schenck v. United States*, 249 *U.S.* 47 (1918)
>
> "Of course, even the fundamental rights of the Bill of Rights are not absolute. Hecklers may be expelled from assemblies and religious worships may not be disturbed by those anxious to preach a doctrine of atheism. The right to speak one's mind would often be an empty privilege in a place and at a time beyond the protecting hand of the guardians of public order. * * * City streets are recognized as a normal place for the exchange of ideas by speech or paper. But this does not mean the freedom is beyond all control." *Kovacs v. Cooper* 336 *U.S.* 77 (1949)

Petitioners make no claim of unqualified license to engage in any kind of activity, no matter how disruptive, in the name of freedom of expression. They concede that there could be methods of expression which would be subject to control. In this case, however, they contend that the principal's regulation is really concerned not with the *method* of speech but with the content. The school administration, they point out, not only tolerates but encourages the distribution of "pep" or "booster" materials, and the sale of school lapel buttons in the entrances and halls. This activity is essentially similar to the one for which they were suspended, in petitioners' view, and the effect on pupil traffic patterns would be the same. Therefore, petitioners argue, the only apparent difference between the permitted activity and the one which was banned is the content, not the method. While the principal's regulation is addressed to a method of expression, petitioners contend that it is in actuality

concerned with content, seeking to repress the expression of controversial opinions, and that therein lies its invalidity. In this case, petitioners urge, the methods of expression gave rise to no real concern on the part of the school authorities but rather their real fear is that other pupils will react in a hostile manner to controversial opinions expressed in handbills and leaflets. From the standpoints of both law and educational policy such fears are insufficient to maintain the regulation, in petitioners' opinion.

Under our system of law, petitioners argue, one's right to free expression may not be repressed in order to avoid realization of threats of hostility by those who disapprove. If it were otherwise, they urge, freedom of expression would be no more than an abstract idea, available only to state non-controversial ideas apt to excite no hostility. If this fear of hostility is to be permitted to justify the repression of free expression, petitioners assert, then liberty would be licensed by the violent. While they do not question the *bona fides* of the school authorities, petitioners contend that they have allowed anxiety to supplant wisdom in the enactment of the rule in issue.

Respondent denies intent to repress expression of pupil opinion, controversial or otherwise, and contends that it seeks only to control the circumstances under which such expression occurs. It points out that there is tension and hostility between student groups in the high school, marked by frequent evidence of threats and by occasional violence. Unrestricted distribution of leaflets on school property during school hours will inevitably lead to added violence, in the opinion of the school administrators. In their testimony they cited instances in which teachers had to be assigned to control a "near-riot" situation, of pupils who expressed fear of attacks and a need for protection, and of parents who made known their concern for the safety of their children. They cite also the existence of "hate literature," some of it in handbill form, which has been received through the mail and has appeared surreptitiously. Under such conditions respondent contends there is ample justification for concern and for seeking to regulate activities, such as the distribution of leaflets, which contribute to the disruption of school work and the impairment of discipline.

Petitioners rely in large measure upon the recent pronouncements of the United States Supreme Court in the case of *Tinker v. Des Moines Independent Community School District et al*, 21 *L. Ed. 2d* 731 (1969). In that case a group of pupils, with the support of their parents, decided to demonstrate their objections to the war in Vietnam by wearing black armbands for the period from December 16 to January 1. The school authorities, becoming aware of the plan, adopted a rule prohibiting the wearing of an armband, and when the pupils refused to comply, they were suspended from school and did not return until the planned protest period expired. The controversy ultimately reached the Supreme Court, which found that the school authorities had exceeded their authority and infringed upon the rights of the pupils to freedom of expression.

In reaching its decision the Court noted that the case was not related to pupil dress or appearance or deportment; that it concerned only a silent, passive, expression of opinion, without disorder or disturbance by the armband wearers; that there was no interference with school work or the rights of other pupils to be secure and to be let alone; and that the pupils' action produced no threats or acts of violence on school premises.

The following excerpts from the opinion of the Court indicate guidelines to be followed in the regulation of pupil expression:

> "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular view-point. Certainly where there is no finding and no showing that the exercise of the forbidden right would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."
>
> "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect just as they themselves must respect their obligations to the State."
>
> "* * * personal intercommunication among the students is an important part of the educational process. A student's rights therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so 'without materially and substantially interfering with appropriate discipline in the operation of the school' and without colliding with the rights of others. *Burnside v. Byars, supra*, at 749. But conduct by the student, in class or out of it, which for any reason whether it stems from time, place, or type of behavior materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guaranty of freedom of speech. Cf. *Blackwell v. Issaquena City Board of Education*, 363 *F. 2d* 749 (C. A. 5th Cir., 1966)."

The Commissioner finds that the instant matter may be distinguished from the situation in the *Tinker* case in several significant respects. In *Tinker* there was no evidence that the school authorities had any reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or the rights of other students. As the Court said:

> "* * * the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material

> interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide."
>
> "* * * They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others."

In the instant matter, however, the testimony indicates that disturbances for which out-of-the-ordinary measures of control were needed had already occurred and that school authorities had substantial reason to foresee and forestall events that would trigger new manifestations of existing tensions.

Moreover, the Commissioner finds herein no deliberate intention to suppress the expression of pupil opinions as occurred in *Tinker*. There the school's interdiction was aimed at a particular point of view expressed in a specific way. In the case herein, the proscription is concerned with the method of expression and its employment as to time and place. The testimony reveals that pupils are afforded many opportunities to express opinions and points of view in the daily operation of the school without censorship or suppression. It is entirely proper that such expression by school pupils be subject to appropriate supervision. Pupils in the public schools are persons and are entitled to enjoy rights as such. It must be recognized, however, that they are persons of tender years and as such have not reached the degree of maturity where all supervision and control should be removed. Such control does not constitute in itself, and need not be, an overt form of suppression. The Commissioner finds no arbitrary attempt or intention by the principal herein to eradicate or suppress the expression of controversial points of view by students such as the Court found and determined to be unacceptable in *Tinker*.

In the Commissioner's judgment, the numerous utterances of the Courts which suggest that freedom of speech may be subject to necessary control but may not be entirely suppressed, provide the key to the problem herein. As has been said *ante*, constitutional liberties are not absolute but are subject to the restrictions necessary to preserve the rights of others. Thus, freedom of speech may be limited for the purpose of preserving good order and insuring the general welfare. But such an encroachment may extend only to the degree necessary to accomplish such purpose, which generally will fall short of an all-encompassing interdiction.

When these principles are applied to the problem herein it becomes clear that neither complete freedom to distribute any kind of leaflet at any time during the school day at any place on the school premises nor an outright prohibition of any such means of expression is correct.

There can be no question, in the Commissioner's judgment, of the authority of the school to control freedom of expression by means of leaflet distribution within necessary and appropriate limits. The public schools exist for the education of children. Parents are compelled by law to cause their children to

attend the public schools. *N.J.S.A.* 18A:38-25 The pupils who attend by such compulsion are, in a sense, a captive audience. That audience does not provide a ready-made forum to be used by anyone on demand in the name of free speech. Responsibility for the welfare of all pupils, while they are at school, devolves upon the school staff who are placed in a status of *in loco parentis.* It is the duty of every school administrator to take such measures as may be appropriate to promote the best interests and insure the well-being of every child. Parents have a right to expect no less. In this case the principal conceived it necessary to limit rights of a handful of pupils to distribute a handbill expressing a point of view about which they felt deeply, in order to preserve the good order of the school and to protect the pupils in his charge. The protection afforded was not against unpopular ideas but against conditions which could interfere with school work and produce physical violence. The testimony of the school personnel that such conditions were present is uncontroverted. Under such circumstances the Commissioner finds that the principal has not only the right but the duty to impose controls necessary to preserve the good order of the school.

It does not appear, however, that a complete prohibition of all such activities is necessary to accomplish the needed controls. To the extent that the contested regulation constitutes an outright interdiction of any distribution of printed material, it is suppressive. It is, therefore, an improper encroachment upon freedom of expression, and as such, it cannot be sustained.

There is a common sense middle ground between the extremes of total proscription and absolute liberty which represents a sound approach to a solution of this problem. Such a plan would not provide an outright ban of all leaflet distribution but would seek to accommodate the maximum degree of freedom of expression by means consistent with the good order of the school. Guidelines for such purpose, cooperatively developed by pupils and faculty, would define the times and places when materials could be distributed without interfering with the work of the school. They would also include criteria by which the appropriateness of the material to be handed out can be judged.

Indeed, it appears from the testimony that the principal had already conceived of some such procedure and had proposed it to petitioners at a meeting called for that purpose. The pupils rejected the idea, however, apparently for the reason that they conceived it to be a form of prior censorship which was unacceptable to them.

But such guidelines and the criteria to implement them need not constitute a censorship procedure. Certainly some decision-making is called for to determine the suitability of materials to be passed out to pupils in the schools. Suitability in this context should not be read to mean only non-controversial, popular, majority point of view expressions of opinion, but might well include materials representing many kinds of opinions on a variety of subjects. It is beyond argument, however, that so called "hate literature" which scurrilously attacks ethnic, religious and racial groups, other irresponsible publications aimed at creating hostility and violence, hard-core pornography, and similar materials

are not suitable for distribution in the schools. Such materials can be banned without restricting other kinds of leaflets by the application of carefully designed criteria for making such judgments. In the Commissioner's opinion, such a program does not constitute the kind of prior censorship which suppresses freedom of expression but represents, instead, the kind of accommodation which can be made in order to achieve the maximum degree of liberty consistent with the preservation of good order.

The Commissioner finds and determines that the regulation banning distribution of leaflets in the Columbia High School cannot be sustained in its present form. This matter is therefore remanded to the South Orange-Maplewood Board of Education for the development of procedures in accordance with the principles enunciated herein with the understanding that (1) such procedures will be formulated and implemented as expeditiously as possible at the beginning of the 1969-70 school year; and (2) until appropriate guidelines and criteria are adopted and promulgated in the fall the current regulation barring leaflet distribution will be continued in effect. The Commissioner further finds no need to deal with the matter of the earlier suspensions for the reason that the pupils were reinstated promptly with no damage to their educational progress.

The Commissioner will retain jurisdiction over this matter until satisfactory completion of the directives contained herein.

COMMISSIONER OF EDUCATION

June 18, 1969

Pending Before State Board of Education.

Samuel Manno,

Petitioner,

v.

Board of Education of the Township of Fairfield, Cumberland County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Harold A. Horwitz, Esq.

For the Respondent, Serata & Kleiner (Isaac I. Serata, Esq., of Counsel)

Petitioner, a bus contractor, alleges that respondent awarded a contract for transportation routes for the 1968-69 school year in violation of applicable statutes and rules and regulations of the State Board of Education, and that a conflict of interest exists in that the successful bidder was at the same time Secretary of respondent Board of Education.

A hearing in this matter was held at the Court House, Bridgeton, on December 12, 1968, by a hearing examiner appointed by the Commissioner. A request for further hearing to take the testimony of the County Superintendent of Schools was withdrawn on May 5, 1969. Memoranda of counsel have been filed. The report of the hearing examiner is as follows:

Respondent advertised for bids for school transportation routes to be received on August 12, 1968. Petitioner bid on 19 routes, submitting alternate bids on each route depending upon the use of six or seven buses. He included with his bid a certified check in the amount of $1,632.50, representing 5% of his highest alternate total. (R-2) Another bidder, Kenneth Sheppard, bid on 17 routes. (R-3) Respondent reserved action on the bids, and at a special meeting on August 16, rejected all bids and determined to operate several of its routes with district-owned buses, and to readvertise for bids for nine public school routes. (P-R-5,6) Petitioner did not protest this action or the specifications for the readvertised routes.

Bids for the nine routes were received and opened, with petitioner present, at a meeting of respondent Board on August 30. Petitioner's bid (P-R-3) was a lump-sum bid for all nine routes, in the amount of $14,980. His bid contained two notations, as follows:

> "This bid is for the nine routes marked above, in which I will use three buses and transport only Fairfield Township pupils."

and

> "NOTE: My last certified check for $1,632.00 is still in your possession. This will more than cover 5% of this bid."

The questionnaire attached to his bid stated that he would offer a surety bond issued by a bank, and also named two personal bondsmen having real estate with combined net value in excess of $100,000.

One other bid was received, in which the bidder submitted bids on each of the nine routes separately. The total amount of the bid was $15,940, for which cash or certified check in the amount of $800 was said to be enclosed. The bidder was Kenneth Sheppard, who was at that time, and at the time of the hearing, Secretary of the respondent Board of Education. The minutes (P-R-5) and the testimony disclose that the bids were opened by the President of the Board. The minutes report the following action of the Board:

> "In consideration of the facts that Mr. Manno did not bid according to route, that he limited the operation to three buses when the specifications clearly call for four buses and that he did not properly bond his bid, it was moved by Mr. Padgett seconded by E. Laning and passed that bid of S. Manno be rejected and contracts for routes as bid by Kenneth Sheppard be awarded."

The specifications for bidding on the readvertised nine routes were in the following form: (P-R-1)

> "I hereby submit the following bid(s) to transport pupils as per your advertisement and specifications:
>
> "Route No. _____ $_____ per year for a term of one year [repeated 10 times]"

Petitioner testified that he had not bid separately on each route because he could not profitably operate a smaller number of the routes if he were not the successful bidder on all nine. Petitioner denies that "the specifications clearly call for four buses," as the minutes, *supra*, state, but he admits that he could not have complied with the specifications, as written, by using only three buses. (Tr. 43, 44)

The hearing examiner finds that petitioner's bid, as submitted and received on August 30, 1968, did not conform to respondent's specifications. The hearing examiner also finds that the bid of Kenneth Sheppard did so conform.

Petitioner's charge that the specifications were written to favor bidder Sheppard is unsubstantiated by competent evidence. The hearing examiner finds that this charge is based upon speculation and unsupported conclusions by petitioner.

Petitioner further charges that the specifications are in violation of the statutes in that respondent required that the bid be accompanied by "cash or certified check" for five per cent of the bid, whereas the statutes *(N.J.S.A.* 18A:39-4) require "a cashier's or certified check" in such amount. However, there is no evidence that petitioner in any way protested this defect, which respondent characterizes as a minor inadvertence. In fact, petitioner's second bid

indicates that he had enclosed with his first bid a certified check which was still in respondent's possession when he submitted his second bid. If petitioner had wished to object to this error in the specifications, he had two opportunities to do so.

The remaining allegation is that the award to bidder Kenneth Sheppard is improper because of an unlawful conflict of interest resulting from the fact that Sheppard is Secretary of respondent Board. That Sheppard holds this office is a fact. No evidence was adduced by petitioner to show that the Secretary participated in any way in the preparation of the transportation specifications, or in the receipt and opening of the bids, or in the award of the contracts, other than to record the proceedings in the minutes of the Board. Petitioner maintains, however, that numerous cases establish the impropriety of any mingling of public duty with self-interest by a public officer. Petitioner quotes at length from *Bracey v. Long Beach*, 73 *N.J. Super.* 91 *(Law Div.* 1962), 179 *A. 2d* 63, to this effect. Respondent denies the alleged conflict of interest, emphasizing that the Secretary of the Board has no decision-making power in the award of transportation contracts, that his function was that of a ministerial officer, whose duties were not public and not governmental, but merely those of a recorder. Having no decision-making power, respondent argues, the Secretary could not place his personal interest above that of the public. Respondent emphasizes that all the cases cited by petitioner refer to the admittedly improper mingling of the public and private interest by a public servant having such decision-making power.

The hearing examiner notes that the New Jersey statutes approach but do not specifically deal with this question. *N.J.S.A.* 18A:6-8 reads in part as follows:

> "No person officially connected with, or employed in, the public school system of this state * * * shall be an agent for, or be in any way pecuniarily or beneficially interested in, or receive any compensation or reward of any kind for, the sale of any textbooks, school apparatus or supplies of any kind, for use in the school district with which he is connected or by which he is employed * * *."

Nothing in this statute, or in the school transportation statutes (Chapter 39 of Title 18A) in specific terms bars the furnishing of transportation or any other services by such an officer or employee. It is the conclusion of the hearing examiner, therefore, that the furnishing of transportation services by the secretary of a board of education as a private contractor to such board does not fall within the prohibition of the statutes or the decisions of the courts of this State.

* * * *

The Commissioner has reviewed and considered the report of the findings and conclusions of the hearing examiner as set forth, *supra*, and concurs therein.

It is well established that a bidder must make timely protest if he wishes to challenge the specifications for bidding on a public contract. *Gunne v. Glen*

Ridge, 11 *N.J. Misc.* 3 (Sup. Ct. 1932); *Saker v. Board of Education of Matawan Regional School District*, Commissioner of Education, May 27, 1969; *Shearer's Dairies, Inc. v. Board of Education of Camden*, 1966 *S.L.D.* 147, 149

It is also well established that, while a public body may waive a minor bidding irregularity when it is in the public interest to do so *(Bryan Construction Co. v. Board of Trustees, etc. of Montclair*, 31 *N.J. Super.* 200, 206 (*App. Div.* 1954), it is otherwise required to award contracts to the lowest responsible bidder who has conformed to the specifications. *George v. Matawan Regional Board of Education*, 1963 *S.L.D.* 218, affirmed State Board of Education 222, affirmed Superior Court, Appellate Division, January 9, 1964

The Commissioner also concurs in the conclusion of the hearing examiner that the language of the statutes and the decisions of the Courts do not bar the awarding of a transportation contract to the Secretary of respondent Board of Education.

The Commissioner accordingly finds and determines that the award of transportation contracts to Kenneth Sheppard on August 30, 1968, was proper and in accordance with the statutes and rules and regulations of the State Board of Education. The petition of appeal is dismissed.

COMMISSIONER OF EDUCATION

July 2, 1969

Board of Education of the Borough of Englewood Cliffs,

Petitioner,

v.

The Mayor and Council of the Borough of Englewood Cliffs, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Tennant and LaSala (Bruce LaSala, Esq., of Counsel)

For the Respondent, Lester & Kahn (Sherwin D. Lester, Esq., of Counsel)

At the annual school election on February 11, 1969, the voters of the school district of Englewood Cliffs rejected proposals of the Board of Education (hereinafter "Board") to raise by local taxation a sum of $1,584,840 for current expenses for the 1969-70 school year and an amount of $23,670 for capital

outlay purposes. The same amounts were resubmitted at a second election on February 25, 1969, and failed again to win approval. The proposed budget was then delivered to the Mayor and Council (hereinafter "Council") pursuant to statute for determination of the amount of appropriations for school purposes to be certified to the County Board of Taxation. On March 8 Council adopted a resolution certifying the sum of $1,424,840 for current expenses and $8,670 for capital outlay. The amounts in issue may be shown as follows:

	Proposed By Board	Certified By Council	Reduction
Current Expense	$1,584,840	$1,424,840	$160,000
Capital Outlay	23,670	8,670	15,000
TOTAL	$1,608,510	$1,433,510	$175,000

The Board contends that the action of Council was arbitrary and the amount certified for current expenses is insufficient to maintain a thorough and efficient system of schools in the district as required by law.

With respect to the charge of arbitrary conduct, the Board contends that Council made its determination to cut the budget on a lump-sum basis without preparing a breakdown of the specific line items where the reductions were to be effected. Nor did Council make any statement, the Board argues, setting forth the reasons underlying its reductions despite requests from the Board for such information. Not until after the appeal herein was filed, the Board asserts, was any such analysis made available. These acts and failures to act by Council constitute arbitrary conduct, the Board urges.

The Commissioner cannot so find. The evidence shows clearly that Council made its determination after due deliberation in terms of the total budget needed to support what it conceived to be an adequate school program for the district. It acknowledged its lack of authority to direct the specific areas to which the monies were to be allocated or withdrawn and made plain its willingness to rely on the judgment of the Board with respect to where curtailment should be made. The evidence does not show that Council failed to deliberate, to consult, or that its determination was so lacking rational or reasonable basis that it should be considered capricious or arbitrary. The fact that Council did not immediately prepare a line item analysis of its reductions does not in itself constitute arbitrary behavior. No such requirement is contained in the statute which imposes the duty upon the governing body to determine the school appropriations after the people have rejected the Board's proposals. *N.J.S.A.* 18A:22-37 The preparation of such a breakdown and statement came about as a result of the Court's requirement in the case of *Board of Education of East Brunswick v. Township Council of East Brunswick*, 48 *N.J.* 94 (1966):

> "* * * Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons.

> This is particularly important since, on the board of education's appeal under *R.S.* 18:3-14, the Commissioner will undoubtedly want to know quickly what individual items in the budget the governing body found could properly be eliminated or curbed and on what basis it so found."

While the Council should have presented a list such as the Court specified at the time it communicated its reduction to the Board, its failure to do so, is not fatal in this case.

Upon institution of the appeal herein Council did provide a suggested list of budget line items where, in its opinion, reductions could be effected. Prior to the hearing in this case, the Board considered Council's suggestions and made a determination to accept certain ones, totaling $41,138, which it would not contest in this appeal. As a result the amount in issue herein is reduced to $133,932. All of the items and amounts may be shown graphically as follows:

Account Number	Item	Board's Budget	Mayor and Council's Reduction	Reduction Accepted	Reduction Appealed
J-110	Salaries - Administration and Clerical	$ 56,400	$ 5,000	$	$ 5,000
J-120	Enrollment Project.	600	600		600
J-130	Bd. Member Expenses	1,200	200		200
	Bd. Sec'y.'s Office	2,000	300	300	
	Sup't.'s Office	1,700	500	500	
	Printing & Publish.	2,500	500	500	
	Recruitment	400	100	100	
J-210	Teachers' Salaries				
	Present Staff	779,000	36,000		36,000
	New	29,400	20,000		20,000
	Substitutes	12,600	2,600		2,600
	Summer School and Summer Salaries	17,000	17,000	4,941	12,059
	Outdoor Education Substitutes	1,000	1,000		1,000
	School Secretaries	22,325	5,000		5,000
	Teacher Aides	39,500	36,000	7,127	28,873
J-220	Textbooks	11,500	3,000	3,000	
J-230	Library and A.V.	19,800	5,000	3,000	2,000
J-240	Teaching Supplies	26,300	6,220	1,720	4,500
J-250	School Office & Curriculum Supps.	1,600	800	400	400
	Professional Meetings & Confs.	4,560	2,000	1,000	1,000
	Tuition Stipends	2,500	500	500	

	Research & Develop.	15,300	12,000		12,000
	North Jersey Cultural Council	450	450	450	
J-420	Health Services - Special Education	500	100	100	
J-520	Transportation	94,080	1,500	1,500	
J-650	Operation & Supps.	6,000	500	500	
J-720	Maintenance Contracted Servs.	7,500	500		500
J-730	Replacement of Equipment	4,000	1,500	500	1,000
J-800	Fixed Charges	46,500	1,200		1,200
L-1200	Capital Outlay	24,170	15,000	15,000	
	TOTALS		$175,070	$41,138	$133,932

At the hearing the various line items were grouped in five categories and testimony and documentary evidence were offered by the Board to support its need for reinstatement of the total funds budgeted for the several purposes. In the ordinary case the Commissioner would address himself to each of these items and make a determination of their essentiality. He finds in this case, however, that the school budget and Council's reductions can be dealt with as a whole without the necessity to consider various line items or categories.

Englewood Cliffs is a Type II school district with a current enrollment of 1,134 pupils in grades K to 8. Its secondary school pupils are sent out of the district. Its facilities comprise three schools as follows:

South Cliff School	grades K-3	8 classrooms	2 special rooms
North Cliff School	grades K-3	14 classrooms	1 special room
Upper School	grades 4-8	32 classrooms	4 special rooms
	Total	54 classrooms	7 special rooms

Its staff includes 5 administrators, 48 classroom teachers, 19 special teachers, and 8 non-teaching specialists. Approximately 90% of the pupils enroll in college preparatory programs in the secondary schools which they attend in other districts.

The community has experienced tremendous growth in the last decade. While there is some disagreement with respect to actual percentages, it appears that since 1957 the enrollment has increased approximately 500%, the classroom space 600%, and the size of the school staff by 500%. The Board concedes that the enrollment growth has leveled off during the past three years to 4% but insists that it is still catching up with the demands imposed by the extraordinary increase of prior years. The Council, on the other hand, while admitting earlier

phenomenal expansion, contends that the Board has continued to plan expenditures which far exceed current needs now that enrollment increases have stabilized.

Council contends that since 1964, while the elementary school enrollment has increased 26%, the teaching staff has grown by 34% and the staff aides by 105%. It offers statistics to show that while the total enrollment has expanded by 31% since 1964, the budget has increased 130%. It also contends that administration costs since 1966 have grown from $24,600 to $71,000, an increase of 200% for a 7.8% growth in enrollment. The contemplated increases in expenditures for 1969-70 are not warranted or necessary, in the opinion of Council, to meet the needs of the school system.

The Board argues that Council's statistics are inaccurate and misleading and in some instances attempt to compare oranges and apples. However that may be, there can be no question that this school district offers one of the most complete school programs in the State. Its pupil-staff ratio is among the lowest and its expenditures per pupil among the highest. The salary schedule and other benefits available to its staff rank at the top. The facilities and equipment for teaching and learning are exceptional. It is one of the few school districts, for instance, which provide closed-circuit television. As a relatively small school district, providing only elementary grade education, it stands far above similar districts in New Jersey in the provisions made for its pupils. Two factors which contribute to this fortunate circumstance are (1) the character of the population and the aspirations they hold for their children and (2) the favorable tax base which enables the municipality to have one of the lowest tax rates in its county.

It should be clear that the Commissioner does not in any way decry the existence of these fortuitous conditions. In his view the community is to be commended for the educational opportunities which have been provided and which hopefully may continue undiminished. The Board concedes that its program is exceptional when compared to other districts of similar size but contends that continued development of such a high-level educational program is essential in a community where the income and the number of college degrees per capita are probably the highest in the State, and in the light of the problems of preparing children to live effectively in an increasingly complex society. It urges the Commissioner, therefore, to override the determination of Council to reduce the school appropriations by restoring the amounts curtailed.

Unfortunately, the Commissioner, as he understands the law, is without power to comply with the Board's request. While he endorses the kind of educational program being offered by the Board and supports its aspirations to maintain it and to introduce further innovative projects, he is specifically constrained by law from the exercise of his independent judgment in a case of this kind.

Prior to the judgment of the Supreme Court in the *East Brunswick* case, *supra*, in 1966, an appeal to the Commissioner of Education from a reduction of the appropriations for school purposes made by a municipal governing body

pursuant to statute had never been attempted. When that case reached the Appellate Division of Superior Court it held that such an appeal was proper but would have to be restricted to an inquiry into whether the governing body's action had been arbitrary. The Supreme Court, however, enlarged the scope of the review to permit the Commissioner to go beyond the mere question of arbitrariness to a determination of whether the State's educational policies and standards are being fulfilled. It defined this function in the following language:

> "* * * the function of the Commissioner under *R.S.* 18:3-14 is not to sit as an original budget-making body, as he would if the governing body had failed to make any certification. * * * His function is admittedly to sit as a reviewing body which, however, is charged with the overriding responsibility of seeing to it that the mandate for a thorough and efficient system of free public schools is being carried out.* * *"
>
> "* * * if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R.S.* 18:7-83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness.* * *"

In the appeal herein, there can be no question that a thorough and efficient school system can be maintained in Englewood Cliffs even with the reduced amount of appropriations set by Council. That some elements of the school program as presently constituted or planned or hoped for by the Board and its staff will have to be curtailed or eliminated is quite probable. But after reviewing the total budget, the specific economies suggested by Council, and the effect which Council's action will have on the school system, the Commissioner cannot find that the funds available will be so inadequate or that the educational program will be so adversely affected that a thorough and efficient school system for the Englewood Cliffs school district cannot be maintained. Certainly, if a thorough and efficient school system is not being provided in Englewood Cliffs and will not be maintained under the reduced appropriations, there are few districts in New Jersey which meet required standards.

This conclusion is inescapable whether the consideration is by named items or the budget as a whole. Elimination of any particular item suggested by Council would not so seriously affect the school system as to require its reinstatement. Moreover, the Board has estimated that it will begin the new school year with a surplus of over $114,000 in the current expense account and almost $7,000 in capital outlay. These monies can be used, of course, for any of

its programs that the Board believes must go on. Additionally there are other savings or reductions which are possible without serious crippling effects.

The Commissioner reaches this conclusion with great reluctance. He is eager to see programs, such as Englewood Cliffs now maintains and aspires to develop, become an actuality for all school districts. It goes without saying that were he free to exercise his independent judgment he would reinstate the Board's budget in its entirety. The reasons he cannot do so have already been set forth. Moreover, it must be realized that the community has rejected the Board's proposals. The Commissioner is aware that the Court uttered a caution in the *East Brunswick* matter that the determination of the funds to be appropriated must be related to educational considerations rather than voter reactions. This does not mean, however, that the will of the people expressed at the polls can be overlooked or lightly set aside. The fact that the community in this case overwhelmingly rejected the proposals of the Board is certainly a factor which must be given proper consideration with due attention at the same time to the educational welfare of the children to be served.

Some explanations of the voters' rejections were offered in this case. Council contends that the budget was defeated because the community is not in accord with the programs proposed by the Board and believes that school monies are expended extravagantly and unnecessarily. In the opinion of the Board the negative vote was not a rejection of the educational program but resulted from three causes: (1) generally increased taxes, (2) change of high school designation, and (3) personal animosities directed toward members of the school staff. The board expressed the view that although the people wanted some reduction, they are shocked and outraged by the size of Council's curtailment. The Board further expresses a belief that had the people known what Council would do they would not have rejected the budget.

The matter of voter reaction has been expounded only for the purpose of indicating that if the Board's point of view is correct, it has a remedy. If, as it says, the voters do not approve of council's cuts and will be dismayed by the economies the Board will be forced to make, the Board has the power to submit a proposal for additional funds to the voters at a special election called for that purpose at any time in its discretion. If the people will authorize such additional funds, the Board may not have to curtail some of the special projects which it believes the community wants continued.

The Commissioner finds and determines that the appropriations for school purposes certified by the Council are sufficient for the maintenance of a thorough and efficient school system in the Borough of Englewood Cliffs. The petition is, therefore, dismissed.

COMMISSIONER OF EDUCATION

July 2, 1969

Board of Education of the City of Elizabeth,

Petitioner,

v.

City Council of the City of Elizabeth, Union County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Joseph G. Barbieri, Esq.

For the Respondent, Edward W. McGrath, Esq.

Petitioner has appealed to the Commissioner of Education from an action of respondent reducing the monies to be raised by local taxation to operate the schools of the district for the school year 1969-70 by an amount $1,000,162 below the amount proposed by petitioner in its budget. Petitioner contends that respondent's action was arbitrary, capricious, and unreasonable and that the sum appropriated will not provide funds sufficient for the operation of a thorough and efficient system of schools in the district. Respondent denies that its action was arbitrary, and asserts that its appropriation is consistent with its duty to provide sufficient school funds as a part of a total municipal budget compatible with the ability of the City's taxpayers to carry the financial tax burden.

A hearing on the petition of appeal was conducted on May 27 and 28, 1969, at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. Affidavits and exhibits prepared by the parties as a result of a conference of the parties held on May 6, 1969, were received in evidence. The report of the hearing examiner is as follows:

Elizabeth is a Type 1 school district, having a Board of School Estimate. The Board of Education prepared and submitted to the Board of School Estimate a budget for the 1969-70 school year in the total amount of $13,576,529.19, of which $10,967,401.23 was to be raised by local taxation. (P-4) Following a public hearing on the proposed budget, the Board of School Estimate certified to City Council a budget requiring a local appropriation of $9,539,339.23, which amounted to a reduction of $1,428,162 in the Board's proposed budget. Following receipt of this certification, the Board and Council met for further discussion of the budget. Petitioner offered testimony that at that meeting it endeavored to elicit information on specific items of the budget in which economies were proposed, and sought questions from the Council by which the Board could explain its fiscal needs. Respondent's testimony, on the other hand, is that the Board refused to discuss any figure below that in its proposed budget. Despite this apparent contradiction in testimony, it is clear that some level of communication was effected, for after first concurring with the certification of the Board of School Estimate, the Council later rescinded its concurrence, and

restored to the budget cut made by the Board of School Estimate the amount of $428,000, so that the net reduction in the Board's proposed 1969-70 budget totals $1,000,162.

Petitioner argues that Council's action is at the least arbitrary, since at no time has it specifically set forth its "underlying determinations and supporting reasons" with respect to proposed operating economies, consonant with the opinion of the Court in *Board of Education of East Brunswick v. Township Council of East Brunswick*, 48 *N.J.* 94, 105 (1966). Instead, says petitioner, respondent has made its determination solely in terms of the effect of the school budget upon the local tax rate.

Respondent does not deny that it has not offered a reason for specific line item reductions in the Board's budget. It would be folly for the Council to do so, says respondent, since it well knows that the Board has full right to spend each dollar of its appropriation as it sees fit, regardless of any proposals or recommendations made by Council. Rather, respondent urges, it is the burden of petitioner to go forward with its proofs in support of its contention that it cannot fulfill its educational mandate with the appropriation fixed by Council. Respondent has, none the less, by agreement prior to the hearing filed the affidavit of the President of Council setting forth the position of Council with respect to its determinations (1) to appropriate more money than was provided in the budget certified to it by the Board of School Estimate, and (2) to appropriate less money than the amount originally sought in the budget prepared by the Board of Education. In that affidavit the affiant states in part that the governing body

> "* * * must in good conscience set forth what it feels might be an area within which the Board of Education could, if it could so determine, effect an economy or refrain from so substantial an increase as planned. * * * Set forth in the schedules attached to the respondent's answer is the thinking of the members of City Council as to areas to which the Board of Education may direct its attention to reductions * * *"

Also filed with the Commissioner is the affidavit of the Business Administrator of the City of Elizabeth, in which is set forth the record of total school district budgets and local school appropriations since the school year 1965-66, the change in the local tax rate beginning with the year 1965, and the record of capital outlay appropriations for the school district over and above the regular budgetary appropriations. The affidavit of the President of Council refers to the "finanacial status of the City" as portrayed by the Business Administrator as "the underlying reason for any economies which it (Council) suggests to the Board of Education."

Respondent argues further that the Commissioner lacks jurisdiction in this matter, which appeals a budget actually higher than that certified by the Board of School Estimate. Petitioner, however, points to the case of *Board of Education of Elizabeth v. Board of School Estimate, etc.*, 95 *N.J.Super.* 284 *(App. Div.* 1967), which affirms a Law Division holding that

"* * * when an amount approved by Council is not sufficient to provide 'for the maintenance and support of a thorough and efficient system of free public schools' * * *, the remedy is by appeal to the Commissioner of Education."

The hearing examiner concludes that while respondent's reasons for its proposed economies are not set forth with that degree of specificity that was contemplated by the Court in the *East Brunswick* case, *supra*, respondent's action taken in the total context of its appropriation of more funds than required by the budget certified to it pursuant to *N.J.S.A.* 18A:22-15, does not constitute a basis for the Commissioner to find that respondent acted arbitrarily or capriciously. *Cf. Board of Education of National Park v. Borough of National Park*, 1967 *S.L.D.* 66.

Respondent did, in fact, propose specific reductions in many categories of the budget, as is shown in the following table:

Account Number	Item	Board's Budget	Council's Proposal	Amount Reduced
110b	Salary of Bd. Sec'y	$18,000.00	$16,500.00	$1,500.00
	Salaries-Clerks & Sec'y's	49,720.00	47,210.00	2,510.00
110f	Salaries-Supt.	28,000.00	26,500.00	1,500.00
	Salaries-Ass't Supt.	20,500.00	19,500.00	1,000.00
	Salaries-Clerks & Sec'y's	48,503.50	47,285.50	1,218.00
110i	Salary-Ass't Bd. Sec'y	13,000.00	12,500.00	500.00
	Salaries-Clerks & Sec'y's	46,430.00	40,500.00	5,930.00
110j	Salary-Dir. of Plant, etc.	15,500.00	15,250.00	250.00
	Salary-Supt. of Custodians	10,550.00	9,950.00	600.00
	Salary-Supt. of Mechanics	13,120.00	12,620.00	500.00
120a	Public School Accountant-Fee	9,500.00	9,000.00	500.00
120b	Legal Fees	12,500.00	12,000.00	500.00
130a	Expenses of Bd. Members	3,000.00	1,500.00	1,500.00
130b	Board Sec'y-Office	4,000.00	3,400.00	600.00
130f	Supt.-Office Expense	2,800.00	2,300.00	500.00
130i	Sch. Bus. Admin.–Office Exp.	3,500.00	3,000.00	500.00
130m	Other Exp. - Printing & Publ.	5,500.00	4,800.00	700.00
130n	Misc. Exp.-Bus. Admin.	1,500.00	1,200.00	300.00
211	Salaries-Principals	515,555.00	456,171.00	59,384.00

212	Salaries-Supervisors	275,366.00	263,902.00	11,464.00
213	Salaries-Teachers	7,401,751.00	6,775,171.00	626,580.00
213a	Bedside Teachers	86,360.00	81,445.00	4,915.00
213b	Indiv. Supp. Instr.	43,404.00	41,384.00	2,020.00
214a	Librarians	75,848.00	71,338.00	4,510.00
214b	Guidance Counselor	276,324.00	216,474.00	59,850.00
214c	Psychological Personnel	204,272.00	166,360.00	37,912.00
215a	Sec'y's & Clerks-Prin. Offices	258,131.00	238,245.00	19,886.00
215b	Sec'y's & Clerks-Supv. of Instr.	99,434.50	86,871.50	12,563.00
216	Other Salaries Instr.	43,756.50	42,706.50	1,050.00
250a	Misc. Supplies-Supv. Office	6,500.00	6,000.00	500.00
250a-1	Misc. Supplies-Prin. Office	10,800.00	10,200.00	600.00
250c	Misc. Exp.-Instruction	10,500.00	9,500.00	1,000.00
310a	Salaries - Attendance Personnel	58,820.00	56,100.00	2,720.00
310b	Sec'y Attendance Service	6,310.00	5,870.00	440.00
410a-3	Salaries-School Nurses	188,910.00	175,000.00	13,910.00
410b	Sec'y's & Clerks-Health Services	3,230.00	2,935.00	295.00
420c	Misc. Exp. - Health Services	3,000.00	2,200.00	800.00
510b	Salaries-Bus Drivers	50,520.00	42,360.00	8,160.00
610a	Salaries-Custodial Services	862,775.00	808,775.00	54,000.00
610b	Salaries-Care of Grounds	19,900.00	14,000.00	5,900.00
610c	Other Salaries-Operation	67,120.00	60,760.00	6,360.00
640a,b,c	Utilities	120,000.00	115,000.00	5,000.00
640d	Telephone & telegraph	35,000.00	30,000.00	5,000.00
650a	Custodial Supp.	27,000.00	22,740.00	4,260.00
730b-3	Replacement-Non-Instr. Equip.	10,000.00	6,000.00	4,000.00
1020	Other Exp.-Student Activities	20,000.00	15,000.00	5,000.00
1123	School Community Couns.	5,000.00	0	5,000.00

GRADES 7 & 8 SUMMER SCHOOLS:

211S	Salaries-Principals	3,000.00	1,000.00	2,000.00
213S	Salaries-Teachers	30,000.00	19,800.00	10,200.00
214cS	Salaries-Guidance	2,100.00	800.00	1,300.00
215aS	Sec'y's -Prin. Office	1,800.00	600.00	1,200.00
250a-1S	Prin. Office Exp.	1,200.00	500.00	700.00

	VOCATIONAL EDUCATION (EVENING):			
2.212	Salary-Supv. of Instr.	14,028.00	13,328.00	700.00
2.215	Salaries-Clerks	3,475.00	3,250.00	225.00
2.216	Other Salaries-Instr.	1,850.00	1,700.00	150.00
	TOTAL	$11,148,663.50	$10,148,501.50	$1,000,162.00

Testimony supporting the Board's contention that its proposed budget appropriations for each of the reduced items are necessary for the support of a thorough and efficient system of public schools in Elizabeth was offered by the Superintendent of Schools and the Board Secretary-School Business Administrator. Testimony as to Council's procedures and reasons in making its determinations of recommended reductions was given by a member of Council who also serves on the Board of School Estimate and by the City Business Administrator. The findings and recommendations of the hearing examiner with respect to each of the proposed reductions are as follows:

110b - Salary of Board Secretary - School Business Administrator. The testimony shows the following development of this salary item:

1967-68	actual	$14,500
1968-69	budgeted	16,000
1969-70	proposed	18,000

Council recommended limiting the increase to $500. In the light of salary increments proposed for other employment categories who work under the Secretary-Business Administrator's direction, a $500 increase is unrealistic. The Board's proposed increase of $2000, on the other hand, is disproportionately high with respect to proposed increases for other top administrative personnel. It is recommended that $1000 of the reduction be restored.

110b - Salaries of Clerks and Secretaries. Council eliminated entirely a budgeted provision of $1,400 for wages of substitutes needed for absences. In the light of statutorily mandated sick leave pay for board of education employees, boards must necessarily make reasonable provision to pay for substitutes. It is recommended that the $1,400 budgeted for this purpose be restored. In addition, Council proposed eliminating $1,110 proposed for across-the-board salary increases, over and above previously scheduled increments, for the seven employees in this account. A new salary schedule for secretarial and clerical employees has been negotiated with the Board, and was received as an exhibit (S-4 of P-6). This schedule provides salaries testified to be necessary to maintain and retain an efficient staff. The hearing examiner finds the $1,110 proposed for this purpose to be a necessary expenditure, and recommends its restoration.

110f - Salaries - Superintendent and Assistant Superintendent. The Board's budget provides for a $2,000 salary increase, to $28,000, for the Superintendent of Schools, and a $1,000 increase, to $20,500, for the Assistant Superintendent.

Council recommends limiting each increase to $500. Testimony shows that the Board's proposals are consistent with salaries and increments in comparable school districts, and in fair proportion to salaries for other professional employees in the district. It is recommended that the two proposed reductions, of $1,500 and $1,000, be restored.

110f - Salaries of Clerks and Secretaries. Council's proposed reductions would eliminate $1,018 for across-the-board salary increases for six secretarial and clerical employees in the Superintendent's and his assistants' offices, in accordance with a negotiated salary schedule. These increases range from $20 to $330. The hearing examiner finds as in Item 110b, *supra*, and recommends restoration of $1,018. Council also proposes eliminating an item of $200 for "extra services." The Board did not show the necessity for this item which is designated for after - hours services of the Superintendent's secretary; it is recommended that this reduction be undisturbed.

110i - Salary of Assistant Secretary - Director of Administration. The Board proposed a $1,250 salary increase, to $13,000, for this employee, who has responsibility for the accounting functions of the district. The increase amounts to approximately 10 per cent, which is consistent with other administrative increases and with the responsibilities of the position. It is recommended that Council's proposed cut of $500 be restored .

110i - Salaries of Clerks and Secretaries, Office of Business Administration. As in 110b and 110f, *supra*, Council eliminated across-the-board increases amounting to $330, and $1,400 for substitute pay. For the reasons already cited, and upon the same findings, the hearing examiner recommends restoration of $1,730. The Board's budget provided $4,200 for an additional clerk to be assigned to the Director of Plant, Property, and Equipment, which Council recommends eliminating. The hearing examiner does not find that additional responsibilities for this Director in 1969-70 have been shown to be sufficient to warrant adding this position, and recommends that Council's reduction be sustained.

110j - Salaries, Administration of Building and Grounds. The Board's budget provides salary increases as follows:

Director of Plant, etc.	$ 750 to $15,500
Supervisor of Janitors	$1,100 to $ 9,950
Supervisor of Mechanics	$1,000 to $13,120

Council proposes cutting these increases by $250, $600, and $500, respectively. The Board contends that their proposed increases are consistent with wages paid in competitive activities with comparable responsibilities, and are in reasonable relationship to the wages paid to employees under their direction and supervision. The hearing examiner finds that the evidence supports the necessity of the increases proposed by the Board, and recommends the restoration of a total of $1,350 to this account.

120a - Public School Accountant's Fee. The Board added $1000 for 1969-70 to the prior appropriation of $8,500 for this item. Council recommends reducing the increase to $500. The testimony does not disclose that the Board has clear knowledge that any increase will amount to $1,000 - only that there has been no increase for several years. It is recommended that Council's recommendation be sustained.

120b - Legal Fees. The Board's budget increased the appropriation for this account from $11,500 to $12,500. Council would halve this increase. Figures supplied by the Board show that actual expenditures from 1965-66 to date have not exceeded $11,000 in any year. It is recommended that Council's reduction be sustained.

130a - Expenses of Board Members. In 1967-68 the Board spent $2,066.61 for this account. It budgeted $1,500 for 1968-69. As of April 30, 1969, it had spent over $2,400. In anticipation of an increase in assessed dues for the Federation of District Boards of Education, the Board proposed a budget of $3,000 for this item in 1969-70. Council would eliminate all of the increase. The hearing examiner finds that $3,000 is supported as a reasonable expenditure for a district of this size, and recommends restoration of the $1,500 reduction.

130b - Board Secretary's Office Expense.

1967-68	actual	$5,378.60
1968-69	budgeted	$3,400.00
1968-69	actual to April 30, 1969	$3,384.88
1969-70	proposed	$4,000.00

Council recommended elimination of the $600 budgeted increase. The Board testified that increased cost of supplies and materials, together with higher postage rates, necessitates the budgeted increase. The hearing examiner finds that the necessity of the increase is supported by the evidence, and recommends restoration of $600 to this account.

130f - Superintendent's Office Expense. A proposed increase from $2,300 to $2,800 for office expenses of the Superintendent and his assistants is defended on the same basis as 130b, *supra.* Council proposes eliminating the increase. On the same finding as in 130b, the hearing examiner recommends restoration of $500 to this account.

130i - School Business Administrator's Office Expense. Expenditures in this account have been above $2,900 in each of the three previous school years. In the current year, to April 30, 1969, expenditures have been over $3,300, above the budgeted $3,000. The Board's proposed budget of $3,500 is defended on the same basis as 130b, and 130f, *supra.* Based on the same findings, the hearing examiner recommends the restoration of $500 cut by Council.

130m - Other Expenses for Printing and Publishing. Expenditures in this account are presented as follows:

1965-66	$4,752.85
1966-67	4,984.88
1967-68	5,785.33
1968-69 to April 30	5,406.50

The Board budgeted $4,800 for the current year, and in the light of experience, increased printing costs, and the necessity to print negotiated agreements, proposed $5,500 for 1969-70. Council recommends eliminating the increase. The hearing examiner finds that $5,500 is a reasonable appropriation, and recommends restoration of the $700 reduction.

130n - Miscellaneous Expense - School Business Administrator. The Board appropriation for this account in 1969-70 is $1,500, up $300 from the 1968-69 budget. Figures supplied by the Board show the following actual expenditures:

1965-66	$ 724.96
1966-67	1,269.55
1967-68	1,799.52
1968-69 to April 30	415.77

The basic expenditure in this account, it is asserted, is for notices to bidders. Absent any showing of contemplated increases, and in the light of prior expenditures, the hearing examiner does not find the proposed increase justified. It is recommended that the reduction be sustained.

211 - Salaries - Principals. Budgeted increases in this account include $21,494 for across-the-board salary increments to keep salaries "on guide," and $37,890 for one additional elementary school principal and two additional vice-principals. The across-the-board increases result from a negotiated agreement with the school administrators, which provides for a ratio relationship between administrative and teachers' salaries. The hearing examiner finds the across-the-board increases necessary to maintain an effective administrative staff, and recommends restoration of this reduction of $21,494. The additional elementary school principal, at $12,630, is needed for the new Mitchell School to be opened in 1969-70, and the hearing examiner so finds. It is also proposed to add an additional vice-principal at Jefferson and Battin High Schools, each at $12,630. The testimony showing anticipated increased enrollments of 111 and 126 pupils respectively at the two schools does not support the need for such additional expenditure, and it is recommended that $25,260 of Council's recommended reduction be sustained.

212 - Salaries - Supervisors. Across-the-board increases in this account, based on negotiated salary ratios (see 211, *supra*), amount to $11,464, which Council would eliminate. Based on the same findings as set forth for similar increases in 211, *supra*, the hearing examiner recommends restoration of this item.

213 - Salaries - Teachers. By far the largest single item of Council's proposed reductions is found in this account. As a result of negotiations pursuant to *Chapter* 303, *Laws* of 1968, the Board entered into an agreement with its teachers, which provided for a salary schedule with a beginning salary of $7,000 per year, versus $6,300 in the prior schedule. Across-the-board increments of $700 each, totaling $477,265, are provided in the Board's budget in order to implement the schedule and to keep present staff from falling farther "off guide." It was testified that fewer than one third of the 1968-69 staff are at their proper place on this year's schedule. It should be noted that the negotiated agreement conditioned all economic provisions on funding approval by the governing body, and it is clear that Council, by its reduction, has not provided that approval. However, notwithstanding any questions raised by the conditions of the agreement, the testimony clearly establishes that a starting salary of $7,000 is as low as, or lower than, that provided in the salary schedules of all but two school districts in Union County. Thus Elizabeth will maintain no more than a competitive position for employing and retaining teachers with the schedule proposed for 1969-70. The hearing examiner therefore recommends the restoration of the $477,265 needed for across-the-board increases.

Council also proposed eliminating $113,200 budgeted for substitute teachers. It was testified that this was the entire appropriation for this purpose. The Councilman who testified for respondent said that he did not realize that this cut was the entire substitute teacher appropriation. The hearing examiner finds that the school system cannot be operated without an appropriation for substitute teachers. He further finds that on the basis of current expenditure for 1968-69 (P-7) the Board's appropriation is not in excess of what may reasonably be anticipated. It is therefore recommended that $113,200 be restored.

Finally, Council proposed eliminating five of 29 additional teachers proposed by the Board, at a suggested saving of $36,115. However, respondent did not specify which five teachers should be eliminated, and the Board did not demonstrate a conclusive need for all 29 teachers. In any event, it is reasonable that turnover savings, even those not anticipated when the budget was fixed by the Board, will be adequate to provide for the five challenged additions to the staff. It is therefore recommended that the $36,115 reduction for this purpose be sustained.

213a - Bedside Teachers. It is recommended that $4,915 cut from the Board's budget for across-the-board increases be restored, for the reasons set forth in 213, *supra.*

213b - Individual Supplementary Instruction. It is recommended that $2,020 cut from the Board's budget for across-the-board increases be restored, for the reasons set forth in 213, *supra.*

214a - Librarians. It is recommended that $4,510 cut from the Board's budget for across-the-board increases be restored, for the reasons set forth in 213, *supra.*

214b - Guidance Counselors. It is recommended that $12,350 cut from the Board's budget for across-the-board increases be restored, for the reasons set forth in 213, *supra.*

A further reduction of $47,500 in this account is proposed by Council, through the elimination of the employment of one additional counselor at Edison High School and at each of the four junior high schools. Present pupil: counselor ratios at Edison and at three of the junior high schools (Cleveland, Hamilton, and Roosevelt) are in excess of 400:1, and will be higher under projected 1969-70 enrollments. Addition of four counselors at these schools would bring about ratios ranging from 254:1 to 341:1. The present and anticipated ratio at Lafayette Jr. High School with its two counselors is 308:1, Addition of a third counselor is not shown to be warranted. It is therefore recommended that $38,000 be restored for the purpose of providing four additional counselors.

214c - Psychological Personnel. The reductions proposed by Council in this account are as follows:

$11,900	for across-the-board salary increases.
$10,312	for a vacancy in the psychological staff.
$11,200	for supervisory staff.
$ 4,500	for psychiatric consultant service.

The hearing examiner recommends the restoration of $11,900 for across-the-board increases, for the reasons set forth in 213, *supra.* The hearing examiner finds that the position of psychologist at $10,312 was shown in the Board's budget worksheets as a vacancy, that this vacancy has subsequently been filled, and that no additional position is proposed. It is therefore recommended that the amount of $10,312 be restored for this position. It is further found that the $11,200 budgeted for supervisory staff does not provide for new services, but for the salary of a position of Coordinator of Psychological Services in existence for many years. It is recommended that this amount of $11,200 be restored. Finally, the hearing examiner finds that the necessity for a budgeted increase of $3,000 to provide additional psychiatric consultant service is not supported by the testimony. On the other hand, the cut of $4,500 proposed by Council would reduce the funds available for this service below the 1968-69 level. The hearing examiner therefore recommends restoration of $1,500 for psychiatric consultant services.

215a - Secretarial and Clerical Services - Principal's Office. Council's recommendations eliminated $4,386 for across-the-board increases, $4,000 for an additional secretary, and $11,500 for substitutes' services in this account. The hearing examiner recommends restoration of $4,386 for salary increases, for the reasons set forth in 110b, *supra.* The hearing examiner finds that the amount eliminated for substitutes represents the entire appropriation for this purpose, and recommends the restoration of $11,500 for the reasons set forth in 110b, *supra.* The appropriation of $4,000 for a secretary is to provide a secretary for the principal of the new Mitchell School. The hearing examiner finds this to be a necessary position, and recommends the restoration of $4,000 for this purpose.

215b - Secretarial and Clerical Services for Supervisors of Instruction. Council recommends reducing this account by eliminating across-the-board salary raises in the amount of $2,963, the appropriation for substitutes amounting to $5,600 and a new secretarial position for central staff offices at $4,000. The hearing examiner recommends restoration of $2,963 for salary increases and $5,600 for substitutes, on the same basis as set forth in 110b, *supra.* The hearing examiner finds that the necessity for the new position has not been established, and recommends that the reduction of $4,000 for this purpose be sustained.

216 - Other Salaries for Instruction. Council recommended eliminating an appropriation of $900 for across-the-board increments and $150 for substitutes in this account. The personnel are non-professional, and serve as pianist, laboratory assistants, and athletic assistants. Consistent with the salary increases provided for other personnel, and the necessity for a reasonable sum for substitute pay, the hearing examiner finds the $1,050 cut from this account to be a necessary expenditure and recommends its restoration.

250a, a-1 - Miscellaneous Supplies for Instruction. The Board's budget provided for an increase of $500 to $6,500 for miscellaneous expenses of the supervisors' offices, and a $600 increase to $10,800 for similar expenses in the principals' offices. For the reasons previously set forth in 130b and 130f, *supra,* the hearing examiner recommends restoration of the total of $1,100 to these accounts.

250c - Miscellaneous Expenses for Instruction. The Board's budget provided a $1,000 increase, from $9,500 to $10,500, for this miscellaneous account. Testimony was offered that funds were needed to match State and Federal programs including equipment for an instructional program in data processing. The testimony was insufficient to establish the necessity to increase the appropriation in this account. It is therefore recommended that the reduction be undisturbed.

310a - Salaries for Attendance Personnel. Council recommends eliminating $2,720 provided for across-the-board increases for district attendance officers. School attendance service is a necessary function of a thorough and efficient school system, and the basic salary program of the district should be applicable to the personnel engaged in this service. It is therefore recommended that the $2,720 proposed to implement the salary program be restored.

310b - Secretarial and Clerical Personnel - Attendance Service. The Board provided a $290 across-the-board increase and $150 for substitute service in this account. Council recommends eliminating these amounts. For the reason expressed in 110b, *supra,* the hearing examiner recommends restoration of $440 to this account.

410a-3 - Salaries of School Nurses. Across-the-board increases for school nurses amount to $11,360, and the appropriation for substitute nurses' pay was $2,550. Council proposes elimination of both amounts. As members of the

school system's professional staff, the same findings are applicable to school nurses as to teachers in account 213, *supra.* The hearing examiner recommends restoration of $13,910 to this account.

410b - Secretarial and Clerical Personnel - Health Services. For the reasons expressed in 110b, *supra,* the hearing examiner recommends restoration of $295, consisting of $145 for across-the-board increase and $150 for substitutes' pay, to this account.

420c - Miscellaneous Expense, Health Services. The appropriation for this account was increased by the Board from $2,200 to $3,000. The increase, it was testified, is largely attributable to higher costs of chest x-ray service and a high incidence of tuberculosis in the community. Since tuberculosis screening is a statutory obligation of boards of education, the hearing examiner finds this a necessary expense, and recommends restoration of $800 to this account.

510b - Salaries of Drivers of Pupil Transportation Vehicles. The Board's budget provided $6,960 for an additional bus driver, on the grounds that buses used in 1968-69 are over crowded, and at least 60 more handicapped pupils have been identified for whom transportation must be provided in 1969-70. The hearing examiner finds that the additional driver's salary must be provided, and recommends restoration of $6,960. For reasons previously stated (213, *supra),* the hearing examiner also recommends restoration of $1,200 deleted by Council for substitute drivers' pay.

610a - Salaries - Custodial Services. Across-the-board increases for custodians' salaries amount to $30,000. An appropriation of $15,000 would provide three additional janitors to reduce the workload at three schools. Substitute janitors' pay amounting to $9,000 was appropriated by the Board. Council would eliminate these three amounts for a total saving of $54,000 in this account. The Board's testimony was that the across-the-board raises result from negotiations with the custodians' group. The hearing examiner finds that the average annual wage increase of $600 per janitor is consistent with the district's need to retain its staff with competitive wages. It is recommended that the amount of $30,000 be restored. The hearing examiner finds that since the building areas where the three additional janitors were to be assigned are no greater than in 1968-69, need for these janitors has not been established as essential, even if desirable. It is recommended that the $15,000 economy be sustained. Finally, for reasons already established, elimination of $9,000 for substitute janitors' pay was not justified. It is therefore recommended that this $9,000 be restored.

610b - Salaries for Care of Grounds. Council recommended elimination of $600 for across-the-board increases for two groundskeepers. For reasons set forth in 610a, *supra,* it is recommended that this amount be restored. Council also eliminated an additional laborer who the Board claims is needed to assist the other two laborers in caring for a six-acre athletic field. The hearing examiner finds that the evidence does not support the need for this additional employee, and recommends that the $5,300 reduction be sustained.

610c - Other Salaries for Operation of Plant. Across-the-board salary increases for other operational employees would require $2,160 under the Board's budget. Council would eliminate this increase. The hearing examiner finds the across-the-board increases warranted, as set forth in 610a, *supra*, and recommends restoration of this amount. The hearing examiner does not find that evidence of additional duties warrants employment of an additional clerk at $4,200, and recommends that Council's reduction of this amount be sustained.

640a,b,c - Utilities. Board exhibits show the following for these accounts:

1967-68	actual	$119,878
1968-69	budgeted	$110,000
1969-70	budgeted	$120,000

Increased building use in the evenings, higher electric rates, and the opening of the Mitchell building are given as the reasons for the $10,000 budgeted increase, which Council proposes to cut in half. Board exhibit P-7 shows that $108,576 had been expended in this account as of April 30, 1969. In the light of experience, the increase proposed by the Board will be necessary, and the $5,000 cut by Council should be restored. The hearing examiner so recommends.

640d - Telephone and Telegraph. For 1968-69, the Board budgeted $30,000, and at the rate of expenditure as of April 30, 1969, will require the budgeted amount. For 1969-70, an additional $5,000 has been budgeted, which Council recommends eliminating. The Board explains the increase as required for installation costs to move its switchboard to the new administration offices in the Mitchell building, to provide additional lines between administrative offices and the secondary schools for emergency needs, and to add administrative office extensions. The hearing examiner finds that the added $5,000 will be necessary to maintain adequate telephone service, and recommends its restoration.

650a - Custodial Supplies. In 1967-68 the Board spent $26,115 in this account. It reduced its budget to $20,000 for 1968-69, and as of April 30, 1969, had spent all but $789 of that amount. In the light of rising costs and the opening of a new buildings, the Board budgeted $27,000, from which Council recommends cutting $4,260. The amount remaining after Council's reduction represents an increase of more than 13 per cent over the current budget. The hearing examiner finds this amount adequate for the operation of the school plant and recommends that Council's reduction be sustained.

730b-3 - Replacement of Non-Instructional Equipment. The Board increased the appropriation in this account from $6,000 to $10,000, allocating most of the $4,000 to replace equipment in supervisors' offices when these offices are moved to the new administrative building. The hearing examiner does not find this expenditure essential to the operation of a thorough and efficient system of public schools in the district, and recommends that Council's reduction be sustained.

1020 - Other Expenses for Student Body Activities. The Board's budget for 1969-70 is up $5,000 from the $15,000 budgeted for 1968-69. As of March 31, 1969, the 1968-69 budget had been overspent by nearly $8,000. Increased costs of supplies and equipment, transportation, game operation, and officials' fees as well as expansion of the student activities program, are stated as reasons for the budget increase. The hearing examiner finds the $5,000 to be needed to support this account, which the Commissioner has found to be an essential aspect of the educational program. *Board of Education of Dumont v. Mayor and Council of Dumont*, Commissioner of Education, November 14, 1968 It is recommended that the cut be restored.

1123 - School Community Counselor. The school district's share of a community service project for which State funds of $14,000 are sought will be $5,000. Because of the unusual problems of such urban districts as Elizabeth, the hearing examiner finds that the appropriation of $5,000 as the local district's share of this project is both reasonable and necessary. It is therefore recommended that Council's reduction of $5,000 be restored.

211S, 213S, 214aS, 215aS, 250a-1S - Grades 7 and 8 Summer Schools. At the time the budget was prepared, the Board anticipated a reduction in ESEA Title I funds used to support the summer school programs in Grades 7 and 8, and provided $15,400 in additional local funds to make up the deficiency. The affidavit of the Superintendent submitted for this hearing states that on April 3, 1969, notice was received that sufficient ESEA funds would be allocated to make the extra local appropriations unnecessary. The hearing examiner therefore recommends that the reductions in these summer school accounts be sustained.

2.212 - Supervisor of Instruction, Vocational Evening School. Council proposes eliminating $700 provided for across-the-board salary increase in this account. For the reasons set forth in 211, *supra*, the hearing examiner recommends restoration of this amount.

2.215 Clerks' Salaries, Vocational Evening School. The Board's proposed increase of $225 for additional clerical time was cut by Council. The evidence does not show additional duties sufficient to warrant this increase. The hearing examiner recommends that the cut be sustained.

2.216 - Other Salaries for Instruction, Vocational Evening School. An increase of $150 was budgeted in this account to pay hourly wages for toolroom attendants in conformance with statutory wage requirements. Council recommends eliminating this increase. The hearing examiner finds the increase necessary, and recommends its restoration.

The recommendations of the hearing examiner are summarized in the following table:

Account Number	Item	Amount of Cut Proposed	Amount Restored	Amount Not Restored
110b	Salary of Bd. Sec'y	$ 1,500	$ 1,000	$ 500
	Salaries-Clerks and Secretaries	2,510	2,510	
110f	Salaries-Supt.	1,500	1,500	
	Salaries-Ass't. Supt.	1,000	1,000	
	Salaries-Clerks and Secretaries	1,218	1.018	200
110i	Salary-Assistant Board Secretary	500	500	
	Salaries-Clerks and Secretaries	5,930	1,730	4,200
110j	Salary-Director of plant, etc.	250	250	
	Salary-Superintendent of Custodians	600	600	
	Salary-Superintendent of Mechanics	500	500	
120a	Public School Accountant-Fee	500		500
120b	Legal Fees	500		500
130a	Expenses of Bd. Members	1,500	1,500	
130b	Board Secretary-Office Expense	600	600	
130f	Superintendent's Office Exp.	500	500	
130i	School Bus. Admin. Office Expense.	500	500	
130m	Other Expenses-Printing & Publish.	700	700	
130n	Misc. Expenses-Business Adminis.	300		300
211	Salaries-Principals	59,384	34,124	25,260
212	Salaries-Supervisors	11,464	11,464	
213	Salaries-Teachers	626,580	590,465	36,115
213a	Bedside Teachers	4,915	4,915	
213b	Indiv. Supp. Instr.	2,020	2.020	
214a	Librarians	4,510	4,510	
214b	Guidance Counselor	59,850	50,350	9,500
214c	Psychological Personnel	37,912	34,912	3,000
215a	Secretaries and Clerks-Prin.Off.	19,886	19,886	
215b	Sec'y's & Clerks-Supv. of Instr.	12,563	8,563	4,000
216	Other Salaries Instr.	1,050	1,050	
250a,a-1	Misc. Supplies-Instr.	1,100	1,100	
250c	Misc. Exp.-Instr.	1,000		1,000
310a	Salaries-Attendance Personnel	2,720	2,720	
310b	Sec'y-Attendance Service	440	440	

410a-3	Salaries-School Nurses	13,910	13,910	
410b	Sec'y's & Clerks-Health Services	295	295	
420c	Misc. Exp.-Health Services	800	800	
510b	Salaries-Bus Drivers	8,160	8,160	
610a	Salaries-Custodial Services	54,000	39,000	15,000
610b	Salaries-Care of Grounds	5,900	600	5,300
610c	Other Salaries-Operation	6,360	2,160	4,200
640a,b,c	Utilities	5,000	5,000	
640d	Telephone & Telegraph	5,000	5,000	
650a	Custodial Supplies	4,260		4,260
730b-3	Replacement-Non-Instr. Equip.	4,000		4,000
1020	Other Exp.-Student Activities	5,000	5,000	
1123	School Community Couns.	5,000	5,000	
	GRADES 7 & 8 SUMMER SCHOOLS:			
211S	Salaries-Principals	2,000		2,000
213S	Salaries-Teachers	10,200		10,200
214cS	Salaries-Guidance	1,300		1,300
215aS	Sec'y's-Prin. Office	1,200		1,200
250a-1S	Prin. Office Exp.	700		700
	VOCATIONAL EDUCATION (EVENING):			
2.212	Salary-Supv. of Instr.	700	700	
2.215	Salaries-Clerks	225		225
2.216	Other Salaries-Instr.	150	150	
	TOTAL	$1,000,162	$866,702	$133,460

* * * *

The Commissioner has reviewed the findings and recommendations of the hearing examiner as set forth herein.

It is to be observed that the greatest percentage of the contested reductions are across-the-board increases which are either the result of negotiated agreements or are corollary increases for employees not covered by such agreements. The Commissioner concurs in the hearing examiner's findings that under the circumstances of this case, these across-the-board increases are necessary to keep salaries in Elizabeth schools in a reasonably competitive posture, either with respect to other school districts or, where applicable in the case of non-professional employees, with respect to private employment.

Another considerable sum of the contested reductions is involved in appropriations for substitutes. The Commissioner concurs in the finding that the elimination of such appropriations cannot be sustained. Mandated sick leave

allowances create a necessity for adequate funds to provide sufficient substitutes.

The necessity for other increases as found by the hearing examiner is attributable to rising costs of supplies, services and operations. The Commissioner observes that few of the restorations recommended are to provide for additional personnel or new services.

Finally, the Commissioner finds that his jurisdiction to make a determination in this case is established in *Board of Education of Elizabeth v. Board of School Estimate, etc., supra.*

The Commissioner therefore finds and determines that an additional $866,702 is necessary for the maintenance and operation of a thorough and efficient system of public schools in the City of Elizabeth for the 1969-70 school year. He therefore directs respondent to take such steps as are required to make an additional appropriation of $866,702 for the Board of Education of the City of Elizabeth.

COMMISSIONER OF EDUCATION

July 17, 1969

Pending before New Jersey Supreme Court.

Jack Rosenman,

Petitioner,

v.

Board of Education of the Township of Howell, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, *Pro Se*

For the Respondent, Lawrence H. Bathgate, II, Esq.

Petitioner in this matter is a parent of children attending respondent's schools. He alleges that the transportation policy affecting children living in his community is discriminatory and contrary to the stated transportation policy of the respondent Board of Education. Respondent denies petitioner's allegations and contends that it has provided transportation not required by law in the proper exercise of its own discretion.

A hearing in this matter was conducted on April 3, 1969, at the Monmouth County Court House, Freehold, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Petitioner resides in a community of Howell Township known as Aldrich Estates, located on the south side of Aldrich Road. On the same side of that road and accessible to Aldrich Estates by means of a black-topped pathway is the Aldrich School. The location of the school and the pathway connecting the school grounds to the Aldrich Estates is such that no pupil walking to the school from Aldrich Estates will be required to cross Aldrich Road, which is testified to be a heavily traveled feeder road to Route 9, or any other main thoroughfare. Also attending Aldrich School are pupils residing in another community of the Township known as Winston Park, which is situated on the opposite side of Aldrich Road. The distance between Aldrich School and the nearest point in Winston Park is greater than the distance between the school and the farthest point in Aldrich Estates.

The hearing examiner finds from the testimony of the Superintendent of Schools and the Secretary of the respondent Board of Education that the Board has established a transportation policy with respect to pupils attending Aldrich School. This policy provides that pupils residing in the Winston Park section will be transported to school while they are enrolled in kindergarten and first and second grade, and that pupils from Winston Park enrolled in grades three through six will not be transported by the Board of Education. The policy further provides that transportation will not be furnished to any children in kindergarten through grade six who reside in Aldrich Estates. Finally, there is a basic provision that any pupil will be provided transportation at public expense if his route to Aldrich School requires him to cross Aldrich Road at a time when the crossing at the school is not protected by a school crossing guard. Thus, for example, it was shown in the testimony that a kindergarten pupil residing not more than four-tenths of a mile from the school is transported at public expense because his residence is on the opposite side of Aldrich Road from Aldrich School and there is no crossing guard provided at noon when his kindergarten session ends. It is clearly established that none of the distances traversed by any pupil enrolled in Aldrich School may be deemed to be remote within the meaning of the transportation statutes, that is, two miles or more.

The hearing examiner finds that the transportation policy of respondent Board takes into consideration different circumstances for the group for whom transportation is provided from the group which is required to walk to school.

* * * *

The Commissioner has reviewed and considered the report of the findings and conclusions of the hearing examiner as set forth herein.

In several decisions *(Klastorin v. Board of Education of Scotch Plains,* 1956-57 *S.L.D.* 85; *Frank v. Board of Education of Englewood Cliffs,* 1963 *S.L.D.* 229; *Dorski v. Board of Education of East Paterson,* 1964 *S.L.D.* 36) the Commissioner has held that where a Board of Education provides pupil transportation for distances less than remote, such transportation may not

unlawfully discriminate against any pupil. On the other hand, the Commissioner has stated in these cases that there is no improper discrimination when the transportation policy of the Board of Education recognizes reasonable differences between the categories of those who are transported and those who do not receive such transportation services. In the case of *Schrenk v. Board of Education of Ridgewood*, 1960-61 *S.L.D.* 185, 188, the Commissioner said:

> "* * * a board of education may, in good faith, evaluate conditions in various areas of the school district with regard to conditions warranting transportation. It may then make reasonable classifications for furnishing transportation, taking into account differences in the degree of traffic and other conditions existing in the various sections of the district."

There is no evidence presented herein to demonstrate that the policy adopted by respondent Board of Education unfairly discriminates against petitioner's children residing in the Aldrich Estates section and attending the Aldrich Road School. Where a board of education having discretionary power to do so, provides transportation as respondent does in this instance pursuant to *N.J.S.A.* 18A:39-1.1, and where there is no showing of discriminatory practices in providing such transportation, the Commissioner will not substitute his discretion for that of the Board of Education. *Pepe v. Board of Education of Livingston*, Commissioner of Education, April 10, 1969; *Boult and Harris v. Board of Education of Passaic*, 1939-49 *S.L.D.* 7, 13, affirmed State Board of Education 15, affirmed 135 *N.J.L.* 329 (*Sup. Ct.* 1947), 136 *N.J.L.* 521 (*E. & A.* 1948) Respondent's policy governing transportation is reasonable and it has not been shown that in its application the policy is arbitrary, unreasonable or discriminatory with respect to the children of petitioner.

The petition is accordingly dismissed.

COMMISSIONER OF EDUCATION

August 19, 1969

Pending Before State Board of Education.

Mary C. Donaldson,

Petitioner,

v.

Board of Education of the City of North Wildwood, Cape May County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Perskie and Perskie (Marvin D. Perskie, Esq., of Counsel)

For the Respondent, Edwin W. Bradway, Esq.

Petitioner was a non-tenure teacher employed under a contract with respondent for the school year 1968-69. Her contract was not renewed for the 1969-70 school year and respondent has refused to furnish her with a statement of its reasons for not reemploying her. She therefore contends that respondent has been arbitrary, capricious and unreasonable and has acted in violation of her constitutional and legal rights. Respondent denies that it has acted improperly and has moved for dismissal of the petition of appeal on the ground that it fails to state a claim upon which relief can be granted.

Argument on respondent's motion was heard at Cape May Court House on July 17, 1969, by the Acting Assistant Commissioner of Education in charge of the Division of Controversies and Disputes sitting as a hearing examiner on behalf of the Commissioner. The report of the hearing examiner is as follows:

It is not denied that petitioner is a properly certificated teacher who has been in the employment of respondent Board of Education since January 1967. It is also admitted that early in January 1969, the Superintendent of Schools of the respondent school district notified petitioner that he would not recommend her for reemployment for the 1969-70 school year. In March the Board of Education approved the action of the Superintendent of Schools and in April the Board of Education, having reconsidered the case of petitioner, announced that it reaffirmed its original position in accepting the recommendation of the Superintendent of Schools not to rehire the petitioner. It is also clear that the Board of Education has consistently refused to state to petitioner its reasons for not offering her a contract renewal. Such a refusal, petitioner contends, is arbitrary and capricious and reflects bias and prejudice on respondent's part.

Moreover, petitioner argues, the right to work is a civil right protected by Article I, Section 5 of the Constitution of New Jersey, and the arbitrary and capricious interference with such a right, represented by respondent's refusal to make its reasons a matter of record, therefore constitutes a denial of petitioner's fundamental rights. Petitioner relies essentially upon the following language of Chief Justice Weintraub in a concurring opinion in the case of *Zimmerman v. Board of Education of the City of Newark*, 38 *N.J.* 65, 80 (1962) as follows:

> "The Legislature intended wide latitude in the employing authority to determine fitness for permanent employment. It is clear that public employment may not be refused upon a basis which would violate any express statutory or constitutional policy. A simple example would be discrimination for race or religion. But I am not sure such specific limitations are the only restraints. If the employing agency, for an absurd example, thought blondes were intrinsically too frivolous for permanent employment, a court would find it difficult to withhold its hand."

Petitioner also quotes the Commissioner's decision in the case of *Ruch v. Board of Education of the Greater Egg Harbor Regional High School District*, Commissioner of Education, January 29, 1968, as follows:

> "The Commissioner agrees that boards of education may not act in an unlawful, unreasonable, frivolous, or arbitrary manner in the exercise of their powers with respect to the employment of personnel. Thus a board of education may not resort to statutorily proscribed discriminatory practices, *i.e.*, race, religion, color, etc., in hiring or dismissing staff. Nor may its employment practices be based on frivolous, capricious, or arbitrary considerations which have no relationship to the purpose to be served. Such a *modus operandi* is clearly unacceptable and when it exists it should be brought to light and subjected to scrutiny."

Finally, petitioner emphasizes that although the Board of Education has refused to state any reason for denying her reemployment, the one member of the Board of Education who voted against the majority in this matter has publicly stated that the alleged reasons for the failure to rehire petitioner are too insignificant to be stated in public.

Respondent, on the other hand, contends that there is no obligation on the part of the Board of Education to state a reason for not reemploying a teacher who has not acquired tenure. The limits of the non-tenure teacher's rights, says respondent, are contained within the terms of the employment contract, which in petitioner's case has been fully performed, and no further rights extend to either party at the expiration of the contract of employment. Respondent further emphasizes that the language of Chief Justice Weintraub's concurring opinion in *Zimmerman*, *supra*, does not reflect the opinion of the Court which, although having had the advantage of knowing the Newark Board of Education's reasons for not rehiring Zimmerman, held that a non-tenure teacher is not entitled to reasons for his non-reemployment. Respondent's position is that not only the *Zimmerman* case, *supra*, but also numerous other decisions of the Commissioner and State Board of Education, have consistently held that a non-tenure teacher is not entitled to a renewal of an employment contract or a statement of reasons when his contractual agreement has terminated and he is not offered reemployment. *Ruch v. Board of Education*, *supra*; *Amorosa v. Board of Education of Bayonne*, 1966 *S.L.D.* 214; *Taylor and Ozmon v. Paterson State College*, 1966 *S.L.D.* 33; *Eastburne v. Newark State College*, 1966 *S.L.D.* 223

* * * *

The Commissioner has reviewed and considered the report of the hearing examiner set forth herein. The situation in this matter, as the hearing examiner notes, is essentially that presented in several cases previously decided by the Commissioner. In the most recent of these cases, *Schaffer v. Board of Education of the Borough of Fair Lawn*, Commissioner of Education, September 16, 1968, petitioner demanded a statement of the reasons for the non-renewal of her employment contract and a hearing thereon. In considering the argument advanced by petitioner in *Schaffer* which referred to the language quoted *supra* in the concurring opinion in *Zimmerman v. Board of Education of Newark*, the Commissioner noted that the language quoted is not that of the majority opinion in the case. The Commissioner relied rather upon the majority opinion, in which the Court said that the "historically prevalent view" had been expressed in *People v. Chicago*, 278 *Ill.* 318, 116 *N.E.* 158, 160 (1917), as follows:

> " 'A new contract must be made each year with such teachers as (the board) desires to retain in its employ. No person has a right to demand that he or she shall be employed as a teacher. The board has the absolute right to decline to employ or to re-employ any applicant *for any reason whatever or for no reason at all.* * * *' " *(Emphasis supplied.)*

The Court went on to observe that certain statutory limitations, such as illegal discrimination and tenure, have been placed upon the employment powers of boards of education, but

> "Except as provided by the above limitations or by contract the Board has the right to employ and discharge its employees as it sees fit." *Ibid.* at page 71

Moreover, the Commissioner emphasized in *Schaffer* and herein reaffirms that where a board of education has taken no affirmative action with respect to employment, there is a presumption of proper conduct on the part of the Board, and therefore the burden of proving unlawful action must be carried by petitioner.

Therefore, consonant with his decision in *Schaffer*, *supra*, and in the other cases cited herein, the Commissioner finds that petitioner herein has no right to a statement of reasons for respondent's non-renewal of her contract. There being no genuine issue of material fact, the Commissioner finds that petitioner has established no claim upon which relief can be granted. Respondent's motion to dismiss is therefore granted.

COMMISSIONER OF EDUCATION

August 21, 1969

Pending Before State Board of Education.

In The Matter of the Tenure Hearing of James Norton, School District of the Borough of Ridgefield, Bergen County.

COMMISSIONER OF EDUCATION

Decision

For the Complainant, Parisi, Evers & Greenfield (Irving C. Evers, Esq., of Counsel)

For the Respondent, Saul R. Alexander, Esq.

Charges against respondent, a teacher under tenure in the Ridgefield school system, were made by the Ridgefield Superintendent of Schools and were certified to the Commissioner of Education pursuant to the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 *et seq.* Respondent denies the charges, and filed a motion seeking dismissal of the charges. After arguments of counsel were heard, the Commissioner on January 4, 1969, denied the motion.

A hearing on the charges was thereafter conducted on March 11 and April 22, 1969, at the office of the Bergen County Superintendent of Schools in Wood-Ridge by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

At the hearing counsel for respondent renewed his motion for dismissal of Charges 1, 3, 4 and 5 on the ground that there is nothing to indicate that in certifying these charges to the Commissioner the Board of Education considered any evidence in support thereof. Counsel for the Board points out that respondent offers no evidence that the Board did not perform its duty in accordance with the statute, and that there is a presumption as to the validity of the acts of the Board. Absent evidence rebutting such a presumption, the hearing examiner concludes, respondent's motion is without merit and should be denied. The hearing examiner so recommends.

The hearing examiner makes the following findings with respect to each of the charges:

Charge No. 1

> "Sometime during the month of April, 1968, the said James Norton, while a teacher at the Ridgefield High School did inflict corporal punishment upon the person of one George Najemian, a pupil then in attendance at the Ridgefield High School, by assaulting him across the face and head, contrary to the provisions of R.S. 18A:6-1."

Testimony in support of this charge was given by the pupil allegedly assaulted. The pupil testified that he was "fooling around" in class and was taken into the corridor by the teacher and slapped on the face and head "a couple times" and told to "wise up." It is clear from his testimony that beyond casual mention of this incident to classmates and possibly his parents, he did not

make a specific complaint about the incident until after the events alleged in Charge No. 2. Respondent denies the charge, and asserts that his first knowledge of the allegation came when the charges herein were certified by the Board. He testified that on occasion he has taken pupils out of the classroom to admonish and discipline them out of sight and hearing of their classmates, and may have done so to this pupil, but asserts that he did not strike the pupil as charged here. The hearing examiner finds that the evidence is insufficient to support Charge No. 1, and recommends that it be dismissed.

Charge No. 2

> "That on or about the 4th day of June 1968, the said James Norton, a teacher in the Ridgefield High School did inflict corporal punishment upon the person of George Najemian, a pupil then in attendance at the Ridgefield High School, by striking the said pupil with his hands and fists about the face, neck, throat, and stomach, and by causing the said pupil to strike his head against a wall contrary to the provisions of R.S. 18A:6-1."

On June 4, 1968, respondent was assisting another teacher in a physics class. A disturbance developed in the rear of the classroom involving two boys, one of whom, George Najemian, was the same pupil who made the allegation considered in Charge No. 1, *supra.* The two teachers went to the rear of the room and physically separated the two boys. When the boys were released, a further disturbance ensued. Respondent thereupon took George Najemian by the arm and, exercising some degree of force, compelled him to enter an office and laboratory preparation room adjoining the classroom and out of a direct line of sight from the connecting doorway. There, the boy asserts, respondent struck him about the face and head, punched him in the stomach when he raised his arms to protect his face, and "grabbed me around the throat and forced me against a shelf in the back and hit me in the jaw." (Tr. 35) After about two minutes, the boy testified, respondent sent him back into the classroom. George said he was crying when he re-entered the room, and was permitted to go to the lavatory to wash his face. The boy testified that he visited a physician the following day because of pains in the head. The boy reported the incident to his parents, and on a subsequent day made a statement to the school principal which was recorded by a secretary and which he later read and signed. Statements of other pupils essentially corroborating the boy's testimony as to the incidents *in the classroom* were also taken in the principal's office, and, with a single exception, were affirmed by the pupils in their testimony at the hearing herein. The single exception was the statement given to the principal by the other boy involved in the classroom altercation. (P-3) In his testimony this boy repudiated his signed statement, and testified that the altercation in the classroom between him and the other boy involved extensive fisticuffs, and that at one time he held the other boy in a "headlock." *(Cf.* Tr. 229) He said that his signed statement was untrue, and that he had given the statement to the principal "to help George (the other boy) out." (Tr. 213)

Respondent denies using unusual force to compel the pupil to enter the room adjoining the classroom. He testified that he felt it necessary to get the pupil out of the classroom to calm him down and prevent further fighting. He

further denies striking the pupil as alleged, but used only such force as was necessary to restrain the boy from forcing his way back into the classroom until he had calmed down. The respondent testified that the boy was in a "rage," that he had tears in his eyes and that his face was red. "So he was – he showed the effects of the fight and his rage." (Tr. 254) Pupils introduced as witnesses by respondent, and the other teacher who was in the classroom at the time of the incident, testified that the fight which the two teachers broke up involved more punching and violence than the complaining witness described.

The hearing examiner finds upon the weight of believable evidence that respondent did in fact inflict corporal punishment upon the person of George Najemian in the manner set forth in Charge No. 2 herein.

Charge No. 3

"That sometime during the month of May, 1968 the said James Norton did inflict corporal punishment upon the person of one Carmine Scerbo, a pupil in attendance at the Ridgefield High School by striking him in the head and upon his arms and by using his hands and fists, contrary to the provisions of R.S. 18A:6-1."

The pupil involved in this charge testified that while in class he asked another boy (the pupil involved in the incident with George Najemian in Charge No. 2, *supra)* for paper. Respondent, it was testified, came to the pupil's desk and struck him with his fist. The pupil testified that he reported the incident only to his parents, until he was called to the principal's office to make a statement about his observations of the events alleged in Charge No. 2. Although the alleged assault in this charge took place in a classroom with other pupils present, the only other testimony was given by the respondent, who denied the charge and testified that he did not even know the identity of the pupil involved until the charges herein were served upon him. The hearing examiner finds the evidence insufficient to support the charge, and recommends that it be dismissed.

Charge No. 4

"That on or about the 4th day of March, 1968, the said James Norton did commit an assault upon the person of Fred J. Procopio who was then and there in the performance of his duties as principal of the Ridgefield High School by pressing his finger into the chest of the said Fred J. Procopio, grabbing him by the arm, stepping on his foot and deliberately brushing against his leg."

Charge No. 5

"That on or about the 4th day of March, 1968 the said James Norton did falsely and without just cause charge Fred J. Procopio, principal of the Ridgefield High School while in the performance of his duties, of harassment; of having made a statement or statements about his (Mr. Norton's) children; and of improperly carrying out and performing his (Mr. Procopio's) duties as principal of the Ridgefield High School."

Charges Nos. 4 and 5 will be considered together as they are so interrelated as to make such a consolidation the most efficient means of reporting the testimony and findings.

Testimony in support of these charges was given by the high school principal and the Superintendent of Schools. The principal testified that on March 4, 1968, he entered respondent's classroom for a period of observation. A few minutes after he had taken a seat near the back of the room, the teacher interrupted his instruction, walked to where the principal was seated, and "signaled" the principal to accompany him to the storeroom - preparation room adjoining the classroom. There, the principal asserts, the teacher accused him of harassment, said he did not like what the principal "was saying around town," and that he didn't like what the principal was saying about his (the teacher's) children. (Tr. 98) While he was addressing these remarks to the principal, it was testified, the teacher "poked" his finger into the principal's chest. When the principal started back into the classroom, it is charged, the teacher grabbed his arm, released it, and then grabbed it again. Back in the classroom, the principal testified, the teacher on three occasions walked past the principal's chair, once stepping on the principal's foot, and each time brushing his leg. Once the teacher said in a low voice, "Excuse me, buddy," the principal testified. One of the teacher's trips to the back storeroom was to inform the department chairman that he was going to report the principal to the New Jersey Education Association for harassment. Later in the class period, the principal testified, the teacher did telephone the field representative of the Association. When the representative subsequently came to the school, arrangements were made for him to consult with respondent, after which respondent apologized to the principal for being "out of line," and repeated his apology in the presence of the Superintendent of Schools, to whom the principal had submitted a written report. The principal accepted the apology, he testified, but warned the teacher against further misconduct. The respondent does not deny the confrontation with the principal on March 4, to the extent that he complained about the principal's frequent visits because this was the principal's second observation visit within a three-day period. He says his discussion with the principal became heated, and he "pointed" his finger at him, but denies the charges of physical assault. He further states that his apology was for being "premature" and "precipitous" in attempting to limit the authority of the principal, but that it had nothing to do with any assault, since the principal at that point had not charged such assault. (Tr. 279) Respondent contends that the apology, made and accepted, concluded the incident and now is improperly made a charge against him. The principal testified that he had indeed accepted the apology, that no ill will remained, but that he made it clear to respondent that if there were ever again a "similar incident," he would press the incident charged in Charges Nos. 4 and 5.

The hearing examiner finds that the weight of credible evidence supports the allegations contained in Charge No. 4 and Charge No. 5, and that they are true as charged.

In summation, the hearing examiner finds that the allegations of Charges Nos. 2, 4 and 5 are true. He finds that the allegations of Charges Nos. 1 and 3 have not been sustained by the evidence and recommends that these charges be dismissed.

* * * *

The Commissioner has reviewed the report of the findings and recommendations of the hearing examiner as set forth herein.

The Commissioner concurs in the hearing examiner's recommendation that respondent's renewed motion for dismissal be denied. The Commissioner reaffirms his denial of respondent's original motion for dismissal on January 6, 1969, as the basis for his denial of the renewed motion reported herein.

The Commissioner concurs that the evidence being insufficient to support the allegations contained in Charge No. 1 and Charge No. 3, said charges must be and are dismissed.

The Commissioner determines that upon the finding that the allegations contained in Charges No. 2, No. 4, and No. 5 are true, respondent has been shown to be guilty of conduct unbecoming a teacher in the public schools of the Borough of Ridgefield, and that such conduct warrants respondent's dismissal. He therefore orders and directs that respondent James Norton be and hereby is dismissed from his employment in the school district of the Borough of Ridgefield, effective as of the date of his suspension and the certification of the charges herein by the Board of Education of said district.

COMMISSIONER OF EDUCATION

September 2, 1969

Pending Before State Board of Education.

James Bennett, an infant by his Guardian Ad Litem Helen Bennett,

Petitioner,

v.

Board of Education of the Township of Middletown, Monmouth County, Paul F. Lefever, Superintendent of Schools, and Nicholas A. Campanile, Principal,

Respondents.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Monmouth Legal Services Organization (Eldridge Hawkins, Esq., of Counsel)

For the Respondents, Lane & Evans (Peter P. Kalac, Esq., of Counsel)

Petitioner, a student in respondent's high school, complains that he was improperly expelled from school and denied procedural rights in the actions of respondents leading to his expulsion. Respondent Board denies that it acted improperly and contends that its actions were taken in accordance with law and the powers vested in it by the statutes.

A hearing in this matter was held on March 25, 1969, at the Court House, Freehold, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

It is stipulated that on or about September 11, 1968, petitioner was suspended from high school. A letter (R-1) addressed to petitioner's parent by the high school principal states that the suspension was for a period of three days for violation of the school's smoking rule. It is further stipulated that a report was made to the school authorities on the same day that petitioner had distributed certain pills to other pupils. On September 16 the petitioner's parent was further notified by letter from the principal that petitioner had been "dropped" from school. The letter (R-2) reads as follows:

> "This is to confirm Mr. Tomlinson's telephone conversation with you on Monday, September 16, 1968. At that time you were informed that it had become necessary to drop your son, James, from our school rolls for distributing pills to students in school.
>
> I should inform you that you have the right to appeal this decision by calling Mr. Lefever's office and arranging for an appointment to see him."

On October 3, 1968, counsel for petitioner addressed a letter to respondent Board of Education complaining that petitioner's expulsion had been accomplished without a hearing and without due process of law. Counsel therefore demanded immediate readmission of petitioner and a hearing as to the propriety of the school administrators' action. (P-1) The stipulation further shows that on October 14, 1968, counsel again addressed the Board of Education by letter reiterating its earlier request for a hearing. On October 16 respondent's Superintendent of Schools addressed a letter (R-3) to petitioner's counsel stating that the expulsion of petitioner was "officially approved" on October 14, 1968.

Thereafter legal action in this matter was carried into the civil courts of the State and when the petition herein was filed before the Commissioner of Education on or about November 8, 1968, it was agreed that the matter before the Commissioner would be held in abeyance pending the action in the civil court. In January 1969 the Appellate Division granted respondent's motion to dismiss and directed that petitioner should exhaust his administrative remedies before any further litigation in Superior Court. Early in February 1969 the Supreme Court denied petitioner's motion for leave to appeal and thereupon petitioner requested that the Commissioner bring this matter on for hearing and determination. The Commissioner set down the hearing date herein and directed that the hearing would be limited to the issue of whether petitioner's expulsion

had been accomplished in accordance with the procedural guidelines set forth in *Scher v. Board of Education of West Orange*, decided by the Commissioner April 25, 1968, remanded by the State Board of Education September 4, 1968. The hearing therefore dealt only with the events leading to petitioner's expulsion from school on October 14, 1968, except in so far as other matters may have been stipulated by counsel. The hearing examiner finds from the testimony that although demand was made through counsel for a hearing before the respondent Board of Education on the charges against petitioner, such a hearing was not in fact afforded and the action taken by the Board of Education to expel petitioner was based upon such facts and information as may have been made available to the Board of Education by the school administrative staff or from other sources. Petitioner was given no opportunity to contest such information or to present any evidence in his own behalf. The hearing examiner also finds that although counsel for petitioner was informed of the meeting of the Board of Education on October 14 at which the expulsion action took place, he was not clearly informed that the Board would make a determination on petitioner's case at that meeting, nor was he given a clear right to appear at a hearing on petitioner's behalf.

Counsel for respondents asserts that subsequent to the filing of the instant petition, they offered to petitioner a hearing before the Board. This offer was restated at the hearing herein. Counsel for petitioner, however, believes that at this posture a hearing on the merits of the charges against petitioner should be conducted at another level, preferably before the Commissioner of Education. It is the conclusion of the hearing examiner on the facts as set forth that petitioner was not afforded the minimum procedural rights delineated by the Commissioner in his decision in *Scher*, *supra*.

* * * *

The Commissioner has reviewed and considered the findings and conclusions of the hearing examiner as set forth above. He concurs that the evidence clearly demonstrates that the action of the Board of Education in expelling petitioner was taken without proper regard for the right of petitioner to be heard in his own defense. In *Scher v. Board of Education of West Orange*, *supra*, the Commissioner reviewed the procedures followed by the respondent Board of Education as follows:

> "* * * Petitioner was informed of the charges against him; his parents and counsel attended one conference with the school authorities; petitioner, his parents, his witness, and counsel appeared before respondent and were given full opportunity to speak in petitioner's behalf; and his counsel was afforded a further chance to be heard at a subsequent Board meeting prior to the formal action to expel. The Board also considered the statements of members of its staff who witnessed the incident in question and interviewed other persons including, respondent avers, two pupils whose names were supplied by the petitioner. The testimony of witnesses was reduced to writing in the form of affidavits

which were supplied to petitioner. Moreover, respondent offered to reserve final decision pending an appropriate mental health evaluation of petitioner, which petitioner rejected. Under these circumstances the Commissioner holds that respondent has fulfilled the procedural requirements prior to an expulsion action demanded by due process."

The Commissioner finds no reason in the facts of the instant matter to conclude that the respondent herein should not be required to conform substantially to the procedures approved in *Scher*. He therefore remands this matter to respondent Board of Education, directing that it afford petitioner a hearing consistent with such procedures. He further directs that pending such hearing, petitioner be reinstated in respondent Board's schools or in the alternative that respondent provide an adequate program of home instruction pending such hearing and determination.

COMMISSIONER OF EDUCATION

September 22, 1969

Board of Education of the Town of Belleville,

Petitioner,

v.

Mayor and Commissioners of the Town of Belleville, Essex County,

Respondents.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Max N. Schwartz, Esq.

For the Respondent, Nicholas R. Amato, Esq.

Petitioner, hereinafter "Board," appeals from an action of respondents, hereinafter "Town," certifying to the County Board of Taxation a lesser amount of appropriations for the 1969-70 school year than the amounts proposed by the Board in its budget which were twice rejected by the voters. The facts of the matter were presented at a hearing conducted by a hearing examiner appointed by the Commissioner, on June 5, 1969, at the State Department of Education, Trenton. Briefs of counsel were subsequently filed. The report of the hearing examiner is as follows:

At the annual school election on February 11, 1969, the voters of the school district rejected proposals to raise by local taxation $3,786,104 for current expenses and $155,343 for capital outlay. At a special election held on February 25, 1969, the Board resubmitted the same proposal for current

expenses but submitted a capital outlay proposal in the reduced amount of $55,343. Again both items were rejected. The Board thereupon submitted the budget to the Town. At a meeting of the Board and the Town on March 3, 1969, the two bodies consulted about the budget. At that meeting, it was testified, the Board voluntarily accepted reductions in the budget in the total amount of $42,402.48. The Town made further reductions of $164,873.65 in the current expense accounts and $40,903.83 in the capital outlay accounts, and by resolution dated March 7, 1969, certified to the Essex County Board of Taxation the amounts of $3,621,230.35 to be raised for current expenses and $14,439.17 for capital outlay. Thereafter the Town submitted to the Board a document entitled "Board of Education Budget Analysis" setting forth proposed reductions in the 1969-70 budget, which are represented as "Amount Reduced" in the following table:

Account Number	Item	Board's Budget	Town's Proposal	Amount Reduced
	CURRENT EXPENSE:			
	Salary Increases to:			
110b	Board Secretary			
110i	Business Administrator			
211	Assist. Superintendent			
211	Princs.- Vice-Princs. (12)	$32,972.00	$ 19,000.00	$13,972.00
212	Dir.-Health,Safety,etc.			
212	Dir. of Music			
212	Dir. of Art			
214	Dir.-Student Pers. Serv.			
120b	Contracted Legal Exp.	2,000.00	1,000.00	1,000.00
120c	Other Contracted Serv.	3,000.00	1,000.00	2,000.00
130	Total-Other Exp. Admin.	15,200.00	13,400.00	1,800.00
213	Salaries-Teachers	2,730,683.00	2,696,483.00	34,200.00
216	Salaries-Teacher Aides	12,000.00	5,000.00	7,000.00
220	Textbooks	48,000.00	32,000.00	16,000.00
310	Salaries-Attend. Pers.	27,100.00	7,800.00	19,300.00
720	Contracted Serv.-Maint.	58,467.00	39,967.00	18,500.00
850	Other Fixed Charges	10,000.00	–0–	10,000.00
720	Reducs.Proposed by Board	6,912.00	–0–	6,912.00
730	Reducs. Proposed by Board	9,189.65	–0–	9,189.65
	TOTAL CURRENT EXPENSE	$2,955,523.65	$2,815,650.00	$139,873.65
	APPROPR. FROM FREE BALANCE			25,000.00
	TOTAL-CURRENT EXPENSE REDUCTION			$164,873.65
	CAPITAL OUTLAY:			
1220	Sites	$17,843.00	$ –0–	$ 17,843.00
1240	Furniture & Equip.	37,500.00	14,439.17	23,060.83
	TOTAL-CAPITAL OUTLAY	$55,343.00	$ 14,439.17	$ 40,903.83

By stipulation between the parties, the Board agreed not to contest the reduction of $6,912 in the 720 account and $9,189.65 in the 730 account shown in the table above as "Reductions Proposed by Board." It was also

stipulated that the reduction of Item 310-Salaries-Attendance Personnel, in the amount of $19,300, should be restored in the budget for the reason that this item represents essentially an accounting transfer from another account in which it had previously been carried.

On the basis of the evidence submitted by oral testimony and documents, the hearing examiner makes the following findings as to each of the proposed reductions in addition to those stipulated, *supra:*

Items 110b, 110i, 211, 212, 214 - Salary Increases. The Town considered the proposed salary increases for the Board of Education Secretary, the Business Administrator, the Assistant Superintendent of Schools, the High School and Junior High School Principals and Vice-Principals, the Principals of the elementary schools, and the Directors of Music, Art, Student Personnel Services, and Health, Safety, and Physical Education - a total of 19 administrative and supervisory positions. While the separate salary figures proposed for each of these positions are nowhere shown in the evidence, nor can they be readily extrapolated from the documents supplied to the Commissioner, the Town asserts in its "Analysis," *supra*, that the aggregate of the salary increases proposed for these positions is $32,972. The Town contends that an across-the-board increase of $1,000 each is adequate, and thus proposes a reduction of $13,972 from the appropriations for salary increases for these personnel. The Board's witnesses testified that the salary increases were calculated from salary guides adopted on April 2, 1968 (P-2), providing a "Ratio Formula for Administrative Personnel," and it is argued that the schedules are binding upon the Board pursuant to *N.J.S.A.* 18A:29-4.1. The Town's testimony was that it felt that the ratio was "getting out of line," that it had "grown to be a monster." The Board testified that the ratio principle had been in use for ten years in the district, and that the formula had been modified in 1965 to provide a lower base for the ratio relationship. As to the Board's contention that the salary increases must be provided as a part of a binding salary schedule, the Town argues, with a supporting brief, that the administrators here involved are not "full-time teaching staff members." *N.J.S.A.* 18A:29-4.1 reads as follows:

> "A board of education of any district may adopt a salary policy, including salary schedules for all full-time teaching staff members which shall not be less than those required by law. Such policy and schedules shall be binding upon the adopting board and upon all future boards in the same district for a period of two years from the effective date of such policy but shall not prohibit the payment of salaries higher than those required by such policy or schedules nor the subsequent adoption of policies or schedules providing for higher salaries, increments or adjustments. Every school budget adopted, certified or approved by the board, the voters of the district, the board of school estimate, the governing body of the municipality or municipalities, or the commissioner, as the case may be, shall contain such amounts as may be necessary to fully implement such policy and schedules for that budget year."

The Town argues that the statute limits its operation to those persons who devote their full time to the teaching of classes and does not and cannot apply to administrative personnel who serve solely in an advisory capacity and do not have full-time teaching duties. The Board, in its answering brief, points to the definition of "teaching staff member" as supplied in *N.J.S.A.* 18A:1-1, as follows:

> " 'Teaching staff member' means a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the state board of examiners and includes a school nurse."

Petitioner points to an earlier decision of the Commissioner in *McCarthy v. Board of Education of Orange*, 1955-56 *S.L.D.* 124, in which the Commissioner held that the term "teacher" may not be narrowly limited to those certificated staff members whose duties are performed in a classroom. The hearing examiner finds no relevance in respondent's citation of *Board of Education of Cliffside Park v. Mayor and Council of Cliffside Park*, 100 *N.J. Super.* 490 *(App. Div.* 1968) to the question here. The hearing examiner therefore concludes that as to 18 of the 19 administrators who hold certificates, the salary schedules are binding upon the Board, the Town, and the Commissioner pursuant to *N.J.S.A.* 18A:29-4.1. As to the Board Secretary, it is the finding of the hearing examiner that the Board-adopted ratio for the position is not excessive and is necessary for the proper and effective administration of the business and fiscal affairs of the district. It is therefore recommended that the $13,972 cut from these appropriations be restored.

Item 120b-Contracted Legal Expense. The Board's budget provided $2,000 for contracted legal services, over and above an appropriation in another account for a salary for legal services, to cover the cost of extra legal services that might be needed. The testimony showed that there had been no increase in the case load for 1969-70, and that $1,500 of a similar appropriation for 1968-69 had not been required. The Town proposes a reduction of $1,000. The hearing examiner, finding that the need for $2,000 has not been established, recommends that the Town's reduction be sustained.

Item 120c-Other Contracted Services. The Board increased its appropriation in this account from $1,000 budgeted for 1968-69 to $3,000 for 1969-70. The increase is explained as anticipation of possible needs for contracted services in connection with employee negotiations. It was testified that as of April 30, 1969, $50 of the 1968-69 appropriation had been spent. The Town recommends eliminating the $2,000 increase as unjustified. While the hearing examiner recognizes that public employer experience in negotiations pursuant to *Chapter* 303, *Laws of* 1968, is necessarily limited, he does not find in the evidence support of the possible need of an additional $2,000 in this account, although some increase is prudent. It is therefore recommended that $1,000 of the reduction be sustained, and $1,000 restored.

Item 130-Other Expenses for Administration. The Town proposed a total cut of $1,800 for the seven items of "other administrative expense" for which the Board had made appropriations, without explanation of which particular items should be reduced, or why. Notwithstanding the Town's testimony that the Board had failed to supply data supporting its several increases in this account, the hearing examiner finds that an out-of-hand reduction in a category of items cannot, on its face, be sustained. Moreover, the Board's testimony shows the need for the additional $1,800 appropriated above the 1968-69 budget to meet higher anticipated dues to the Federation of District Boards of Education, the cost of an additional polling place for school elections, the higher cost of supplies used in administrative offices, and a new item of $500 for legal services (non-contractual) resulting from prior experience in connection with the unfortunate illness of Board counsel. The hearing examiner recommends restoration of the $1,800 cut from the total appropriation in the 130 account.

Item 213-Salaries-Teachers. The Board's budget provided for four additional teachers at $7,000 each, and $6,200 increase in the estimated expenditure for substitute teachers. The Town contends that data were not shown to justify the needs for the total increase of $34,200 in these two items. The Board's testimony shows that an increase of 160 or more pupils is anticipated, and that in 1968-69 there were 12 elementary grade classes enrolling over 30 pupils. The hearing examiner finds the additional four teachers needed for a thorough and efficient school system. The Board's testimony also shows that the increase of $6,200 for substitute teachers is needed to provide a $1 per day increase in wages to maintain a competitive position with neighboring districts in hiring substitutes, and to provide substitute teachers for additional personal leave days for teachers. It is therefore recommended that the $34,200 cut from this account be restored.

Item 216-Salaries-Teacher Aides. The Board budgeted an increase from $7,000 to $12,000 in this account for 1969-70. The need was testified to be based on the necessity to provide duty-free lunch periods for teachers, in conformance with a rule of the State Board of Education. The Town testified that it had not been apprised of this rule, but that if the Board could find the $7,000 to replace the cut made by the Town in the 1968-69 budget, then the cut should be made again. The hearing examiner cannot find support for this reasoning. Neither does he find in the testimony the basis for the $5,000 increase over the 1968-69 budget. It is therefore recommended that $5,000 of the Town's proposed cut of $7,000 be sustained, and $2,000 restored.

Item 220-Textbooks. The budget record on this item is as follows:

1967-68	actual	$16,183.49
1968-69	budgeted	31,000.00
1969-70	estimated	48,000.00

The Town believes that the rate of increase is not justified, and proposes a cut of $16,000 for 1969-70. The $32,000 would provide about the same per capita amount available for the 1969-70 enrollment as in 1968-69. The

testimony shows that while certain series of books, such as those in science and social studies, are ten or more years old, the Board has been engaged in a replacement program. The Board testified that the appropriation cut leaves an amount inadequate for quality education; however, the hearing examiner does not find in the testimony such proofs as will warrant a finding that the Town's proposed reduction will render the Board incapable of operating a thorough and efficient system of public schools. It is therefore recommended that the $16,000 reduction be undisturbed.

Item 720-Contracted Services-Maintenance. A cut of $18,500 in this account is comprised of $12,500 appropriated for exterior painting of three schools and $6,000 for emergency repairs. The Town contends that with the employment of another maintenance painter last year, it should be unnecessary to contract this painting. The Board testified that it employes three painters, which is an insufficient staff to do both the interior and exterior painting; hence it is necessary to contract the exterior painting of the three schools, which were last painted in 1963 and 1964. The hearing examiner so finds. It was also testified that the $6,000 budgeted for emergency repairs is based on 1967-68 experience, when $7,400 was spent. In the light of the great age (40 years or more) of all the district school buildings except the high school building, the hearing examiner finds an appropriation of $6,000 for emergency repairs to boilers, plumbing, roofs, etc., a necessary budgetary provision. It is accordingly recommended that $18,500 be restored to this account.

Item 850-Other Fixed Charges. The Board appropriated $5,000 in this account for 1968-69, of which none had been spent or committed as of April 30, 1969. Its appropriation for 1969-70 was $10,000. The Board's testimony was that this appropriation is a general "contingency account" for operating deficits that might occur in current expenses, mainly in tuition and transportation. The Town contends that prior experience does not warrant such an appropriation and that it should be totally deleted. No testimony supports the maintenance of this item for such purposes as the Board testified. Account 850, as defined in the "Chart of Accounts" of the uniform system of budgeting and accounting prescribed by the State Board of Education is for:

> "Expenditures for any losses resulting from the sale of securities purchased prior to the current fiscal year, and any other expenses of a generally recurrent nature which are allocable to pupil cost and cannot be recorded under other current expense accounts."

The hearing examiner does not find that an appropriation in Account 850 for unspecified current expense contingencies is necessary for the thorough and efficient operation of the school system, and recommends that the Town's cut be sustained.

Item 1220-Sites. The Board appropriated $17,843 for several projects for the repair and improvement of school sites. The Town proposes eliminating the entire appropriation. The Board's testimony convinces the hearing examiner that

certain of these projects, involving the patching of playground areas and replacement of curbing in the amount of $12,603, are essential safety measures which may not properly be deferred. The remaining projects, while desirable, are not found to be necessary and may be deferred. It is therefore recommended that $12,603 be restored and that $5,240 of the reduction be sustained.

Item 1240-Furniture and Equipment. The Board appropriated $37,500 for this capital item, which is approximately the amount spent in 1967-68 and $2,000 above the budgeted figure for 1968-69. Budget data indicate well over 200 separate items of furniture and equipment which were anticipated to be purchased. It was testified by the Town that the Board had proposed that it could delete $23,060.83 from this account, and the Board's witness testified that the deletion of this amount would not prevent the Board from operating a thorough and efficient system of public schools during the 1969-70 school year. On the basis of the testimony presented, and absent specific testimony on critical needs, the hearing examiner finds that $23,060.83 can be reduced from the appropriation for this account, and recommends that the Town's reduction in this amount be sustained.

The Town proposed the use of $25,000 from free balances for the current expense budget. The reported unappropriated balance in the current expense account on June 30, 1968, was $40,117.50. The Board's testimony was that on a total proposed budget of nearly $4 million, a free balance of this size is exceptionally low, especially in view of the obsolescence of nearly all of the schoolhouses in the district. The hearing examiner finds that the proposed use of $25,000 from free balances would leave an operating balance below a reasonable amount in relation to the total budget. It is therefore recommended that the $25,000 should not be appropriated from free balances.

The hearing examiner's recommendations, together with stipulated changes, may be recapitulated in the following table:

Account Number	Item	Proposed Reduction	Amount Restored	Amount Not Restored
	CURRENT EXPENSE:			
	Salary Increases to:			
110b	Board Secretary			
110i	Business Administrator			
211	Assistant Superintendent			
211	Princs. & Vice-Prins. (12)	$13,972.00	$13,972.00	$ –0–
212	Dir.-Health, Safety, Etc.			
212	Dir. of Music			
212	Dir. of Art			
214	Dir.-Student Pers. Serv.			
120b	Contracted Legal Exp.	1,000.00	–0–	1,000.00
120c	Other Contracted Serv.	2,000.00	1,000.00	1,000.00
130	Total-Other Exp.Admin.	1,800.00	1,800.00	–0–
213	Salaries-Teachers	34,200.00	34,200.00	–0–
216	Salaries-Teacher Aides	7,000.00	2,000.00	5,000.00
220	Textbooks	16,000.00	–0–	16,000.00
310	Salaries-Attend.Pers.	19,300.00	19,300.00*	–0–
720	Contracted Serv.-Maint.	18,500.00	18,500.00	–0–
850	Other Fixed Charges	10,000.00	–0–	10,000.00
720	Reducs. Proposed by Board	6,912.00	–0–	6,912.00*
730	Reducs. Proposed by Board	9,189.65	–0–	9,189.65
	TOTAL CURRENT EXPENSE	$139,873.65	$90,772.00	$49,101.65
	APPROPR. FROM FREE BALANCE	25,000.00	25,000.00	–0–
	TOTAL-CURRENT EXPENSE	$164,873.65	$115,772.00	$49,101.65
	CAPITAL OUTLAY:			
1220	Sites	17,843.00	12,603.00	5,240.00
1240	Furniture & Equip.	23,060.83	–0–	23,060.83
	TOTAL-CAPITAL OUTLAY	$40,903.83	$12,603.00	$28,300.83

*Stipulated

* * * *

The Commissioner has reviewed and considered the findings, conclusions, and recommendations of the hearing examiner as reported above.

With respect to the argument of respondent that the administrative staff members whose salary increases are in contention herein are not legally within the meaning of *N.J.S.A.* 18A:29-4.1, the Commissioner concludes, and so holds, that the term "teaching staff member," as used in the statute is as defined in *N.J.S.A.* 18A:1-1, and does not exclude those not engaged full time in the actual teaching of classes. The Commissioner considered a similar question in *McCarthy v. Board of Education of Orange*, 1955-56 *S.L.D.* 124, where the status of a

school nurse as a "teacher" for the purposes of the State Minimum Salary Law *(R.S.* 18:13-13.1 *et seq.,* now 18A:29-6 *et seq.)* was contested. After reviewing the definition of "teacher" provided in the statute as "any full-time member of the professional staff," and noting that "one does not ordinarily associate the term 'teacher' with the nursing profession," the Commissioner then said that he could:

> "* * * find no reason to narrow, by construction, the broad sweep of that definition. Nurses who hold their positions by virtue of section 18:14-56.3 do not fall within the express terms of the definition, but neither are they excluded. The act provides as we noted, that the word 'teacher' shall 'include any full-time member of the professional staff' holding certificates, etc.; the word 'include' denotes that other persons may also meet the description if the sense of the statute warrants it. See *State v. Rosecliff Co.* 1 *N.J. Super.* 94, 101 *(App. Div.* 1948)."

The same reasoning is applicable here. The Commissioner finds nothing in the broad sweep of the definition given in *N.J.S.A.* 18A:1-1 to eliminate administrators whose positions do require them to hold appropriate certificates. As to those administrators in the business and fiscal operation of the school, the Commissioner concurs with the recommendation of the hearing examiner that the proper administration of these functions warrants the salary increases provided.

The Commissioner concurs in the recommendations as to the other account items as stated.

The Commissioner accordingly finds and determines that in addition to the amounts already certified to the Essex County Board of Taxation, it is necessary for the operation of a thorough and efficient system of public schools in the Town of Belleville that the additional amounts of $115,772 for current expenses and $12,603 for capital outlay are needed to be raised by local taxation for the 1969-70 school year. He therefore directs the Mayor and Commissioners to certify these additional amounts to the Essex County Board of Taxation.

COMMISSIONER OF EDUCATION

November 6, 1969

Board of Education of the City of Trenton,

Petitioner,

v.

City Council of the City of Trenton, Mercer County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, McLaughlin, Dawes, & Abbotts (James J. McLaughlin, Esq., of Counsel)

For the Respondent, Joseph P. Merlino, Esq.

Petitioner, hereinafter "Board," appeals from an action of respondent, hereinafter "Council," certifying to the Mercer County Board of Taxation a lesser amount of appropriations for school purposes for the 1969-70 school year than the amount certified to Council by the Board of School Estimate. An order of the Commissioner dated May 29, 1969, directed Council to furnish a detailed statement of its underlying determinations and supporting reasons and the individual items in the budget where it believed excessive expenditures were proposed. A further order was issued by the Commissioner on June 18, 1969, to the same effect. Thereafter, a hearing on the petition was conducted on August 20, 1969, at the State Department of Education, Trenton, by the Acting Assistant Commissioner in charge of Controversies and Disputes as hearing examiner for the Commissioner. The report of the hearing examiner is as follows:

It is stipulated that Board of School Estimate certified to the Council the amount of $10,516,738.75 to be raised by local taxation for the support of the schools in the 1969-70 school year, as follows:

For Current Expense	$10,441,646.50
For Capital Outlay	12,888.00
For Vocational Evening Schools	55,268.00
For Evening Schools for Foreign Born Residents	6,936.25
Total Amount to be Raised	$10,516,738.75

It may be noted that the total amount is the same as that submitted to the Board of School Estimate by the Board of Education.

Thereafter, following a conference with the Board and its own study of the school budget, Council by resolution fixed the sum of $9,214,443.75 as the amount to be raised for the operation of the schools in the 1969-70 school year. This amount represents a reduction of $1,302,295.00. Pursuant to the

Commissioner's order of June 18, 1969, *supra*, Council submitted the following proposed reductions and deletions, and presented a statement explaining its reasons therefor:

Staff Personnel	$239,000
Salary Adjustments	328,545
Special Programs	169,750
Graduate Courses	30,000
Major Medical Insurance	20,000
Two New Positions	20,000
Operation of Plant (Heating)	10,000
Maintenance of Plant	450,000
Football	23,000
Capital Outlay	12,000
Total Reductions	$1,302,295

The hearing examiner's findings and recommendations with respect to each of the proposed reductions are as follows:

Staff Personnel. The Board proposes 61 new professional staff positions at an estimated cost of $513,500. (P-2) Without specifying which of these positions should be eliminated, and acknowledging that they are parts of expanded programs which are beneficial, Council states that positions in the amount of $239,000 should be eliminated as not essential to a thorough and efficient system of public schools at the present time. The Superintendent of Schools testified at length as to the need for these positions. His testimony emphasized the complexity of educational programs in an urban system, the need for overall, systemwide coordination and direction of programs, and serious deficiencies in particular curriculum areas. The hearing examiner finds that the evidence supports the need for the additional personnel required for instructional programs in science, art, music, physical education, biology, and reading; for special education programs, speech correctionist, psychologists and social workers, for guidance service at Junior High School No. 2; and for a director of elementary education and elementary helping teachers. He further finds that projected enrollment increases the need for 9 of the 10 additional classroom teachers proposed. On the other hand, desirable as the positions may be, the hearing examiner does not find in the evidence that the following positions are essential at this time for a thorough and efficient system of public schools in Trenton:

Coordinator of Information Services	$15,000
Coordinator of Research and Evaluation	16,000
Coordinator of Music Education	14,000
Coordinator of Guidance	15,000
1 Classroom Teacher	7,000
	$67,000

It is therefore the recommendation of the hearing examiner that $67,000 of the proposed reduction of $239,000 in this item be sustained, and the remainder, amounting to $172,000, restored to the budget.

Salary Adjustments. The Board's budget (P-1, page 58) provides $328,545 for "salary adjustments," as follows:

Teachers, Principals, Directors, Vice-Principals, Supervisors	$229,375
Custodians, Secretaries and Other Titles	65,370
Masters Degrees	33,800
	$328,545

It was testified that the Board's proposal contemplated a salary adjustment of $250 above the normal increment for the category of teachers, principals, etc.; one and one-half increments for custodians, secretaries, etc.; and adjustments to the masters degree scale for approximately 169 members of the professional staff. It was further testified that after a series of negotiating sessions with the Trenton Education Association, including fact-finding by the Public Employment Relations Commission, and culminating in what was described as a "strike" on February 15, 1969, the Board reached a contractual agreement with the Association which embodied, *inter alia*, a salary schedule which added an estimated $167,000 to salary requirements, not reflected in the original budget (P-1). Council proposes eliminating the $328,545 for salary adjustments, contending that it was not consulted with respect to the negotiated agreement, and is not therefore bound by it. The hearing examiner finds no need to make a finding or recommendation on this contention. Testimony of witnesses and evidence stipulated by counsel (Exhibit H of the petition of appeal) clearly demonstrates that the salary schedule provided by the Board is no more than competitive with those of four other school districts in the Mercer County area. It is the conclusion of the hearing examiner that the funds provided by the Board in its budget for salary adjustments are essential to enable the Board to compete for teachers as an urban district and to retain its experienced staff. The hearing examiner recommends the restoration of $328,545 for salary adjustments.

Special Programs. The Board's budget provides a total of $194,500 for what are described in the budget (P-1, page 59) as "Special Programs." These programs were further described in terms of content, purpose, and cost in Exhibit P-2, and in the testimony of the Superintendent of Schools, and are summarized briefly as follows:

1.	Reading (Project Read and Project Learn) - materials and services for 2500 pupils, grades 1 to 12	$52,500
2.	Human Relations Training - for all personnel beginning with Board Members and teachers	50,000
3.	Staff Development - summer workshops for teachers in elementary science, linguistics, minority group culture and history, social studies, teacher behavior in the classroom - 5 groups, 20 teachers each	20,000

4.	Curriculum Development - studies in five curriculum areas - 5 teachers in each area	10,000
5.	Individually Prescribed Instruction (I.P.I.) - an innovative study begun in 1968-69 by Research for Better Schools - Board's 1/8 share of cost for 1969-70	12,000
6.	Advancement School - an innovative "mini-school" to explore new ideas in education at senior high school level	50,000
		$194,500

The testimony of Council members and the statement furnished by Council in response to the Commissioner's order, *supra*, were that these programs were not essential to the educational program, and a reduction of $169,750 was proposed. However, further testimony indicated that at least one Councilman believed that these programs consituted too big a step for one year and should be cut in half. This position is supported by the following excerpt from Council's minutes of February 18, 1969 (R-1):

> "Special Programs. The special programs amounted to $339,500, and after review of the items ending with instructional supplies, a motion was made to cut this program down to $169,750.00. * * * The motion was adopted seven to nothing."

Examination of the Board's budget (P-1, pages 59 and B-61) shows that the sum of $339,500, which was cut in half by Council's motion, *supra*, comprises the following items:

Special Programs - total	$194,500
Library Books	62,000
Textbooks	45,000
Instructional Supplies	38,000
	$339,500

The hearing examiner further observes that the items, *supra*, for library books, textbooks, and instructional supplies, are appropriations over and above other "regular" appropriations for the same items (P-1, page B-1), which petitioner's budget for 1969-70 shows to be the same amounts appropriated for 1968-69 (see P-1, page B-61). The hearing examiner therefore concludes that in grouping appropriations for "Special Programs" with additional appropriations for library books, textbooks, and instructional supplies, and then reducing the total by half, Council made no reduction in the on-going program of the school system, but reduced by half an appropriation for new or additional programs and services. The hearing examiner finds that these programs and services, while highly desirable for the Trenton school district, may not be deemed so essential to the operation of a thorough and efficient system of public schools that the effectuation of some part thereof may not be deferred. The hearing examiner

recommends that Council's reduction of $169,750 for the items listed, *supra*, be sustained.

Graduate Courses. The Board provided in its budget the sum of $30,000 to reimburse teachers for graduate courses taken while enrolled in a masters degree program. It is estimated that 200 teachers would be affected, at a maximum of $150 per teacher. The Superintendent testified that this program provides an inducement for recruitment of new teachers and retention of teachers already employed, as well as encouragement to teachers to seek additional training. Council proposes the elimination of this appropriation, contending that despite its benefits it cannot be deemed essential to the efficient operation of the school system. No testimony was offered to demonstrate the essentiality of this program. The hearing examiner recommends that Council's cut be sustained.

Major Medical Insurance. The Board appropriated $20,000 to pay the premiums for major medical insurance for employees. It was testified that this salary benefit is necessary to maintain a competitive position for the recruitment and retention of staff. Council contends that Board of Education staff benefits should not move ahead of those provided for other municipal employees. It was shown that a degree of comparability adequate to sustain this contention exists. The hearing examiner recommends that the $20,000 appropriated for major medical insurance be restored.

Two New Positions. An appropriation of $20,000 for "two new positions" was cut from the budget by Council as not shown to be necessary. The testimony of Board witnesses was not clear on this item, beyond testimony that the positions were for a school nurse and a social worker in addition to the new "Staff Personnel" considered, *supra.* Examination of the budget (P-1, pages C-4, C-6, C-10, C-11) discloses that these two positions, although not provided in the 1968-69 budget, were filled and are now budgeted for retention. The budget shows that there are 23 school nurses and 7 social workers (including those budgeted for 1969-70) in a school district of more than 18,000 pupils. In the light of the urgent problems of an urban district such as Trenton, the ratios thus proposed are reasonable and must be deemed essential for a thorough and efficient system. However, the aggregate salaries of the two positions described in the budget total $16,800, rather than the $20,000 proposed. It is therefore recommended that $16,800 be restored, and $3,200 of the reduction be sustained.

Plant Operation (Heating). Council reduced the appropriation for building heating by $10,000, contending that a 25 per cent increase for this item is excessive. The Board testified that it bases this item on estimates given by its fuel suppliers, and that it had been advised to anticipate an increase from nine cents to twelve cents in the price of No. 4 fuel oil. This increase and price increases for other fuel oil grades and for coal, together with higher heating costs resulting from structural additions to buildings necessitate the budget increase, it was testified. The hearing examiner finds that the weight of evidence supports the increase proposed in the Board's budget, and recommends restoration of $10,000 to this account.

Maintenance of Plant. Council recommends reduction of $450,000 from the $1,193,642 appropriated for maintenance of plant. Council contends that over past years the Board has consistently requested more money for maintenance than it has needed. The Board denies this, contending that after the budget had been cut by Council, the Board tailored its program to the available monies. Council further contends that the Board's proposed increase for maintenance expenditures amounts to 100 per cent more than was spent in 1967-68. Figures from the Board's budget (P-1, page E-1) show the following actual and proposed expenditures:

Account	Actual 1967-68	Budget 1968-69	Budget 1969-70
Ground Repairs	$ 23,891.51	$ 17,900.00	$ 36,640.00
Building Repairs	448,332.56	375,553.00	950,802.00
Equipment Repairs	35,080.17	35,676.00	40,565.00
Equipment Replacements	79,142.62	54,589.95	130,755.00
Unallocated Shop Oper.	68,149.60	69,000.00	34,880.00
	$654,596.46	$552,718.95	$1,193,642.00

It was testified that $668,215 of the 1969-70 budget is represented in major items of building repairs (Exhibit K of Petition). It was also testified that actual expenditures in the maintenance account for three years were as follows:

1965-66	$650,000
1966-67	671,000
1967-68	655,000

The hearing examiner observes that the Board's maintenance program includes interior and exterior painting of several buildings, most of which were last painted 10 or more years ago. Additionally, because bids received on new heating systems were so high that only two of ten proposed new systems could be purchased from the proceeds of a bond issue for that purpose, extensive repairs of existing heating systems must be undertaken. On the other hand, the hearing examiner is convinced that certain maintenance projects can be deferred without irreparable harm to the school property. It is therefore recommended that one-half of the cut proposed by Council, or $225,000, be restored to the budget, in order that essential and critical maintenance projects may be completed.

Football. An appropriation of $23,000 to provide for a program of interscholastic football at the junior high school level was cut by Council as not essential to a thorough and efficient system of public schools. It was argued that such a program, involving pupils from all the junior high schools of the district, would provide experience that would enable the schools to equalize competition with neighboring schools. Although the value of competitive sports is not questioned, it is not shown that the projected program is essential. The hearing examiner recommends that Council's cut be undisturbed.

Capital Outlay. The Board's budget for the purchase of instructional and non-instructional equipment increased from $58,902 for 1968-69 to $100,825

for 1969-70. State Building Aid to support the capital budget is anticipated in the amount of $87,937. Council's proposed cut of $12,000 in the budget would not seriously hamper or affect the operation of the school system. Little testimony was offered in support of the Board's capital outlay budget. The hearing examiner finds that the $12,000 which has been cut by Council is not required for the operation of a thorough and efficient system of public schools.

The recommendations of the hearing examiner with respect to the proposed budget reductions are shown in the following table:

Item	Proposed Reduction	Amount Restored	Amount Not Restored
Staff Personnel	$ 239,000	$172,000	$ 67,000
Salary Adjustments	328,545	328,545	–0–
Special Programs	169,750	–0–	169,750
Graduate Courses	30,000	–0–	30,000
Major Medical Insurance	20,000	20,000	–0–
Two New Positions	20,000	16,800	3,200
Operation of Plant (Heating)	10,000	10,000	–0–
Maintenance of Plant	450,000	225,000	225,000
Football	23,000	–0–	23,000
Capital Outlay	12,000	–0–	12,000
	$1,302,295	$772,345	$529,950

Finally, the hearing examiner heard testimony of Board members and Councilmen on the processes by which Council arrived at its determination, with reference to petitioner's charge that Council's determinations were arbitrary, unreasonable, capricious, and made without thorough consideration of the needs of the Trenton public school system. While it is true that unfortunate statements were made in connection with the meetings between Board and Council, it is also to be remembered that the climate for the determinations was affected by a "strike" of professional personnel and a period of anxiety related to the resultant negotiations. The hearing examiner is convinced that in view of the difficulty in communicating all possible information which Council might find desirable in making its determinations, and the unique circumstances attendant upon this year's determination, there is no conclusive showing of arbitrary, capricious, or unreasonable action. It is scarcely necessary to repeat the Commissioner's determinations, as reflected in his orders of May 29 and June 18, of Council's obligation to detail and state its underlying reasons for its proposed budget reductions.

* * * *

The Commissioner has reviewed and considered the findings, conclusions, and recommendations of the hearing examiner as set forth herein. The Commissioner is cognizant of the particular and difficult educational problems which beset an urban school district. He recognizes the forward-looking and energetic proposals advanced by petitioner herein as desirable programs aimed at solving some of these problems and exploring innovative approaches to others. If it were within the Commissioner's power as set forth in *Board of Education of*

East Brunswick v. Township Council of East Brunswick, 48 *N.J.* 94 (1966), the Commissioner would seek ways to implement much more of the Board's program. He is constrained to determine, however, what sums are necessary for the operation of a thorough and efficient system of public schools in Trenton, and therefore he concurs in the recommendations of the hearing examiner as supported by the findings herein. Accordingly, he directs that the City Council of the City of Trenton certify to the Mercer County Board of Taxation an additional sum of $772,345 to be raised by taxation for the support of the public schools of Trenton in the 1969-70 school year.

COMMISSIONER OF EDUCATION

November 10, 1969

Pending Before State Board of Education.

Michael A. Fiore,

Petitioner,

v.

Board of Education of the City of Jersey City, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, William L. Boyan, Esq.

For the Respondent, William A. Massa, Esq.

Petitioner appeals from the appointment by respondent of another person to a position to which he claims tenure rights. He seeks an order directing that he be employed in the position of Business Manager in respondent's school district, with compensation therefor from the date on which the position was re-established by the Board of Education. Respondent denies the validity of petitioner's claim.

This case is submitted to the Commissioner on a stipulation of facts as set forth in the pleadings and in a series of resolutions adopted by respondent. Briefs of counsel were submitted.

The relevant facts as stipulated by both parties in this matter are as follows:

One John Romanowski had acquired tenure in the position of Business Manager for respondent, but on August 1, 1962, he was dismissed from this position by reason of conviction of a crime. On the same date petitioner was appointed to the position of Business Manager in the place of Romanowski.

However, the Supreme Court of New Jersey reversed Romanowski's conviction, and as provided by *R.S.* 2A:135-9, he was entitled to be restored to his former position with full rights, including compensation. This was done by resolution of respondent Board on June 10, 1964, and petitioner was dismissed as Business Manager on the same date.

On July 15, 1964, respondent adopted a resolution suspending Romanowski from his position as Business Manager, pending a judicial decision on three other indictments still effective against him. On the same date, petitioner was appointed as Acting Business Manager.

He served in this capacity until September 10, 1965, when, by resolution, respondent abolished the position of Business Manager, and dismissed petitioner as Acting Business Manager. The functions of the office were transferred to the office of the Secretary of the Board.

On May 8, 1968, respondent re-established the position of Business Manager and appointed John Kijewski to the office. Petitioner had previously informed respondent by letter on January 4, 1968, that if the position were re-created he would assert his claim to the appointment. The present action to this effect was taken by petitioner by appeal to the Commissioner on August 5, 1968.

Petitioner argues that he held the position of Business Manager from August 1, 1962, until September 10, 1965, except for the period from June 10, 1964, until July 15, 1964; and that he thus occupied the position for an aggregate of three years and five days. He argues that he accordingly acquired tenure and reemployment rights under *N.J.S.A.* 18:5-51, which stated that tenure rights were acquired "after three years' service." Petitioner maintains that there was no requirement that the three years be consecutive, and argues that the introduction in the Title 18A revision *(N.J.S.A.* 18A:17-2) of the word "consecutive" indicates the understanding of the Legislature that this requirement did not exist under the earlier statute, and that it now wished to insert it in the revision. On the basis of this contention that he had acquired tenure as Business Manager when the position was abolished, petitioner claims prior rights to be reemployed as Business Manager when the position was re-created in May 1968.

Respondent denies petitioner's right to the re-created position. It holds that petitioner never acquired tenure in the position. Respondent asserts, first, that tenure under Title 18 was never obtainable except after three *consecutive* years of service, and that no provision for "tacking" prior service was ever made in

either statute or case law insofar as the position of Business Manager is concerned. *Cf. Nichols v. Board of Education of Jersey City*, 9 *N.J.* 241 (1952). In any case, respondent contends, petitioner did not serve as Business Manager from July 5, 1964, until September 10, 1965, but only as *Acting* Business Manager, as shown by Board resolution at the time of appointment; and that he was, therefore, not the legal possessor of the office during that time. Hence, respondent argues that petitioner's period of service as Acting Business Manager could not in any case be counted as part of a service leading toward tenure in the position. Finally, respondent argues that there is no provision whereby petitioner can acquire "secondary" tenure rights in a position which can be held by only one incumbent. Respondent avers that petitioner and Romanowski could not have held or acquired tenure to the same position at the same time.

The Commissioner, having carefully considered the facts and the respective contentions of the parties herein, concludes that petitioner's claim to have acquired tenure rights in the position of Business Manager is without merit. Petitioner's argument rests upon a period of service as Business Manager of one year, ten months and ten days, which was terminated by the restoration of Romanowski to the post with full rights of tenure and back compensation; and upon a subsequent service of one year, one month and twenty-six days as Acting Business Manager during the suspension of Romanowski from the position. Upon the basis of these facts, the Commissioner must conclude that petitioner's claim fails for the following reasons:

It has been long and clearly established by decision and precedent that the provision under Title 18 that tenure should ensue "after three years' service" meant three years' *consecutive* service. *Schumacher v. Board of Education of Manchester Township*, 1961-62 *S.L.D.* 175, affirmed as *Board of Education of Manchester Township v. Raubinger*, 78 *N.J.Super.* 90 *(App. Div.* 1963) The inclusion of the word "consecutive" in the revised statute under Title 18A cannot be held to represent a new intention by the Legislature, but rather a clarification of an interpretation already in effect. Therefore, petitioner's claim on the basis of length of service cannot be sustained.

But even if, *arguendo*, the claim to tenure as Business Manager on a total of three years and five days of service could be sustained on the grounds of aggregate time, it must fail nevertheless because the second portion of the two periods of service was clearly one of employment only as *Acting* Business Manager, as shown by the resolution of respondent Board on July 15, 1964. Such employment cannot in any way be considered as equivalent to appointment to the position, for the position of Business Manager had not been officially vacated. It was still in the legal possession of Romanowski, who had been suspended, but not dismissed, by respondent on July 15, 1964, pending judicial settlement of certain indictments. Petitioner could not properly claim service toward tenure during a period when he was not the official incumbent of the position.

Finally, it must be emphasized that at no time prior to the abolition of the position of Business Manager by respondent on September 10, 1965, did

Romanowski lose his tenure rights previously acquired. His dismissal by respondent on August 1, 1962, though doubtless done in good faith and on information of his conviction of crime by a lower court, had to be rescinded on June 10, 1964, because of a reversal by a higher court; and all his tenure rights and back compensation were restored to him as though there had been no lapse of time. His subsequent suspension on July 15, 1964, also did not vacate his title to the position, until the latter was eventually abolished by respondent on September 10, 1965. In view of these facts, it is impossible to hold that petitioner could have acquired tenure as Business Manager at any time between August 1962 and September 1965, since this would imply the possibility of two persons simultaneously holding or gaining tenure in a one-person position. This is clearly anomalous and contrary to reason.

The petition of appeal is accordingly dismissed.

COMMISSIONER OF EDUCATION

November 21, 1969

Board of Education of the Borough of South Belmar,

Petitioner,

v.

Board of Education of the City of Asbury Park and Board of Education of the Borough of Manasquan,

Respondents.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Harold Feinberg, Esq.

For the Respondent Board of Education of the City of Asbury Park, Joseph N. Dempsey, Esq.

For the Respondent Board of Education of the Borough of Manasquan, Pearce and Pearce (Owen B. Pearce, Esq., and William H. Burns, Esq., of Counsel)

Petitioner is a school district of Monmouth County which maintains no school of its own, but sends its elementary pupils to Belmar district schools, and its high school pupils to respondents' high schools. Petitioner seeks relief from a demand made by Asbury Park School District that, pursuant to statute, it send to Asbury Park High School the same proportion of its high school pupils as were attending Asbury Park in 1943-44. The respondent Board of Education of Asbury Park moved that the Commissioner issue a summary judgment denying petitioner's appeal and ordering petitioner to comply with respondents' request.

On October 30, 1968, the Commissioner denied this motion for a summary judgment. In so doing, the Commissioner found that a valid *de facto* sending-receiving relationship exists between South Belmar and Asbury Park. He therefore gave petitioner leave to proceed as in an application for termination or modification of such relationship as provided for in *N.J.S.A.* 18A:38-13. He further directed that since a similar relationship also exists between South Belmar and Manasquan, which relationship must inevitably be affected by any determination with respect to South Belmar and Asbury Park, Manasquan Board of Education must be jointed as an indispensable party to this action. An order so joining Manasquan was issued on January 8, 1969.

A hearing on the question of the termination or modification of the existing sending-receiving relationships was accordingly held on April 29, 1969, at the Courthouse in Freehold, by a hearing examiner appointed by the Commissioner for this purpose. The report of the hearing examiner is as follows:

It was stipulated by counsel of all parties to the action that in 1943-44, 33 per cent of South Belmar's high school pupils were in attendance at Asbury Park High School. Evidence was presented by the Superintendents of Asbury Park and Manasquan that in 1968-69 there were 11 and 57 pupils from South Belmar attending their respective high schools.

Petitioner based its case on two contentions. In the first place, it avers that it would be seriously disadvantaged if its past and present policy of allowing its high school pupils to make a "free choice" of the high school they wish to attend were abrogated, thereby compelling petitioner to assign pupils to a school that might not be of their preference. Petitioner offered no conclusive testimony in support of this contention. Its second contention is that Asbury Park would not be seriously affected either educationally or financially. Testimony was offered to show that the total withdrawal of all South Belmar pupils by the termination of the existing relationship would reduce Asbury Park's revenue at the rate of about $1,000 per pupil. Thus, if the 33 per cent of the South Belmar pupils to which Asbury Park claims entitlement were not assigned to Asbury Park for the 1969-70 school year, the tuition loss for the 23 pupils would be approximately $23,000. The Asbury Park Superintendent further testified that the withdrawal of all South Belmar students would not generate a reduction of faculty, nor would the assignment of the full percentage of South Belmar pupils necessitate a staff increase. On the other hand, the withdrawal of South Belmar pupils could, it was testified, reduce the enrollment in certain one-section courses sufficiently to endanger the continuance of such courses.

Petitioner places reliance on *N.J.S.A.* 18A:38-21 in support of its contention that the Commissioner may terminate a sending-receiving relationship when it is shown, as expressed in the statute, that "the board of education of the receiving district will not be seriously affected educationally or financially" by the withdrawal of the sending district pupils. The hearing examiner notes that this statute is *Section* 2 of *Chapter* 273, *Laws* of 1953, which provides for contracts securing the benefits of a sending-receiving

relationship to both parties when the receiving district finds it necessary to provide additional facilities. *Section* 2 of this Act sets forth the conditions under which the Commissioner may terminate such a contract. The hearing examiner finds no evidence of the existence of a contract entered into between Asbury Park and South Belmar pursuant to *Chapter* 273, *Laws* of 1953.

The Board of Education of Manasquan filed an answer and cross petition on February 28, 1969. In this and in the present hearing it averred and offered testimony to show that South Belmar pupils prefer the program at Manasquan, as evidenced by the increasing numbers choosing to go there; that the school is a comprehensive and democratic institution; and that since several of the South Belmar pupils are Negroes they would provide a better racial balance at Manasquan High School, as contrasted to Asbury Park High School which already has a high percentage of Negro pupils.

It is the conclusion of the hearing examiner, based upon the foregoing facts and the testimony heard, that (1) Asbury Park is entitled, by law and stipulation, to 33 per cent of South Belmar's pupils according to statute; (2) the gain or loss financially to any of the parties would not be significant by whatever determination is made; (3) the weight of evidence does not show that the educational program at Manasquan is in any significant respect superior to or different from that offered by Asbury Park; nor is the number of pupils involved sufficient to change the nature of the pupil population of either school materially and (4) that any reliance by petitioner upon *N.J.S.A.* 18A:38-21 for relief is not applicable because this test is created only for contractual agreements, which do not exist in the present relationships.

* * * *

The Commissioner has carefully reviewed and considered the findings and conclusions reported by the hearing examiner, *supra.* He concurs in the findings and conclusions, and again calls attention, as he did in his decision in the case of *Asbury Park Board of Education v. Belmar Board of Education, 1967 S.L.D.* 275, to the purpose of the Legislature in enacting *N.J.S.A.* 18A:38-11 *et seq.*, namely, to provide stability in sending-receiving relationships unless good and sufficient reasons are adduced that the Commissioner should change them. It must be recognized that it is clearly the burden of an applicant for such change to produce adequate proof that it should be made. The Commissioner does not find that such reasons have been shown in the present issue, and therefore directs that the parties shall forthwith take appropriate steps to reinstate the sending-receiving ratios of the 1943-44 school year, to become effective no later than the opening of school in September 1970.

COMMISSIONER OF EDUCATION

November 21, 1969

Pending Before State Board of Education.

In the Matter of the Tenure Hearing of Thomas Appleby, School District of Vineland, Cumberland County.

COMMISSIONER OF EDUCATION

Decision

For the Complainant Board of Education, Frank J. Testa, Esq.

For the Respondent, Harold A. Horwitz, Esq.

Respondent is a teacher, under tenure in the Vineland schools. A series of charges alleging conduct unbecoming a teacher was filed against him by the Superintendent of Schools and certified to the Commissioner of Education pursuant to the Tenure Employees Hearing Act *(R.S.* 18:3-23 *et seq.*, now *N.J.S.A.* 18A:6-10 *et seq.)*, by a resolution of the Board of Education of Vineland dated February 21, 1967, which suspended respondent without pay pending determination of the charges filed against him. Respondent, by way of answer, denied the allegations set forth in the charges. At a conference of counsel held in the office of the Assistant Commissioner of Education in charge of Controversies and Disputes on April 21, 1967, counsel waived the hearing of the charges within 60 days after the certification thereof.

A hearing on the charges was conducted on 33 days, beginning on June 7, 1967, and concluding on September 8, 1969, at the Court House, Bridgeton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

At the opening of the hearing, counsel for respondent made four motions or objections having the effect of motions as follows:

1. That complainant had failed or refused to provide full or responsive answers to certain interrogatories propounded upon it. Extensive argument was heard, and the hearing examiner ruled on each separate objection, either by directing complainant to supplement or complete its answers, or by finding the answer sufficient.

2. That complainant had failed to comply with procedural requirements of the statutes *(R.S.* 18:3-25, now *N.J.S.A.* 18A:6-15) by serving upon respondent a copy of the Board's resolution certifying the charges to the Commissioner. Respondent claimed that he first saw the resolution at the hearing. The Commissioner's records include a photocopy of a letter to respondent, sent by certified mail with signed receipt, stating that the charges and certifying resolution were being served upon him. The hearing examiner concludes that if in fact respondent did not receive in the letter the stated contents thereof, the procedural defect is offset by the unusual delay in protesting it, absent any showing that he has been harmed or prejudiced.

3. That complainant has failed to make any determination of the truth of the charges as a basis for certifying them to the Commissioner. It is respondent's contention that the statutes require the Board to make "an affirmative finding," and that it is not enough for the Board, by resolution, to determine that if the charges are true in fact, action by the Commissioner is warranted. *(Cf.R.S.* 18:3-25, now *N.J.S.A* 18A:6-11.) The Commissioner has previously considered the question of a board's procedure in making its determination when charges are filed against a tenured employee. *In Sheffmaker v. Board of Education of Runnemede*, 1963 *S.L.D.* 116, 118, the Commissioner likened the function of the board of education in such a matter to that of a grand jury, requiring no "hearing" to determine whether the charges are in fact true, but rather requiring the board to examine the evidence which the person preferring the charges has to offer. See also *King v. Board of Education of Newark*, 1967 *S.L.D.* 167, 168, affirmed State Board of Education April 3, 1968. The hearing offered no evidence to show that complainant Board failed to perform its statutory function in determining to certify the charges herein. Respondent renewed his motion at the conclusion of the presentation of the Board's case. The hearing examiner accordingly recommends that respondent's motion be dismissed.

4. Respondent urges that the Board of Education which certified the charges to the Commissioner (by resolution dated February 21, 1967) was not the Board in existence when the events constituting the charges occurred. Even assuming the charges to be true, respondent asks by what right does a new Board (which in this instance came into being on February 1, 1967) go back to make findings of fact existing before its life? The hearing examiner notes that the Appellate Division of Superior Court considered this question *In the Matter of the Tenure Hearing of Joseph A. Maratea*, December 1, 1967 (1967 *S.L.D.* 351) and held as follows:

"If this were the only substantial charge, and if all the improper conduct charged occurred before appellant acquired tenure as superintendent, it might well be argued that the local Board was precluded from reviving stale charges if it was aware of the existence of them and nevertheless re-employed appellant. An examination of the other charges which the Commissioner found supported by the evidence clearly shows that the episode contained in charge number one was only one of many demonstrating appellant's unsuitability to serve in the office of superintendent."

The hearing examiner further observes that many of these other charges against Maratea were based on incidents occurring before the life of the Board which certified the charges to the Commissioner. 1966 *S.L.D.* 77 The hearing examiner concludes that in its finding in *Maratea*, the Court acknowledged the right of the Board of Education to certify charges based

on incidents occurring prior to its official existence. It is therefore recommended that this motion be dismissed.

The charges herein were severally set forth in three groups, each group containing its separately and consecutively numbered set of charges. Throughout these proceedings the charges were referred to by charge and page number; they will be so reported herein. In the course of the hearing, certain of the charges were abandoned, and will not be recited in this report. Many of the charges contain the names of present or former school pupils, many of whom are still minors. It is the hearing examiner's belief that it is not in the best interests of children, and no essential purpose will be served, if the full names of such children are reported here. Therefore, only the initials of such children will be used in this report, and it is the hearing examiner's recommendation that such a procedure be employed in the Commissioner's published decision in this case.

CHARGE No. 1, Page 1

"On January 27, 1967 at approximately 12:40 p.m. in front of the study hall at Landis Junior High School, Vineland, New Jersey while a B- T-, a student at said school was having a conversation with another girl, to wit: P- J-, you intruded into a personal conversation between the two students, became angry and called her 'a tramp'."

The testimony establishes that respondent came upon the two named girls in the school corridor. As respondent approached, B- said, "Here comes nibby." There was a discussion between respondent and B- about a so-called "slang book" or "slam book," which B- refused to give up at respondent's request, although she knew that such books were forbidden. After an exchange of words in which B- used language which was clearly disrespectful, respondent ordered B- into the school office where he told her to sit down. He left the office and immediately returned, and at this time uttered the offensive language. Two other pupils in the office at the time testified that they heard respondent call B- "a tramp." Respondent denies using this term, but testified that he "had just had it" as a result of his argument with B-. Respondent offered additional testimony to support his assertion that over a period of more than two and a half years he had experienced difficulty with B-, including her utterances of profane language addressed to him, smoking on school property, classroom annoyances, fighting, and insolence and insubordination. The hearing examiner finds that the incident occurred as charged.

CHARGE No. 2, Page 1

"On January 30, 1967 at approximately 2:50 p.m. during a homeroom activity period at Landis Junior High School, without provocation, you stated to a student, D- P-, 'I am blood thirsty today, you look like a nice victim'. As a result you picked up his left arm, bit him causing injuries to this arm requiring the said student D- P-, to seek medical attention."

The alleged incident occurred near the end of the school day, in a "homeroom" or "activities" period. It is clear to the hearing examiner that D- was disorderly and out of his proper place, that respondent told D- to be seated, and that ultimately respondent went to the back of the classroom, where D- was. Respondent says that at this point he asked D- what he would have to do to make him understand the teacher's request. "Do I have to bite your head off?" respondent testified he asked D-. Respondent took D- by the arm and led him back to his seat. There, respondent admits, he lifted D-'s left arm to "a couple inches away from his mouth" and "pretended" to bite it. Respondent denies, however, having actually bitten D-. Testimony of several other pupils sitting at various locations in the classrooms gave widely divergent reports of what they had observed, ranging from testimony tending to show that respondent had not done even what respondent testified that he did, to testimony of a pupil who said he saw the moisture from respondent's lips on D-'s arm. D- did not cry out in pain, and no witness conclusively stated that he saw any marks on D-'s arm. However, when the school physician examined D- some seven hours later, he found four red "spot-type" marks on D-'s left forearm, which, on the basis of the history given him, and only on that basis, he testified were "consistent with" teeth marks. The physician testified that he could not estimate the durability of bite marks, but believed it reasonably certain, allowing for differences of pain threshold, that a bite of such intensity as to leave marks of the duration noted would have occasioned some outcry at the time they were inflicted.

The weight of believable evidence does not support a finding that respondent did in fact "bite" D-'s arm as charged. The evidence, including respondent's own testimony, does support a conclusion that respondent "pretended" to bite D-'s arm, even to the point that his mouth came into contact with D-'s flesh, but without the exertion of tooth pressure that would be required to bite the arm. Notwithstanding the evidence of D-'s misbehavior and disobedience, the hearing examiner does not find provocation to warrant respondent's behavior, however jocular he may have intended it to be.

CHARGE No. 1, Page 2

> "On January 17, 1967 in the classroom at Landis Junior High School while students were watching a film strip without provocation you grabbed M- C- who was attempting to fix a wrinkle in the sweater belonging to a girl student seated in front of her and called her a 'dopey thing' and sent her out of the room. After she left, you said 'She is a dopey stupid girl'."

The hearing examiner finds that M- C- reached forward to smooth out two lumps in the back of the sweater of the girl sitting in front of her. Respondent, who sat behind M-, first warned her, then reached forward to hold M-'s collar in such a way as to restrain M- from further touching the girl in front. Respondent at that point, by his own testimony, told M- that her actions were "very stupid." An exchange of words occurred between M- and respondent, during which, respondent says, M- challenged him to put her out of class. Respondent

directed her to leave the room, and as she left, arguing, he said to her, "You act like a dopey girl." The hearing examiner finds that respondent did not "grab" M-, as charged, but did use such force as to restrain her. He did not use the language in the specific combination of words alleged in the charge, but did, by his own testimony, use the same or similar words to a like effect. The hearing examiner finds that testimony as to respondent's efforts to have M- rescheduled to remove her from his class is of no relevance to the finding as to the truth of the charge itself.

CHARGE No. 2, Page 2

> "On November 30, 1966, while G- G-, a student at Landis Junior High School, was walking down the center stairs to a shop class, you and the student bumped shoulders. The student turned around to apologize at which time after some remarks you grabbed said student by the shirt at his shoulder and continued to hold him while you took him to the office."

The hearing examiner finds that an incident occurred in which G- G- did in fact bump respondent. An exchange of words ensued; G- claims that he endeavored to apologize; respondent says he endeavored to elicit an apology. Thereafter respondent took G- to the office. G- was subsequently transferred out of respondent's class, and about five days after the incident, respondent had occasion to break up a fight between G- and another boy and reported the fight to the school administration. G- was then suspended from school. Testimony was given that G- told others that his testimony against respondent was false. The hearing examiner finds that the weight of believable evidence does not support a finding that respondent's conduct in this matter constituted "grabbing" G-'s shirt as charged. It is recommended that the charge be dismissed.

CHARGE No. 3, Page 2

CHARGE No. 4, Page 2

No testimony was offered on these charges, and they were abandoned.

CHARGE No. 5, Page 2

> "On June 6, 1966 at Landis Junior High School in the corridor you grabbed and twisted the arm of a student, P- W-, during a conversation with her."

The pupil named in this charge testified that she and another girl were passing through the corridor, laughing and reading a note. Respondent asked for the note. There was an exchange of words, after which the pupil ran up the stairway, followed by respondent, who grabbed her arm and twisted it behind her to force her to give up the note. She was released and went on to her next class, but her friend reported the incident to the school authorities. A teacher who was in the corridor at the time of the incident testified that she saw respondent twist P-'s arm, but did not hear the exchange of words. She also

testified that she reported the incident to the vice-principal at the close of the school day. Respondent denies the incident, and asserts that he was not aware of the identity of the pupil until after the charges were certified against him. The hearing examiner finds that the charge is supported by the weight of believable evidence.

CHARGE No. 6, Page 2

> "On March 28, 1966 at Landis Junior High School in front of locker of A- C-, a student, you engaged in a conversation with him attempting to force him to take all of his books out of his locker. When you were told that he did not need all of his books for his next class, you pushed him into locker."

The incident alleged in this charge occurred in a corridor where respondent was on duty. A- went to his corridor locker to exchange a book, and respondent challenged A-'s right to be at his locker at that time, and told A- that the condition of his locker was such that he would have to clean it at the end of the day. An exchange of words ensued, and respondent knelt at the locker and began handing A- the books in the locker, one at a time, which A- threw or handed back to respondent. From the demonstration of the incident given by A- at the hearing, and from respondent's testimony, the hearing examiner concludes that in the resulting confusion, either or both of the participants may have been thrown off balance to such a degree that respondent's shoulder pressed against A-, impelling him toward the open locker. Both the pupil and respondent then went to the school office, where the incident was reported to the principal. While the hearing examiner finds no evidence of intentional assault, as charged, he finds that an unseemly and unwarranted display of ill-temper by both parties led to a result which has been misinterpreted into the charge as stated.

CHARGE No. 7, Page 3

> "On February 9, 1966 you refused to submit lesson plans as is required each week to Farrell J. Lynch, Social Studies Department Head, and further for the period from September 12, 1965 to February 1, 1966, you failed to submit said plans except on October 18, December 6, 1965 and January 7, 1966."

Testimony on this charge includes an admission by respondent that he was not always punctual in submitting his lesson plans. However, the charges against respondent generally allege conduct unbecoming a teacher, and the specific allegation of this charge is that respondent *refused* to submit lesson plans. There is no evidence of such a refusal; rather, respondent may have inefficiently performed a duty expected of him as a teacher. However, charges of inefficiency are required by statute to be served in writing upon the employee, and he must thereafter be allowed 90 days to overcome his inefficiency. *N.J.S.A.* 18A:6-12 There is no indication that such written notice was ever given to respondent with

respect to this charge. It is therefore recommended that the charge be dismissed. *Cf. In the Matter of the Tenure Hearing of Alfred E. Jakucs*, Commissioner of Education, August 12, 1968.

CHARGE No. 8, Page 3

> "On May 4, 1965 at Landis Junior High School, R- S-, a student, was seated in the Junior High School auditorium with a bottle of fingernail polish in her hand. You took the bottle from her after you were told that it did not belong to the student and that it be returned and at the same time you began shouting 'you are a tramp. You only know how to walk the streets'."

The accounts of this incident as given by both the pupil and respondent differ in no significant respect other than respondent's complete denial that he addressed to the pupil the remarks imputed to him, and his further assertion that as the pupil left the study hall to go to the school office, as directed, she threatened respondent and said "she would be back in study hall," although he had said he would not readmit her without a conference. The hearing examiner finds the evidence insufficient to support the charge that respondent "shouted" the offensive remarks at the pupil.

CHARGE No. 9, Page 3

> "On May 8, 1965 when the same above named student R- S-, entered your study hall with a late pass, you yelled at her for disturbing the class and ordered her to get out. As she walked out of the room, you yelled 'You whore get out'."

The testimony establishes that the named pupil entered the study hall with a "late pass." Respondent says she walked down the aisle of the auditorium study hall in such a noisy manner as to disturb the other pupils. Respondent refused to accept the pass, absent the conference he had set as a condition of her readmission (See Charge No. 9, *supra.*). Again there was an exchange of words, during which the pupil asserts that respondent addressed the alleged epithet to her. She left the study hall, and entered the office in a state described by a guidance counselor as "hysterical." In a later conference involving the respondent, the pupil, the vice-principal, and a social caseworker having supervisory responsibility for the pupil, respondent apologized to the pupil. However, respondent asserts that his apology was for the trouble he had caused and not for the alleged epithet, which he denies. The hearing examiner finds that the evidence does not support a finding that respondent "yelled" the statement charged to him.

CHARGE No. 10, Page 3

> "On February 19, 1965 at Landis Junior High School while a student K- F- was walking toward center stairway from locker near 202, he passed you standing in the hall opposite room 207. After some remarks by you

about his smoking and his denial, you called him a wise guy and grabbed him by the shirt collar and pushed him into the locker, some words were exchanged between you and him and you again grabbed him by the collar in an attempt to get him into the room."

The accounts of this incident as related by both the pupil and respondent reveal a confrontation in which respondent accused the pupil of smoking near the school. The expression "liar" was exchanged, and respondent admits he "touched" the pupil's shirt in an effort to get possession of a cigarette pack which he says was in the boy's shirt pocket, under his sweater. The boy denied having cigarettes on his person, although he admitted having them in his locker. In any event, he admits saying to respondent, "Take your crummy hands off me." This altercation took place near lockers along the corridor wall; however, there is no convincing evidence that the pupil was pushed "into a locker," as charged. Respondent testified that the principal required teachers to take cigarettes from pupils' shirt pockets, but that in the incident charged, he "did not use force." The hearing examiner observes that the statutes authorize the use of "such amounts of force as is reasonable and necessary *** to obtain possession of weapons or other dangerous objects upon the person or within the control of the pupil ***." *N.J.S.A.* 18A:6-1 In the instant matter, however, the hearing examiner finds no statutory authority of such use of his hands upon the person of the pupil as respondent admits in his own testimony. The hearing examiner finds that the evidence supports that part of the charge which deals with taking hold of the pupil's shirt as true.

CHARGE No. 11, Page 4

"On November 25, 1964 at Landis Junior High School at dismissal time, Mr. John Garrahan, Guidance Director, reported to the principal, C. Edward Lipartito, that you had made loud and uncomplementary remarks concerning guidance counselors and their coddling of students that were sent to the guidance office. Mr. Garrahan took exceptions to these remarks because of their loudness and because it became audible to many students changing classes. You were informed by Mr. Garrahan to discuss this in private and not in the presence of students."

The guidance counselor named in this charge testified that as he passed through the corridor at dismissal time, he overheard respondent making derogatory remarks about the guidance department. The counselor stopped and asked respondent what he meant by the remarks. It was testified that respondent, in a loud voice, audible to pupils in the area, criticized the guidance staff for "pampering" and "sympathizing" with pupils. Respondent and the counselor went to the principal's office, where respondent repeated the remarks, this time including the principal in the criticism. The counselor testified that he objected to respondent's manner of making criticisms audible to pupils, not to respondent's right to criticize. Respondent admits that there was an incident in which he had criticized the guidance staff's treatment of a pupil to another teacher, but he denies that his statements to the teacher, or to the counselor, were audible to any but the three staff members directly involved. On

cross-examination respondent testified that at the time he talked with the other teacher he wasn't conscious of the counselor's presence nearby, but is clear in his recollection that there were no pupils within hearing. He further testified that at the principal's office the principal suggested that the matter be dropped and that if respondent wished to comment to the guidance counselor, he do so in the guidance office. The hearing examiner finds that the incident occurred substantially as charged.

CHARGE No. 12, Page 4

> "On December 18, 1963 at Landis Junior High School you admitted to the principal, C. Edward Lipartito. that you had slapped a student, A-B-, on the face at approximately 8:30 a.m. in the school auditorium."

The alleged incident occurred in the rear of the school auditorium, where A-B- and some companions were sitting. Respondent, who testified that he was on "early morning duty," passed by and heard the pupils making noise, and saw them wearing hats and chewing gum. Respondent directed the boys to remove the hats and dispose of the gum, and moved on. When he returned, respondent said, he found A- B- wearing a hat and chewing gum, in deliberate defiance of his order. It is at this point that, according to the boy's testimony, respondent slapped him. Respondent denies slapping A- B-, testifying that he "did not touch the boy," but that he raised his voice at him. Another teacher who was also on duty testified that he noticed the "turmoil" in the auditorium and saw respondent and the boy. The teacher testified that respondent told him that he had slapped the pupil. The teacher reported the incident to the principal, and later that day participated in a conference with the principal, the pupil, and the pupil's father. The father said that he didn't want to make a "big commotion about the incident." The principal said that both the pupil and respondent had told him their versions of the incident, and that respondent told him that he had slapped the boy. The pupil never returned to school after the incident. The pupil's father testified that he saw a "red mark" on his son's face, and that the son said he did not want to go to school because the teacher had slapped him. The pupil's brother testified that he had never known of the incident until he read in a newspaper of the boy's testimony, and that he considered respondent's reputation "among the best." The hearing examiner finds that the truth of the charge is supported by the weight of believable testimony.

CHARGE No. 13, Page 4

> "Mr. Ardah Donley, then Superintendent of Schools in the City of Vineland, received a letter on February 6, 1961 from Nathaniel Rogovoy, attorney for Mr. and Mrs. N- S-, Sr., concerning complaint of said parents that on January 31, 1961 when you were a teacher at the Memorial Junior High School, Vineland, New Jersey between the hours of 8:00 and 8:30 a.m. you pushed their son N- S-, Jr., a student at Memorial Junior High School, for forty-five feet down the hall and threw him against the wall on the locker room in the presence of some of his classmates."

Counsel for respondent objected to the hearing of testimony on this charge, contending that it was stale, that the Superintendent of Schools in 1961 had dismissed it as a dead issue, and that a long period of time had elapsed without action of the Board of Education. Respondent's testimony on this charge shows that the pupil was dilatory in moving toward his homeroom as respondent had directed, and that respondent had put his hand on the pupil's back, not to push him but to make sure that the pupil moved in the indicated direction. He said that the motion was toward the pupil's locker, but that he had not pushed the boy into the locker, as charged. The hearing examiner so finds. The boy's father took the matter to an attorney, who wrote a letter of complaint to the Superintendent, who called a conference of respondent, the principal, and himself, at which the Superintendent reprimanded respondent, who considered the matter finished at that point. The hearing examiner finds inconclusive testimony that the pupil's parents had been promised "a nice sum of money," which was not received, for their son's appearance to testify at the hearing herein. The hearing examiner finds that respondent used force, as charged, without just cause, to direct pupil's movement for some 40 feet, more or less, in the school corridor.

CHARGE No. 14, Page 4

No testimony was presented on this charge, and it was abandoned.

The foregoing charges allege incidents which occurred in school. Additional charges relating to incidents outside of school were made as follows:

CHARGE No. 1, Page 5

> "On February 5, 1966, at the Vineland Y.M.C.A. following a game in which a team coached by you had participated, you displayed conduct that was unbecoming a teacher when you were involved in an argument with a Mr. Bernard Goldstein while he was going to the locker room concerning his smoking a cigarette. As a result you punched Mr. Goldstein about the head and face."

The incident alleged in this charge occurred near a doorway leading to a locker room in the city Y.M.C.A., after a community basketball league game. It is clear that ill-will had previously developed between respondent and Mr. Goldstein, related to both men's work as basketball referees and other basketball game incidents. Complainant admits that he had a cigarette in hand as he approached the locker room door. Respondent, who sometimes, but not on this occasion, worked at the Y.M.C.A., told complainant that he could not go to the locker room while smoking, and physically restrained him from doing so. A scuffle ensued. A witness testified that complainant "flailed his arms," but that respondent did not strike complainant. Another witness said that respondent and complainant were so restrained that respondent could not have struck complainant. Still another witness testified that others present attempted to separate the two, and that respondent broke away and struck complainant on the face, resulting in swelling on complainant's lip. Complainant says that his

injuries required medical attention, and that he reported the matter to the police. The hearing examiner finds that there was an altercation in which respondent struck complainant.

CHARGE No. 2, Page 5

> "On May 21, 1966 at approximately 11:00 p.m. in the City of Vineland, you were involved with another former teacher, Richard Wetterau, in molesting and disturbing a citizen of the City of Vineland, Mrs. Carolyn Mossbrook."

While there was a great deal of testimony on this charge, the hearing examiner finds that the extent of the "involvement" of respondent is that he was a passenger in a car driven by a former teacher, and that he did not himself molest or disturb the citizen named. That he was subsequently caught up in the unpleasant aftermath of the incident, of which he was subsequently exonerated in the courts, cannot be held as conduct unbecoming a teacher. The hearing examiner finds that this charge has not been substantiated by the evidence.

CHARGE No. 3, Page 5

> "As an officiating official of the Cumberland-Cape May Basketball Association, Local Board No. 196 you were expelled from officiating because of your conduct as said official was unbecoming and among other incidents particuarly (Sic) on January 10, 1964 while officiating the Junior Varsity game between St. Joseph's High School, of Hammonton, and St. Augustine Prep School you struck the coach of St. Joseph's High School."

The hearing examiner finds that respondent was suspended, then expelled from the officials' group to which he belonged, on the basis of charges and complaints brought against him by other officials. Much of the testimony on this charge was directed, first, to the incidents allegedly leading to his suspension; second, to the alleged improper motivation of the charges against him; and finally to respondent's assertion that the procedures employed with respect to notifying him of the action taken were improper. The hearing examiner concludes that the matters concerning the action taken were privy to the association of which respondent was a member, and that in the context of the charge as framed, it is no part of the Commissioner's responsibility to evaluate their weight.

CHARGE No. 4, Page 6

CHARGE No. 5, Page 6

No testimony was offered with respect to these charges, and they are abandoned.

"Not specifically set forth herein, however, we have received numerous other complaints from parents, fellow teachers, athletic officials and other citizens concerning your conduct and actions as a teacher in the classroom, school building, school events and at other public places which actions constituted conduct unbecoming a teacher."

The specific incidents covered by this charge are set forth in supplemental answers to interrogatories propounded by respondent, as directed by the hearing examiner following argument of respondent's motion to compel answers, *supra*.

Two incidents alleged to have occurred at the Silver Inn are charged as follows:

"In January, 1961, while sitting in the bar at Silver Inn, 725 South East Avenue, Vineland, N. J., Thomas Appleby provoked an argument with Ray Stanker. Mr. Stanker had had an argument previously in the bar with a close friend, Al Zucca, and they were not on speaking terms. Both Zucca and Stanker were in the bar. Mr. Appleby, knowing that they had been close friends and knowing that they were not speaking to each other, tried to 'needle' Stanker, shouldering him as Stanker was shooting pool and making insulting remarks. Finally Stanker said 'you are pretty ignorant for a school teacher'. Then Mr. Stanker finished his beer and left the Silver Inn. He got into his car and closed the door. He started to light a cigarette before leaving. As he was lighting his cigarette, Mr. Appleby opened the car door, grabbed Mr. Stanker by his shirt front and yanked him out of the car. Mr. Stanker said that Mr. Appleby was so mad that he started to raise his fist to strike him but instead kicked the door of Stanker's car. Then Leo Costello, owner of the bar, came out and broke up the argument. Stanker said that he believes Donald Trucano also came out of the bar with Mr. Costello. When Costello went back in the bar, he saw Mr. Appleby go to the front window and make infantile gestures through the window at the people inside the bar. The Vineland Police were called and Officer Richard Fitzgerald was one of the officers who came to the Inn. No complaint was signed and Mr. Appleby was asked to leave."

"In February, 1967, Thomas Appleby was refused service of alcoholic beverages at the Silver Inn, 725 South East Avenue, Vineland, N.J. He became enraged at this refusal and berated the proprietor, Mr. Louis Costello, until Mr. Costello left the room to call the police. At this point, Mr. Appleby left the building."

With respect to the incident in January 1961, the testimony shows that after an exchange of remarks in the bar, which respondent says originated from his unsuccessful effort to patch up a rift between Mr. Stanker and a friend, respondent followed Mr. Stanker to the latter's car. Mr. Stanker testified that respondent grabbed his shirt, and the bartender who had also gone to the parking area, testified that he saw respondent holding Mr. Stanker by the shirt.

Respondent recalls that he kicked the automobile as charged because he was angry. Respondent denies that he later made "infantile gestures" through the tavern window, explaining that he was making a "beckoning motion" to a friend inside. As a result of this incident, it was testified, respondent was denied further service at the tavern. In early 1967 respondent asked to be served, and when he was refused, made insulting remarks to the bartender. When the bartender attempted to go to the telephone to call police, he testified, respondent physically blocked his way. The hearing examiner finds these charges supported by the weight of believable evidence.

> "At a high school football game involving teams representing Atlantic City High School and Memorial Junior High School, in November, 1959, Mr. Thomas Appleby, then football coach at Memorial Junior High School, objected to a penalty called by the game officials and cursed and swore at the officials, using such profanity in the presence of the boys on both football teams. He threatened the officials, particularly Jerome Nolan, who is currently a teacher at Delsea Regional High School, Franklinville, N.J."

The testimony on this charge, given by witnesses near enough to hear respondent, refutes the allegations. The hearing examiner finds this charge not supported by the evidence, and recommends that it be dismissed.

> "While Thomas Appleby was in the bar of Maple Shade Inn, North Main Road, Vineland, N.J. in the evening of January, 1967, he picked an argument with Tom Provenzano. Mr. Mattioli does not know what the artument (Sic) was about. He does know that Mr. Appleby provoked the argument with Mr. Provenzano and although Provenzano wanted to stop the argument, Appleby continued. Mr. Appleby finally grabbed Mr. Provenzano and tried to pull him out of the bar to fight with him on the outside. Mr. Provenzano braced himself against the bar so Mr. Appleby couldn't get him out. The only way Mattioli said he was able to stop the argument was by threatening Appleby with calling the police."

The testimony given by the bartender was that respondent engaged in an argument with another patron, and that the argument led to an attempt by respondent to engage in a fight. Respondent denies the charge, claiming that he had drunk a beer and played a game of pool with the patron. He said that there had been some "clowning," but no argument or scuffling sufficient to warrant the instant charge. The hearing examiner finds that the charge is not supported by the weight of evidence.

> "In the winter of 1961 at Dot's and Lou's Bar, Harding Highway and Brewster Road, Buena Vista Township, New Jersey close to closing time on this date, exact month and day unknown at this time (will be supplied if obtained before hearing), Thomas Appleby asked the woman bartender for a date. The woman refused and defendant Appleby became abusive toward her and used indecent language. One of the patrons, Bruno Patella of 1128 Sharp Road, Vineland, New Jersey, took exception to this

conduct and defendant dared Patella to physically do something about the argument. As a result it ended up in a fist fight outside the bar. In addition to Patella being present, Chick Cowell of Wheat Road, Vineland, New Jersey was also present during this altercation. The woman bartender was between the ages of 40 to 50 years."

The time of this incident alleged in the charge was established as January 1961. Respondent and a companion, Mr. Cowell, stopped at the bar on their return from officiating at a basketball game. One other patron, Mr. Patella, was present in addition to the woman bartender. Respondent admits conversing with her, but denies any invitation, or any improper language or abusive conduct, as had been testified. Respondent claims that as he left the bar, Mr. Patella followed him and struck and knocked him down. Respondent's companion came to his assistance. The hearing examiner finds this charge true only to the degree that there was an altercation. Other aspects of the charge are not supported by the weight of the evidence.

In summation, the hearing examiner finds that the following charges have been supported as true by the weight of believable evidence: Charge No. 1, Page 1; Charges Nos. 1 and 5, Page 2; Charge No. 10, Page 3; Charges Nos. 11, 12, and 13, Page 4; Charge No. 1, Page 5; and one of the four incidents set forth in Charge No. 6, Page 6. Additionally, he finds that while the specific allegations of Charge No. 2, Page 1, and Charge No. 6, Page 2, were not substantiated, in both incidents respondent engaged in conduct unbecoming a teacher.

Throughout the hearing of the charges, respondent endeavored to show that the filing of the charges resulted from improper motives, particularly on the part of the principal and vice-principal of the school to which respondent was assigned, stemming from respondent's activities as a basketball official, which culminated in respondent's suspension and expulsion from the officials' association. The hearing examiner finds such an implication of impropriety unfounded. With respect to several of the incidents contained in the charges, there was testimony that administrative conferences followed the incidents, in which the inappropriateness of respondent's behavior was reviewed with him.

It is accordingly the conclusion of the hearing examiner that the series of incidents, extending over a period of several years, which are found here to be true in fact, constitute a pattern of behavior demonstrating conduct unbecoming a teacher of such seriousness as to warrant dismissal or reduction in salary.

* * * *

The Commissioner has carefully reviewed and considered the findings, conclusions, and recommendations of the hearing examiner as set forth herein.

The Commissioner finds in the incidents found to be true by the hearing examiner a pattern of conduct on the part of respondent that demonstrates a disposition to resort to unlawful physical force and to harsh and abusive treatment of those whose conduct he found offensive. While the Commissioner understands the exasperations and frustrations that often accompany the

teacher's functions, he cannot condone resort to force and fear as appropriate procedures in dealing with pupils, even those whose recalcitrance appears to be open defiance. The Commissioner finds in the century-old statute prohibiting corporal punishment *(N.J.S.A.* 18A:6-1) an underlying philosophy that an individual has a right not only to freedom from bodily harm but also to freedom from offensive bodily touching even though there be no actual physical harm. *In the Matter of the Tenure Hearing of Frederick L. Ostergren,* 1966 *S.L.D.* 185, 186 The Commissioner said further, *In the Matter of the Tenure Hearing of David Fulcomer,* 1962 *S.L.D.* 160, 162, remanded State Board of Education 1963 *S.L.D.* 251, decided by the Commissioner 1964 *S.L.D.* 142, affirmed State Board of Education 1966 *S.L.D.* 225, reversed and remanded 93 *N.J. Super.* 404 *(App. Div.* 1967), decided by the Commissioner 1967 *S.L.D.* 215,

> "***that such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. If all other means fail there is always a resort to removal from the classroom or school through suspension or expulsion. The Commissioner cannot find any justification for, nor can he condone the use of physical force by a teacher to maintain discipline or to punish infractions. Nor can the Commissioner find validity in any defense of the use of force or violence on the ground that 'it was one of those things that just happen'***. While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control."

Thus, when teachers resort "to unnecessary and inappropriate physical contact with those in their charge (they) must expect to face dismissal or other severe penalty. *In the Matter of the Tenure Hearing of Frederick L. Ostergren, supra.*

In the *Fulcomer* case, *supra,* it was the Commissioner's ultimate determination that the single established incident of improper conduct was insufficient to warrant dismissal of the teacher from his position. (1967 *S.L.D.* 215, 219) In the instant matter, however, it has been established that there were many instances of unbecoming conduct, covering a period of years. In *Redcay v. State Board of Education,* 130 *N.J.L.* 369, 371 *(Sup. Ct.* 1943), affirmed 131 *N.J.L.* 326 *(E. & A.* 1944), it was held that

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

The Commissioner finds and determines that respondent, by a series of incidents of conduct unbecoming a teacher, has shown his unfitness to be continued in his employment in the Vineland school system. The Commissioner dismisses respondent's motion for dismissal of the charges, as recommended by the hearing examiner for the reasons stated in the hearing examiner's report, and directs that respondent be dismissed from his employment with the Board of Education of the City of Vineland, effective as of the date of his suspension by that Board.

COMMISSIONER OF EDUCATION

November 25, 1969

Pending before State Board of Education.

Emil F. Tomecek,

Petitioner,

v.

Board of Education of the Borough of Verona, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, *Pro Se*
For the Respondent, Keer, Booth, Buermann and Bate (George Buermann, Esq., of Counsel)

Petitioner in this case contends that the Verona Board of Education (hereinafter "Board") permitted action to be taken in the name of the Board without proper authorization by that Board. He asks the Commissioner to declare this action invalid and requests the Commissioner to instruct the Board that official acts, commitments, and decisions cannot take place without specific authorization emanating from acts taken by the Board at public meetings. The matter is submitted on the pleadings and a stipulation of the facts.

In his pleadings the petitioner contends that (1) on December 19, 1968, the President of the Board signed a contract on behalf of the Board between the Boards of Education of Newark and Verona and the Educational Testing Service of Princeton (hereinafter "ETS") without authorization from the Verona Board of Education; (2) an advertisement containing budget information was published in the February 6, 1969, issue of the *Verona-Cedar Grove Times*, likewise without prior authorization.

In its answer the Board declares that (1) the contract between the Boards of Education of Newark and Verona and ETS was authorized under specific conditions of an agreement between the Board of Education of the City of Newark and the respondent Board, which was approved by a resolution of respondent Board at a regular public meeting held on June 25, 1968; (2) respondent further answers that the advertisement of February 6, 1969, was approved at a conference meeting of the Board on January 7, 1969, and that the approval action of that meeting was formally ratified on February 25, 1969, at the Board's regular meeting, by the approval of a purchase order for the *Verona-Cedar Grove Times* which included a $320 expenditure for the full-page budget notice.

Exhibits stipulated by the parties hereto show that

(a) The minutes of the regular public meeting held on June 25, 1968, read as follows:

"RESOLVED that the Verona Board of Education enter into the attached agreement with the Newark Board of Education for the educating of up to forty (40) Newark children in the Verona elementary schools, and

"BE IT FURTHER RESOLVED that the President and Secretary be authorized to execute said agreement.

"Moved by Mr. McDonald, seconded by Mr. Wizda.
Ayes: McDonald, Wizda, Jaffe.
Noes: Tomecek.
Abstained: Gustavson.

"Mr. Sellitto read the attached agreement.

"Mr. McDonald: This was approved by Counsel for the Board?

"Mr. Sellitto: Yes, it was. Mr. Mattis, Mr. Buermann, our Board attorney, and I met with the Board attorney from Newark, Mr. Titus and Mr. DePhilippo last Wednesday."

(b) The agreement between the Board of Education of the City of Newark and the respondent Board was subject to these specific conditions:

"19. Any special testing program for participating children shall be kept as normal as possible and such testing program shall be approved by the superintendents of schools of the participating communities.

"20.The cost of the special testing program, research and evalution (sic), including consultant services up to $3,000, will be borne by the Newark Board of Education and the administration thereof shall be carried out under the jurisdiction of the Verona Board of Education in cooperation with the Newark Board of Education."

(c) The President of the respondent Board did on December 19, 1968, sign an agreement authorizing ETS to perform services described in "A Proposal to Evaluate the Verona Plan for Sharing Educational Opportunity."

(d) The minutes of a conference meeting held on January 7, 1969, read in part:

"3. *Budget Advertisement* – Mr. Mattis suggested that, rather than having a budget mailing piece this year, we have the budget, with pictures, included in the Verona-Cedar Grove Times. Copies of this print would then be made available to citizens."

(e) A full-page advertisement providing explanation of the school budget appeared in the February 6, 1969, issue of the *Verona-Cedar Grove Times.*

(f) The following is an excerpt from the minutes of the February 25, 1969 regular meeting of the respondent Board:

"RESOLVED that purchase orders No. 1400 to No. 1516, inclusive, amounting to $14,016.69 be approved. Moved by Mrs. Jaffe, seconded by Mr. Butler.
Ayes: Jaffe, Butler, McDonald.
Noes: Tomecek.

"Mr. Tomecek asked if No. 1403 for the Verona-Cedar Grove Times included the full page advertisement. Mr. Sellitto said $36.48 was for the budget advertisement and $320.00 was for the full page advertisement and the remainder was for 1,000 reprints.

"Mr. Tomecek said the large ad was the one he and other Board members did not see until after its publication. He felt the authorization for this ad was not done in the proper fashion.

"Mr. McDonald said either the majority of the Board or all five members had authorized the Superintendent to prepare an advertisement in lieu of sending out the Verona School News since time was short."

It is clear that contracts must be passed upon at a public meeting. *N.J.S.A.* 18A:18-1 reads as follows:

> "No board of education shall enter into a contract until the same has been presented and passed upon at a regularly called meeting of the board***."

While it is common practice for boards to meet in conference or caucus sessions during which there is free and full discussion, no final action can be taken at such a meeting. *Cullum v. Board of Education of North Bergen*, 15 *N.J.* 285, 294 (1953) The Courts have held that a board of education may ratify any action which it has the power to authorize in advance. *Frank v. Board of Education of Jersey City*, 90 *N.J.L.* 273 *(E. & A.* 1917); *Ratajczak v. Board of Education of Perth Amboy*, 114 *N.J.L.* 577 *(Sup. Ct.* 1935), affirmed 116 *N.J.L.* 162 *(E. & A.* 1936)

The Commissioner finds and determines that (1) in the matter of the agreement signed by the President of the respondent Board with the Newark Board and ETS the respondent Board authorized such action as part of the specific conditions of the agreement approved by resolution at the regular public meeting held on June 25, 1968. The Commissioner further determines that (2) the respondent Board has the authority to fully inform the public regarding its school program and such authority includes expending funds for newspaper advertisement. It is clear that the Board ratified the expenditure of funds for the advertisement in question at its regular meeting of February 25, 1969, and that such ratification constitutes legal authorization.The Commissioner is compelled, however, to admonish the Verona Board of Education that the mere approval of the expenditure of $320 was not the issue in this case. Such an important communication with the public should have the benefit of the wisdom of the entire Board and not merely those present at a caucus session. Further, such an important communication should be discussed at an open Board meeting in order that all members of the Board of Education may have an opportunity to modify its content through a free interchange of ideas. The request to render the contested actions of the Board invalid is denied and the petition is dismissed.

COMMISSIONER OF EDUCATION

December 4, 1969
Pending before State Board of Education.

William G. Locker and Janet Locker, his wife; Jackmo Pippo and Florence Pippo, his wife,

Petitioners,

v.

Board of Education of the Township of Monroe, Gloucester County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioners, Elliott G. Heard, Jr., Esq.
For the Respondent, H. Emil Paarz, Jr., Esq.

Petitioners are residents of the school district of Monroe Township in Gloucester County who contend that their children, in attending the public schools assigned them, must walk along a route so hazardous as to represent a failure of respondent to fulfill its duties to such children. Respondent asserts that appropriate transportation has been offered, and that its transportation policies have been thoughtfully arranged within its discretionary authority and in accordance with all pertaining laws and regulations.

On April 11, 1969, a hearing was held at the County Office Building, Clayton, New Jersey before an examiner appointed by the Commissioner. Testimony and documentary evidence were presented. The report of the hearing examiner follows:

There are no basic disagreements as to the facts in this case. At a conference on December 10, 1968, held in the office of the Assistant Commissioner of Education in charge of Controversies and Disputes, and with counsel for petitioners and counsel for respondent in attendance, the following agreements were reached:

1. It was stipulated that the posted speed limit along Black Horse Pike is 55 miles per hour.

2. It was agreed that the issue in this matter is whether respondent's requirement that petitioners' children walk along the Black Horse Pike approximately two-tenths of a mile to the bus stop or three-tenths of a mile to the Whitehall School and the Cecil School constitutes such an abuse of discretion as to warrant the Commissioner's intervention.

Monroe Township has in late years experienced considerable population growth and a consequent increase in pupil enrollment and school transportation problems. Motor traffic has increased, especially on the Black Horse Pike (U.S. Route 322), the most heavily traveled of township roads and one of the main

routes between Camden and seashore communities. Children living along the Pike usually walk to school or to a bus stop on the shoulder or berm of the highway, and, in inclement weather, particularly after snow is plowed, are subjected to splashing from fast-moving trucks and tractor-trailers.

Testimony adduced at the hearing disclosed that the Pike, in the area under discussion, is a four-lane highway, two lanes each way, with each lane measuring twelve feet in width, with a center painted island eight feet wide, and with a berm ten feet wide on either side. The point at issue relates to the dangers of walking on the ten-foot berm. There was some conflicting testimony as to whether or not the highway crews, in case of snowstorm, plowed the entire berm; but since the mailboxes are erected beyond the berm, and since, except in emergency, the mail is delivered, the examiner must conclude that normally the ten-foot shoulder is plowed.

Transportation policy under the respondent Board developed gradually over the years, and the development of those policies need not be detailed since petitioners' counsel stipulated the honesty and thoughtfulness with which the Board approached its transportation problems. Certain statements, however, will clarify the present issue.

Prior to November 1967, transportation was under the part-time supervision of the Secretary of the respondent Board. The Board has set up "walking zones" for its various schools, and the walking zone for the Cecil School area was, largely because of recognized dangers along the Black Horse Pike, reduced from two miles, which establishes remoteness for elementary school children, to approximately one-half mile. During the 1966-67 school year the respondent Board authorized that certain children walking to school in various parts of the Township might walk to geographical pickup points to board a school bus and be transported the remainder of the distance to school. In all cases these exceptions were made for children, kindergarten through fourth grade, and in September 1968, this policy (for K-4 children) was made district-wide. The effect of this gradually-developed policy on the petitioners in this action can be simply stated. Instead of all their children walking less than five-tenths of a mile to Cecil or Whitehall School, only those above fourth grade must traverse that distance; those children in grades K-4 may now walk approximately two-tenths of a mile to a bus stop and be transported therefrom, either to the school assigned, or to a point opposite the school where traffic lights and a crossing guard are provided.

In November of 1967, the respondent Board, concerned with its burgeoning transportation problems, employed a transportation coordinator. He, in conference with the Board Secretary, and with the advice and approval of the Board, reviewed the entire system of transportation and refined the existing policies, translating them into written statements for inclusion in the Board minutes, and in its rules and regulations. He therefore participated in the latter part of the policy development described just above; and when the one petitioner-family, the Lockers, called him in September of 1968 and requested

transportation from their driveway to the schools assigned, he refused their request, informing them of their alternative rights under the policy described. A few days after school had begun in September 1968, the coordinator received word that children of the other petitioner-family, the Pippos, were being picked up at their home driveway, and he at once, applying the policy, notified them of their ineligibility and of their alternative rights.

While not germane to the chief issue, the fact that the Pippo children had been picked up at their driveway for several years prior to September of 1968 was presented in evidence. The examiner can find no indication that such transportation was with consent, or even knowledge, of the Board. It has been held repeatedly that such an irregularity, when not authorized by the governing body, does not bestow residuary continuing rights upon the recipient; nor do the petitioners make such allegation.

The petitioners request that, because of the hazards threatening their children who must walk to assigned schools or to designated pick-up points along the Black Horse Pike, the respondent Board be directed to pick up such children at the respective home driveways. As pointed out in testimony produced at the hearing, however, stopping of school buses at these driveways – and, to avoid discrimination, all similar home driveways along the Pike – would be contrary to the rules of the State Board of Education pertaining to pupil transportation. Such increased stopping at short distances along a heavily-traveled highway might easily compound dangers rather than eliminate them.

* * * *

The Commissioner has reviewed the report of the hearing examiner as set forth above. There is here no question of remoteness. The question is simply one of danger over the route traversed, since petitioners have no claim to transportation to and from school for any of their children, arising out of a condition of remoteness. *Livingston v. Board of Education of Bernards Township*, 1965 *S.L.D.* 29; *Pepe v. Board of Education of Livingston*, Commissioner of Education, April 10, 1969. The Commissioner can find no evidence that the respondent Board acted in an arbitrary or unreasonable manner with respect to school bus transportation in the district, and specifically in the area in question. In fact, there is evidence that the Board was thoughtful and concerned in its deliberations. Certainly it went beyond its legal obligation in two respects. First, it reduced the required walking distance in the Cecil and Whitehall Schools area to approximately five-tenths of a mile. Second, it arranged to furnish transportation for all K-4 children from the nearest pick-up points, which are shown to be approximately two-tenths of a mile distant from the homes of the petitioners.

None of the above denies the inconveniences and even dangers for young children who must walk for any distance along well-traveled highways, or along the shoulders and berms of same. The Commissioner must reiterate that he is, like any parent, deeply cognizant and concerned; and he assumes that all

thoughtful school board members share in his apprehensions. But to hold board members responsible for conditions not of their making, and over which they have no control, would be unjust and unreasonable.

In *Schrenk v. Board of Education of Ridgewood*, 1960-61 *S.L.D.* 185, the Commissioner stated:

> "The provision for safe conditions of travel is a municipal function. A board of education is limited to educational functions. It can provide instruction in safety in order to inculcate habits of safety. It is not within its authority to enforce traffic laws, to provide sidewalks, traffic lights, crossing guards, police patrols, over-passes, etc., to meet the requirements of safe travel for school children.***"

The above quotation represents the best judgment, over many years, of present and former Commissioners, and of present and former State Boards of Education. This hearing produces no elements which would influence the Commissioner to a contrary judgment. School law decisions, consistently reaffirmed, which apply, in part at least, to the petitioners' complaints regarding dangerous hazards, are numerous. They include *Read et al. v. Board of Education of Roxbury Township*, 1938 *S.L.D.* 763; *Iden v. Board of Education of West Orange*, 1959-60 *S.L.D.* 96; *Frank v. Board of Education of Englewood Cliffs*, 1963 *S.L.D.* 229; *Livingston v. Bernards Township, supra; Trossman et al. v. Board of Education of Highland Park*, Commissioner of Education, May 1, 1969.

From a practical viewpoint, and somewhat parenthetically, the Commissioner must agree with the testimony on the amplification of danger if bus stops were increased in number along a highway as heavily traveled as the Black Horse Pike. The amber warning lamps of buses must be actuated for 300 feet prior to each school bus stop, and, with buses stopping at every driveway, there would ensue tremendous amplification of traffic problems. The phychological reactions of delayed and exasperated drivers, plus the assumption of safety on the part of the children, could easily lead to a far more dangerous situation than now prevails.

Since the transportation of petitioners' children devolves upon respondent Board's discretion, since no evidence has been produced of bad faith or discrimination on the part of said Board, and since provision for safe conditions of travel is not a Board function, the Commissioner must find for the respondent. He quotes below the guiding principle as given in *Boult and Harris v. Board of Education of Passaic*, 1939-1949 *S.L.D.* 7, 13, affirmed State Board of Education 15, affirmed 135 *N.J.L.* 329 *(Sup. Ct.* 1947), 136 *N.J.L.* 521 *(E. & A.* 1947).

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

In the present case, therefore, the Commissioner must refuse to interfere. The petition is accordingly dismissed.

COMMISSIONER OF EDUCATION

December 24, 1969

In the Matter of M- Y-,

Petitioner,

v.

Dr. Ercell I. Watson, Superintendent of Schools, Roland Daniels, Principal of Trenton Central High School, and the Board of Education of the City of Trenton, Mercer County,

Respondents.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Alice Ashley Costello, Esq. (Mercer County Legal Aid Society)

For the Respondents, McLaughlin, Dawes and Abbotts (James J. McLaughlin, Esq., of Counsel)

Petitioner in this case is a resident of the City of Trenton. He appeals for reinstatement as a student in Trenton Central High School, from which he was expelled by action of the Board on December 10, 1968. This action was reaffirmed by the Board after reconsideration of the case on July 17, 1969. Petitioner charges that respondents exceeded their statutory powers in expelling him, contending that the nature and severity of his misconduct did not warrant expulsion under the terms and intent of *N.J.S.A.* 18A: 37-2. He also charges that he has been unlawfully deprived of his right to an education as provided by the laws of the State.

A hearing on the petition was held on September 2, 1969, at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education for that purpose. The report of the hearing examiner is as follows:

M- Y- was a tenth grade student, age 15, in Trenton Central High School when, on October 24, 1968, he was suspended from school for having, on the previous day, struck another boy in a corridor of the high school. The case was then referred by the principal to the Board of Education, which held a formal hearing on December 6, 1968. M- and his mother were present. M-'s mother was advised of her right to be represented by counsel.

The transcript of testimony taken at the hearing shows that the petitioner admitted striking the other pupil while both were passing between classes. He claimed, however, that the blow was a light one, and that still another boy struck the pupil. Petitioner stated that his action derived from a dispute that had occurred in a gym class soccer game about twenty minutes previously.

Four days later, at a regular meeting, the Board voted to expel M- from school. In January, counsel for the mother and her son filed in the Superior Court, Law Division, an action in lieu of prerogative writ seeking to reverse the expulsion on the ground that it had denied him his right to an education without due process. A hearing before the Court was held on May 9, 1969, at which time the Court gave an oral decision denying the application because petitioner had not exhausted his administrative remedies. This decision was subsequently formally rendered in writing on July 30.

Counsel for petitioner filed a petition of appeal with the Commissioner of Education, seeking to reverse the action of the Board of Education, and also a motion for interim relief, seeking to have petitioner readmitted to school forthwith, and to be given remedial or make-up work during the summer of 1969 so that he might attend school in September at the eleventh grade level. A hearing on the motion was held on August 5, 1969, before the present hearing examiner. On August 12 the Commissioner denied the petition for interim relief for the reason that up to this point no evidence had been shown that could justify him in overruling an action by a Board of Education acting within its statutory authority. However, he directed that as soon as possible a hearing be held on the merits of the petition of appeal. This hearing was held on September 2, 1969.

Petitioner contends that he had been expelled without due process, and that he had wrongfully been deprived of his right to an education. Respondents, on the other hand, argue that the Commissioner, in his decision of August 12 denying the application for interim relief, had in effect ruled that respondent had acted with due process and within its authority; and that the present hearing was solely for the purpose of considering the merits of the case itself.

Testimony was offered by petitioner that he had had only one previous serious disciplinary difficulty; this had occurred in junior high school, when he had been suspended for fighting. Evidence was also presented to show that while in junior high school his scholastic achievement had been good.

Respondents offered the testimony of the vice-principal of the High School, who is directly responsible for dealing with matters of pupil conduct. He testified that pupils and parents had been notified at the opening of school, by printed bulletins, of the possible penalties for various breaches of rules. He explained that a distinction was made between an "assault" and "fighting," and that in his opinion M- had assaulted the other boy. He further testified that the normal penalty for fighting would be a week's suspension, but that assault might call for a recommendation for expulsion. He indicated that such a recommendation is more likely to occur in a period of serious racial tension and disorder, such as had occurred at Trenton Central High School shortly before the incident involving petitioner.

It is the conclusion of the hearing examiner that, on the basis of testimony given at the original hearing before the Board of Education on December 6, 1968, and at the two hearings in the Commissioner's office on August 5 and September 2, 1969, the only real issue to be determined is the degree of severity of punishment and its consequent effect on petitioner's education. That he broke an important and established rule of the school is unquestioned. The Commissioner has already decided that the respondents acted within their statutory prerogative in expelling M-, and did not deny him due process. Yet the questions presented by petitioner are very pertinent: whether the offense was so gross as to justify the permanent abandonment by the respondents of their responsibility for the education of a boy whose previous record was not bad; and whether the penalty was not influenced by the atmosphere of racial tension then enveloping the school. It would indeed appear from the testimony of the vice-principal that had it not been for the latter factor, petitioner's offense might well have been handled by the school's administrative and guidance staff, without recourse to the Board of Education; that in fact, similar offenses had been so dealt with on occasion in the past.

It must be concluded that the continuing loss of education by petitioner, amounting now to more than a year, constitutes a sufficient penalty for the offense committed, and should now be terminated. It is recommended that petitioner be readmitted to school forthwith, in the courses which he was pursuing at the time of his suspension. It is also recommended that he be provided by the school with special tutorial assistance to aid him in making up work missed since the beginning of the present term.

* * * *

The Commissioner has carefully considered the findings, conclusions and recommendations of the hearing examiner, and concurs therein. He cannot interpose his judgment in the original decision of the Board of Education, which has an unquestioned duty to maintain satisfactory pupil behavior within its schools. Yet both they and he have a responsibility under the law for the

educational welfare of a pupil. No convincing testimony has been adduced that petitioner's offense in striking another boy, whether it be called fighting or assault, caused serious injury or provoked general school disorder. It appears to have been a personal issue, such as schoolboys have been prone to settle by physical means. The Commissioner recognizes that it occurred within a general framework of racial unrest, which the Board of Education had a responsibility for quelling. Nevertheless, this issue is an individual one and must be determined on its merits as such. Petitioner has paid for his misconduct by the loss of more than a year of educational opportunity, and this becomes the overriding factor at this point.

Respondents are hereby directed to readmit petitioner to Trenton Central High School forthwith, in the classes and courses he was pursuing at the time of his suspension, insofar as possible, and with the academic standing he had at that time. It is directed further that petitioner be given such additional assistance as may be necessary in order that he may have an opportunity to make up work missed since the opening of school for the current school year.

COMMISSIONER OF EDUCATION

December 24, 1969

Vincent J. Abbatiello, Acting Superintendent of Schools and Secretary of the Sayerville Board of Education of the Borough of Sayerville, Middlesex County,

Petitioner-Respondent,

v.

Francis M. Starego,

Defendant-Appellant.

Decided by the Commissioner of Education, September 21, 1967.

Affirmed by the State Board of Education, February 5, 1969.

Decision of Superior Court
Appellate Division

Argued November 3, 1969 – Decided November 17, 1969.

Before Judges Sullivan, Carton and Halpern.

On appeal from State Board of Education.

Mr. Frederick J. Fox argued the cause for appellant.

Mr. Eugene F. Hayden argued the cause for respondent.

Statement in lieu of brief on behalf of State Department of Education filed by *Mrs. Virginia Long Annich*, Deputy Attorney General *(Mr. Arthur J. Sills*, Attorney General of New Jersey, attorney).

PER CURIAM.

Defendant Francis M. Starego appeals from a decision of the State Board of Education affirming a decision of the Commissioner of Education finding that his removal as a tenure teacher was warranted by the evidence as to his unfitness and directing that his dismissal as of the date of his suspension be made final.

The charge of inefficiency was grounded on the allegations of unsatisfactory performance by the teacher with respect to class discipline, inability to motivate students, lack of ability in certified subject areas and lack of suitable classroom techniques. Defendant argues that the evidence presented by the Board failed to establish these charges.

The 900-page record discloses that the Commissioner carefully reviewed the salient features of the evidence as to defendant's performance as a teacher. That performance is described at great length in the testimony of this teacher's four supervisors during his employment and in his own testimony, as well as that of the other witnesses. Our examination of the record satisfies us that the evidence amply supports the Commissioner's findings and conclusions.

The decision of the State Board of Education is therefore affirmed.

Board of Education of the Township of Deptford,

Petitioner-Respondent,

v.

The Township of Deptford and The Gloucester County Board of Taxation,

Respondents-Appellants.

Decided by the Commissioner of Education, June 7, 1968.
Affirmed by the State Board of Education, February 5, 1969.

Decision of Superior Court
Appellate Division

Argued December 15, 1969 – Decided December 31, 1969.

Before Judges Conford, Collester and Kolovsky.

On appeal from the New Jersey State Board of Education.

Mr. Alfred T. Sanderson argued the cause for appellants.

Mr. Martin F. Caulfield argued the cause for respondent (*Messrs. Ware, Caulfield, Zamal & Cunard,* attorneys).

Mrs. Virginia Long Annich, Deputy Attorney General, filed a statement in lieu of brief for State Board of Education *(Mr. Arthur J. Sills,* Attorney General of New Jersey, attorney).

PER CURIAM

We conclude that the Commissioner of Education in deciding the school budget dispute in this case complied with the guide lines for review laid down in *Board of Education, East Brunswick Township v. Township Council, East Brunswick,* 48 *N.J.* 94 (1966) and that the findings and conclusions upon which his decision was based are supported by substantial credible evidence in the record. The State Board of Education therefore properly affirmed.

Affirmed.

Victor Porcelli, Francis Bigley, Arthur Shapiro, Allan M. Cohn, Helen R. Justin, Maxine F. Edelstein, Robert J. Hickey, William J. Dunne, Jr., William C. LaRusso and Joseph Chagnon,

Petitioners,

v.

Franklyn Titus, Superintendent of the Newark Board of Education and the Newark Board of Education, Essex County.

Respondents.

Decided by the Commissioner of Education, December 13, 1968.

State Board of Education Decision

For the Petitioners, Bracken and Walsh (Joseph F. Walsh, Esq., of Counsel)
For the Respondents, Victor A. DeFilippo, Esq.

We affirm the Commissioner's decision.

An agreement covering the period February 1, 1967, to February 1, 1970, was entered into between the Board of Education of Newark and the Newark Teachers' Association, embodying among other things a promotional procedure for positions of principals and vice-principals, which had previously been established in the rules and regulations of the Newark Board.

On August 22, 1968, the Newark Board passed a resolution suspending the promotional procedures then in effect and establishing a new procedure. One of the considerations leading to the action (which was approved by negotiating representatives of the Newark Teachers' Association, but rejected by its membership at large) was to make possible the placement of more nonwhite personnel in administrative and supervisory positions in the district, which has a predominantly nonwhite pupil population, and thereby more adequately meet the educational needs of the pupils and community[1]. Petitioners herein would be the first persons eligible for promotions to principals and vice-principals had the promotional precedures in effect prior to August 22, 1968 been retained. (Under the new promotional procedure petitioners automatically become eligible with others for promotion.) It is agreed that Newark is a school district whose employment actions are governed by local board rules.

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[1] At the hearing before the Commissioner of Education of New Jersey, the superintendent, Franklyn Titus, testified that the interest of sound educational policy, philosophy and procedure required minority group representation on the administrative policy-making level "of a school system such as it is in Newark." (Trans., 9/13/68, pp. 13-14). Petitioners do not contradict this thesis, nor do they suggest that the new promotional procedure would not tend to achieve this objective.

The Board contends that the agreement derives its efficacy from rules of the Board, and that by Rule 103.28, "Any rule of the Board may be suspended by a two-third majority of the entire Board." The rule relating to promotions, it contends, could therefore properly be suspended. Petitioners contend that the agreement between the Board and the Association could not be unilaterally modified, and that the resolution of the Board effectively does just that.

N.J.S.A. 18A:27-4 (formerly *R.S.* 18:13-5) authorizes a local board to make rules and regulations relating to terms of employment and promotions, and may change and amend such rules. It provides further that "the rights and duties of any employee with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto." There is statutory evidence elsewhere that such board authority is immune from change by higher authority (See *N.J.S.A.* 18A:4-24, which carves out from the authority of the Commissioner of Education any power to do any act which would "affect the right of each district to prescribe its own rules for promotion.") We see this authority as flowing from the constitutional requirement that the Legislature "provide for the maintenance and support of a thorough and efficient system of free public schools" (*Constitution of New Jersey*, 1947, *Art.* 8, *Sec.* 4, *par.* 1), and the obligation of a local board under *N.J.S.A.* 18A:11-1 to provide for its own government and management of its schools and employees. The Association must be deemed to have negotiated its agreement with knowledge of *N.J.S.A.* 18A:27-4 and the fact that its agreement, including parts relating to promotions, could be the subject of change where supervening constitutional and statutory educational objectives might be involved.

We find that the Newark Board of Education acted lawfully in passing the resolution of August 22, 1968.

Mr. Martin S. Fox did not participate in this matter, having disqualified himself.

Mr. Jack Slater dissents from the opinion and conclusion above.

May 7, 1969

Victor Porcelli (and nine others),

Plaintiffs-Appellants,

v.

Franklyn Titus, Superintendent,
and the Newark Board of Education,

Defendants-Respondents.

Decided by the Commissioner of Education, December 13, 1968.
Affirmed by the State Board of Education, May 7, 1969.

Decision of Superior Court
Appellate Division

Argued September 15, 1969 – Decided November 7, 1969.

Before Judges Goldmann, Lewis and Matthews.

On appeal from the New Jersey State Board of Education.

Mr. Joseph F. Walsh argued the cause for appellants *(Messrs. Bracken & Walsh*, attorneys).

Mr. Victor A. DeFilippo argued the cause for respondents.

Mr. Arthur J. Sills, Attorney General of New Jersey, filed a statement in lieu of brief (*Mrs. Virginia Long Annich*, Deputy Attorney General, of counsel).

The opinion of the court was delivered by

LEWIS, J. A. D.

Plaintiffs, ten members of the teaching staff of the Newark Board of Education (herein Newark Board), appeal pursuant to *R.R.* 4:88-8 (now *R.* 2:2-3(a)) from a final determination of the New Jersey State Board of Education (herein State Board). The latter affirmed a decision of the Commissioner of Education which held that the action of the Newark Board, in suspending its promotional procedure and its eligibility lists and in instituting a new policy for promotions, was a lawful exercise of discretionary authority.

Plaintiffs here urge that the Newark Board (1) is bound by the terms of an outstanding employment agreement with the Newark Teachers' Association (herein NTA), the exclusive bargaining agent for all teachers in the Newark school district, and (2) may not lawfully disregard or modify by unilateral action the terms of that agreement.

The teachers' contract under review, dated June 19,1967, covers the period from February 1, 1967 to February 1, 1970 and provides in pertinent part:

Article X PROMOTIONS

A. The positions of principal, vice principal, * * * shall be filled in order of numerical ranking from the appropriate list, which ranking shall be determined by written and oral examinations. * * *

* * * * * * *

Article XXII GENERAL

F. The Board hereby amends its rules and regulations to the extent necessary to give effect to the provisions of this Agreement.

* * * * * * *

Article XXIV MUTUALITY OF OBLIGATION

The Board and the Association will make every good faith effort to carry out the spirit as well as the letter of this Agreement, subject to law. * * *

Subsequently, on June 30, 1967, Newark Board adopted an amendment to its Rules and Regulations, section 505.4 thereof, to conform to Article X of the agreement and to provide specifically that "all promotional lists shall expire after four years."

On May 28, 1968, after a public hearing, the Newark Board passed a resolution suspending the making of any appointments to the positions of principal or vice-principal from promotional lists "pending an evaluation by the Board of Education of the present procedure for making such appointments, effective after October 1, 1968." Thereafter no appointments for the positions of principal or vice-principal were made from promotional lists.

On August 22, 1968 defendant Franklyn Titus, Superintendent of Schools of the City of Newark (herein superintendent), proposed to the Newark Board that written examinations and numerical listings according to any test scorings be abolished and replaced by a general pool of qualified candidates selected by a screening committee, from which appointments would be made by the superintendent. The recommendations[1] were adopted by the Newark Board on that date.

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1 The Superintendent recommends the approval of the plan listed below for appointment to promotional positions.

The objective of this plan is to have one standard of selection.

The existing procedure of written and oral examinations for promotional positions shall be abolished. A pool of candidates for promotional positions shall be established. The procedure for placement in the pool is described below. The Superintendent would make appointments to promotional positions from candidates in the pool.

Procedure for Establishing a Pool of Candidates for Promotional Positions

1. Candidates shall submit a formal application.
2. Candidates in order to be eligible for inclusion in the pool shall meet training, experience, and State certification requirements as established for each promotional position. These requirements must be met prior to interview by the screening committee.

   The following are minimum experience requirements:

   a. For Principals:
      Five years of successful contractual teaching experience in the Newark Public Schools, or ten years of successful contractual teaching experience in schools outside of Newark, three years of which shall have been on a recognized administrative level.
   b. For Vice Principals, Department Chairmen, and Junior High School Supervisory Assistants:
      Three years of successful contractual teaching experience in the Newark Public Schools (with the attainment of tenure).
3. Candidates for the pool shall not be restricted to members of the Newark Public School staff.
4. Candidates shall be screened by a committee composed of:

   a. Assistant Superintendent in charge of Personnel or a Director on his staff.
   b. Assistant Superintendent from the appropriate school level.
   c. A Newark school administrator from the appropriate level.
   d. An educator from outside the Newark school system.
   e. A Newark school teacher from the appropriate school area. No teacher shall serve on a screening committee who is a candidate for promotional position.
5. The screening committee shall recommend to the Superintendent those candidates judged to be worthy candidates for promotion. These successful candidates shall constitute the pool from which promotions shall be made.
6. The criteria for use by the screening committee shall be co-operatively developed by representatives of the NTA and the Superintendent's staff.
7. New candidates shall be selected for the pool once each year in March.
8. The pools shall be in existence for a period of five years from the date of their establishment. At that time this entire procedure will be subject to re-evaluation.
9. As a result of negotiations with the NTA, it is recommended that all individuals who were on unexpired promotional lists, upon their request, be automatically placed in the pool for the appropriate area without prejudice. It is further agreed that all such individuals will be sent notices to this effect by the Department of Personnel.
10. As a result of negotiations with the NTA, all individuals who applied and paid the required fees for participation in the examinations which have been suspended by the Board of Education shall automatically be considered as

having applied for inclusion in the pool. It is further agreed that all such individuals will be sent notices to this effect by the Department of Personnel. It is also recommended that all such fees for the suspended promotional examinations be returned.

NOTE: The Negotiations Committee of the Newark Teachers Association have agreed to the above and will recommend this procedure to the NTA Senate at their next meeting. [The membership of NTA did not ratify the proposal of its negotiating team.]

Prior to that August meeting, the numerical ranking lists included three plaintiffs for the position of principal and three plaintiffs for the position of vice-principal. The remaining four plaintiffs had passed written examinations during the 1967-68 school year for the position of principal or vice-principal but because of the suspension resolution they had no opportunity to take the oral part of the examination. All plaintiffs, however, were placed in the general pool of qualified candidates but lost the advantage they had acquired by being on the eligibility lists.

At this juncture we note that plaintiffs also filed suit in the United States District Court, District of New Jersey, against defendants superintendent and the Newark Board alleging a violation of their civil rights under 42 *U.S.C.A.* 1983 in that defendants, acting under color of law, abolished an established examinational procedure in order to appoint Negroes to positions for which they would not otherwise be eligible and made appointments to such positions solely on the basis of race, and that plaintiffs were thereby discriminated against solely because they are white. Damages and a mandatory permanent injunction against defendants were sought in that litigation. The court permitted the American Civil Liberties Union and The Law Center for Constitutional Rights to file an amicus brief, and, after a plenary hearing, a decision was rendered which was adverse to plaintiffs. Their complaint was dismissed with prejudice. *Porcelli v. Titus*, 302*F. Supp.* 726 (D.N.J. 1969).

In the instant proceedings plaintiffs in substance demand a rescission of the challenged action of the Newark Board and an enforcement of the promotional system prescribed by the agreement of June 19, 1967. They argue on appeal, as they did before the State agencies, that the Newark Board, in changing its procedure for promotions, violated its own rules and regulations and unlawfully breached its negotiated contractual obligation with the NTA.

There can be no doubt, as plaintiffs contend in their brief, that the teachers in the Newark school system, as public employees, had the right to organize and, through organizational representation, the right to make proposals which could be effectuated by an enforceable agreement between the school board and its organized employees. *N.J.Const.* (1947), Art. I, "Rights and Privileges," par. 19. This right was expressly recognized in the recently adopted "New Jersey Employer-Employee Relations Act." *L.* 1968, *c.* 303, *N.J.S.A.* 34:13A-1 *et seq.* The enactment mandates that negotiations concerning terms and conditions of employment shall be made in good faith and that when an agreement is reached

such terms and conditions shall be embodied in a signed agreement. *N.J.S.A.* 34:13A-5.3. It also provides that "Nothing in this act shall be construed to annul or modify, or to preclude the renewal or continuation of an agreement heretofore entered into between any public employer and any employee organization, nor shall any provision hereof annul or modify any statute or statutes of this State." *N.J.S.A.* 34:13A-8.1.

In view of those fundamental concepts and directives, it is urged that the instant employment contract must be binding and enforceable against all parties, including the public employer. *Clifton v. Passaic County Board of Taxation*, 28 *N.J.* 411 (1958), and *Hackensack Bd. of Education v. Hackensack*, 63 *N.J. Super.* 560 (App. Div. 1960), are cited for the proposition that "Our statutes cannot be so interpreted as to impute to the Legislature a vain or futile act."

Thus the critical issue before us is whether the Newark Board had the right to adopt unilaterally an educational policy relating to promotions which was inconsistent with the procedure contemplated by an agreement voluntarily entered into with its employees. We need not for purpose of this opinion consider the issue as to what extent a board of education may contractually bind its successor board or boards, since here the Commissioner found specifically that the contract in question was authorized by the Newark Board in 1967 and ratified by its 1968 and 1969 successor boards.

Defendants justify their action on the grounds of statutory authority and educational necessity. They refer to the constitutional requirement that the Legislature provide for a thorough and efficient system of free public schools, *N.J.Const.* (1947), Art. VIII, Sec. IV, par. 1; the legislative implementation thereof delegating the operation of public schools to local boards of education, *N.J.S.A.* 18A:10-1; the broad discretionary powers vested in such boards with respect to the day-to-day functioning of the schools within their jurisdiction, *N.J.S.A.* 18A:11-1; and the board's authority enunciated under *N.J.S.A.* 18A:27-4:

> Each board of education may make rules, not inconsistent with the provisions of this title, governing the employment, terms and tenure of employment, *promotion* and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district, *and may from time to time change, amend or repeal the same*, and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto. [Emphasis added]

These statutory provisions and *N.J.S.A.* 34:13A-1 *et seq.*, *supra*, are *in pari materia*, and it is axiomatic that such enactments are to be construed together "as a unitary and harmonious whole, in order that each may be fully effective." *Clifton v. Passaic County Board of Taxation*, *supra*, 28 *N.J.*, at 421. Accord, *Brewer v. Porch*, 53 *N.J.* 167, 174 (1969).

The argument of defendants then runs that the action of the Newark Board on May 28 and August 22 was in accord with its Rule 103.28 which reads: "Any rule of the Board may be suspended by a two-third vote of the entire Board * * *." Therefore, since plaintiffs are employed under board rules, which as provided by law may be changed, amended or repealed from time to time, and their employment contract of June 19, 1967 sets forth in its terms that it would become part of the board's rules and expressly provides that the agreement is "subject to law," the decision to suspend and modify the promotional system was consonant with the statutory powers with which the Newark Board was vested.

In considering those contentions the Commissioner properly observed that:

> * * * the law is not to be construed to imply that a board of education is not legally and morally bound to comply in good faith with the terms of any agreement consummated with its employees. Nor is a board permitted to enter into such an agreement with the implicit reservation that it can abrogate the terms thereof on any pretext. Such drastic, unilateral action can be sustained only in the face of *a real threat or obstacle* to the proper operation of the school system, or in an emergency of equal importance. [Emphasis added]

He found that the Newark Board deemed it essential to alter its method of selecting and appointing administrative and supervisory personnel for the reason that the educational needs and aspirations of the school children and the local community were being thwarted by the dearth of representation by Negro staff members in the leadership councils of the schools. Also, it was found that defendants endeavored, without success, to accomplish the desired result within the framework of the existing agreement; the dilemma that confronted the board was expressed in these words:

> "It could abide by its agreement and make no deviation of any kind in its rules and ignore public demand for change, or it could respond to what it conceived to be the needs of the school system and the desires of the community by modifying a part of its agreement against the wishes of a majority of the teachers' association. Faced with such a Hobson's choice the Board made its decision in terms of its overriding obligation to serve the needs of the children and the community."

It is significant that the challenged action of defendants eventuated after the period between July 13 and 17, 1967, when the City of Newark was violently shaken by widespread civil disorders. Judicial notice of those tragic incidents was taken in *State v. Chandler*, 98 *N.J. Super.* 241, 243 (Cty. Ct. 1967). But see *A & B Auto Stores, Inc. v. City of Newark*, 103 *N.J. Super.* 559 (Law Div. 1968). It is only reasonable to assume that the city and state school authorities were seriously concerned about the impact of such disturbances upon the students and their parents, the community at large, and the general administration of the school system throughout the city.

Superintendent Titus testified at the hearing before the Commissioner that the interest of sound educational policy, philosophy and procedure requires minority group representation on the administration policy-making level "of a school system such as Newark's." Indeed this thesis is not questioned by plaintiffs nor do they suggest that the amended promotional procedure would not tend to achieve this objective. Furthermore, the witness in referring to his testimony in *Porcelli v. Titus*, *supra*, acknowledged that there was a "clamor" from the community and certain members of his staff with respect to the insufficiency of qualified black personnel in the administrative positions of the Newark schools.

In that federal proceeding it was stipulated that in September 1968 the school census was 75,876, with a Negro student population of 72.5%. It was also stipulated that of the 72 positions of principal in existence prior to August 22, 1968, none were held by Negroes, and with respect to the 64 vice-principal positions only three were held by Negroes.[2]

Furthermore, the trial judge in that case noted in his decision the comments of Mrs. Gladys Churchman, a member of the Newark Board of Education, who testified that "in order to appoint qualified Negroes, it was necessary to suspend the promotional lists." The president and two other members of the board gave evidence to the same effect. The court also made reference to the testimony proffered by Dr. Donald Wesley Campbell, Director of Reference and Research for the Newark Board of Education, in support of the claim that an "educational crisis" existed in Newark. That factual assertion can be buttressed by recourse to public documents and writings dealing with recent urban problems. See, for example, *Report for Action, Governor's Select Commission on Civil Disorder*

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[2] Paragraphs 4 and 5 of the stipulation read as follows:

4. The school population in the City of Newark in October 1961 was 67,134, and had a Negro population of 55.1%. In September 1968 the total school population was 75,876, with a Negro student population of 72.5%, reflecting an increase in seven years of 8,742 students and a percentage increase of nego (sic) students of 17.4%.

5. For the school year 1967-68 there were 259 administrative and supervisory positions (Superintendents and Assistants, directors of departments, Supervisors; Senior High, Junior High, Elementary, Special Schools; principals and vice-principals, department chairmen; supervisory assistants and teachers to assist principals), of which 27, or 10% were held by negroes (sic).

(February 1968), at 75 – a general discussion of infirmities in the Newark school system, and at 170 – the conclusion that "The Newark Public School System is in a state of educational crisis."[3]

The Commissioner held that the subject agreement, "whatever it may be labeled," could not constitute a surrender by the Newark Board of its responsibility under the law to conduct the schools under its charge "in the best interests of the children to be served." For a clear expression of this overriding purpose of public schools, he referred to *Bates v. Board of Education*, 139 *Cal.* 145, 148, 72 *P.* 907, 908 (Sup. Ct. 1903), and the following statement repeated in *McGrath v. Burkhard*, 131 *Cal. App.* 2d 367, 377, 280 *P.* 2d 864, 871 (D.Ct. App. 1955): "The public schools were not created, nor are they supported, for the benefit of the teachers therein, * * * but for the benefit of the pupils, and the resulting benefit to their parents and the community at large."

We endorse the principle, as did the court in *Kemp v. Beasley*, 389 *F.* 2d 178, 189 (8 Cir. 1968), "that faculty selection must remain for the broad and sensitive expertise of the School Board and its officials," and this we do notwithstanding an existing employment agreement where subsequent conditions make impossible a literal performance of all of its terms. The essence of the modern defense of impossibility is that the promised performance was at the making of the contract, or thereafter became, impracticable owing to some extreme or unreasonable difficulty or the like "rather than that it is scientifically or actually impossible." 6 *Williston, Contracts* (rev. ed. 1938), 1931, p. 5410. *Cf.* 6 *Corbin, Contracts*, 1336, p. 384 (1962).

As approvingly noted in *Newark v. North Jersey Dist. Water Sup. Comm.*, 106 *N.J. Super.* 88, 106 (Ch. Div. 1968), affirmed o.b. 54 *N.J.* 258 (1969), "A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost" (quoted from 1 *Beach, Contracts*, 216, p. 269 (1896). *A fortiori*, the concept of impossibility should prevail where a particular provision in a school contract is rendered impracticable by subsequent events demanding changes in an educational program in order to give meaningful effect to an overriding public policy. Moreover, it is well settled that specific performance will not be decreed if the performance to be compelled is contrary to public welfare. *Restatement, Contracts*, 369, p. 671 (1932).

This court has recognized that a contract is to be considered "subject to the implied condition that the parties shall be excused in case, before breach, the state of things constituting the fundamental basis of the contract ceases to exist

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[3] See also *Report of The National Advisory Commission on Civil Disorders* 236, 242 (March 1, 1968); *Supplemental Studies for The National Advisory Commission on Civil Disorders* 133 (July 1968); Farnsworth, "The City in the Recent Past," 1 *Rutgers-Camden L.J.* 1, 11 (1969); *cf.* Fiss, "Racial Imbalance in the Public Schools: The Constitutional Concepts,"78 *Harv. L. Rev.* 564, 617 (1965).

without default of either of the parties." *Edwards v. Leopoldi*, 20 *N.J. Super.* 43, 54 (App. Div.), certif. den. 10 *N.J.* 347 (1952). Stated differently, "there is no more intrinsic sanctity in stipulations by contract than in other solemn acts of parties which are constantly interfered with by Courts of Equity upon the broad ground of public policy or the pure principles of natural justice." 2 *Story, Equity Jurisprudence* (13th ed. 1886), 1316, p. 648. These legal principles are nonetheless applicable in situations involving a collective bargaining agreement, despite "suggestions that such contracts might, in some respects, well be considered *sui generis.*" *Adams v. Jersey Central Power & Light Co.*, 36 *N.J. Super.* 53, 70 (Law Div. 1955). See *Kennedy v. Westinghouse Electric Corp.*, 16 *N.J.* 280, 284-287 (1954).

Implicit in the agency's decision here under review are findings that the Newark Board was in fact faced with "a real threat or obstacle" to the proper administration of its school system. The record before us, and the attendant public events that may be judicially noticed, support the findings of the Commissioner that the *ex parte* adoption of new promotional rules by the Newark Board, notwithstanding lack of approval by a majority of the NTA, was "warranted and appropriate."

The determination of the State Board that the Newark Board acted lawfully, in the particular circumstances of this case, is affirmed.

Clifford L. Rall,

Petitioner-Appellant,

v.

The Board of Education of the City of Bayonne, Hudson County, New Jersey, and The State Board of Education, State of New Jersey,

Respondents-Respondents.

Decided by the Commissioner of Education, November 22, 1967.
Affirmed by the State Board of Education, May 1, 1968.
Decided by the Superior Court, Appellate Division, January 24, 1969.

Decision of the Supreme Court

Argued June 2, 1969 – Decided July 2, 1969.

On appeal from the Superior Court, Appellate Division, whose opinion is reported in 104 *N.J. Super. 236.*

Mr. Joseph N. Dempsey argued the cause for appellant.

Mr. John J. Pagano argued the cause for respondent Board of Education of the City of Bayonne.

Mr. Stephen G. Weiss, Deputy Attorney General, submitted a memorandum on behalf of *Mr. Arthur J. Sills,* Attorney General.

The opinion of the Court was delivered by

FRANCIS, J.

The issue here is whether Dr. Clifford L. Rall had tenure as Superintendent of the public schools of the City of Bayonne when its Board of Education undertook to terminate his services. On review of the action, the Commissioner of Education declared he had tenure and ordered his reinstatement. The State Board of Education disagreed, one member dissenting. On subsequent appeal to the Appellate Division, the majority concurred in the view of the State Board. Judge Kilkenny dissented.104 *N.J. Super.* 236 *(App. Div.* 1969). The matter was then brought to this Court. *R. R.* 1:2-1(*b*).

On June 24, 1964 Dr. Rall was appointed Superintendent of Schools for the City of Bayonne by resolution of the local Board of Education. His term of employment was fixed therein as being from July 1, 1964 to May 31, 1967, a period of two years and eleven months. On January 14, 1965 after he had served about six and one-half months as Superintendent, the same Board unanimously adopted another resolution affecting his term of employment. It recited that Dr. Rall had efficiently performed his duties from July 1, 1964 to date and should

have tenure as Superintendent. Accordingly, the remainder of his original term pursuant to *N.J.S.A.* 18:13-15 (*a*) was rescinded and he was granted tenure as of January 14, 1965. The controlling portion of the statute provides:

> "The services of all teachers, principals, assistant principals, vice-principals, superintendents, assistant superintendents, * * * shall be during good behavior and efficiency, (a) after the expiration of a period of employment of 3 consecutive calendar years in that district unless a shorter period is fixed by the employing board, * * *." (*N.J.S.A.* 18:13-16 (*a*) (now 18A:28-5).

It is conceded that the Board's action pursuant to this statute was taken in good faith.

Dr. Rall continued his satisfactory performance in office for almost two and one-half years thereafter. Then on May 29, 1967 without warning or notice to him the then existing Board by a six to three vote adopted a resolution rescinding the resolution of January 14, 1965 which granted the tenure, and reciting that the original contract for two years and eleven months service was the only one which would be recognized. It went on to say that since that contract by its terms would expire on May 31, 1967 (two days later), Dr. Rall's employment was terminated and the office declared vacant as of that date. Shortly thereafter these proceedings challenging the validity of the May 29, 1967 resolution were instituted.

The majority of the Appellate Division declared that the statute authorizing the grant of tenure by a board of education in a shorter period than three consecutive calendar years of service does not contemplate grant of tenure to an individual employee alone (whether he is a member of a class of employees or constitutes a single member class within the statutory coverage). In their judgment the statute can be satisfied only by a board's adoption of a rule of general application to all employees covered thereby, or to all employees of a group who could properly be considered as a separate class, or to a distinct class which might reasonably consist of a single employee. They held that tenure could not be given for short term service to a particular individual on an *ad hoc* basis. As a consequence the majority held that since the resolution granting tenure after six and one-half months of service purported to govern tenure for Dr. Rall alone and not for superintendents generally, it did not come within the power conferred by the statute, and therefore its recision or vacation was valid.

Judge Kilkenny in his dissent noted that the board had the authority to shorten the period required for tenure and that it had exercised it in good faith in this instance. In his opinion to condemn the resolution as illegal because of the manner in which it was drawn would be, as the Commissioner of Education had indicated, contrary to the spirit and intent of the statute. As Judge Kilkenny put it, "That the tenure conferred was limited to a single person was necessitated by the fact that he was the only person in the particular category. To destroy that tenure because the proper *form* of resolution was not adopted would be nothing more or less than exalting form over substance." 104 *N.J. Super* at 249.

We agree that there must be some reasonable probationary period of service as a basis for granting tenure. Such is clearly the intention of the statute in specifying three years as a general qualifying term but authorizing the board in its discretion to fix " a shorter period." The legislative purpose is not to authorize elimination of the probationary period – simply to sanction a reasonable shortening of it.

As noted above, no one suggests that the Board acted arbitrarily or failed to act honestly and in good faith in this case in shortening the period for tenure to six and one-half months. Undoubtedly it intended to act in consonance with the statutory grant of power, and it believed the form of resolution its attorney drafted was a proper legal method of accomplishing the purpose. Under the circumstances we think the legislative act of the Board – the resolution – should be construed broadly to do what it was intended to do, *i.e.*, meet and satisfy the requirement of the statute. Therefore we hold that the resolution shortened the period for acquisition of tenure for superintendents of schools generally – not just for Dr. Rall – to six and one-half months of service. That rule now prevails and will continue to do so unless and until a board of education adopts another rule of general application fixing a different tenure qualifying period.

The Board suggests that the issue here is moot because on February 26, 1969 Dr. Rall applied for and was granted a pension by the Teachers' Pension and Annuity Fund based upon his required contribution to the fund. There is no merit in the point. The supplemental record shows that Dr. Rall was notified his pension account would expire on May 30, 1969 unless he returned to regular school service in New Jersey or filed a request for extension of inactive membership. In view of this pending litigation respecting his right to reinstatement and his honest doubt as to whether he could obtain or was qualified under existing conditions to obtain an extension of his pension credits, on advice of counsel he filed the application for pension. It was a course reasonably necessary in the exigency and cannot be treated as an abandonment of his claim that his services were improperly terminated on May 31, 1967.

For the reasons expressed, Dr. Rall acquired tenure by virtue of the resolution of January 14, 1965. Therefore he could not be dismissed as Superintendent except for good cause and after notice and hearing. *N.J.S.A.* 18A:6-10 (then *N.J.S.A.* 18:13-17). The resolution of May 29, 1967, being invalid in the face of his tenure, was incapable of terminating his employment. Accordingly the judgment of the Appellate Division is reversed and the Board of Education is directed to restore Dr. Rall to his position as Superintendent of Schools for the City of Bayonne. This reinstatement includes restoration to all pension rights possessed by him as of May 31, 1967, the date of illegal termination of his employment.

George A. Ruch,

Petitioner-Appellant,

v.

The Board of Education of the Greater Egg Harbor Regional High School District, in the County of Atlantic, New Jersey,

Defendant-Respondent.

Decided by the Commissioner of Education, January 29, 1968.

Dismissed by the State Board of Education, May 1, 1968.

Decision of Superior Court,

Appellate Division.

Argued March 17, 1969 - Decided March 24, 1969.

Before Judges Goldmann, Kolovsky and Carton.

On appeal from the State Board of Education.

Mr. Joel A. Mott, Jr. argued the cause for appellant.

Mr. Edward W. Champion argued the cause for respondent (*Messrs. Champion & Champion,* attorneys).

Mr. Arthur J. Sills, Attorney General, filed a statement in lieu of brief on behalf of the State Board of Education (*Mr. Robert H. Greenwood,* Deputy Attorney General, of counsel).

PER CURIAM

Petitioner served as a teacher in defendant school district under three successive contracts of employment, each covering the period from September 1 to the end of the school year in June next ensuing. His contract was not renewed. Admittedly, petitioner did not acquire tenure. He subsequently filed a petition with the Commissioner of Education, alleging that defendant board's failure to continue his employment was arbitrary, capricious and discriminatory, and based on allegedly inaccurate and prejudicial reports and information upon which he had been denied the right to be heard.

The Commissioner granted defendant's motion to dismiss the petition. In our view the dismissal was entirely proper, and this essentially for the reasons stated in the Commissioner's decision.

Petitioner eventually appealed to the State Board of Education from the Commissioner's determination. The appeal was filed beyond the 30-day period fixed by *N.J.S.* 18A:6-28 and section 3 of the State Board's rules and regulations. The State Board correctly dismissed the appeal as untimely.

We affirm.

George W. Schultz, Publisher,

Petitioner-Appellant,

v.

Board of Education of the Borough of Wanaque, Passaic County, New Jersey,

Respondent.

Decided by the Commissioner of Education, October 4, 1967.
Affirmed by the State Board of Education, May 1, 1968.

Decision of Superior Court,
Appellate Division

Submitted March 10, 1969 – Decided March 20, 1969.
Before Judges Conford, Kilkenny and Leonard.
On appeal from the State Board of Education.
Messrs. Young and Sears, Attorneys for Petitioner-Appellant (*Mr. Harry L. Sears*, On the Brief).
Messrs. Grabow, Verp & Rosenfelt, Attorneys for Respondent, Board of Education of the Borough of Wanaque (*Mr. Robert Chimileski*, On the Brief).
Mr. Arthur J. Sills, Attorney General, Attorney for State Board of Education (*Mr. Robert H. Greenwood*, Deputy Attorney General, of Counsel).

PER CURIAM

The critical issue here presented is whether petitioner's newspaper, The Wanaque Bulletin (Bulletin), is, within the meaning of *N.J.S.* 18A:22-11, published in the Borough of Wanaque.

In the latter part of 1966 petitioner applied to the respondent Board of Education of the Borough of Wanaque (hereinafter local board) to have the Bulletin exclusively used in the publication of notices of the local board. Particularly, he sought publication of the notice of the public hearing to be held on the school budget and of the statement annexed to the budget for the years 1966-67 and 1967-68. He asserted that since the Bulletin was the only newspaper published in Wanaque, *N.J.S.A.* 18:7-77.1 (now *N.J.S.* 18A:22-11) prohibited the local board from publishing these notices in any other newspaper. His application was denied and the local board ordered the requisite notices to be placed in the Paterson Evening News, a newspaper admittedly not published in Wanaque.

Petitioner appealed to the Commissioner of Education and, upon the latter's affirmance of the decision of the local board, petitioner then appealed to the State Board of Education. The latter in affirming the Commissioner determined that the Bulletin was not published in Wanaque. We disagree.

N.J.S. 18A:22-11 provides as follows:

> "The board of education shall cause notice of such public hearing and the statement annexed to the budget to be published at least once in at least one newspaper published in the district and if no newspaper be published therein, then in at least one newspaper circulating in said district not less than seven days prior to the date fixed for such public hearing."

The local board concedes that if it be determined that the Bulletin is published in Wanaque, then the cited statute mandates publication of the pertinent items therein.

The "place of publication of a newspaper is where the paper is first put into circulation, where it is first issued to be delivered or sent, by mail or otherwise, to its subscribers." *Montesano v. Liberty Warehouse Co.*, 121 *N.J.L.* 124, 125 (*E. & A.* 1938). See also *Wildwood, etc. Pub. Co. v. City of Wildwood*, 35 *N.J. Super.* 543, 547 (*Law Div.* 1955). A newspaper may be considered published in a place where it is not printed. *Montesano, supra*, at 125.

It is not disputed that a second class mailing permit has been accorded to the Bulletin by the Wanaque post office since 1950. The paid circulation of the newspaper varies from 450 issues to 720 issues. Of this amount, 325 issues are mailed through the Wanaque post office. The balance are sold through three newstands and carriers within the borough.

Although the paper is printed in Butler and Riverdale, the Bulletin maintains an office (a counter and a desk) in a store in Wanaque. This office is listed on the masthead of the paper as the publication office. The office is open between 9 a.m. and 5 p.m. on weekdays and someone is there during these times for the transaction of business. Mail is received, news items are left, advertising space is ordered and paid for and bills are paid at that office. Further, some news articles are prepared for printing in the newspaper on these premises.

Under all the circumstances here present we find that the Bulletin is "first put into circulation" in Wanaque. Consequently, we conclude that it is, within the meaning of *N.J.S.* 18A:22-11, published in that borough. Therefore, the local board must cause the notice of public hearings of its budget and the statement annexed thereto to be published in the Bulletin.

Reversed and remanded to the State Board of Education for the entry of an order in conformity herewith.

In the Matter of "T",

Petitioner-Appellant,

v.

Board of Education of the Borough of Tenafly,
Bergen County,

Respondent-Respondent.

Decided by the Commissioner of Education, April 25, 1968.

State Board of Education
Decision

We remand to the Commissioner of Education, after hearing the appeal presented before the State Board of Education on April 2, 1969, with the suggestion that an examination of the child would be helpful and that he arrange the examination.

April 7, 1969